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„Restorative Justice in Ukraine:

(Not) Coping with Soviet State Crimes from 1991 until Today“

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Final Report of the Pilot Project:

Legislation on the Past in Ukraine: an Analytical and Comparative
Overview

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Introduction

The Soviet Union was a dictatorial system [Boeckh (2024), p. 3]. At times, it admitted openly to be a dictatorship. According to Article 2 of the Soviet Constitution of 1936, the Soviet system was a ‘dictatorship of the proletariat’. Soviet propaganda held that that sort of dictatorship was much better than all other dictatorships and certainly much better than liberal democracy. A look at the realities in the Soviet Union shows that the Soviet system, from the beginnings after the revolution until its collapse, was the dictatorship of a small power élite dominating both the state and the Communist Party (CP) [Brunner (1977)]. The Soviet system was based on the massive and systematic violation of human rights, at times more moderate, e.g. in the comparatively liberal 1920s or during the ossification of the ‘bureaucratic socialism’ under Brezhnev and his successors, at times excessively brutal, e.g. under Stalin. In the division of labour between the state and the CP, the violation of human rights, the suppression of true or imaginary opponents and the population in general, were largely the tasks of the state and its organs. The CP, on the other hand, was comparatively rarely involved in direct human rights violations. It was responsible, however, for forming the political will to exercise the Soviet power in dictatorial, authoritarian, even totalitarian¹ ways, for producing the ideological justification of systematic human rights violations as well as for identifying the target groups of state terror.

At the same time, the Soviet Union was a colonial empire. Around the ethnically Russian centre, a non-Russian periphery had to serve the interests of the centre and its masters [Hirsch (2005); Partlett/Küpper (2022); Raffas (2012); Uerpmann-Witzack (2024), p. 4]. Soviet colonialism was veiled by a façade-like independence of the satellite states outside the Soviet Union and an equally façade-like federalism within the Soviet Union and the RSFSR. One of the most basic criteria for the definition of colonialism is racism, i.e. the assignment of the role of the subaltern on grounds of ascribed ‘race’, i.e. ethnicity. Every Soviet citizen had their ethnicity officially documented in their internal passports, and the ethnic category registered in the passport was not a matter of individual identity, let alone individual choice, but of official attribution, based on hereditary principles and administrative arbitrariness [Partlett/Küpper (2022), pp. 20–21; Uibopuu (1983)]. In the non-Russian periphery of the USSR, Soviet power maintained a fine ethnic balance, with the leading figure usually being a member of the local ethnic group (in republics and ‘autonomous’ units the so-called titular nation), the second-in-command – who in most cases held the real power – was an ethnic Russian (or Ukrain-

¹ In this paper, we do not apply the differentiation between authoritarian and totalitarian that some authors make. For the purpose of our project, it suffices to use ‘authoritarian’ and ‘totalitarian’ as synonyms when describing the character of the Soviet system.

ian or Belarusian), next came another member of the local ethnic group(s), and so on. This pattern was not limited to the CP and the state but repeated itself in the leading posts in economy, culture, and many more fields of life. The ideological justification for the racist privileges for ethnic Russians was a typical colonial paternalism: the ethnic Russians allegedly had progressed furthest on the path leading towards communism; therefore they were the ‘elder brother’ helping the less advanced siblings (the other ethnic groups in the Soviet Union and the outer Soviet empire) on their way to follow the Russians. The parallels with the overseas colonialism of Western European states in the 19th and early 20th century are obvious. We may add here that the 2020 amendments of the Russian Constitution introduced similar text by defining the ethnic Russians as the ‘state-forming people’ (государствообразующий народ) of Russia, thus elevating the colonial paternalism of the ethnic Russian people towards non-Russians within – and, arguably, outside – the Russian Federation onto a constitutional level [Küpper (2022), pp. 68–71].

In Soviet colonialism, the role of the Ukrainians (and Belarusians) was ambiguous. On the one hand, Ukraine and Belarus formed part of the non-Russian periphery and as such were the object of colonisation. Especially in Ukraine with its unbroken national movement, repression was often harsher than in many other parts of the Soviet Union. On the other hand, in the racist domination of the non-Slavonic periphery, ethnic Ukrainians and Belarusians, being East Slavonic and thus younger siblings to the Russians, but elder siblings to the non-Slavonic peoples of the empire, often helped the Russian centre, taking a share in the power positions reserved for Russians [Boeckh (2024)].

During the mid-1980s, Soviet rule became less totalitarian, but the systematic violation of human rights was at best weakened, it did not stop entirely. On the other hand, some initiatives to address certain aspects of the authoritarian legacy were taken first in the years after Stalin’s death and, more widely, in the late 1980s [Chapter 5.4.; Baller, Oesten in Brunner (1995), pp. 136–139; Küpper (2004), pp. 756–775; Himmelreich, Antje in Schroeder/Küpper (2010), pp. 191–195]. In 1991, the Soviet Union collapsed, leaving behind unanswered questions about a vast number of crimes, human rights violations and injustices committed by the Soviet state and its organs.

Our project takes stock of the legal steps that independent Ukraine has taken to give some answers to the open questions of that part of the authoritarian and colonial legacy of the by-gone Soviet Union. Given the renaissance of Soviet nostalgia and the role it plays in the ‘legitimation’ of the Russian regime as well as in the ‘justification’ of Russia’s war against Ukraine, the politics of the past, as well as the legislation on the past, have very close links to the present time and to the future.

1. The Constitutional Framework

In all modern European states based on the rule of law, the constitution forms the highest layer in the pyramid of sources of law.² Ukraine is de jure no exception to this rule.³ When we look at the legal initiatives to address the Soviet past and its legacies, we have to start with ascertaining the framework that the Constitution of Ukraine (Const. Ukr.) sets.

The dissolution and the collapse of the Soviet Union was a process. If one were to identify one date to define the end of the Soviet Union, it will probably have to be the date of the Treaty on the Creation of the Commonwealth of Independent States, i.e. December 10, 1991. Since that date, injustices committed by state authorities can no longer be attributed to the Soviet Union. Article 160 Const. Ukr. sets the date for its entry into force at June 28, 1996. This timeline means that the Const. Ukr. was not in force when Soviet state crimes were committed. From the perspective of the Const. Ukr., Soviet state crimes are ‘pre-constitutional’.

1.1. The Question of the ‘If’: Free Constitutional Discretion

Since the Const. Ukr. has no clause on retroactive effect, it does not claim to regulate former Soviet acts. In confirmation of this, no. 1 of the Transitional Provisions upholds old law etc., provided that it has not become unconstitutional under the Const. Ukr. This shows that the Const. Ukr. does not intend to set retroactive standards for the past.

In other countries such as Germany or Hungary, the constitutional courts concluded from similar provisions that the state was not under the constitutional obligation to address pre-constitutional injustice. The state is constitutionally free to decide whether or not to legislate on past injustice [Küpper (2004), pp. 98–121, 788–789; Küpper (2024), pp. 9–10; Schroeder, Friedrich-Christian/Küpper, Herbert/Bormann, Axel in Schroeder/Küpper (2010), p. 63; Küpper, Herbert in Schroeder/Küpper (2010), p. 277; Stern (2006), p. 2244].⁴

² The most important exception is the United Kingdom which, for reasons of tradition, has no constitution laid down in one constitutional document and no sources of law in the rank above parliamentary statute.

³ On the de facto role of the constitution in Ukrainian politics Pleines (2025).

⁴ – Germany: e.g. decisions of the Federal Constitutional Court of 22 October 1974, BVerfGE 38/128, of 23 April 1991, BVerfGE 84/90, and of 22 November 2000, case nos. 1 BvR 2307/94 and more (inter alia on the differentiation in the reparation of Soviet and East German expropriations); decision of the Federal Supreme Administrative Court of 6 April 1994, case no. 7 C 10/94.

– Hungary: e.g. decision of the Constitutional Court no. 46/2000. (XII. 14.) AB of 14 December 2000.

The ECtHR is of the same opinion: events that took place before the ECHR was binding on the signatory do not fall within the scope of the ECHR. If, however, the state decides to react on these events at a time when the ECHR is binding, these reactions (not the past events themselves) need to comply with the ECHR [see end of this sub-chapter].

Nothing in the Const. Ukr. opposes a similar conclusion for Ukrainian constitutional law. The Ukrainian Constitutional Court accepts the fact that laws on the past are adopted, i.e. does not consider legislation on the past per se as unconstitutional, as is shown in its decision on the constitutionality of the Totalitarian Regimes Condemnation Act.⁵ The court did not yet decide on whether or not the Ukrainian state is under an obligation to deal with the pre-constitutional past. The normative situation is similar as in Germany, Hungary and many other post-totalitarian constitutions. If this is so, the Const. Ukr. allows the state to legislate on the past, but does not oblige it to do so.

This constitutional situation may be somewhat different in three particular relations. As a first aspect, the preamble of the Const. Ukr. sets the ‘strengthening of civic harmony in Ukrainian land’ as a goal. When the Const. Ukr. was enacted in 1996, this aimed at the conflict between the Western and the Eastern orientation of the country and its regions [Strasser-Gackenheimer (2006), p. 175], but the interpretation of this clause of the preamble does not have to be reduced to this aspect. Under the double condition that (1) the preamble of the Const. Ukr. has binding force (which preambles usually do not have), and (2) the open wounds from the Soviet past prejudice civic harmony in present-day Ukraine, the Ukrainian state may be under the constitutional obligation to address these wounds from the past to the extent necessary to ‘strengthen civic harmony’. The reference to ‘in Ukrainian land’ (на землі України) is geographical in its nature, refers to territory and not to people and therefore may be understood to encompass all inhabitants of Ukraine irrespective of nationality and ethnicity, perhaps even all persons who permanently or for a limited period of time reside or sojourn in Ukrainian lands.

As a second aspect, Ukraine is a social state (соціальна держава), as Article 1 Const. Ukr. sets out. Article 46 Const. Ukr. contains the parallel subjective basic rights to social protection in certain situations. If the present situation of the victims of Soviet injustice is socially vulnerable, this may give rise to a constitutional obligation of the Ukrainian social state to react to this social mischief, within the framework of Article 46 Const. Ukr. and beyond.

⁵ Constitutional Court of the Ukraine, decision no. 9-р/2019 of 16 July 2019. A German translation by Antje Himmelreich is available at <<https://nachkriegsukraine.de>> (Working Paper no. 27).

Third, Article 3(1) Const. Ukr. enumerates as ‘the highest social value’ inter alia ‘human honour and dignity’. Where Soviet state crimes violated the victim’s honour and dignity, e.g. by sentencing them for acts they did not commit, by subjecting them to medical treatment without necessity, thus implying them to be ill, or by spreading lies, this violation of honour and dignity did not necessarily stop with the end of the totalitarian regime but may continue to be a flaw on the person’s honour and dignity. With honour and dignity being of ‘highest social value’, this may oblige the Ukrainian state to take the necessary steps to re-establish the victim’s honour and dignity even decades after the end of the Soviet rule.

The constitutional duties to further civic harmony, to care for the social situation of victims of Soviet injustice, and to rectify ongoing violations of a person’s dignity and honour are extremely vague, have an objective nature and create neither concrete obligations for the state nor concrete subjective rights for private individuals, leaving the government of the day and its parliament a wide discretion of how to react to this constitutional text.

Apart from these three aspects, the general rule prevails that the state is constitutionally not bound in its decision on whether or not to react to past injustice.

The same applies under the ECHR, to which Ukraine has been a party since 1997. It has no retroactive effect but regulates only actions the state has undertaken since the ECHR entered into force for that state [Bormann, Axel in Schroeder/Küpper (2010), pp. 163–165; Uerpmann-Witzack (2024), pp. 6–7].⁶

1.2. The Question of the ‘How’: Constitutional Limitations for Past-Related Legislation

This wide constitutional discretion on whether or not to address past injustice, however, is only half the story. Foreign constitutional practice shows that constitutional law may play an important role in questions of past injustice. If the state decides to conduct politics of the past and to enact legislation on the past, the pertinent measures are taken under the new, post-authoritarian constitution and have to be in accordance with it. The injustice of the past may be pre-constitutional, but the present reactions of the state to that injustice are not. They are bound by the constitution [Küpper (2024), pp. 9–10; Méndez (2012), pp. 1271–1272]. The Council of Europe, too, warns against trying to overcome

⁶ ECtHR, decisions of 22 June 2004, *Broniowski v. Poland*, 31443/96 (Grand Chamber); 9 April 2009, *Šilih v. Slovenia*, 71463/01, §§ 124-167; 8 December 2009, *Şandru et al. v. Romania*, 22465/03, §§ 55-59.

the socialist heritage with means and instruments contrary to the new democratic and liberal constitutions and the rule of law:

“Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be not better than the totalitarian regime which is to be dismantled.”⁷

Article 8(2)2 Const. Ukr. makes it quite clear that all legal norms must conform with the Constitution. This is true for past-related legislation as well. Even if the point of reference or object of that legislation lie in the pre-constitutional past, which as such is not regulated by the present constitution [Chapter 1.1.], today’s past-related laws must conform to the current constitutional law. Since Ukraine is a party to the ECHR, the basic rights enshrined in that treaty, too, have to be observed by present measures addressing past crimes [Brems (2011); Buyse/Hamilton (2011); Uerpmann-Witzack (2024), pp. 6–7].

This means that the state is free to decide whether or not to legislate on the past. If it decides to enact past-related legislation, these laws must be in harmony with the present constitution. The Const. Ukr. has several rules which may have an impact on laws on the past.

1.2.1. Basic rights and freedoms

All legislation of Ukraine must respect the constitutional basic rights and freedoms.

First, Article 24(1) Const. Ukr. grants all citizens equal rights and equal treatment. According to the ECtHR⁸ and the general doctrinal views on the meaning of equality clauses in European liberal constitutionalism, Article 24(1) Const. Ukr. can be interpreted in a way that state organs in general and the law-maker in particular are required to treat equal situations equally and unequal situations differently [Wieser (2024), pp. 463–464]. This means that if and when the state enacts legislation on the past, this legislation must not make unfounded differentiations. Especially Germany and Hungary have developed extensive constitutional case-law on equality as a constitutional yardstick for past-

⁷ Parliamentary Assembly of the Council of Europe (27 June 1996), § 4.

⁸ ECtHR, decisions of 13 June 1979, *Marckx v. Belgium*, 6833/74, §§ 32–33; 23 November 1983, *van der Musselle v. Belgium*, 8919/80, § 46; 6 April 2000, *Thlimmenos v. Greece*, 34369/97, § 44; 29 April 2002, *Pretty v. United Kingdom*, 2346/02, § 88; 13 July 2010, *Clift v. United Kingdom*, 7205/07, § 66.

related legislation [Küpper (2024), p. 9].⁹ In relation to Ukraine, the equality clause in Article 24(1) Const. Ukr. provides that legislation on the past has to be reasonable and non-discriminatory. What this means in detail is a question that necessitates differentiated answers in the various fields of the past-related legislation [Chapters 3.–9.].

Second, Article 32(2)–(4) Const. Ukr. guarantees certain rights in connection with personal data and confidential personal information. This norm does not limit its scope to data and information produced at a time when the Const. Ukr. was in force but refers to the entirety of existing data and information. This includes information and data produced before 1996, e.g. in Soviet times [Chapter 4.3.]. In the field of legislation on the past, Article 32(2)–(4) Const. Ukr. is especially relevant for the rules on the archives of the repression organs which may contain sensitive information on individuals. It may also set limits to criminal procedures against perpetrators of state crimes because data and information on their individual victims may be protected by Article 32(2)–(4) Const. Ukr.

Article 34(2)–(3) and Article 54(1) Const. Ukr. allow everybody resp. Ukrainian citizens to freely handle past-related information and to research the past. It is true that Article 11 Const. Ukr. obliges the state to ‘promote the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine’. This obligation can be read to include research on the Soviet past and its human rights violations. However, Article 34(2)–(3) and Article 54(1) Const. Ukr. make it clear that uncovering the past is not a monopoly for state-organised historiography but a field where every citizen has the right to become active.

Third, today’s legislation on the past must respect the procedural rights the Const. Ukr. grants every individual. In criminal procedures against perpetrators of Soviet injustice, the guarantees of Articles 61–63 Const. Ukr. have to be observed. This includes the guarantee, enshrined in Article 58(2) Const. Ukr., that perpetrators may be tried and sentenced only for acts that were punishable under Soviet or international criminal law of the time [Uerpmann-Wittzack (2024), pp. 9–10].

Fourth, Article 56 Const. Ukr. guarantees the compensation of damages caused by illegal state activities, including omissions. It is true that this only relates to state activities conducted under the Const.

⁹ Two leading cases from Germany are the decisions of the Federal Constitutional Court of 16 October 1968, BVerfGE 24/203, and of 3 December 1969, BVerfGE 27/253. Hungarian leading cases are the decisions of the Hungarian Constitutional Court no. 21/1990. (X. 4.) AB of 4 October 1990, no. 28/1991. (VI. 3.) AB of 3 June 1991, no. 1/1995. (II. 8.) AB of 8 February 1995, and no. 4/1996. (II. 23.) AB of 23 February 1996.

Ukr. Article 56 Const. Ukr. obliges the state to compensate damages committed since the Const. Ukr. entered into force but has no rules obliging the state to compensate pre-constitutional, e.g. Soviet, state injustice. Since Article 56 Const. Ukr. does not apply directly to Soviet acts, present laws on the compensation of Soviet injustice do not have to conform to this article, i.e. there is no direct constitutional obligation to compensate the damages caused by the Soviet Union and its organs. Nevertheless, Article 56 may set certain standards for the legislation on compensating damages suffered from Soviet injustice in a more indirect manner. Article 56 Const. Ukr. may be read as giving certain guidelines on what the principles of such an indemnification may look like, e.g. that the differentiation illegal–legal may be an admissible yardstick in such a past-related legislation. Yet, the law-maker has a much larger constitutional discretion when compensating Soviet injustice than when compensating damage caused by present activities that underlie Article 56 Const. Ukr. The law-maker may, e.g., grant compensation for acts which were considered legal under Soviet law because the Soviet law itself may be unjust in the light of today’s liberal constitutionalism. In post-Nazi Germany, Gustav Radbruch opened the eyes of the legal profession and the general public to the fact that (totalitarian) law as such may constitute a massive violation of human rights and the post-totalitarian state wishing to observe the rule of law cannot uphold such unjust law even if it formally still may be on the statute-book [Radbruch (1946)].

The same is true for Article 62(4) Const. Ukr. which defines the citizen’s right to compensation in the special case of a court verdict being annulled. This clause, too, relates to present-day rule of law-Ukraine and does not apply to the retroactive annulment of Soviet court decisions. Nevertheless, Article 62(4) Const. Ukr. may be seen as some constitutional guideline in case the Ukrainian state decides to annul faulty Soviet convictions, as Article 56 Const. Ukr. may serve as a guideline for the definition of other compensations to victims of Soviet state crimes.

1.2.2. Objective constitutional law

Apart from basic rights and freedoms, certain constitutional rules of an objective nature have to be observed when legislating on the past.

Article 92(1) no. 22 Const. Ukr. requires that rules on certain subjects in the context of civil and criminal liability are enacted as statutes, if they are enacted. It is not too far-fetched to relate these criteria to certain parts of the legislation on the past. If we accept this, this means that rules on the

past regulating civil legal liability, crimes or other offences have to be enacted as statutes and cannot be adopted in another form, e.g. as presidential or government decrees.

When adopting laws on the past, the general constitutional rules on the legislative process apply.

1.2.3. Summary

In sum, the constitutional requirements on the legislation of the past are rather vague.

The Const. Ukr. does not require the state to take any action with view to the past. With regard to the ‘if’, the state is constitutionally free to decide whether or not to conduct politics of the past and/or enact legislation on the past.

In case the state decides to address the past through legislation, it has to observe certain constitutional rules when doing so. The decision on the ‘if’ may be free from constitutional obligations, but the ‘how’ of past-related state activities is bound by the present constitution and the human rights enshrined therein.

The same is true for the ECHR. This human rights treaty does not require to redress human rights violations that occurred before the Convention entered into force. If, however, a signatory state decides to redress such injustice, it needs to respect the ECHR when doing so.

A comparative overview shows that equal treatment is the most important constitutional requirement among the constitutional rules relevant for past-related legislation because it forbids to create discriminatory categories and differentiations in the laws on the past.

2. Ukraine as an Addressee to Deal with Soviet Injustice

The subject-matter of our project is Soviet injustice, i.e. the human rights violations, crimes and other injustice that the Soviet Union and its components committed. Ukraine is not identical with the Soviet Union. Why should Ukraine address through legislation or with other means the legacy of the Soviet dictatorship?

There are many reasons for Ukraine to do so. Some are legal, others political. We will first deal with some legal reasons [Chapter 2.1.], then have a look at some political ones [Chapter 2.2.].

2.1. Legal Reasons

The Soviet Union and Ukraine are not identical, but they are not entirely different entities either. Until the end of the Soviet Union, Ukraine was one of its constituent federal units: the Ukrainian Socialist Soviet Republic. In fact, Ukraine was one of the four states that founded the Soviet Union in 1922,¹⁰ and a Ukrainian SSR, i.e. a Ukrainian federal entity existed throughout the entire history of the USSR.

The independent Ukrainian state issued from the implosion of the USSR in 1991. If Ukraine is a legal successor to the Soviet Union (which we will examine *infra*), it is only logical that Ukraine should deal with its share of Soviet injustice.

The Treaty on the Creation of the Commonwealth of Independent States of 10 December 1991, which terminated the legal existence of the Soviet Union, contains a clause that its signatories, i.e. Russia, Belarus, and Ukraine, guarantee the continuation of the obligations stemming from the treaties of the by-gone Soviet Union. The declaration of Alma-Ata of December 24, 1991, has text to the same effect. Furthermore, independent Ukraine continued the UN membership of the Ukrainian SSR. Therefore, on an international level, Ukraine is one – though not the only – legal successor to international rights and duties of the former Soviet Union. As such, Ukraine may address in its legislation and court practice Soviet crimes without issues of state immunity arising: the Soviet Union enjoys no immunity towards its Ukrainian successor state [Uerpmann-Wittzack (2024), pp. 13–14].

Politics of the past and legislation on the past, however, do not so much concern the international personality, rights and duties of a state in international law, but are much rather an internal affair based in domestic law. The duties to compensate victims of former state crime, e.g., are rooted in (state) tort [Küpper (2004), pp. 45–165]. The internal legal succession to the Soviet Union was clarified by the Resolution of the Heads of State of the Member States of the Commonwealth of Independent States of 20 March 1992. That resolution states in its no. 1 that all member states of the CIS are legal successors into the rights and duties of the former Soviet Union. In its domestic legislation, independent Ukraine assumed in the State Succession Act of 1991 the rights and duties of the Ukrain-

¹⁰ Declaration and Treaty on the Formation of the Union of Soviet Socialist Republics of 30 December 1922, concluded between the RSFSR, the Ukrainian SSR, the Belarusian SSR and the Transcaucasian SSR.

ian SSR including succession into its international rights and duties, as well as a partial succession into the Soviet debts. Therefore, Ukraine, in its capacity as one successor state of the Soviet Union, is the legally proper addressee for questions arising from Soviet injustice.

However, there is a bill pending in the Verkhovna Rada ‘On the legal succession of Ukraine to the Ukrainian People’s Republic’.¹¹ It was presented by MPs most of whom are members of the party Svoboda, which no longer is in parliament, but the bill is still on the house’s register. The bill, in its Article 6(3), does not accept Ukraine’s succession into the legal positions of the Ukrainian SSR, stressing that that Ukrainian SSR had been under Soviet occupation (окупована країна). As such, the bill repudiates any Ukrainian responsibility for the totalitarian – i.e. both Soviet and Nazi – crimes committed on its territory. Its Article 9 sees Russia in the position of the country answerable today for past Soviet crimes. The bill tries to create legal continuity between the Ukrainian People’s Republic (1917–1921) and independent Ukraine by vesting the sovereignty of the country for the intermediate period of 1921–1991 in an exile body, the ‘State Centre of the Ukrainian People’s Republic’ (Державний центр Української Народної Республіки). If this very one-sided version of Ukrainian history were to become law, Ukraine will refuse to be responsible for Soviet crimes but will identify exclusively as a victim. Even then, the Ukrainian state would be the proper addressee for righting Soviet state crimes on its own territory. The bill deals with state succession in an international legal capacity, not in the sense of internal relations. It does not refuse Ukrainian legislation addressing the past; among the laws it proposes to invalidate is the State Succession Act of 1991 but not the legislative instruments on condemning the past or dealing with perpetrators or victims of Soviet crimes etc. It therefore does not seem to question the role of Ukrainian legislation as a proper forum to deal with the Soviet past and its consequences on Ukrainian territory. The commitment of a ‘victim country’ to dealing with the consequences of a past occupation is in line with international practice: After World War II, Nazi injustice had to be, and was, dealt with not only by Germany and its allies, but also the states occupied by Germany such as, e.g., the Netherlands, France, Norway, or Greece, to mention just some. Even states having remained neutral during the war, e.g. Switzerland or Sweden, needed to conduct some politics of, and legislation on, the past for the simple fact that persons affected by Nazi crimes and stolen property were on their territory [Küpper (2004), pp. 748–756, 777–784, 800–801, 811–812, 815–816].

¹¹ Legislative project no. 5796 of 16 July 2021, accessible on the website of the Verkhovna Rada <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=72562> (last accessed 6 May 2026).

We need to bear in mind, however, that Ukraine is not the sole and only addressee. All former Soviet republics – with the possible exception of Estonia, Latvia, and Lithuania, states that always considered their belonging to the Soviet Union as contrary to international law, therefore illegal and consequently void in law [Partlett/Küpper (2022), pp. 114–116] – are legal successors of the Soviet Union and have accepted their succession into the rights and duties of the Soviet Union to which they belonged. Ukraine is not the only successor state and therefore not answerable for the entirety of Soviet injustice. Soviet injustice and the questions arising from it until today are a matter of and for all successor states. Ukraine may therefore limit its efforts to aspects of the Soviet past that have a certain relation to Ukraine, its territory or its people. Since there is no treaty between the successor states of the Soviet Union that distributes the responsibility for the past among them, Ukraine is free in international law to delimit the scope of questions it addresses.

It is a different question that Ukraine was during its belonging to the Soviet Union a part of the colonised periphery, that the Soviet occupation of Ukraine was an injustice in itself. This may or may not give rise to Ukrainian claims against Russia first for keeping Ukraine unlawfully under its rule and second for the compensations and other benefits that Ukraine paid to victims of Soviet state crimes. Article 9(2) of the aforementioned bill ‘On the legal succession of Ukraine to the Ukrainian People’s Republic’ formulates such Ukrainian claims. Whether or not Ukraine has a claim in international law against Russia for reimbursement lies beyond the scope of our project. Therefore, we do not deal with it. From the perspective of our project it is important to state that even if such a Ukrainian claim should exist, the Ukrainian state remains the proper addressee for legislating on the injustice committed on its territory and the present consequences thereof.

2.2. Political Reasons

Addressing the open questions from the Soviet past is also a matter of political wisdom for Ukraine. Most societies that lived through a period of authoritarian and/or colonial mass violation of their human rights show signs of traumatisation. International experience teaches us that past-related trauma is best cured by appropriate ways of addressing its reasons. Silence usually does not help but much rather prolongs the trauma and its effects, although there are examples to the contrary, too. Another international experience shows that societies get more open to debate issues from a traumatic past once one generation, i.e. some 15–25 years, as the case may be, has passed. Post-Soviet Ukraine has reached this state.

Former authoritarian or colonial regimes often leave the society deeply divided. Cleavages run between the former perpetrators and the former victims, between those who profited from the old regime and those who suffered under it, between followers and opponents. These different groups need to grow into one post-authoritarian, post-colonial society. Here again, international experience offers lessons that the reconciliation between these various groups works best if the past is a subject of open discussion and if the state adopts an active, though not a monopolistic role in the politics of the past, e.g. by moderating the social debate and giving it the necessary infrastructure: “The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.”¹² If conflicts stemming from the past are allowed to come into the open, they can be managed, properly channelled and, eventually, resolved whereas they linger on and fester under the surface if they are hushed up and tabooed.

In the case of Ukraine, there is an additional need to address the wounds from the past. The cleavages in Ukrainian society, caused by those wounds, are an instrument for the Russian aggressor to disunite and thus weaken Ukrainian society. Some years ago, Russia has embarked on a political course of glorifying the – often invented – Soviet history and negating its negative sides, i.e. its authoritarianism and human rights violations as well as the colonial nature of the centre-periphery relations in the Soviet empire. At the same time, Russia has identified more and more with the Soviet Union, as is expressed, e.g., in the new Article 67.1(1) of the Russian Constitution (1993/2020), thus trying to instrumentalise Soviet glory as a narrative to enhance Russia’s soft power and attractiveness. The Soviet past – again often in an invented version – serves as a ‘justification’ of the Russian aggression against Ukraine [Belavusau/Gliszczynska-Grabias/Mälksoo (2021); Mälksoo (2023)]. Mihályi/Sze-lényi (2023) interpret the Russian war against Ukraine as an effect of the failed post-communist transition, whereas Partlett/Küpper (2022) [pp. 36–60] analyse it as the endeavour of a former colonial power to gain its old empire back. At the intersection of these arguments, we can state that Russia’s economic transition and economy have been underachieving since the start of Putin’s autocracy, and the trend to de-carbonise the global economy threatens to devalue the only commodity Russia has for the world market so that a further decline of Russia’s economy is to be expected. Putin started his war against Ukraine at the last moment the Russian economy is in the position to sustain a war [Küpper (2022), pp. 77–78]. Be this as it may, Russia uses the Soviet past as a source of ‘legitimacy’ for its war and a leverage to intervene into, and to destabilise Ukrainian society.

¹² Parliamentary Assembly of the Council of Europe (27 June 1996), § 3.

An open, transparent and honest debate on the Soviet era with both its negative and positive sides is an antidote for Ukraine to counter the Russian mystification of the Soviet past in its ideological, propagandistic and psychological warfare against Ukraine. In this context, the preamble of the Repression Archives Act states that “closing the archives was one of the preconditions for the annexation of the Crimean Peninsula and the military conflict on the territories of the districts of Donec’k and Luhans’k”. The Ukrainian parliament acknowledged that deficits in the Ukrainian politics on the past create a favourable environment for the Russian aggression.

Even if Ukraine does not identify politically with the Soviet Union and the injustice it committed, the country cannot avoid facing the Soviet legacy on its territory and in its society. Again, a comparative perspective may help understand this. It has a post-authoritarian and a post-colonial aspect.

Under post-authoritarian conditions, many states that had been occupied by Nazi Germany found the need to face the human rights violations that had happened on their territory or to their people under German occupation. It is true that those states had been ‘victims’ and as such were not responsible for the human rights violations. Still, they had to punish the perpetrators (e.g. the collaborators), restore the stolen property and care for the victims of persecution on their territory. They did so because first, after the end of the German occupation, the perpetrators, victims and stolen assets were on their territory under their jurisdiction, and second their societies needed reconciliation after the trauma of the Nazi crimes in which locals collaborated [Chapter 2.1.].

In a post-colonial perspective, former colonies have to come to terms with their past and the injustice of the colonial era. Here again, the newly independent state is not identical with the colonial masters and therefore *strictu sensu* not responsible for the human rights violations the colonial power committed. In the perspective of (international) law, the financial burdens left by the former colonial power may be ‘*dettes odieuses*’ and as such be cancelled by the newly independent former colony. On a political level, the post-colonial state, too, faces the need to deal with perpetrators, victims and stolen assets under its jurisdiction as well as the need to initiate and shape a process of social reconciliation (which, in a post-colonial situation, often is the precondition for nation-building). The South African experience, just to name one, shows that it is not enough to re-define the post-independence society as a ‘rainbow nation’ in which the racist and other differentiations of the former colonial regime are no longer accepted. The ‘rainbow nation’ needs to face the past, uncover the historical truths (in plural!), and debate about these facts and truths [Hahn-Godeffroy (1998); Kutz (2001)].

As stated in the Introduction, the Ukrainians' role in the Soviet empire was ambiguous. On the one hand, Ukraine was colonised by the centre. On the other hand, many Ukrainians placed themselves in the racial hierarchies of colonial domination on the masters' and not on the subalterns' side because the Russian centre accepted ethnic Ukrainians (and Belarusians) as willing helpers in their rule over the non-East Slavonic periphery. This aspect of the Ukrainian past, too, has to be discussed and researched openly. A state built on lies is not stable and generates violence and new human rights violations [Küpper (2024), p. 14], and it is an easy target for hybrid attacks by other states.

As can be seen, many reasons speak in favour of Ukrainian politics of the past and legislation on the past, even if the subject matter is injustice committed not by independent Ukraine but by the Soviet Union including its component, the Ukrainian SSR. We will now describe the measures that Ukraine has undertaken so far.

3. The Official Stance: Condemnation

3.1. International standards

Many post-authoritarian states issue some kind of official statement giving a negative assessment of the dictatorial, unjust or criminal character of the previous authoritarian regime. This can be done in the post-authoritarian constitution¹³ or an act of parliament (statute) on the past¹⁴ or a declaration of the parliament¹⁵ [Küpper (2005), pp. 669–670; Küpper (2024), pp. 10–16; Partlett/Küpper (2022), pp. 36–39, 61–64, 117–139; Schroeder/Küpper (2010), pp. 12, 64, 102, 129, 158–161, 191–195, 233–237, 274–276]. Such a condemnation usually is pronounced soon after the end of the totalitarian regime, but in some cases like Romania [Gyöngy (2022), pp. 71–73], it happens much later, usually in reaction to some favourable political constellation.

¹³ The longest text of such a nature is Article U) of the Hungarian Basic Law of 25 April 2011. Shorter remarks on the lawlessness of the previous Nazi dictatorship can be found in the preambles of the constitutions of various German federal states such as Bavaria (2 December 1946) or Bremen (21 October 1947).

¹⁴ Examples:

- Bulgarian Law on the Declaration of the Communist Regime in Bulgaria as Criminal of 27 April 2000.
- Czech Law no. 198/1993. Sb. of 9 July 1993 on the Illegality of the Communist Regime and the Resistance against It.
- Slovak Law no. 125/1996. Z.z. of 27 March 1996 on the Immorality and Illegality of the Communist System.

¹⁵ Examples:

- Declaration on the Condemnation of the Crimes Committed by the Communist System in Croatia in the Years 1945–1990, adopted by the Croatian parliament on 30 June 2006.
- Declaration of Honour for the Victims of the Communist Tyranny, adopted by the German parliament on 17 June 1992.
- Resolution of the Senate of the Polish Republic of 16 April 1998 on the Legal Continuity between the II. and the III. Polish Republics (this resolution contains a negation of the Communist Polish state by not counting it and an indirect condemnation of its crimes); Resolution of the Sejm of the Polish Republic of 18 June 1998 on the Condemnation of Communist Totalitarianism.

“Condemning serious crimes committed by totalitarian regimes, raising public awareness about such crimes, and putting in place measures aimed at preventing the return of such regimes is, in general, fully in line with the principles of democracy, the rule of law and the protection of human rights” [European Commission for Democracy through Law / OSCE (18-19 December 2015), § 16].

Several resolutions of the Parliamentary Assembly of the Council of Europe call for an unequivocal condemnation of the crimes of the past and the ‘totalitarian communist regimes’ that committed them.¹⁶ The most explicit text says:

“Furthermore, it [*i.e.*: *the Assembly*] calls on all communist or post-communist parties in its member states which have not yet done so to reassess the history of communism and their own past, clearly distance themselves from the crimes committed by totalitarian communist regimes and condemn them without any ambiguity.”¹⁷

These resolutions are not binding (international) law, they are soft law at best. Nevertheless, being the essence of a comparative analysis of best practice examples from all over Europe, they possess persuasive authority and stress the importance of taking a clear stance on the past after the end of a totalitarian dictatorship, as was the Soviet rule in Ukraine [Mälksoo (2014)].

Apart from this soft law, international law is silent on official statements of the past. It denounces both colonialism and totalitarianism but does not require any post-colonial or post-totalitarian state to produce official negative interpretations of its past.

3.2. The Constitution of Ukraine

Ukraine did not pronounce an official condemnation of the Soviet past at a constitutional level. Neither its Declaration of State Sovereignty of 16th July 1990 nor its Declaration of Independence of 24th August 1991 contain text evaluating the Soviet past.

The same is true for the Const. Ukr. of 1996 which does not mention – neither in its preamble nor in the normative text – the Soviet rule over the country.

¹⁶ Parliamentary Assembly of the Council of Europe (27 June 1996); Parliamentary Assembly of the Council of Europe (25 January 2006).

¹⁷ Parliamentary Assembly of the Council of Europe (25 January 2006), § 13.

A very indirect condemnation of the Soviet crimes may be read into Ukraine's present self-definition as a state based on the rule of law (правова держава) in Article 1 Const. Ukr. Soviet socialism rejected the very idea of the rule of law, and the Soviet crimes and human rights violations can be seen as an active negation of the principles of the rule of law. The rule of law as one fundamental state principle stands in stark contrast to the Soviet past and its atrocities. However, the condemnation of Soviet practices that the rule of law clause contains, is very indirect. The rule of law was not included into Article 1 Const. Ukr. to give a comment on the past but to shape the present and the future of the Ukrainian state. Its focus is forward, not backward. This does not prevent the reader from interpreting Article 1 as a negative comment on the past, perhaps in the sense of a 'never again' [Parliamentary Assembly of the Council of Europe (25 January 2006), § 7], but this is only a side-effect of that norm.

The same may be said about Article 3(1) Const. Ukr. that declares human dignity to be one of the 'highest social value(s)'. The concentration on human dignity is typical for post-totalitarian constitutions. Just as Article 1(1)1 of Germany's Basic Law of 23 May 1949, so is Article 3 Const. Ukr. an abdication to totalitarian arbitrariness and an indirect comment on Soviet totalitarianism. However, this too is but a side-effect of a norm the focus of which is today's Ukraine.

3.3. The Totalitarian Regimes Condemnation Act of 2015: Communism equals Nazism?

Ukrainian statutory law is more explicit than the Const. Ukr. A full-fledged condemnation of the Soviet state crimes is given in the Totalitarian Regimes Condemnation Act of April 2015. According to its preamble, the condemnation of the totalitarian regimes that existed in Ukraine serves two purposes. First, the law is to prevent a 'repetition of the crimes of the Communist and the National-Socialist (Nazi) totalitarian regimes and any discrimination on national, social, class, ethnic, racial or other motives in future'. The 'never again' is a motive common to all legislative and other acts in which a post-totalitarian state condemns its totalitarian past. Second, the law wants to 'restore historical and social justice and eliminate the threat to the independence, sovereignty, territorial integrity and national security of Ukraine'. This second motive is more specific to the situation of Ukraine and places the Totalitarian Regimes Condemnation Act into the context of fighting off the Russian propaganda war accompanying the Russian military war against the country. The Totalitarian Regimes Condemnation Act makes it clear that Ukraine does not share the recent Russian narrative of Soviet glory which serves as an argument to restore Russia in the borders of the former Soviet Union.

The Totalitarian Regimes Condemnation Act defines in its Article 2(1) the ‘Communist totalitarian regime 1917–1991’ as ‘criminal and a regime that conducted politics of state terror’. The Soviet state terror is described in detail. The criminal character of the Communist totalitarian regime is not ‘denounced’ or ‘accused’ but ‘recognized’ (визнається): the tone of the law is not emotional but fact-centred. Article 2(2) gives a parallel negative evaluation of the Nazi rule on Ukrainian soil. This puts the Soviet rule 1917–1991 and the Nazi occupation during World War II on the same footing: both were criminal regimes the crimes of which today’s Ukraine condemns. The other provisions of that law concern the ban of Communist and Nazi symbols in Ukraine and pertinent amendments of the Criminal Code [Chapter 7.2.].

The Ukrainian Constitutional Court declared the Totalitarian Regimes Condemnation Act to be constitutional. The constitutional problems raised by the applicants did not concern the negative judgement on the Soviet and the Nazi past and not even the equation of both dictatorships but the limitation of the freedom of opinion with view to the ban on totalitarian propaganda and the symbols of Soviet rule, such as the red star [for more detail see Chapter 7.2.2.].¹⁸

The equalisation of Nazi and Communist crimes is based on a mixture of post-totalitarian and post-colonial perspectives. In the former Soviet empire, this equalisation is very pronounced in the Baltic states of Estonia, Latvia and Lithuania. For these states and their peoples, the occupations by (Nazi) Germany and (Communist) Soviet Union were equally traumatic and equally grave violations of their self-determination. In fact, both occupations put the very existence of the Baltic peoples at risk because they amounted to attempted genocide. The ECtHR tends to qualify Nazism as the graver system of injustice¹⁹ but this is the position mainly of the West European judges whose countries never suffered a communist dictatorship under Soviet occupation. From the perspective of the East European victims of both Nazi German and Communist Soviet occupation and human rights violations, there is little difference in the political and moral evaluation of both regimes [European Parliament (2 April 2009), point H); Küpper (2026); Mälksoo (2017); Schroeder/Küpper (2009)].

Apart from the Baltic states, Hungary strongly stresses to have suffered equally under the (Nazi) German and (Communist) Soviet rule, which both are qualified as foreign.²⁰ However, the main func-

¹⁸ Constitutional Court of the Ukraine, decision no. 9-r/2019 of 16 July 2019. A German translation by Antje Himmelreich is available at <<https://nachkriegsukraine.de>> (Working Paper no. 27).

¹⁹ Decision of 24 July 2008, Kononov v. Latvia, 36376/04.

²⁰ This attitude is expressed most clearly in the preamble of the Hungarian Constitution of 25 April 2011: “We do not acknowledge the suspension of our historic constitution due to foreign occupations. We refuse the prescription of the inhuman crimes against the Hungarian nation and its citizens committed under the rule of the National-Socialist and

tion of the equalisation of both dictatorships and of the stressing their ‘foreign’ nature in Hungary is apologetic: its aim is to white-wash the extensive collaboration of Hungarians with both regimes, thus stabilising the incumbent self-styled illiberal government by rehabilitating the parts of the past it uses as a resource of legitimacy [Partlett/Küpper (2022), pp. 214–219]. A politically less tainted equalisation of Nazi and Soviet crimes is practiced in the Czech Republic where the period of these two subsequent occupations is summarised under the term ‘time of non-freedom’ (*doba nesvobody*) [Bohata, Petr in Schroeder/Küpper (2010), pp. 233–237].

Some texts of the Parliamentary Assembly of the Council of Europe draw at least strong parallels between the crimes committed by Nazism and the crimes committed by the ‘totalitarian communist regimes’, e.g. Parliamentary Assembly of the Council of Europe (25 January 2006), § 5:

“The fall of totalitarian communist regimes in central and eastern Europe has not been followed in all cases by an international investigation of the crimes committed by them. Moreover, the authors of these crimes have not been brought to trial by the international community, as was the case with the horrible crimes committed by National Socialism (Nazism)”.

The Parliamentary Assembly does not explicitly put Communism and Nazism on the same footing but describes them as deserving the same consequence, i.e. the punishment of the perpetrators, ideally by an international court of justice.

In opposition to the aforementioned practice, Russia made it an administrative infraction to equate the Soviet and the Nazi dictatorships.²¹ The intention is clear: Shortly after launching war against Ukraine, Russia wants to protect its narrative that it liberated Ukraine from an allegedly fascist regime, as the Soviet Union allegedly had liberated Europe from Nazi Germany. The criminalisation of the equation between both dictatorships is the perspective of the former colonial power trying to restore its empire by white-washing its negative aspects [Küpper (2025), pp. 149–150].

Thus, an equal condemnation of both the Nazi and the Soviet rule, as practised in the Ukrainian Totalitarian Regimes Condemnation Act of April 2015, is not contrary to international law and in line with state practice in Eastern Europe. In the specific context of Russia’s war against Ukraine, which

Communist dictatorships.” Another part of the preamble calculates the time of the loss of the self-determination of the Hungarian state from 19 March 1944 (the time of the German occupation) until 2 May 1990 (the date of the first post-socialist general elections).

²¹ Article 13.48 Russian Administrative Infraction Code, inserted by Federal law of 16 April 2022 no. 103-FZ ‘On amending the Code of the RF on Administrative Infractions’.

is, inter alia, ‘legitimised’ with the arguments that (1) the Soviet Union was perhaps not heaven on earth but certainly a glorious system worth restoring and (2) the present Ukrainian regime is ‘fascist’ or ‘Nazi’, the equalisation of Soviet and Nazi dictatorships and crimes can be seen as a Ukrainian counter-argument, serving to neutralise the Russian war narrative.

3.4. The Holodomor Act of 2006: Genocide or ‘Simply’ State Terror?

In the general Ukrainian perception, the central piece of Soviet state terror against Ukraine and its people was the state-induced famine called Holodomor [Schenk (2020), pp. 45–53].

3.4.1. The Holodomor Act

Holodomor was condemned in a separate piece of legislation in late 2006. Article 1 Holodomor Act describes the famines of 1932–1933 as an intentional act of Soviet state terror designed to eradicate the Ukrainian people as a distinct ethnic entity. The preamble of the Holodomor Act qualifies Holodomor as a genocide in the sense of the pertinent international treaties.²² The law also stresses that Ukraine does not stand alone with this interpretation, relying, in its preamble, on the documents adopted on the 58th General Assembly of the United Nations.

Denial of the Holodomor is forbidden, but not criminalised.²³ All public authorities and entities are under the obligation to promote commemoration and research.

The Holodomor law is the result of parliamentary activities that started in 2003 when a parliamentary hearing was held on the commemoration of the victims of the Holodomor.²⁴ The starting point of that law and its condemnation of that Soviet state crime was therefore the commemoration of the victims. The focus on the victims and the cultivation of their memory led to the condemnation of the underlying crime, the Holodomor, and its definition as a genocide. Naturally, Article 1 of the Holodomor Act, stating that ‘The Holodomor 1932-1933 in Ukraine is a genocide against the Ukrainian People’ is in itself insufficient authority for this legal qualification.

²² The definition of genocide in domestic Ukrainian law, in Article 442 Criminal Code, is in line with the notion of genocide in international law.

²³ Article 2 Holodomor Act.

²⁴ Resolutions of the Verkhovna Rada of Ukraine no. 607-IV of 6 March 2003 ‘On the Recommendation of the Parliamentary Hearings on the Commemoration of the Victims of the Holodomor of 1932-1933’; no. 789-IV of 15 May 2003 ‘On the Address to the Ukrainian People by the Participants of the Special Session of the Verkhovna Rada of Ukraine on 14 May 2003 on the Commemoration of the Victims of the Holodomor 1932-1933’.

The argument that Holodomor constitutes a genocide against the Ukrainian people serves, inter alia, as a counter-argument against Russian propaganda saying that what Ukraine did in Crimea and the Eastern parts of the country amounted to a genocide against the local Russian population [Dreyer (2018)]. Insofar, the Holodomor Act is not only a part of the legislation on the past but also an element of the propagandistic warfare between Russian and Ukraine.

Whether or not the Holodomor constitutes a genocide in the sense of the Genocide Convention and other international law is a matter of legal interpretation. This is done by international state practice, the practice of the relevant international bodies, and legal science in theoretically all countries. In this context, the preamble and Article 1 of the Holodomor Act may be seen as the official Ukrainian point of view. It is noteworthy that neither the United Nations nor UNESCO have acknowledged the Holodomor as a genocide. In the same line, the various joint statements signed by various – mostly European and North American – states in the context of UN General Assemblies stress the violent nature of the Holodomor and other state-induced famines in the Soviet Union but refrain from qualifying them as genocides. The same is true for the documents of the European Parliament, e.g. the Resolution on the commemoration of the Holodomor, the Ukraine artificial famine (1932–1933), of 23 October 2008, or the Declaration of on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism of 23 August 2008.²⁵ These documents do not constitute conclusive evidence of a state practice saying that Holodomor was not a genocide but merely mean that opinions vary about the exact legal qualification of this key event in modern Ukrainian history. The Ukrainian state is perfectly within its rights when subsuming the Holodomor under the Genocide Convention.

3.4.2. The decision of the Kyiv Appellate Court

The Totalitarian Regimes Condemnation Act mentions in its preamble a decision of the Kyiv Appellate Court of 13 January 2010 which established the fact that ‘the supreme leadership of the USSR, of the Ukrainian SSR and the Communist Party took part in the organisation of the Holodomor in Ukraine in 1932–33’.²⁶ The decision was taken in the procedural framework a preliminary criminal

²⁵ European Parliament (23 October 2008), the Holodomor resolution, uses expressions like ‘an appalling crime against the Ukrainian people and against humanity’ but does not qualify Holodomor as genocide. According to European Parliament (23 August 2008), the Day of Remembrance declaration, ‘mass deportations, murders and enslavements committed in the context of the acts of aggression by Stalinism and Nazism fall into the category of war crimes and crimes against humanity’.

²⁶ Kyiv Appellate Court, decision no. 1-33/2010 of 13 January 2010, available in the Unified Register of Court Decisions at <<https://reyestr.court.gov.ua/Review/9470003>> (last accessed 6 May 2026). In the version in the Unified Register of Court Decisions, the names of the persons under investigation are anonymised. A version of the ruling containing the real

investigation, initiated by the Security Service of Ukraine and conducted against the high-rank decision-makers of the USSR and the Ukrainian SSR with view to their role in the Holodomor. Given the fact that all persons in question were dead at the time of the investigation, no formal charges were filed. The public prosecutor asked the court instead to establish the historical facts which the court did in its *ratio decidendi*, identifying in detail who was responsible for which part of the Holodomor. The investigation qualifies the Holodomor as genocide which the Appellate Court accepted without any further comment. The ruling terminated the criminal investigation because all persons concerned no longer lived.

This court decision settles the so far rather amorphous and abstract responsibility of ‘the USSR’ for the Holodomor on a defined circle of persons, thus personalising that responsibility. Since all of the persons in question are dead, that ruling has no practical consequences, in particular not for the purposes of criminal prosecution or political accountability. Its meaning is merely symbolic and as such a countermeasure against Russia’s recent cult of Stalin which serves as a pretext for Russia to ‘legitimise’ its aggressive war against Ukraine.

The rule of law-quality of the court procedure is questionable. First, a criminal investigation against deceased persons as alleged perpetrators does not make sense because they no longer can be punished. Consequently, Ukrainian criminal procedure law at Soviet times, at the time of the decision²⁷ and today define the death of the alleged perpetrator as an absolute ground to terminate proceedings. The aim of uncovering the historical truth ought to be pursued in another forum than a criminal court. Second, the court decided merely on the basis of the documents produced in the pre-trial investigation but did not undertake any examination of its own. Therefore, the court did not decide on the merits in a fair criminal trial, as is required not only, but also by Ukrainian criminal procedure law. Since there were no living accused, all the guarantees that Ukrainian criminal procedure law provides in the adversarial structure of a criminal procedure, could and did not function [Zakharov (2013), pp. 128–156]. Third, the court, in its decision, states that certain (deceased) persons are criminally liable for defined acts, even if this statement is not given in the ruling part but in the reasons only. Such a practice raises concerns *inter alia* with view to the guarantee of the presumption of innocence in Article 62(1) Const. Ukr. and should therefore not be repeated or continued.

names (e.g. Stalin, Molotov, Kaganovich, Postishev, Kosior, Chubar’, Khataevich) was published by the NGO Kharkiv Human Rights Protection Group on 1 February 2010: <<https://archive.khpg.org/1265039604>> (last accessed 6 May 2026).

²⁷ Article 284(1) no. 5 Criminal Procedure Code of 1960 (which was in force at the time of the decision of the Appellate Court).

In that criminal procedure, Ukrainian authorities chose the wrong forum for establishing historical guilt of individual persons. On a formal level, the court decision closes the procedure and therefore does not stand in the way of more appropriate historical research.²⁸ Nevertheless, Ukrainian authorities should make sure that the existence and possible persuasive authority of that ruling does not hinder, nor is used as an argument to hinder, a more objective investigation in the backgrounds of who was responsible for which acts constituting, in their total, the Holodomor against Ukrainians and others. Furthermore, it is advisable for Ukraine to abstain in future from criminal investigations or procedures against deceased persons and to observe its own criminal procedure law.

3.5. Other legislation on the past

– *The Rehabilitation Act of 1991*

As early as April 1991, the Verkhovna Rada adopted a law on the rehabilitation of the victims of Soviet repressions. Both the title and the preamble of the law mention ‘repressions of the Communist totalitarian regime 1917–1991’. The law itself speaks of ‘politics of state terror’, naming in some detail the

“millions of persons suppressed, deprived of their freedom and property, deported, displaced into special settlements outside Ukraine, forcefully resettled, exiled, subjected to forced labour with limitations of freedom, forcefully repatriated and interned, deprived of their nationality, committed forcefully to psychiatric institutions, deprived of their civil rights and freedoms in other ways, exposed to torture and the persecution of themselves and their family members or to other physical and moral sufferings, out of political, social, class, national, religious and other motives”.

This strong language leaves no doubt that the Ukrainian legislator disapproves of the Soviet past. In this law, “the Verkhovna Rada of the Ukrainian SSR (...) condemned the repressions and distanced itself ‘from the terrorist methods of the management of society’”.²⁹ Yet, the place of this text, i.e. a law on the rehabilitation of the victims, first is a ‘natural’ place for such condemnation which for this reason may be seen as merely instrumental to the main purpose of the law, i.e. the care for the victims. This may relativise the impact of that condemnation. Second, the condemnation is rather hidden because a law with such an ‘exotic’ content is noted only by specialists. Its condemning text has little

²⁸ Article 90 Criminal Procedure Code.

²⁹ Constitutional Court of the Ukraine, decision no. 9-р/2019 of 16 July 2019, § 7. A German translation by Antje Himmelreich is available at <<https://nachkriegsukraine.de>> (Working Paper no. 27).

impact on the perception of the population at large. The effect of this legislative condemnation is therefore limited. Nevertheless, the Ukrainian parliament gave an unequivocal judgement on the past in this piece of legislation in 1991.

The preamble of the Totalitarian Regimes Condemnation Act mentions the Rehabilitation Act, quoting it as a ‘condemnation of the political repression (...) conducted by the communist totalitarian regime on the territory of Ukraine in the years 1917–1991’, a ‘distancing from the method of state terror in the leadership of the state, immanent to the communist totalitarian regime’ and a ‘declaration of the aim to continually contribute to the restoration of justice and the elimination of the consequences of arbitrariness and the violation of civic rights’.

– *The Repression Archives Act of 2015*

In the same line, the Repression Archives Act of 2015 refers, in its preamble, to the ‘crimes of totalitarian regimes and all sorts of discrimination on the grounds of national, social, class, ethnic, racial, or other qualities’, which it condemns.

– *The 1945 Victory Act of 2015 and the re-definition of the ‘Victory Day’*

A certain distancing from the Soviet Union can be seen in the 1945 Victory Act. The law stands in the Soviet tradition of glorifying the victory over Nazi Germany in 1945. This glorification was a central component of Soviet identity from 1945 until the end. Today, Russia’s regime more and more builds its legitimacy on this past victory [Küpper (2022), pp. 73–78; Küpper (2025); Partlett/Küpper (2022), pp. 36–39, 55–60; Zhurzhenko (2022), pp. 99–100, 107–108, 113–114].³⁰ In this context, the Ukrainian 1945 Victory Act carries two central messages.

First, it says that in the years of 1939–1945, Ukraine was a part of the Soviet Union, but a discernible part. This denies Putin’s ahistorical theories on the historical non-existence of Ukraine and Ukrainians and includes the message that Ukraine was not a German ally but that Ukraine resp. Ukrainians fought against Nazism – despite the fact that not only Nazi Germany but also Communist Soviet Union ‘committed a large number of crimes against humanity, war crimes and genocide crimes on the territory of Ukraine, which caused enormous losses to Ukraine and the Ukrainian People’.³¹ The victory

³⁰ Article 67.1(3) Russian Constitution of 12 December 1993, as amended on 14 March 2020.

³¹ Preamble 1945 Victory Act.

over Nazism was achieved not by some amorphous entity Soviet Union but, inter alia, by the Ukrainians as one of the peoples in that Soviet Union.

Second, the law fights off the Russian monopolisation of the Soviet victory of 1945 by stressing that the victory over Nazi Germany and Nazism has become a deep-rooted part of Ukrainian tradition and identity, too. Not only Russia inherited the Soviet glory, but also Ukraine. This endeavour is the background of Article 2(1) no. 3 of the 1945 Victory Act enumerating among the various forms of commemoration the ‘combat against the falsification of the history of World War II’. This wording evokes Article 67.1(3)1 Russian Constitution as amended in 2020 which makes the ‘protection of the historical truth’ the task of the state. Knowing what such a clause means in the Russian context, the Ukrainian state has to be careful not to follow the Russian example, not to impose a compulsory narrative on the past and not to narrow down historical research and the freedom of expression by outlawing or tabooing the views on history not in harmony with the official stance [Coynash (2015); European Commission for Democracy through Law / OSCE (18-19 December 2015), § 9; Marples (2015); Nuzov (2016)]. Given the fact that in the post-Soviet space ‘historical remembrance is a security issue’,³² the Ukrainian state must resist the temptation to put supposed military and other security above the freedom of opinion, speech, and research.

Even according to those who initially criticised that law, the official Ukrainian history narrative has not been enforced with means contrary to the rule of law and human rights [Shevel (2016); Viatrovykh (2015)]. There is no criminal offence of ‘falsification or history’ or of a similar nature on the Ukrainian statute book, neither in the Criminal Code nor in the Holodomor Act which prohibits, but does not penalise the denial or falsification of that particular piece of Ukrainian history, nor in any other normative act. The judicial practice with respect to the crime of ‘propaganda of totalitarian regimes’³³ seems to respect the freedom of opinion, speech, and research and is not (mis-)used to punish versions of the Ukrainian history differing from the official narrative.

Both messages ukrainise the 1945 victory and its memory [Budrytè (2018); Peters (2016), pp. 60–67] and thus focus on Ukraine’s separate identity and independence. This is why some interpret them as ‘post-colonial’ [Zhurzhenko (2015), p. 17]. The text on the (Nazi and) Soviet crimes committed on Ukrainian territory to the detriment of Ukraine and its people pronounces also a condemnation of the Soviet rule over Ukraine.

³² Budrytè (2018), p. 158, referring, inter alia, to Mälksoo (2015).

³³ Article 436.1 Criminal Code.

To add one small detail: the 1945 Victory Act shifts the national commemoration day from May 9, the day when Germany repeated its capitulation vis-à-vis the Soviet Union and which since has been Victory Day in the Soviet Union and its successor states including Russia, to May 8, the day when Germany pronounced its capitulation vis-à-vis the entire world (which, on May 8, 1945, was rejected by the Soviet Union because Stalin wanted his own, separate Victory Day) and when the non-Soviet and non-post-Soviet world celebrates the end of Nazism and World War II in Europe. Celebrating Victory Day on May 8 instead of May 9 removes Ukraine from the Soviet tradition still prevalent in the post-Soviet world, and integrates the country into the global community. In the light of no. 1 of the Resolution of the UN General Assembly A/Res/59/26 of 22 November 2004 ‘Commemoration of the sixtieth anniversary of the end of the Second World War’, confirmed by the Resolution of the UN General Assembly A/Res/64/257 of 2 March 2010, both May 8 and 9 are ‘a time of remembrance and reconciliation’, both dates are legitimate commemoration days. Furthermore, the Council of Europe stressed that the victory over Nazi Germany was the achievement of the ‘anti-Hitler coalition’ and not one country alone.³⁴ By celebrating the Ukrainian victory over Nazi Germany, and by doing so on May 8, Ukraine removes itself from the Soviet-Russian tradition without relinquishing its claim to having been a fighter against Nazi Germany and one of the winners of World War II.

In the same line, Article 4(2) no. 6 National Identity Act defines information about, and commemoration of, World War II veterans as one of the measures in order to strengthen the national and civic identity in Ukraine. Articles 9(2) no. 9 and 10(2) nos. 7–8 National Identity Act suggest to include war veterans into the national and patriotic as well as military education.

– *The Crimean Tatars Genocide Resolution of 2015*

Soon after the general legislative ‘decommunisation package’ of 2015, the Ukrainian Parliament adopted a resolution that qualifies the deportation of the Crimean Tatars in 1944 as genocide, establishes May 18 as a day of remembrance in entire Ukraine, and condemns the suppression of the Crimean Tatars by the Russian occupants in the South and East of Ukraine.³⁵

Whether or not a given historical fact constitutes a genocide in the (international) legal sense is not for the Ukrainian Parliament to decide authoritatively. Like the Holodomor Act [see Chapter 3.4.1.],

³⁴ Parliamentary Assembly of the Council of Europe (12 April 2006).

³⁵ Resolution of the Verkhovna Rada of Ukraine no. 792-VIII of 12 November 2015 ‘On the Recognition of the Genocide of the Crimean Tatars’.

the Crimean Tatars Genocide Resolution can state the official point of view of the Ukrainian state, no more, no less.

The Holodomor is dealt with in an act of parliament, whereas the Crimean Tatars only get a parliamentary resolution. On a symbolic level, a resolution may be considered to be a minus as compared to a statute. This different treatment requires justification. The symbolical hierarchisation seems acceptable because the Holodomor affected the entire population of Ukraine whereas the deportations of the Crimean Tatars in 1944 targeted only one special group within Ukraine. Furthermore, the Holodomor Act formally forbids the denial of the Holodomor which, due its relevance for basic rights, requires the source of law of a formal statute. However, there seems to be no constitutional justification for the fact that the deportation of the Crimean Tatars is commemorated in a separate resolution, whereas other ethnic groups that shared the same fate (such as, inter alia, Armenians, Bulgarians, Germans, Greeks or Italians – and these are only the groups deported from Crimea, not from other parts of Ukraine [see Chapter 5.4.2.7.3.2.]) do not receive similar normative attention.

3.6. Analysis

After a rather hidden condemnation in 1991, Ukraine has condemned the Holodomor since 2006 and the entirety of the Soviet state crimes since 2015. This text is contained in statutes and sometimes in resolutions of the parliament, but not in the Constitution. A condemnation on constitutional level is not necessary, as a comparative analysis reveals. The important aspect is that the Ukrainian state has unequivocally condemned the state crimes that occurred during the Soviet times. This makes it clear that the Soviet Union committed crimes on Ukrainian territory, a fact which today induces certain activities of the Ukrainian state and its organs.

The special genocide resolution for the Crimean Tatars, but not for other ethnic groups with a similar fate, is not a question of the condemnation of the Soviet regime but of the Ukrainian state's care for the victims. Therefore, this unequal treatment is discussed in Chapter 5.4.2.7.3.2.

The Russian war against Ukraine is at the same time a propaganda war about the interpretation of the Soviet past. This gives the Ukrainian condemnation legislation an importance beyond mere politics of the past: it is part of Ukraine's war effort [European Commission for Democracy through Law / OSCE (18-19 December 2015), §§ 25–26]. It is not by chance that the central piece of the condemnation of Soviet injustice, the Totalitarian Regimes Condemnation Act, was adopted, together with

other past-related laws, in 2015, one year after the hybrid Russian aggression against Ukraine had started. As a past-related reaction to a present attack, the Totalitarian Regimes Condemnation Act pursues various aims not all of which are spelt out with sufficient clarity [European Commission for Democracy through Law / OSCE (18-19 December 2015), § 73]. This problem does not concern the condemnation of the Soviet rule but the prohibitive norms and their administrative and criminal sanctions. These are dealt with in the relevant chapters of this paper.

In the field of the condemnation of the totalitarian and colonial past, Ukrainian legislation is in line with international law and foreign state practice and is quite sufficient.

4. Access to the Knowledge on the Past: the Archives of the Soviet Repression Services and Beyond

4.1. The archival legacy of the former repression services

Archives preserve the collective memory of their community. They are of supreme importance for the identity of a state and a society. In the context of politics of the past and legislation on the past, their significance is even more pronounced. They are a key factor in dealing with the post-totalitarian and/or post-colonial past. In this paper, we concentrate on the archives of the repression services because they are the most sensitive as well as most important part of the archival heritage of the Soviet regime. What is said for the archives of the repression services can be applied *mutatis mutandis* to other archives of the totalitarian and / or colonial government.

The relevance of archives for identity-building is highlighted by the Russian practice of closing the own archives in the process of re-establishing a system of autocracy. A regime drawing a part of its legitimacy from an invented past cannot risk that archives reveal to the public what the past really was like. In line with this, the Ukrainian Repression Archives Act correctly states that “closing the archives was one of the preconditions for the annexation of the Crimean Peninsula and the military conflict on the territories of the districts of Donets’k and Luhans’k”.

The archives of a former totalitarian and / or colonial regime are a very special issue in the politics of the past and the legislation on the past. This has various aspects.

First, the archives do not only document human rights violations, but their contents themselves may constitute a violation of the human rights of the persons about whom the files were written. Especially the totalitarian dictatorships of the 20th century amassed a vast amount of information about every individual. The compilation of this information may violate the human rights of the persons in question,³⁶ in particular their right to private life and their right to own their personal data. This violation or threat of violation of the rights of the individuals in question does not stop when the totalitarian or colonial regime ends but continues and has to be taken into account by the post-totalitarian/post-colonial state. The post-totalitarian/post-colonial state must be careful to handle the archival heritage in a way that avoids and prevents human rights violations.

The analysis of the files of the secret police of the GDR revealed that they occasionally contained intentionally untrue statements about individuals, e.g. who was or was not an informal informer. Secret police agents were under the obligation to recruit a certain number of informal informers every year. Agents who did not achieve their quota sometimes invented informers by forging the signatures of citizens who had never acquiesced in being an informer. Similar practices are known about the secret police services of Nazi Germany. This means that the files of the repression organs sometimes contain lies about the persons in question [Voloshyn (2019)], which aggravates the effect of the archival information on individual human rights.

Second, the importance of the archives does not diminish in time. Measures against perpetrators of state crimes and human rights violations or for the victims of such crimes become less important in the course of years and decades because the individuals in question die. The same is true for the de-communisation (de-Nazification, de-colonisation) of the power structures and the legal position of the former state party. The more time has elapsed since the end of the dictatorship, the less important become these aspects of the past. The following chapters will deal with the factor time in their respective fields.

Archives, however, exist and preserve their content in principle forever. Their mere physical existence requires continuous measures even decades after the end of the dictatorship such as, e.g., the preservation of the materials or rules on access and publication of the contents. In this respect, time is not completely irrelevant. Personal data can be handled with more freedom after the individuals in question died. Official secrets cease to be confidential after a certain period. But even if the role of

³⁶ In relation to archives and the documents therein, the term ‘person in question’ and ‘individual in question’ means the person about whom the documents and other archival materials were made, whose data constitute the content of the archival material.

the documents and the data changes with time, the archives and their contents remain and continue to be both a source of information and an object of care.

Third, archives are an important infrastructure for other official and private activities dealing with the past. In the use of archives, several purposes compete with each other. Some of these purposes can be qualified as subjective (in the individual interest), others as objective (in the public interest).

Archival information may be used in criminal and administrative procedures. First, it may contain evidence that can be used in the criminal prosecution of the perpetrators of state crimes, which is a public interest. Second, on the subjective level, it may contain evidence of human rights violations and other repressions that victims can use to substantiate their claims to indemnification or social benefits or to restore their reputation.

Beyond individual procedures, archival information sheds a light on the past. A pertinent subjective (individual) interest may be the wish of relatives to know details about the fate of deceased or vanished family members, friends etc., or of citizens to know what information the regime collected about them. Objectively, historical research has a vivid interest to use the materials in the archives to research the past. The Parliamentary Assembly of the Council of Europe sees the information contained in archives as an important element to educate the public in order to prevent history from repeating itself, as well as an important element in societal reconciliation which must not be based on lies but on the knowledge of the past [Parliamentary Assembly of the Council of Europe (25 January 2006), § 7, § 13].

It is the task of the legislation on historical archives in general and on the archives of the former totalitarian or colonial regime in particular to harmonise these competing purposes. Given the limited capacities as well as the fact that one document can be used for one purpose only at the time (at least in its original version), this legislation has to define priorities. It is true that the legislation on the archives of the repression organs varies widely from country to country, but in the question of priorities, we can identify a general trend of prioritisation in time. In the first years, the use for individual criminal, administrative or judicial procedures is given priority because these procedures are urgent and often under legal deadlines. On the other hand, they can be expected to be finished after some years so that they no longer will bind capacities. A second priority are individual quests about one's own file and the fate of deceased or disappeared family members. This interest, too, usually is most vivid in the first years after the opening of the archives. Objective research purposes have to wait

during the first years, but are given full consideration after the first waves of individual procedures and quests are over.

The laws on the archives of the repression organs have to take account of another aspect: data protection. As was set out before, the mere existence of the archival material may seriously violate the human rights of the individuals in question. These archives often contain personal data which in a rule of law cannot be levied at all or, if they can be collected, must be limited to a very narrow circle of recipients. The rules on access to archival information must balance the protection of the personal data against the public interest to know the past. It is obvious that personal data can and must be disclosed in full to the person in question. This is a question of data ownership and as such protected by basic rights. The disclosure to other persons can be limited in a way that the person in question has to assent, or that personal data such as names or addresses are made illegible. The latter variant is a feasible way to open personal data to historical research.

4.2. International law and foreign practice

4.2.1. International law

There are no rules in strict international law on how to deal with archives and similar heritage of a previous totalitarian and / or colonial regime. Insofar, every state is free to act as it likes.

In Europe, there is a certain amount of international soft law, codifying recommendations and best practices.

A central text is the recommendation of the Committee of Ministers of the Council of Europe on the access to archives [Committee of Ministers of the Council of Europe (13 July 2000)]. This recommendation deals with archives in general and has no special recommendations for archives of former repression organs. It calls for a regulation by act of parliament and defines access to public archives as a right that everybody – not only a citizen of the given state – has. This access is characterised in detail, arguing for low thresholds of access and describing the means to achieve this in various contexts.

The Parliamentary Assembly of the Council of Europe also called for an opening particularly of the Soviet repression archives, with special regard to the persons who are the object of data collection:

“The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services.”³⁷

Finally, the European Parliament “[r]egrets that, 20 years after the collapse of the Communist dictatorships in Central and Eastern Europe, access to documents that are of personal relevance or needed for scientific research is still unduly restricted in some Member States; calls for a genuine effort in all Member States towards opening up archives, including those of the former internal security services, secret police and intelligence agencies, although steps must be taken to ensure that this process is not abused for political purposes”. The European Parliament “[i]s convinced that the ultimate goal of disclosure and assessment of the crimes committed by the Communist totalitarian regimes is reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal.”³⁸

Thus, there is general political consensus in Europe that access to archives in general and archives of former repression organs in particular should be free and at the same time respect the rights of the individuals on whom files were kept and information was collected. This is seen as part of the democratic culture as well as of the European human rights system. Spreading the knowledge about previous totalitarianism also with the help of archives because they possess first-hand information and evidence, is considered to be helpful in the process of post-totalitarian societal reconciliation.

4.2.2. Foreign practice

As mentioned before, the legislation on archives varies very strongly among the formerly socialist states in Eastern Europe [Küpper (2024), pp. 37–38]. The reasons for this legislative heterogeneity are manifold. The repression services had different roles and functioned differently in the various socialist states. Their practice to produce, collect and archive data varied significantly, both in space and time. Furthermore, there are strong differences from country to country which archives and data survived the destruction by repression services themselves when they felt that their rule was waning, or by the members of the public in the course of the ‘revolutions’ and turmoil leading to the downfall of socialist autocracy. As a result, the archival legacy is different in each formerly socialist state.

³⁷ Parliamentary Assembly of the Council of Europe (27 June 1996), § 9.

³⁸ European Parliament (2 April 2009), § 6, § 16.

An additional reason for legislative differentiation is the existence of different societal needs and wishes. Some societies are very keen on disclosing the past, whereas others prefer not to talk too much about the ‘dark years’. The protection of data has a very different position in different states and societies. Scandinavian societies, e.g., consider transparency more important than the secrecy of personal data and therefore tend to disclose rather than protect data in all fields of life. This mentality has influenced post-socialist countries like Estonia or Latvia. Another factor is the nature of the change of system. Where large parts of the socialist élite remained in power, as happened in many former Soviet republics, the official initiatives to open archives were much weaker than in countries where former dissidents came into power positions.

Considerable differences in the nature and extent of the archives of the former repressive services, as well as divergent political situations and mentalities as to, e.g., the past and the protection of privacy have led to individual solutions in every post-socialist state [Schroeder/Küpper (2010)]. It is practically impossible to identify general standards beyond the prioritisation of various uses in time [Chapter 4.1.]. At the same time, the practice with view to the archives is a good barometer for assessing how far the new system has broken with the old, socialist one: when Russia started to develop into a neo-imperial autocracy using the socialist and even Stalinist past as a resource of legitimacy, one of the first measures was the limitation and finally closure of the archives, and Ukraine’s pro-Russian president Yanukovich did the same in his country [Boeckh (2024), pp. 10–11; Viatrovych (2024), pp. 2–4].

4.3. The Ukrainian Constitution

As was pointed out before, the archives of the former repression organs raise questions in the field of data protection and the protection of private life. Since the archives and the data therein continue to exist, they continue to pose a possible threat to these human rights. Therefore, the contents of the archives, if they violate human rights, are one form of ongoing violation that did not cease with the former totalitarian and / or colonial regime but continues to have effect.³⁹ If handled inadequately, the contents of the archives of the former repression organs may violate the individual rights to data protection and secrecy of private life even in the subsequent democratic system.

³⁹ The archives are one form of potentially ongoing rights violation. Similarly, the loss of citizenship or homeland are hereditary forms of injustice: Chapters 5.4.2.6. and 5.4.2.7. including sub-chapters.

One instrument to prevent this are the pertinent basic rights in the constitution. The most relevant norm is Article 32(2)–(4) Const. Ukr. with the rules on data protection. This article says:

“(2) The collection, storage, use, and dissemination of confidential information about a person without their consent shall not be permitted, except in cases determined by law, and only in the interests of national security, economic welfare and human rights.

(3) Every citizen has the right to examine information about themselves, that is not a state secret or other secret protected by law, at the bodies of state power, bodies of local self-government, institutions and organisations.

(4) Everyone is guaranteed judicial protection of the right to refute incorrect information about themselves and members of their family, and of the right to demand that any type of information be expunged, and also the right to compensation for material and moral damages inflicted by the collection, storage, use and dissemination of such incorrect information.”

This norm does not mention ‘data’ (дані) but ‘information’ (інформації) which has the same meaning. The literature on constitutional law uses both terms as synonyms [Tatsiy (2011), Article 32, pp. 234–236]. Article 32 Const. Ukr. relates to all existing information including the information in the archives of the Soviet repression organs. Even if that information was collected under pre-constitutional conditions before the Const. Ukr. entered into force, it constitutes today information in the sense of Article 32(2)–(4) Const. Ukr. This is the result of a grammatical interpretation because Article 32(2)–(4) Const. Ukr. does not limit its scope to information collected after 1996, as well as of a teleological interpretation because Article 32(2)–(4) Const. Ukr. wants to protect the individual informational autonomy which may be threatened by an abuse of pre-constitutional information just as much as by an abuse of more recent data. Given the sensitive nature of the information in the archives of the Soviet repression organs, the danger for the individual’s human rights is even graver than in the case of recent data.

The privacy guaranteed in Article 32(2)–(4) Const. Ukr. must be seen in the light of the basic right of free access to, and use of, information guaranteed in Article 34(2)–(3) Const. Ukr. There is not much debate on the relationship of privacy and free access to information in Ukrainian academia. The one article that deals with this question gives both constitutional rights an equal weight, yet articulates a certain preference for free access to information in the course of weighing both rights [Matviychuk (2010)]. However, this article was published before the adoption of the Repression Archives Act and

therefore does not deal with the special nature of information gathered by Soviet repression organs under the circumstances of a totalitarian dictatorship.

4.3.1. The protection of ‘confidential information’

In the light of Article 32(2) Const. Ukr., the state must not collect, store and disseminate ‘confidential information’. ‘Confidential information’ (конфіденційна інформація) is the Ukrainian equivalent of ‘protected personal data’ or ‘sensitive personal data’, though with a somewhat wider scope, i.e. information about a person which is not destined to be known to everybody [Tatsiy (2011), Article 32, p. 234, with reference to Articles 11(2), 21(2), 23 Information Act]. As far as the information in the Soviet archives relates to individual persons, it is at least in part ‘confidential information’. In the case of the Soviet archives, the collecting happened before the Const. Ukr. entered into force. Under the Const. Ukr., the Ukrainian state ‘stores’ and, if it opens the information to research or other public use, ‘disseminates’ this information. In the latter case, the constitutional protection of the informational autonomy would be incomplete if ‘dissemination’ in Article 32(2) Const. Ukr. did not include ‘passive dissemination’ by making the information accessible to a wider public through opening the archives and allowing private individuals to disseminate the information they find. Neither Ukrainian court practice nor Ukrainian legal literature address the question of ‘active’ and ‘passive’ dissemination. ‘Passive’ dissemination as an activity lies somewhere in between the ‘active’ dissemination on the one hand and the storage on the other: in a continuum where the extremes (active dissemination and storage) are governed by Article 32(2) Const. Ukr., it would make little sense to exclude the in-between elements (passive dissemination) from the scope of that constitutional clause. Furthermore, given the ratio legis of Article 32(2) Const. Ukr., i.e. to guarantee a high level of protection, the better arguments speak in favour of including both ‘passive’ and ‘active’ dissemination into its scope of protection. This means that the Ukrainian state can only store or disseminate, i.e. make accessible the information in the Soviet archives if the persons in question give their consent or if a law permits the storage and / or dissemination in the interests of national security, economic welfare and human rights. Article 32(2) Const. Ukr. does not mention information about dead persons; the fact that it mentions the consent of the person in question suggests that Article 32(2) Const. Ukr. only encompasses information about living people. Information about dead people thus enjoys less constitutional protection, but the dignity clause in Article 28(1) Const. Ukr. forbids too arbitrary a handling of ‘confidential information’ after the death of the individual concerned. So far, there has been no leading case before the Constitutional Court on the post-moral effect of human dignity, but some recent decisions, embedded in a dynamic case law, suggest that the Court is open to acknowledge that dig-

nity continues to have at least some effect after the death of its bearer [Schloer (2025), pp. 16–17].⁴⁰ This would be in line with some statutory provisions that protect the confidentiality of a deceased person’s data and the protection of the personality rights (rights concerning the image) of a deceased as well as with the case-law of the Supreme Court about the confidential character of the cause of death and the personal belongings of a body delivered to a medical institution.⁴¹

The persons in question did not consent freely to their data being collected in Soviet times. Under Article 32 Const. Ukr., the question of consent is an individual one which means that the person in question needs to permit each and every piece of confidential information to be stored and disseminated. It is obvious that the consent of the persons concerned is no workable basis for the functioning of the Soviet archives in present-day Ukraine. Requiring this consent would prevent the archives from fulfilling their tasks in a post-totalitarian society as mentioned in Chapters 4.1. and 4.2. Therefore, Ukraine has to rely on the law which, however, can authorise the storage and dissemination without individual authorisation only ‘in the interests of national security, economic welfare and human rights’. The Ukrainian Constitutional Court confirmed that a law may permit the dissemination of confidential information if it can rely on one of the constitutional exceptions.⁴² Which of these three constitutional exceptions can support the operation of the Soviet archives in harmony with their post-totalitarian functions?

Soviet archives and the way their data are handled have no connection to economic welfare.

What about national security? We find such a clause in many modern constitutions where their task is to permit data collection to combat (serious) crime and terrorism. Arguably, the Ukrainian clause has the same background. Is it possible to understand ‘national security’ in a wider sense? It was mentioned several times that the knowledge of the past is a prerequisite of societal reconciliation and thus social peace. In the special situation of Ukraine, being the target of an aggressive war ‘justified’, *inter alia*, with a certain narrative of the past, the knowledge of the past may be seen as an instrument to fight off Russia’s propagandistic aggression. The war against Ukraine may justify the storage and dissemination of personal information in the Soviet archives. But what if there were no war? The war is a Ukrainian specific – other post-socialist countries had to justify their legislation on the archives

⁴⁰ Constitutional Court of Ukraine, decision no. 6-r(II)/2021 of 16 September 2021, referring to German law and German legal practice.

⁴¹ Article 7 Law of Ukraine no. 1102-IV of 10 July 2003 ‘On burial and funeral affairs’; Article 308 Law of Ukraine no. 435-IV of 16 January 2003 ‘Civil Code of Ukraine’; Supreme Court, decision no. 428/3905/16-s of 3 July 2019.

⁴² Constitutional Court of the Ukraine, decision no. 2-rp/2012 of 20 January 2012.

of the repression organs without this aspect. Could Ukraine rely on national security as a justification for its laws on the archives if there were no Russian aggression and no war? Probably not, but this is a question of constitutional interpretation.

Can human rights justify the storage and dissemination of information in the former Soviet archives? Knowing the truth about totalitarian human rights violations is seen as one safeguard against their repetition. Insofar, opening the Soviet archives to research on the past is one way of making sure that those human rights violations will not happen again.⁴³ Furthermore, the ECtHR has a long-standing case law on the duty to protect that obliges the member states to detect the truth about human rights violations it could not prevent [Uerpmann-Witzack (2024), p. 6; van der Vet (2013), pp. 368–376].⁴⁴ Insofar, there is a good argument for human rights as a justification for laws on the operation of the archives of the Soviet repression organs.

The preamble of the law that governs the access to the former Soviet archives, the Repression Archives Act of 2015 [Chapter 4.4. and sub-chapters], refers to both the prevention of a repetition of those crimes as well as to national security in the light of the Russian aggression. This indicates that the Ukrainian legislator bases the law on the exceptions of ‘human rights’ as well as ‘national security’.

There is more constitutional authority in favour of opening the archives of the Soviet repression organs. The knowledge they store and distribute serves, if handled properly, civic harmony in Ukraine. Civic harmony is a constitutional value the strengthening of which is mentioned in the preamble. The preamble is not normative text in the strict sense, but the values it enshrines may be used to interpret the constitution proper. In the light of ‘strengthening of civic harmony in Ukrainian land’, both national security and human rights in Article 32(2) Const. Ukr. can be interpreted to justify legislation on the Soviet archives.

A last constitutional argument is Article 11 Const. Ukr. which makes the ‘promotion of the historical consciousness’ a task of the Ukrainian state. This clause can be understood as an additional justification for the legislation on archives, additional to the three exceptions mentioned in Article 32(2)

⁴³ Parliamentary Assembly of the Council of Europe (25 January 2006), § 7: “The Assembly is convinced that the awareness of history is one of the preconditions for avoiding similar crimes in the future. Furthermore, moral assessment and condemnation of crimes committed play an important role in the education of young generations. The clear position of the international community on the past may be a reference for their future actions.”

⁴⁴ ECtHR, judgements of 28 January 2014, T.M. and C.M. v. Moldova, 26608/11; of 28 September 2015, Bouyid v. Belgium, 23380/09; of 11 April 2024, Karter v. Ukraine, 18179/17, §§ 75-77.

Const. Ukr. If, however, Article 32(2) Const. Ukr. is read as a closed list of exceptions, Article 11 Const. Ukr. works the same way as the civic harmony clause in the preamble. It has to be taken into account in the interpretation of the exceptions of national security and human rights, arguing in favour of operating the archives of the Soviet repression organs. Finally, the freedom of scientific creativity in Article 54(1) Const. Ukr. speaks in favour of putting the archives at the disposal of scientific research.

Article 34(2)–(3) Const. Ukr. grants everybody the right to ‘freely collect, store, use and disseminate information’. This, however, is a basic right which empowers ‘everybody’ (кожен), i.e. the individual. It does not authorise the state to conduct these activities. The collection, storage and dissemination of information by the state is governed by Article 32, not by Article 34 Const. Ukr.

As a result, the Ukrainian state may legislate on the archives of the Soviet repression organs in a way that they can store and grant access to their contents without the consent of all persons concerned. However, this is not a constitutional *carte blanche*. Both in the general lines of the pertinent laws as well as in the individual case, the basic right to data protection must be protected as widely as possible which means, e.g., that documents may be made accessible to research in a way that the person in question is not identifiable. Article 32(2) Const. Ukr. sets quite a delicate constitutional framework for the Soviet archives. As was laid out before, pre-constitutional human rights violations cannot be remedied in an unconstitutional way [Chapter 1.2. and sub-chapters].

4.3.2. Rules on data protection in general

Whereas Article 32(2) Const. Ukr. protects sensitive data, Article (3)–(4) Const. Ukr. contain the rules on data protection in general.

Article 32(3) Const. Ukr. gives every citizen the right to check what information public institutions collect and store about them. Since this provision has no exception for pre-constitutional collections of data, it covers the Soviet archives as well. This means that at least Ukrainian citizens must be given access to the information about themselves.

The exception of state secrets and other secrets does not apply to the Soviet archives. The main purpose of preserving these materials and opening them to the public is, as was seen in Chapter 4.3.1., transparency and knowledge about the past. Therefore, keeping parts of them secret would counter

the overall purpose which, as was pointed out in Chapter 4.3.1., is the primary constitutional justification for the laws on Soviet archives. Furthermore, the harsh reaction of Russian authorities against the Ukrainian policy of opening the archives of Soviet repression organs shows that this information hits a nerve in Russia because it confutes the Russian narrative that the Soviet times were glorious and should be re-established, including in a territorial sense.

If a person in question finds information about themselves or their family to be incorrect, Article 32(4) Const. Ukr. gives them certain remedies, primarily the right to have such information expunged from the archive. This remedy, however, is inappropriate for incorrect information in the Soviet archives. As was set out in Chapter 4.1., archives of repression organs are liable to contain the lies of those organs, their employees and informers. This is a historical fact, and expunging such information from the archives would veil the partly mendacious character of Soviet rule and its repression organs, make the archives incomplete and, finally, impair their function. A remedy adequate for data collected after 1996 does not work in the case of Soviet archives.

A proper way to preserve the protection of the individual envisaged by Article 32(4) Const. Ukr. would be to re-interpret that clause in a way that in case of Soviet archives and their special function, the individual in question cannot demand incorrect information to be expunged but can demand that its incorrect content be made public, e.g. by adding the citizen's counterstatement or confuting historical research to the document. Such a re-interpretation is not impossible since there is constitutional text in favour of the preservation of the full text of the archival documents, e.g. the clause on civic harmony. A weighing between the constitutional interest in the preservation of the repression archives and the individual rights protected in Article 32(4) Const. Ukr. allows to mitigate the right to deletion (which makes full sense for post-totalitarian data abuse) into a right to have the false character of the information made open. The laws on the Soviet archives have to provide some way that false information can be made recognizable on the request of the person in question.

4.4. Ukrainian legislation

The central piece of legislation on the Soviet repression archives is the Repression Archives Act of 2015. It is rather short in comparison to some other East European laws on socialist archives. Its preamble mentions, inter alia, the role of archives for the historical heritage, the knowledge about the country's history and its importance for societal reconciliation and thus roots the law in the value of

‘strengthening of civic harmony in Ukrainian land’⁴⁵ as well as in Article 11 Const. Ukr. without saying so explicitly. At the same time, the preamble of the Repression Archives Act mentions the conflicting requirements of transparency and protection of privacy which shows that the law-maker was cognisant of the constitutional framework.

Along with the Repression Archives Act, the Archive Fund Act is applicable to the Soviet archives. However, Article 3(4) Archive Fund Act, following the *lex specialis* rule, gives priority to the Repression Archives Act in the question of access to the archival information of repression organs. Article 1(3) Repression Archives Act excludes the application of the data protection legislation. This exclusion is repeated in Article 25(3) Data Protection Act.⁴⁶ Given the special nature of the data in question and the special function of the archival legacy, a separate legal regime for the Soviet repression archives is adequate, provided that the Repression Archives Act itself ensures a sufficient level of data protection.

Numerous sub-statutory instruments regulate the details of the use of the archives, among them the Regulation of the State Archival Service,⁴⁷ the Use of Documents Order⁴⁸ or the Archive Rules of Operation.⁴⁹

Article 298.1 Criminal Code protects archival documents against destruction, damaging and misappropriation. This criminal protection relates to all public archival documents in Ukraine, not only to the archives of the Soviet repression organs.

The Repression Archives Act defines the scope of ‘archival information of the repression organ’, the right to free access as a rule, the right of the person in question to object as an exception, the competent authorities and their duties as well as very briefly legal protection before authorities and courts of law.

⁴⁵ Preamble Const. Ukr.

⁴⁶ Law of Ukraine no. 2297-VI of 1 June 2010 ‘On the protection of personal data’.

⁴⁷ Cabinet of Ministers Resolution no. 870 of 21 October 2015 ‘On the approval of the Regulation on the State Archival Service of Ukraine’.

⁴⁸ Ministry of Justice of Ukraine order no. 2438/5 of 19 November 2013 ‘On the approval of the procedure for using documents of the National Archival Fund of Ukraine belonging to the state and territorial communities’.

⁴⁹ Ministry of Justice of Ukraine order no. 656/5 of 8 April 2013 ‘On the approval of the rules of operation of archival institutions’.

4.4.1. The delimitation of the relevant archival legacy

The Soviet Union left behind many archives in Ukraine. Not all of them are linked to Soviet injustice and require a special legal treatment. Only archives with information relating to, or constituting in themselves, state crimes are relevant in the perspective of the legislation on the past.

Article 1(1) and Article 2 no. 1 Repression Archives Act circumscribe the scope of archival legacy: ‘archival information of the repression organs of the communist totalitarian regime of the years 1917 to 1991’. This delimitation is rather wide. First of all, it comprises the entire era of Soviet rule in Ukraine (1917–1991). Second, it relates to the documents of all Soviet repression services. Third, it encompasses all information that the repression services left behind, irrespective of its outer form or the nature of the data carrier.

The crucial term is ‘repression organs’ which Article 2 no. 6 Repression Archives Act defines as

“the organs of the communist totalitarian regime as defined in this law, which were active in the years from 1917 to 1991 on the territory of Ukraine, which applied means and methods of state coercion and terror against certain persons or groups of persons for political, social, class, national, religious or other motives, and whose activities were characterised by a large number of violations of human rights.”

In addition to this general clause, Article 3 Repression Archives Act enumerates various authorities, entities and organs. This enumeration contains, inter alia, several secret police services including the secret police units within the army, the secret services, the camps and their administration, but also regular police units, all prosecution authorities (prokuratura) and all courts.

In principle, this enumeration is final because Article 2 no. 6 Repression Archives Act refers to ‘organs (...) as defined in this law’ which means that the list in Article 3 cannot be widened by analogy or other interpretation. However, Article 3 no. 4 Repression Archives Act opens its scope to ‘other repression organs, their territorial, functional or structural subdivisions as well as official persons, whose activities were incompatible with the basic human and civil rights and freedoms and characterised by massive human rights violations’. The massive human rights violations are defined in more detail, limiting the scope of the ‘other repression organs’ to organs that conducted Soviet political persecution. If interpreted properly, this norm is not overly wide and does not extend to ‘non-totalitarian’ violations of the law by the state. As a result, Article 3 no. 4 Repression Archives Act allows

the inclusion of repression organs overlooked in the enumerations in Article 3 nos. 1–3 as well as of ‘accidental persecutors’ who were not formally competent for repression but still exercised such acts.

4.4.2. Ownership of the data

‘Ownership of the data’ means the right to regulate the storage of and access to data about oneself. This is not the same as the property of the information carrier, e.g. the physical document. Information carriers are the property of the Ukrainian state, as Article 2 no. 3 Repression Archives Act sets out. However, the ownership of the data lies at least partly with the person who is the object of the information contained therein.

Article 32(2)–(3) Const. Ukr. guarantees every person ownership of the data containing information about that person. Since Article 1(3) Repression Archives Act exempts the archival information of the repression organs from the scope of the data protection legislation, the Repression Archives Act has to put that constitutional right into reality.

Just like the general rules on archives [Matviychuk (2010)], the Repression Archives Act as well is rather reluctant on the protection of the status of the owner of the data. This reluctance starts on a symbolic level because the free access to archival information is the basis and purpose of the law and mentioned much earlier in the text of the law than the safeguards for the persons about whom the information was collected. Therefore, free access to any information is the rule, and the protection of the owner of the data is the exception.

This exception is laid down in Article 9 Repression Archives Act. A victim of repression organs has the right to limit access to the information about him- or herself. Article 2 no. 2 defines as ‘victims’ all persons who were exposed to repression or persecution and whose basic rights were violated by the repression organs. Since ‘repression organs’ are defined very widely [Chapter 4.4.1.], the circle of possible victims is wide, too, encompassing everybody whose rights were violated for political and similar reasons. Family members of victims enjoy the same status as victims.

Victims and their family members can forbid public access to information concerning themselves. In doing so, they have to hand in an application to the archive or authority in possession of this information. Applications could be handed in only in the year after the Repression Archives Act entered into force. Furthermore, applicants had to indicate very precisely which part of the information about

themselves is to be of limited access. Article 9(2) Repression Archives Act required the indication of ‘pages, paragraphs etc.’ Article 9(3)2 Repression Archives Act provided for the possibility to prohibit public access only to information ‘about their racial (ethnic) origin, their political or philosophical views, their religion as well information about their health and sexual life’. If a victim or family member wanted to limit access to this sort of confidential personal data, they had to make an appropriate declaration – as a result, they did not have to name every page and paragraph where such information can be found but the authority or archive in possession of the documents has been obliged to control, before granting third persons access to documents, if such information is contained in the documents. If the authority or archive find such information in the archival material, they have to prevent the third persons’ access to those data.

The victim had also to define a period of time for the limitation of access. The maximum is 25 years. This is in contrast with the 75 years period during which documents containing confidential personal information are exempt from public access under Article 16(4) Archive Fund Act. Article 16(5) Archive Fund Act states clearly that the Repression Archives Act enjoys priority for the materials of the Soviet repression organs.

Article 9(5) Repression Archives Act forbids limitations of access to material the content of which has been published. In this case, the information in question is at everybody’s disposal so that the limitation of the access to the archival material does not make much sense.

These provisions are problematic in various respects.

First, only living persons have the right to limit access to their information: victims and their family members. There is no provision extending this right to surviving family members of deceased victims. The moment a victim dies, even the most intimate information has to be made accessible to the public. This may be considered as an unproportional limitation of the victim’s human dignity which does not cease to exist in the moment of the victim’s death but continues to have effect, though less and less in the course of time [Chapter 4.3.1.]. This problem can be remedied easily by giving close family members the right to limit access to information concerning dead victims under the same conditions they can limit access to information concerning themselves.

Second, the victim or family member has to become active in order to limit access to their information. This presupposes that the victim or family member know about the existence of such archival

material. Even more so, the requirement to name page and paragraph of the documents in question presupposes that the victim or family member have copies of those materials. There is no provision in the Repression Archives Act or in the Archive Fund Act, including their bye-laws and sub-statutory instruments, that victims and family members have to be informed *ex officio* that information exists about them, nor is there a provision in the Repression Archives Act or its sub-statutory instruments that victims and family members have to be informed *ex officio* that a third person requested access to information containing information about them. A victim or family member has to become active in a twofold manner in order to prevent the world knowing about secret police information concerning the victim or family member: they have to request information about the existence and content of archival material of the repression organs about them, and they have to request to limit access to precisely defined pieces of information contained therein. The possibility to block access to information ‘about their racial (ethnic) origin, their political or philosophical views, their religion as well information about their health and sexual life’ is a procedural simplification for the most intimate pieces of information.

The requirement of an application is aggravated by the time limit of one year after the Repression Archives Act entered into force. This comparatively narrow deadline serves to create a clear situation. During this one year, it is possible to deal only with applications to access by victims and their family members and keep all other requests for access on hold; after that one year, the closed list of applications clearly states which victim or family member objects to access to exactly which piece of information. However, this only works for the victims and their family members if the state informs widely about the deadline in a way that every possible victim or family member may take notice of it. Since there was no comprehensive information campaign, official sources name only two persons – one victim and one family member – to have restricted access to their personal data [Ukrains’kii Institut Natsional’noi Pam’yati (official site), Rosdil II. 1.]. This low number suggests that owners of archival information are not aware of their rights and, possibly, of the existence of archival documents concerning them.

Third, the maximum secrecy period is 25 years. This means that victims who were persecuted as children or young adults in the last years of the Soviet Union may still be alive when the secrecy period ends. In principle, a limitation in time is an adequate means to strike a balance between the interest of the victims and their family members to protect their personal life on the one hand and the public interest of knowing how the repression organs worked on the other. This public interest is stronger than in the case of other archival documents which may justify the unequal treatment through

the much shorter deadline for documents of Soviet repression organs: 25 instead of the usual 75 years. Since these deadlines commence at different points of time, they cannot really be compared. Nevertheless, they illustrate the priorities of the legislator.

If the information collected by the repression organ is made accessible to the public during the lifetime of the person concerned, this may result in a renewed violation of that person's right to privacy. A schematic maximum period is not an adequate means to properly balance the personal and public interests. As long as the victim or the family member live (and in line with criticism no. 1, perhaps a certain period after their death), at least information 'about their racial (ethnic) origin, their political or philosophical views, their religion as well information about their health and sexual life' should be *ex lege* taboo for public access. The public interest in unveiling the mechanisms of oppression and repression can be served by the requirement that documents with this type of information about living or recently deceased persons can be accessed only in an anonymous version.

Fourth, there is no procedure for persons about whom the documents of repression organs contain information to rectify information they consider false. This is in violation of Article 32(4) Const. Ukr. saying that

“[e]veryone is guaranteed judicial protection of the right to refute incorrect information about themselves and members of their family, and of the right to demand that any type of information be expunged (...).”

As mentioned before, the information archival legacy of the Soviet repression organs is not always correct. One reason is that the repression organs did not always work with precision but sometimes were sloppy. Another reason is that the repression organs, their employees or informants included, for reasons of their own, information into their files about which they knew to be false, perhaps even invented. Under the present Repression Archives Act as well as the Archive Fund Act, including their bye-laws and sub-statutory instruments, victims and their family have no instrument at hand to protect themselves against the errors and lies of the Soviet repression organs. This is a clear violation of Article 32(4) Const. Ukr. Even if Article 32(4) Const. Ukr. is seen as a directly applicable guarantee, not needing any statutory instrument for application, it is difficult to conceive how the subject of that right can enforce their right to have information expunged – or, in the case of Soviet archives, have it rectified or marked as false or mendacious – without rules setting out the procedure, including the administrative competence, for such an intervention into the archival documents.

The rights given in this constitutional provision, i.e. refuting and expunging data, obviously relate to information collected in harmony with the rule of law. In the case of the archives of the Soviet repression organs, these rights have to be adapted to the special role of that archival legacy. There is a public interest in knowing exactly how these organs worked, and this public interest extends to the historical fact that the repression organs sometimes included errors and lies into their files. Therefore, expunging information is no solution because that would falsify the historical value of the Soviet documents. However, the victims or family members must be given the possibility to add information to the materials of the repression organs, stating their view of the truth. If these statements are identifiable as victim statements added later, the historical value does not suffer, and the persons about whom documents contain erroneous or mendacious information have the possibility to ‘rectify incorrect information’, as Article 32(4) Const. Ukr. puts it.

Fifth, not every victim or family member about whom the files of the repression organs contain information, has the right to limit access to this information. Article 8(4)–(5) Repression Archives Act forbids to limit access to information about persons who worked for the repression organs, including their informal helpers (informants, ‘snitches’). This means that former perpetrators cannot forbid access to files showing that fact. Similar provisions can be found in many post-socialist countries and are usually considered unproblematic. The interest of the perpetrators and helpers of repression to keep their involvement secret is not considered legitimate, whereas the public interest in knowing who worked for the old system is. In Ukraine, the only problem is that persons about whom the files of the repression organs state that they were informal collaborators but who in fact were not (e.g. because the repression organ agent lied about the number of informants they had recruited, in order to boost their own career), are not awarded a procedure to clarify and rectify erroneous or mendacious information about their involvement with the repression organs. This is dealt with under criticism no. 4.

The rule that former perpetrators cannot limit access to files with information about themselves is valid even if the individual in question is not only a perpetrator, but at the same time a victim, as Article 8(5) Repression Archives Act sets out explicitly. The question of ‘fallen angels’, i.e. of perpetrators who later were victimised by the regime they served, is a difficult one in many states [Chapter 5.4.1.1.1.1.]. In the question of the access to archival material, the Ukrainian decision to keep the files of the perpetrators open even they later became victims, is well-founded. The public interest to know the workings of the repression organ extends to all collaborators and the fate of those who fell from grace. This argument advocates an open access to pertinent information. Furthermore, consid-

erations of prevention speak in favour of excluding former perpetrators from the privileges for victims. Persons who work for a repressive regime should know that they will find no pardon, even if the regime they support and serve turns against them.

4.4.3. Access to information

Free access to the archives and the information therein is the purpose of the Repression Archives Act.⁵⁰ Article 4(1)–(2) Repression Archives Act guarantees free access to the archival information of the repression organs as a rule and grants an individual subjective right to access. This right to access does not have any prerequisites so that everybody can demand access to any piece of information. Everybody has a subjective right to be granted access, as Article 10(1) Repression Archives Act explicitly states. Administrative requirements are an application and an official identification. Article 11(1) Repression Archives Act forbids to demand anything else from persons wishing to access archival information. The right to access is wider than for other archives because Article 15(4) Archive Fund Act limits unconditional access on the basis of an application and a valid identification to Ukrainian citizens, and Article 40(2) Archive Fund Act authorises the Ukrainian government to restrict the access of certain foreigners to documents in state property. In contrast, access under the Repression Archives Act is free for everybody which includes, e.g., foreign citizens or stateless persons. A negative answer to an application for access may be contested, according to the rather vague provision in Article 13(3) Repression Archives Act, before the superior authority or in court.

All archives and authorities in possession of relevant archival material⁵¹ are obliged by Article 5 nos. 1-5, Article 6 and Article 10 Repression Archives Act to grant everybody easy and equal access to the archives as well as to provide information and assistance. ‘Access’ does not only mean physical presence in the archives. Article 7 Repression Archives Act defines as ‘access’ all actions that provide information. This includes paper-based and electronic copies as well as the accessibility of digital copies on the archive’s website. Thus, the person requesting ‘access’ to some archival material does not have to be present in the archive but can hand in their request, as well as receive the requested material, via e-mail or mail. The choice between the various ways of access is a right of the person seeking access, as Article 5 no. 3 Repression Archives Act sets out. This means that the archives and authorities in possession of archival material have to accept that choice. Whereas physical access is free of costs, other forms may entail the duty to cover the costs of the archive for the services deliv-

⁵⁰ Article 1(1)–(2) Repression Archives Act.

⁵¹ On this, see Chapter 4.4.4. on ‘handlers of archival information’.

ered.⁵² Persons who distribute information obtained in the course of access to the archival legacy of the Soviet repression organs are answerable for the legal consequences of a publication of such information: the Ukrainian state, the archives and their staff cannot be held responsible, as Article 11(2) and Article 13(2) Repression Archives Act state.

Whereas victims and their family members have a certain right to limit public access to information about themselves [Chapter 4.4.2.], the state has only very limited ways to protect its own secrets by limiting access to the archives of the Soviet repression organs. Soviet or Russian rules on confidentiality or state secrets do not apply and therefore cannot limit public access to the archives, as Article 8(3) Repression Archives Act sets out. The Ukrainian state may apply its own confidentiality rules, but only to a limited extent. The authorities and archives in possession of the Soviet material cannot classify any files of the Soviet repression organs as secret and may classify them as confidential only if the Repression Archives Act itself authorises them to do so.⁵³ The only pertaining provisions of the Repression Archives Act are the rules on the limitation of access to personal information on the request of the victim or family member who is the object of that information [Chapter 4.4.2.]. Article 5(4) Totalitarian Regimes Condemnation Act repeats the principle that no rules on state secrets, confidentiality or official secrets apply to archival documents on Soviet and Nazi totalitarian crimes. Nevertheless, problems occur in the administrative practice, e.g. in the access to files held by the Ministry of the Interior and its subordinate authorities where officials sometimes feel they still need to protect Soviet state secrets [Adamovych (2024), pp. 8–9]. The official body, the Ukrainian Institute for National Commemoration, enumerates the qualification of a given information as a state secret under the relevant legislation, as one possible exception to the free access to archival documents [Ukrains’kii Institut Natsional’noi Pam’yati (official site), Rosdil II. 1.]; the State Secrets Act⁵⁴ does not make any exceptions for Soviet repression archives and their contents but defines in its Article 1 no. 1 a state secret quite neutrally as any type of classified ‘secret information, including information in the field of defence, economics, science and technology, foreign relations, state security and law enforcement, the disclosure of which may harm the national security of Ukraine’. There was a discussion about creating one comprehensive archive of the Soviet repression organs outside the reach of the present security authorities in order to prevent limitations of access for security reasons but those suggestions were not put into reality.

⁵² Article 11 Repression Archives Act.

⁵³ Article 5 nos. 4–5 Repression Archives Act.

⁵⁴ Law of Ukraine no. 3855-XII of 21 January 1994 ‘On state secrets’.

No limitations of access apply to information about the former perpetrators [Chapter 4.4.2.] or the issues enumerated in Article 8(2) Repression Archives Act: the quality of the environment and food; accidents, catastrophes and emergencies (this applies, inter alia, to information about Chernobyl); health, standard of living, and health care of the population; the state of law enforcement, education and culture of the population; the fact that human rights were violated; illegal acts of public organs and their officials; socially relevant information.

4.4.4. Institutions, in particular the Ukrainian Institute for National Commemoration (Ukrainian Institute for National Remembrance – UINC)

The Repression Archives Act defines several institutions. ‘The state’ as such is responsible for the organisation of everybody’s access to the archival information, for its proper storage, indexation, use and digitalisation and is under the obligation to trace and conserve archival information of the repression organs within and outside Ukraine. Research activities of the state designed to ‘restore the national commemoration of the Ukrainian People’ are to be given assistance. These principles are put into reality by the Ukrainian government, the Ukrainian Institute for National Commemoration, Crimean and local authorities as well as the archives within their respective competence.⁵⁵

Article 5 Repression Archives Act refers questions of access into the competence of the ‘handlers of archival information’. Article 2 no. 7 Repression Archives Act defines as ‘handlers of archival information’ all public authorities and archives possessing relevant archival information. This wide understanding of a ‘handler of archival information’ guarantees that no institution possessing archives in the sense of the Repression Archives Act can refuse to fulfil the obligations created by that law under the pretext of not being competent. ‘Handlers of archival information’ have to make access as easy as possible but are free to chose how they do this. Thus, institutions possessing relevant archival material can chose the ways best adapted to their possibilities.

The central archival institution for the legacy of the Soviet repression organs is the State Archive Branch of the Ukrainian Institute for National Commemoration which the government established on the basis of a joint proposal of the Ministry of Justice and the Ukrainian Institute for National Commemoration. It registers the victims and family members who restricted access to information about

⁵⁵ Articles 4, 6 Repression Archives Act.

themselves and provides the archives and authorities in possession of archival material with specialised information and services and keeps a register of the relevant archival materials.⁵⁶

The Ukrainian Institute for National Commemoration (UINC, Український інститут національної пам'яті – an alternative possible translation is Ukrainian Institute for National Remembrance) was founded in 2006⁵⁷ and has been thoroughly reorganised in 2014 by the UINC Decree and the UINC Charter. Originally, the UINC was a research institution affiliated to the Ukrainian government. In 2014, it has been remodelled into a ‘central executive authority for the implementation of the state policy in the field of the restoration and preservation of the national memory’, as par. 1 UINC Decree puts it. It continues to be affiliated to the government as a whole but is ‘guided and co-ordinated through the Minister of Culture’.⁵⁸ The reorganisation from a research institution in a more authority-style institution was the administrative prerequisite to transfer to the UINC official tasks such as the administration of access to the archives of the repressive organs.

The scope of the UINC and its commemoration goes beyond the Soviet era although the Ukrainian struggle for independence and the totalitarian regimes on Ukrainian soil between 1917 and 1991, i.e. the Soviet and the Nazi regimes, form the centre of its activity. Beyond this, the UINC also popularises the entire Ukrainian history within the country and abroad. Par. 4 UINC Charter enumerates two dozens tasks for the UINC, among them research, publications and exhibitions about Ukrainian history (in particular, but not exclusively, about the struggle for independence, the Soviet and the Nazi eras), searching, listing and maintaining the graves of the victims, initiating the erection of monuments and memorial places, collaboration in preparatory work for laws, international treaties and the award of state decorations, which expressly includes the initiation of measures for the social protection of World War II veterans and fighters for Ukrainian independence, support of authorities in their ‘de-Russification’ (‘decolonisation’) work, collaboration with and support of museums and NGOs, international contacts as well as fighting against Russia’s propaganda war. The tasks in close connection with the injustices of the past are the organisation of the National Rehabilitation Commission within the framework of the UINC⁵⁹ as well as logistic and other support for its activities, similar

⁵⁶ Article 12 Repression Archives Act.

⁵⁷ Decision of the Cabinet of Ministers of Ukraine no. 764 of 31 May 2006 ‘On the establishment of the Ukrainian Institute of National Commemoration’; replaced by Decree of the Cabinet of Ministers of Ukraine no. 8 of 12 January 2011 ‘On the establishment of the Ukrainian Institute of National Commemoration’; Decree of the Cabinet of Ministers of Ukraine no. 74 ‘On confirming the charter of the Ukrainian Institute of National Commemoration’.

⁵⁸ Par. 1 UINC Decree, repeated in par. 1 UINC Charter.

⁵⁹ Section 1(1) of the Order of the Ministry of Culture of Ukraine no. 926 of 25 October 2018 ‘On the regulation of the National Commission of Rehabilitation’: “The National Rehabilitation Commission is a special permanent body under the Ukrainian Institute of National Commemoration.”

tasks with view to the State Archive Branch of the UINC as the central authority to administer the Repression Archives Act, the collection and publication of facts about the Soviet repression 1917-1991, and aiding the implementation of the Rehabilitation Act.⁶⁰ The UINC was obviously shaped after the Polish Institute of National Remembrance (Instytut Pamięci Narodowej), a major difference being that one central activity of the Polish institution is the criminal investigation and prosecution of former state crimes, whereas the prosecution of the perpetrators is less important in the Ukrainian context [Chapter 6; Bułhak, Władysław in Brechtken/Bułhak/Zarusky (2019); Küpper (2024), pp. 15–16; de Vries, Tina in Schroeder/Küpper (2010), pp. 152–156].

The UINC is closely linked to the Ukrainian government. Its president, who enjoys wide powers within the institute, and three deputy presidents are appointed and dismissed by the government. The president is the recourse authority for complaints against decisions by the UINC branch offices. (S)He may be dismissed at any time without any specific reason. The UINC’s working plan and inner organisation require the approval of the Minister of Culture.⁶¹ Given the administrative rather than scientific scope of work, this organisational form does not seem problematic per se. As an authority, the UINC has to blend into the general administrative structure of Ukraine where the government is the head of the executive branch, as Article 113(1) Const. Ukr. points out. Even if the UINC is an administrative authority, it does have certain research and other scientific tasks but, being a state body, it cannot rely on the freedom of scientific activity because Article 54(1) Const. Ukr. grants this freedom to ‘citizens’ but not to the state and its subdivisions. Nevertheless, it is advisable for reasons of both constitutional law and expediency that the government does not interfere into the research and other scientific activities of the UINC. An institutional independence in order to prevent the government from dictating contents or even ‘truths’ for the scientific work might be advisable. This helps preventing the Ukrainian state and government from developing and imposing their own version of the ‘historical truth about Soviet repression’ on the country and its people, as some Ukrainian and foreign scholars fear [Hörbelt (2017); Zhurzhenko (2022)]. A transparent and reliable public funding, combined with the control of possible external funding, may protect the UINC’s independence from influence by non-state donors.

The tasks of the UINC are manifold. The administration of the Repression Archives Act, however, is not done by the UINC itself but the State Archive Branch of the Ukrainian Institute for National Commemoration. Handling the archives of the Soviet repression organs and administering the access

⁶⁰ Par. 4 nos. 7, 9, 18.1, 18.2 UINC Charter.

⁶¹ Par.s 8–10 UINC Charter.

of the public as well as the interests of the persons about whom the information was collected requires expertise in two fields: historical knowledge about the Soviet repression organs, which the UINC possesses, and knowledge about the administration of larger archival material, which the State Archive has. A mixed institution, combining the expertise of both relevant fields, seems a sensible construct. A practical aspect is that the State Archive Branch of the Ukrainian Institute for National Commemoration is given sufficient staff in order to guarantee a speedy processing of applications of the public. If applicants get the feeling that their applications take an unduly long time, the effect of societal pacification that free access to the archives may have will erode.

In questions of the State Archive Branch of the Ukrainian Institute for National Commemoration, the Ministry of Justice (and not the Minister of Culture) is the institutional partner of the UINC. This is appropriate because the State Archive Branch of the Ukrainian Institute for National Commemoration is responsible for the implementation of the Repression Archives Act which is not so much a scientific activity but centres on the realisation of individual rights of the victims and the members of the public.

4.5. Analysis

The question of the archival materials of former repression organs is a very special field of legislation on the past because the information in these materials can continue the violation of the human rights of the individuals in question even after the end of the totalitarian or colonial regime. Therefore, they require special care.

The Ukrainian legislation on the repression archives is in principle cognisant of the special role that such archives play in the politics of, and legislation on, the past. It allows for the various kinds of use of the archives: the individuals in question, administrative and judicial procedures, historical research.

The strongest flaw on this legislation is the weak position of the individual in question in limiting public access to their own data. The principal interest of the law is wide access to archival information because this contributes to societal reconciliation and may help prevent the reoccurrence of similar abuses. Insofar, the reasoning and the weighing of the law is acceptable and not in contrast with international and foreign standards. This principal interest needs to be weighed against the individual rights of the owners of the data, i.e. the persons about whom the archival material contains information. This result of weighing the conflicting interests holds up even when considering the fact that the collection and storage of data as such by a totalitarian dictatorship was a grave violation of human

rights, which makes a difference to data collected and stored by a public authority under the rule of law. The data of the archives of the repression organs are a human rights violation per se which did not end with the end of the dictatorship but lasts as long as the data exist. Even then, the public interest of societal reconciliation, as such a consequence of the totalitarian past, carries sufficient importance to grant a certain public access to those ‘contaminated’ data.

The Repression Archives Act allows for individuals in question to limit public access to their data but this protection seems insufficient. The protection ends with the death of the individual in question which does not allow to take account of the continuing dignity of the deceased as well as the legitimate interest of their surviving family members. The limitation of access in order to protect personal information is not provided for ex officio but requires an application of the individual in question. The time window for applications was very narrow. Furthermore, an application for non-disclosure requires intimate knowledge of the materials because it has to name pages and paragraphs. The general clause to close certain fields of highly personal information makes the procedure somewhat less cumbersome, but in general, the protection of the data ownership of the person in question is very weak – given the fact that in principle everybody has the right of low-threshold access to all data of the repression organs. The law-maker should re-adjust the balance between legitimate public interest in wide knowledge about the past and access to the archival materials and the legitimate interests of the data owners who are, which must not be forgotten, victims of Soviet repression. In its present form, the Ukrainian law does not do enough to prevent those individuals from being victimised again.

A serious point is that the individual in question does not have any procedure to protest against wrong, false and falsified, invented, or mendacious information. The usual remedy of rectifying or expunging that piece of information is inadequate for historical archives because both remedies would falsify the historical value of the material. Instead, the individual in question should be given the chance to add their version of the truth, including evidence which may exist, to archival materials in order to make the errors or lies of Soviet repression authorities known and restore their individual reputation.

A last point is the institutional position of the UINC. As an administrative organ, it may be under the supervision of the government as the head of the executive in Ukraine. However, institutional safeguards for the independence of the UINC’s historical research and against a government influence on the contents and results of that research appear to be insufficient. Governments in post-totalitarian or post-colonial states may have a political interest in one special version of the historical truth. This is even more the case if the country is being attacked in a propagandistic and real war, an element of

which is the interpretation of the past. An obligatory government-sponsored version of the truth, however, would hinder both historical justice and societal reconciliation. It would therefore be wise to include into the legal framework of the UINC more explicit guarantees for the independence of its research and against government influence on that part of its work.

5. Care for the Victims

The care for the victims encompasses both measures in order to neutralise, indemnify or repair the harm they suffered, as well as measures of a social nature addressing a socially vulnerable position they are in now.

5.1. Soviet crimes and present indemnification: ‘moral indemnification’

The Soviet Union committed innumerable crimes against individuals. When a private individual violates another person, (s)he is liable for damages in tort; this is considered a basic concept of justice [Smith (2012)]. The same principle of justice applies when the violator is not a private individual but the state – irrespective of the fact of whether or not that state created a legal basis for itself to commit those crimes [Radbruch (1946)]. Insofar, it is reasonable to argue that the state must indemnify victims of state crimes, even if post-totalitarian constitutions usually do not oblige the state to indemnify pre-constitutional totalitarian injustice [Chapter 1.1.]. As seen before, the perpetrator state, i.e. the Soviet Union, no longer exists and therefore cannot take care of the victims of its crimes. There are good reasons for the Ukrainian state to assume the responsibilities of the Soviet Union [Chapter 2 and sub-chapters].

The post-totalitarian (or post-colonial) state can address the victims of totalitarian (or colonial) crimes in various ways. Practical experience shows that the most important redress for many victims is the official acknowledgement that what happened to them was not right, that the state acted in an illegal, immoral and criminal manner. This may be termed ‘moral indemnification’ [Küpper (2024), p. 30].

One part of this ‘moral indemnification’ in respect to Soviet crimes is the official condemnation of the illegal or criminal character of the Soviet regime and its practices [Chapter 3. and sub-chapters]. The condemnation of the Soviet rule and its illegal character in general does not, however, address the individual victim of state crimes. A more personal acknowledgement of the criminal character of what was done to the victim in question can be achieved by official declarations that specific kinds

of state behaviour were unjust or that what was done to specific groups of persons was wrong, reprehensible, criminal, illegal etc. The most personalised way is to issue to every victim an official statement that the state committed injustice towards them. This ‘moral indemnification’ is important for the individual persecutee as well as for the societal reconciliation because it helps the reintegration of the victims and their families into society. Many forms of Soviet state crime destroyed the social position and the reputation of the victims and thus disintegrated them from mainstream society. This can be repaired if the state officially certifies that not the victim committed morally reprehensible acts, but the state did towards the victim. This can help annihilate the flaw that Soviet state crimes tried to settle on their victims.

Apart from this ‘moral indemnification’ by acknowledging the injustice of the state crimes, the post-totalitarian (or post-colonial) state can do more, e.g. grant the victims payments, reparation in kind and other benefits in connection with their sufferings. In a comparative perspective, most indemnification laws differentiate according to which right or legal interest was violated by the state crime: life, health, freedom etc. The following analysis follows this pattern because it allows an in-depth analysis of which state crimes have been addressed so far and to what extent, and which have not.

5.2. International law and foreign practice

International law does not oblige post-totalitarian or post-colonial states to create special legislation in favour of the victims of state crimes committed in the past. Any state is free to decide whether or not to do so, and if so, how to deal with the persons who suffered under the previous regime.

The case-law of the ECtHR holds that every member state is under an obligation to help clarify former human rights violations [Chapter 4.3.1.]. Applying this principle to Ukraine means that the Ukrainian state would violate the human rights of the victims of Soviet state crimes and their families if it tried to hush up those crimes. The condemnation of the past as well as the legislation on archives demonstrate that the Ukrainian state takes an active interest in uncovering the Soviet past including its darker chapters [Chapters 3. and 4.].

European soft law suggests that the post-totalitarian state should not remain passive vis-à-vis the survivors of state crimes. However, this recommendation is rather unspecific and does not describe concrete measures. In general terms, the Parliamentary Assembly of the Council of Europe stresses

the necessity of a moral indemnification⁶² and addresses the restoration of the honour of victims of an abusive criminal system (‘rehabilitation’) and the restitution of property.⁶³

“The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of ‘crimes’ which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.”

“Furthermore, the Assembly advises that property, including that of the churches, which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners in integrum, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Claims and conflicts relating to individual cases of property restitution should be decided by the courts.”

In the former socialist world, there are two lines of policy towards the victims of former state crimes. In many successor states of the Soviet Union, the Soviet ‘rehabilitations’ were upheld, but not much action was added to indemnify the victims [Stan (2018)]. A similarly restricted practice can be found in many successor states of Yugoslavia [Dureinović (2018)]. In most East European states, i.e. the former Soviet satellites, legal instruments were developed to address past injuries and/or present needs of the victims. These legal instruments define the persecution acts by their political motivation in order to distinguish them from the ‘normal’ criminal prosecution, and they award financial and/or other benefits for violations of certain rights such as life, health, freedom etc. Some countries award these benefits as special pensions, whereas others include the benefits into the overall social provisions by, e.g., raising the old age or invalid pension of a persecuted person. Every country found its own system of who was given what, reflecting the different kind and extent of political persecution in the individual socialist countries [Brunner (1995); Küpper (2004), pp. 756-826; Küpper (2024), pp. 30–36; Schroeder/Küpper (2010)].

⁶² Parliamentary Assembly of the Council of Europe (25 January 2006), § 8: “Moreover, the Assembly believes that those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings.”

On moral indemnification, see Chapter 5.1.

⁶³ Parliamentary Assembly of the Council of Europe (27 June 1996), § 8 and § 10.

5.3. The Ukrainian Constitution

The Const. Ukr. does not contain specific text on victims of Soviet state crimes. The most relevant provision is the social state (соціальна держава) clause in Article 1 Const. Ukr. and the parallel basic human right to social security in Article 46(1) Const. Ukr. Social state in general means that the state has to take care of persons in need [Wieser (2024), p. 182]. With view to the victims of Soviet state crimes, it means that the Ukrainian state has to create certain provisions for those victims who are in need or in a socially vulnerable position. Ukrainian constitutional court practice interprets the social state clause and the social rights enshrined in the Const. Ukr. and in statute not as absolute and accepts a wide margin of appreciation of the state, especially, but not exclusively with view to the financial possibilities [Yezerov/Terletsnyi (2022)].⁶⁴ Neither the Constitutional Court nor legal literature have dealt so far with the social state clause in respect to victims of Soviet state crimes.

Ukraine operates elaborate systems of social security in line with Article 1 Const. Ukr. This suggests that measures, e.g. benefits, for victims of Soviet injustice may be embedded in general social instruments. Payments to victims can be integrated into general social benefits, e.g. old age pensions, leading to an increased amount of these general social benefits. This integration of special indemnification measures into the general social welfare system and its benefits makes those indemnification measures seem less exceptional which might advance their acceptance by the population at large. In Ukraine, as in most other post-socialist countries, egalitarian reflexes are still strong, ‘extra benefits’ for certain persons are seen in a rather negative light. It therefore may make sense to use the general institutions of the social state, institutions that potentially everybody may rely upon such as old age pensions, to channel persecution-related benefits to the victims of Soviet crimes.

The indemnification of victims of state crimes may follow other lines or be more generous than the state payments to victims of ‘private’ crimes because these are two different cases. Victims of Soviet state crimes were victimised by the state itself. For this reason, the state bears full moral – though not necessarily legal [Chapters 1., 5.1.] – responsibility for the persons it – in the case of Ukraine: its predecessor state – victimised at an earlier stage. A victim of a ‘private’ crime must seek redress first of all with the perpetrator [Pylypenko (2024)]. Only if the perpetrator cannot be identified or cannot indemnify the victims of their acts, the state may be expected to grant benefits to the victim for social considerations.

⁶⁴ Constitutional Court of Ukraine, decisions no. 20-rp/2011 of 26 December 2011 and no. 3-rp/2012 of 25 January 2012.

5.4. Ukrainian legislation in favour of victims of Soviet crimes

Before we analyse the Ukrainian legislation in favour of the victims of Soviet crimes, we need to take a look at the initiatives the Soviet Union took. First initiatives were started from the 1960s on. One special feature of Soviet crimes under Stalin, particularly during and after World War II, was the forceful deportation of entire ethnic groups from their traditional homes into Central Asia, sometimes into camps or closed settlements or other forms of deprivation of personal liberty, sometimes into a ‘normal’ life at their new place of residence. This happened to dozens of ethnic groups, e.g. Estonians, Latvians, Lithuanians, Finns, Germans, Meskhetians, Poles, Koreans or – particularly important in the case of Ukraine – Crimean Tatars and other peoples living in the Crimean Peninsula such as Armenians, Bulgarians, Greeks, or Italians. The official reason was that those peoples collectively had collaborated with Nazi Germany or Japan or were ‘unreliable’ in some other way. This is dealt with in more detail in Chapter 5.4.2.7. and its sub-chapters.

After the end of Stalinism, the feeling grew in the Soviet Union that something had to be done about those peoples. Starting in the 1960s, the supreme Soviet authorities issued separate official statements for the various ethnic groups, restoring their reputation by saying that they were neither collaborators nor unreliable. Hand in hand with those statements, the restrictions were reduced and sometimes terminated, and in some cases, the authorities assisted individual members of those groups in their resettlement to the old dwelling-grounds. Since the focus of those Soviet measures lay on the declaration that the peoples in question and their members had not been traitors or other enemies, they were felt to restore more than anything else the collective and individual honour of what Soviet authorities called the ‘repressed peoples’. This is why this entire complex of measures, from statements restoring the reputation via reducing and terminating restrictions on the choice of residence and personal liberty up to active assistance in the resettlement, was called ‘rehabilitation’ (реабилитация), a term which meant in the Soviet context every measure in favour of ‘repressed peoples’ and their members. By the end of the Soviet Union, most of the ‘repressed peoples’ had been given their declaration of rehabilitation, and some had been allowed back into their old region entirely or at least partially [Chapter 5.4.2.7. and sub-chapters].

Post-independence Ukraine has upheld these ‘acts of the state authorities of the former USSR concerning the rehabilitation of deported persons forcefully resettled from their permanent residence, and

the restoration of their rights’.⁶⁵ On a doctrinal level, this may be interpreted as the nostrification of former Soviet law into Ukrainian law.

When free discussion and media coverage became possible towards the end of the socialist rule, it became obvious that the Soviet-style ‘rehabilitations’ were only a starting-point for Ukrainian initiatives for the victims of Soviet state crimes. The Soviet ‘rehabilitations’ first did not include all deported peoples, second did not address all the needs of those peoples, and third ignored the mass of Soviet state crimes not connected to deportations of repressed peoples. After independence, Ukrainian authorities felt that independent Ukraine had to fill the gaps:

“Yet, not all victims of the repression were rehabilitated, and because of this, the Verkhovna Rada of the Ukrainian SSR adopted on 17th April 1991 the Law ‘On the rehabilitation of the victims of political repression in Ukraine’ no. 962-XII (...)”.⁶⁶

The Ukrainian Rehabilitation Act of 1991 was still very Soviet-style, particularly in its wording, but also in its philosophy. It was nevertheless the first step of independent Ukraine towards adopting a policy of care towards the victims of Soviet state crimes – which also meant the non-acceptance of the old system and its injustices [Chapter 3.5.] as well as creating a new, non-Soviet, Ukrainian identity.

Ukraine continues the structures of the Soviet social system. The state pays pensions in the case of old age, invalidity and similar situations. Apart from this, special one-time or monthly payments are made in special situations. Special grants for victims of Soviet crimes and other recipients usually are designed as a surplus to the regular social benefits. As mentioned before in Chapter 5.3., the integration of reparations of state crimes into the general social benefits structures is advisable in Ukraine because of the still strongly egalitarian mentality and a negative social attitude towards ‘extra benefits’ and ‘special privileges’.

The legislation on past-related payments for special persons concentrates on the ‘heroes’ of recent Ukrainian history, not so much the victims. Good examples are the Veteran Act, the Fighters for Independence Act and the Special Merits Pensions Act. However, these laws do not entirely ignore the victims. The general pension legislation as well contains certain benefits for the victims of Soviet state crimes: the Pensions Act and the Military Pensions Act.

⁶⁵ Article 3(2) Deported Persons Act.

⁶⁶ Constitutional Court of the Ukraine, decision no. 9-р/2019 of 16 July 2019, § 7. The law mentioned is the Rehabilitation Act.

Apart from monetary payments, the general health care provisions are available for victims of Soviet state crimes and their persecution-induced health problems. In some cases, their request for treatment enjoys priority over ‘regular’ patients.

In a somewhat different context, the National Identity Act tries to establish and consolidate a national and civic consciousness by integrating, inter alia, war veterans and their memory into Ukrainian nation-building, but is silent about the victims. In the situation of ongoing military attack, Ukrainian decision-makers prefer to paint the Ukrainian nation as one of warriors and not of victims [Schenk (2020)].

5.4.1. Recipients of benefits

The recipients of benefits for past-related losses and damages can be subdivided into two groups: victims of Soviet state crimes and fighters for Ukrainian independence. This subdivision is at least partly the external perspective, not necessarily the Ukrainian one. From a Ukrainian point of view, Ukraine’s belonging to the Soviet Union was an injustice in itself, and the fighters for independence fought against that form of injustice. In this line of argument, fighters for independence who suffered losses and damages during their fight are just as much victims of Soviet state crimes as are persons deported into Central Asia, persons put into psychiatric institutions because of their political opinion, or persons being denied an education or a career because of their religious, ethnic or social background are. If we abstract from this special Ukrainian perspective, the differentiation between (passive) victims who are indemnified and (active) fighters for independence who are rewarded makes sense. This is a differentiation rooted in the pertinent legislation of other states as well.

5.4.1.1. Victims

5.4.1.1.1. Material definition

First, we deal with the material definition of the victims of Soviet repression. Ukrainian law differentiates between ‘repressed persons’ and ‘victims of repression’.

5.4.1.1.1. Repressed persons

The overall definition of the victims of Soviet state crime entitled to some sort of privileges is given in the Rehabilitation Act. The central term is the ‘repressed person’ which continues the Soviet terminology used for the victims of Stalinism [Chapter 5.4.]. Article 1.1 Rehabilitation Act defines a repressed person as ‘a person exposed to repression for the motives and in the forms defined in this law’. The definition of repression in the Rehabilitation Act has been widened by amendments and now encompasses a wide field of Soviet injustice. As a rule, Article 1.4 Rehabilitation Act takes into account only repressions that occurred on the territory of Ukraine (including deportations and similar measures aimed at persons in Ukraine) or which are documented in archival materials in Ukraine or which happened to persons who are now Ukrainian citizens. The requirement of a link to Ukraine takes into account the fact that Ukraine was only a part of the wider Soviet Union and cannot take care of all victims of Soviet crimes [Chapter 2. and sub-chapters].

The Ukrainian definition of repressed persons centres on individuals who were deprived of their liberty. Adamovych therefore speaks of ‘victims of (...) the Soviet punitive and repressive regime in Ukraine’ [Adamovych (2024), title of the paper]. Articles 1.2 and 3 Rehabilitation Act try very carefully to differentiate between persons persecuted for political and similar reasons (these are repressed persons) and persons prosecuted in the normal course of criminal justice (these are not repressed persons) [Misinkevich (2014)]. Measures of political and other persecution are, inter alia,

- all indictments and sentences by non-judicial organs,
- measures of other repressive organs (i.e. a wide circle of regular and irregular judicial and administrative organs) if the repression was based on class, national, political, religious, or social motives,
- decisions of other repressive organs (i.e. a wide circle of regular and irregular judicial and administrative organs) if it can be shown that the person in question did not commit any criminal act,
- indictments, imprisonments and sentences based on well-defined paragraphs of the Soviet political criminal law.

Article 2 Rehabilitation Act enumerates the forms of injustice that qualify as repression:

- deprivation of life,
- deprivation or restriction of personal liberty,
- locking away a healthy person in a psychiatric institution,
- deprivation of the Soviet resp. Ukrainian citizenship and expulsion from the USSR,

- deportation or forceful relocation within the Soviet Union, sometimes combined with limitations of personal freedom at the new place of residence (e.g. in a camp or a special settlement),
- prohibition to be in certain places, cities etc.,
- forceful integration into the Labour Army,
- internment of persons returning or being forced to return to the Soviet Union and subsequent forced labour,⁶⁷
- deprivation of property or the family home,
- excessive criminal sentences or sanctions for misdemeanours,
- being taken as a hostage,
- internment of foreign citizens during World War II,
- restriction of the right to vote, the right to work and similar civic rights,
- certain measures against persons defined as ‘socially dangerous for the Soviet government, the Soviet state or the Soviet system’.

This enumeration covers a wider scope than Article 1.2 Rehabilitation Act because it includes many, though not all forms of political persecution beyond measures against personal liberty, e.g. killings, expatriation, forced labour (which, however, usually was combined with some form of deprivation of liberty), expropriations, limitations in certain rights such as the right to vote. Some forms of political repression not expressly mentioned in this enumeration such as restrictions in the educational and professional career may be subsumed under the general clause of “certain measures against person defined as ‘socially dangerous for the Soviet government, the Soviet state or the Soviet system’”, whereas other forms such as taking away children to be raised in state-run homes or politically reliable families cannot be subsumed into that legal formula. They fall outside the scope of Article 2 and thus the entire Rehabilitation Act.

The relationship between Article 1.2 Rehabilitation Act (which was included later)⁶⁸ and Article 2 Rehabilitation Act is unclear. The categories in Article 2 Rehabilitation Act are not stringent. Some look at the violated right, e.g. the deprivation of life or personal liberty, others look at the kind of measure, e.g. psychiatric institutions, deportation or forced labour. Article 1.2 in combination with

⁶⁷ This is a form of persecution typical for Ukrainians who had been enslaved and deported to the West by Nazi Germany. After their liberation by the Soviet army, many of them were taken into custody and forced to return to the Soviet Union where they were imprisoned in camps or prisons for alleged crimes of ‘defection to the enemy’ or ‘surrender to the enemy’ and had to perform forced labour. Ukrainians liberated by the Western Allies often remained in West Germany as DPs or migrated to other Western countries such as the UK, Canada or Australia.

⁶⁸ The inner nexus between the Orange Revolution and Revolution of Dignity with improvements in the legislation on the past is described in detail in Adamovych (2024).

Article 3 Rehabilitation Act strongly focus on the deprivation of personal liberty by judicial, quasi-judicial and administrative measures. In the original version, this incoherent definition of the beneficiaries caused a high rate of negative rehabilitation decisions: until 2001, 248.710 persons were acknowledged as a repressed persons whereas 117.243 applications were turned down [Adamovych (2024), pp. 4–5]. The situation has become better in recent years, as the official statistics in the annual reports of UINP show.

Between 2019 and May 2026, the regional commissions forwarded a total of 6.040 applications to the National Commission for final decision [on the procedure see Chapter 5.4.1.1.2.]. From these, 4.776 cases were discussed, out of which 4.247 were decided. Positive rehabilitation decisions were taken in 2.757 cases, and another 1.166 applications were accepted as victims of repression [these are family members of repressed persons: Chapter 5.4.1.1.1.2.]. 190 applications were turned down because the applicants had been rehabilitated earlier, and 134 decisions were negative. The low number of negative decisions is misleading because the bulk of negative decisions is taken on the regional level. Negative decisions on the regional level are not forwarded to the National Commission and therefore do not appear in its statistics. A certain number of cases is pending because of lacking information. These numbers refer to the entire period from 2019 to 2026.⁶⁹

The most recent detailed figures cover the year 2025:⁷⁰ 864 applications were considered, out of which

- 560 applicants were rehabilitated, i.e. accepted as a repressed person,
- 263 applicants were recognised as victims of repression [these are family members of repressed persons: Chapter 5.4.1.1.1.2.],
- 21 applicants were identified as having been rehabilitated earlier and were explained that therefore they did not need a renewed rehabilitation,
- 82 applications were pending at the end of the year for need of additional information,
- 29 applications were turned down; here again, this low figure does not contain the negative decisions taken in the regional commissions.

The official document of the UINP does not explain the difference of 864 applications having been considered and 955 decisions (which is the sum of the numbers in the various categories) having been taken. Regardless of this statistical contradiction, the picture is clear. The vast majority of applications is accepted, and the inconsistencies in the legal basis does no longer lead to high numbers of refusal.

⁶⁹ National Commission of Rehabilitation, official information no. 3743 of 4 May 2026.

⁷⁰ Ukrain'skii Institut Natsional'noi Pam'yati (official website): Zvit za 2025 rik <<https://uinp.gov.ua/pro-institut/zvity/zvit-za-2025-rik>> (last accessed 7 May 2026). On that site, the official numbers for earlier years are available as well.

It is obvious that the Rehabilitation Act wants to define its scope very widely in order to include into the Ukrainian legislation all possible victims of Soviet injustice who have a link to Ukraine. This legislative goal is very generous. However, a more stringent definition of who is a ‘repressed person’, classifying the definition according to (1) the motives of persecution (e.g. class, national, political, religious, or social reasons), (2) the measures taken (e.g. criminal sentence, admission to a psychiatric hospital etc.), and (3) the rights affected (e.g. life, personal liberty, freedom of labour etc.), is advisable under both doctrinal and practical aspects.

In its original form, valid until 2018, Article 2(2) Rehabilitation Act excluded persons from the definition of a repressed person who had been active in the political repression but subsequently had fallen victim to repression themselves. The 2018 amendments repealed this clause so that persons may be rehabilitated who first were perpetrators and only later became victimised by the Soviet regime. This is what was called in the practice of the indemnification of Nazi crimes in post-war West Germany the question of the ‘fallen angels’ (‘gefallene Engel’): former collaborators of the regime who for one reason or other fell from grace. The pertinent German legislation refused indemnification to everybody who had been member in the Nazi party or ‘promoted the National-Socialist tyranny’, even if they at one point became victims of Nazi persecution [Küpper (2004), p. 205].⁷¹ In the case of persons who were both perpetrators and victims, the legislation on the past has to weigh their initial position as a perpetrator not deserving any respect or consideration against their subsequent position as a victim who may have a claim for respect, e.g. of their privacy. The Ukrainian law-maker, just like the West German one, decided in 1992 that the ‘fallen angels’ were first of all perpetrators. There are good reasons for this conclusion. However, in 2018, the ‘fallen angels’ were included in the definition of ‘repressed persons’ which acknowledged that such persons as well may have been victims. There may be good reasons of social reconciliation to regard ‘fallen angels’ as victims as well as perpetrators, but not everybody in Ukraine finds these reasons convincing. There has been explicit criticism in Ukrainian legal literature [Adamovych (2024), p. 8; Rozhkova (2018)]. Since the question of the ‘fallen angels’ has a bearing on societal reconciliation, the proper way do come to a decision in this question is a popular debate.

⁷¹ § 6(1) no. 1 Federal Law on the Indemnification for Victims of National-Socialist Persecution (Federal Indemnification Act) of 18 September 1953.

5.4.1.1.2. Victims of repression

Article 1.3 Rehabilitation Act defines the category of a ‘victim of repression’. These are spouses and children of repressed persons as well as persons living in one household with the repressed person or depending on a repressed person at the time of the repression measures. Neither the Rehabilitation Act nor sub-legal bye-laws or similar executive rules on the execution of that law define the scope of benefits for the victims of repression, which causes considerable concern in practice. Some Ukrainian academics express doubts that that might constitute an unconstitutional discrimination [Adamovych (2024), pp. 7–8, 9; Prots’/Kopel’tsiv-Levits’ka (2023)]. Even if one does not share this legal assessment, the fact of a constitutionally doubtful procedure remains: if the law-maker defines a certain category of victims, then they should also define their entitlements, or else that category remains empty and gives rise to expectations which the law does not fulfil. This is problematic for the rule of law as well as for societal reconciliation.

5.4.1.1.2. Procedural aspects: certification of status

After the material definition, we now analyse the administrative procedure to acquire the status of a repressed person or victim of repression.

Persons qualifying as rehabilitated may request a certification of their status. The same applies to victims of repression. The certificate is the administrative basis for awarding benefits to rehabilitated persons.

The material decision whether or not an applicant qualifies as rehabilitated or a victim is taken by a special organ, the National Commission for Rehabilitation, whereas the certificate is issued by the local authority of the applicant’s residence.⁷² The commission for rehabilitation is composed of two levels: regional and national. The regional commissions prepare the decisions about the certification or non-certification of applicants, and the National Commission examines these proposals.

In the verification process, the commission has to treat all doubts about insufficient evidence in favour of the applicant. On the other hand, the testimony of the applicant and witnesses is itself never sufficient ground for a positive decision.⁷³ This means that the testimony of the applicant and witnesses

⁷² Article 6(8)–(9), Article 7, Article 8 Rehabilitation Act.

⁷³ Article 8(6)–(7) Rehabilitation Act.

has to be supported by some documents as evidence. The search for evidence led to lengthy procedures in the early years [Voloshyn (2019)], a phenomenon also known in the West German indemnification of Nazi crimes. The declining percentage of negative or suspended decisions in recent years [Chapter 5.4.1.1.1.1.] suggest that nowadays questions of evidence rarely constitute a major problem and are handled adequately by the authorities. Problems sometimes arise because Soviet authorities led their registers sloppily, leading to one and the same person being registered under different dates of births in different registers. Other problems of evidence arise because the relevant Soviet case files cover more than 1.000 pages each and are therefore difficult to copy, or the documents are in the Russian-occupied territories and thus out of reach of the Ukrainian authorities [Gordich (2023); Vovk (2024)].

The sessions of the commission are public unless the chairperson decides to hold a closed meeting.⁷⁴ Given the nature of the rehabilitation procedures, holding meetings openly seems a violation of the applicants' rights to privacy unless the applicant gives express consent. On the other hand, open sessions are a good instrument to prevent corruption, unlawful decision-making and questionable compromises and to inspire public trust by transparency. Nevertheless, in questions of individual fates during Soviet times, the applicant's right not to have their past made public seems to outweigh the requirements of good administration.

All decisions, positive and negative, may be challenged in court. Legal scrutiny is thus available to applicants.

Article 8(12) Rehabilitation Act provides for the publication of all decisions about applications on the websites of the proper state organs, including the Ukrainian Institute for National Commemoration [Chapter 4.4.4.]. The publication of positive decisions is acceptable because they restore the honour and reputation of the repressed person, although the protection of privacy and personal data in Article 32 Const. Ukr. suggests that successful applicants must have the right to object against the publication of their rehabilitation decision or parts thereof.

Not only positive decisions are published, but negative decisions as well. The bye-laws provide for the publication of the applicant's full name and date of birth, of the outcome (refusal) and its reasons, standardised in the formula 'lack of grounds', without any specification of those grounds or their

⁷⁴ Section 5(5) Standard Regulation on Regional Rehabilitation Commissions, approved by Order of the Ministry of Culture of Ukraine no. 926 of 28 October 2018.

lack.⁷⁵ In practice, the UINC publishes the name and the outcome: ‘refusal’, but does not give any ground.⁷⁶ The publication of negative decisions is doubtful under the standards of human rights and the rule of law. A negative decision may create the impression that the applicant tried to obtain privileges (s)he is not entitled to, i.e. may create the impression of a dishonest application, even in a situation when the lack of evidence, some formal aspect or an unusual form of persecution not covered by the scope of the legal definition, is the sole reason for the rejection of the application. As mentioned in Chapter 5.4.1.1.1.1., Ukrainian legal literature identified the incoherent legal definition of the beneficiaries as the main reason for the high number of rejections in the early years: applications of persons were turned down who had suffered Soviet injustice but did not fall under the inadequate legal definition of a repressed person. The publication of such a decision may create an additional flaw on the reputation of a person who suffered Soviet state injustice, and it may deter victims to apply if they possess little evidence supporting their application. The ex officio publication of negative decisions should be terminated.

The two levels of the commission are composed on similar lines. The National Commission is composed of members delegated by the ombudsperson, the Ministry of the Interior, the Security Service, national commemoration organs, the Procurator-General and appropriate scientific institutions. The bye-laws mention ‘public associations engaged in activities in the field of research on the history of Ukraine in the 20th century and/or providing assistance to citizens on issues related to the rehabilitation of victims of repression of totalitarian regimes (...), established and registered in Ukraine in accordance with the procedure established by law’.⁷⁷ This allows for the inclusion of civil society but not necessarily of the persons concerned and their interest representations. The regional commissions are composed in a similar, though not identical manner⁷⁸ and may include some persons designed to represent victims’ organisations [Voloshyn (2019)]. From a comparative perspective, a severe flaw on this composition is the relative lack of members delegated by the NGOs of persecuted resp. rehabilitated persons or of ethnic groups that were subject to collective deportations. German commissions deciding on awarding payments to victims of Nazi persecutions, e.g., are composed entirely of representatives of the groups of persecutees and their organisations [Küpper (1997)]. This allows to

⁷⁵ Appendix 5 of the Order of the Ministry of Culture of Ukraine no. 926 of 25 October 2018 ‘On the regulation of the National Commission of Rehabilitation’.

⁷⁶ Ukrain’skii Institut Natsional’noi Pam’yati (official website): Zasadannya no. 37 vid 27 listopada 2025 roku (official publication of the results of the session of 27 November 2025): <<https://uinp.gov.ua/dekomunizaciya-ta-reabilitaciya/reabilitaciya/oglyad-zasidann-nacionalnoyi-komisiyi-z-reabilitaciyi/zasidannya-no-37-vid-27-lystopada-2025-roku>> (last accessed 6 May 2026).

⁷⁷ Section 3 Order of the Ministry of Culture of Ukraine no. 926 of 25 October 2018 ‘On the regulation of the National Commission of Rehabilitation’.

⁷⁸ Articles 7.1–7.2 Rehabilitation Act.

include first-hand knowledge of the persecution into the decisions, and it provides the commissions with an increased level of legitimacy. NGOs involved in research cannot offer the same level of knowledge and legitimacy. Whether NGOs providing assistance to victims can do that depends on their composition. One way to overcome that flaw is to make the presence of NGOs of repressed persons or ethnic groups in the commissions mandatory.

A positive point in this context is Article 9(2) no. 2 Rehabilitation Act, pronouncing a duty for national and local organs to promote NGOs of rehabilitated persons.

5.4.1.2. Fighters for Ukrainian independence

A second group of recipients of past-related benefits and privileges are persons who fought, at various stages of the 20th century, for Ukrainian independence and were, eventually, killed, wounded, imprisoned etc. Our project and consequently this study concentrate on Soviet state crime and how to deal with it today. Is there a link between Soviet state crime and the fight for Ukrainian independence? If one accepts the Ukrainian argument that the fact that Ukraine belonged to the Soviet Union was in itself Soviet crime, then yes, there is a link. This reminds of the position of Estonia, Latvia and Lithuania. The official position of the Baltic states – between 1940 and 1991 of their governments in exile – as well as the majority of world-wide academia has been since 1940 that the Soviet occupation of these three countries was illegal, in violation of international law, and criminal.

In the case of Ukraine, the *opinio iuris* is less unequivocal. Ukraine's official position is that the Soviet Union committed many crimes against Ukraine and Ukrainians, the most terrible one being the Holodomor, and for this reason, resistance against the Soviet rule and the fight for Ukrainian independence were acts that triggered Soviet retaliation, the victims of which deserve today at least as much attention as the victims of other Soviet state crimes do. Since Ukraine and its laws establish this link between the fight for independence and the legislation on the past, this study would be incomplete without analysing the benefits in favour of persons who were fighters rather than victims. The conventional post-authoritarian interpretation of present-day Ukraine and its laws may find it questionable to equate independence fighters with victims of repression, whereas a post-colonial perspective accepts this parallel more easily [Partlett/Küpper (2022); Törnquist-Plewa/Yurchuk (2017)].

Various laws provide for benefits and privileges for the fighters for Ukrainian independence. Every law has its own definition of the beneficiaries. As a consequence, there is no central definition of

‘fighters for Ukrainian independence’ the way the Rehabilitation Act gives a central definition of ‘repressed persons’ and ‘victims of repression’ valid for all pertinent laws [Chapter 5.4.1.1.1.].

A very detailed definition of ‘fighters for independence’ is provided in Article 1 Fighters for Independence Act. On an individual basis, fighters for independence took part in the political, armed or other collective or individual fight for Ukraine’s independence as a part of certain political structures. The definition enumerates these political structures: a large number of organisations, formations, political movements, official and unofficial authorities that fought for, or are deemed to have fought for, Ukrainian independence at some point in the 20th century. Article 1 no. 20 Fighters for Independence Act opens the list of explicitly named formations for ‘other organisations, structures or formations that existed during the 20th century (until 24 August 1991) and had the aim of achieving (restoring) or defending Ukrainian independence’. The government is charged with confirming the list of these ‘other organisations, structures or formations’. No such list can be identified among official documents, i.e. that list does not exist.

The Ukrainian law-maker tried to give a comprehensive list in Article 1 nos. 1–19 Fighters for Independence Act. Some of these formations are well known in international historical research, others cannot be found or receive at best a footnote in highly specialised literature. Some of the formations mentioned are known to have, or suspected of having, collaborated with Nazi Germany during the occupation, others are known or suspected of having committed crimes against humanity without instigation or help by Nazi Germany [Marples (2015); Peters (2016); Portnov (2015); Yurchuk (2017); Zhurzhenko (2022), p. 99]. For this reason, the very long list in Article 1 Fighters for Independence Act raises many questions. It is true that from a Ukrainian perspective all these formations fought for an independent Ukraine.

It seems advisable, however, that Ukraine should take into account that not all of these formations did so with means acceptable under present-day standards of human rights and rule of law. This is true not only for some small and unknown formations but even for large organisations such as OUN and UPA. A possible legislative remedy *de lege ferenda* on the collective level would be to delete formations which were as a whole involved in grave violations of human rights. This is admittedly a difficult task because historical research will have to take into account that sources may be contaminated by Soviet or Russian propaganda, but it is a task that the Ukrainian legislator should face in order to dress in a consistent manner a list of organisations which will not damage Ukraine’s civic harmony, societal reconciliation, and foreign reputation. A second advisable legislative strategy looks

at the individual level, inserting into the Fighters for Independence Act a clause that individuals who contributed to war crimes, crimes against humanity or genocide as the gravest forms of structural human rights violations are excluded from all benefits and privileges that fighters for independence may claim under Ukrainian law. Both the collective and the individual strategies would bring Ukrainian legislation in line with international and constitutional standards and would at the same time reduce the goals for Russian propaganda. It would also bring the ‘nationalist’ Fighters for Independence Act and ‘nationalist’ perspective of Ukrainian history in harmony with the ‘European’ tendency of dealing with the Soviet past. So far, these different tendencies in various parts of the legislation on the past – serving different and possibly conflicting sections of the Ukrainian political arena⁷⁹ – conflict with each other, causing incoherences in the Ukrainian legal system as well as fears that the Ukrainian state may impose its own ‘heroic’ version of Ukrainian history, superseding or even outlawing alternative narratives on Ukrainian history [Coynash (2015); Myshlovska (2021)].

In the Veteran Act, ‘participants in combat action’ is a central category. The past-related part of this category is defined in Article 6 no. 16 Veteran Act: persons who fought in one of six explicitly named formations and have obtained a recognition under the Fighters for Independence Act.

5.4.2. Losses entitling to special benefits

Special benefits depend on the right affected by Soviet state crimes.

5.4.2.1. Life

Human life is usually considered the most valuable right because its destruction cannot be repaired. Unlike many other post-totalitarian states, Ukrainian law does not have any explicit provisions for benefits for surviving family members of victims who were killed in the course of state crimes.

After the end of the Soviet rule, the lack of provisions for the benefit of surviving family members of killed repressed persons may have been a flaw on the Ukrainian legislation. More than three decades after the end of the Soviet crimes, both widow(er)s and orphans no longer suffer financial damage from the loss of a family member and eventual bread-winner. Financial benefits may be welcome but come too late now to address persecution-induced losses and damages. The human suffering for the

⁷⁹ Some scholars speak in this respect of a ‘pillarized mnemonic field’: Shevel (2014), pp. 160–164.

loss of a family member continues. This feeling of grief can be addressed by the post-totalitarian state by honouring the persons killed by the previous totalitarian (or colonial) regime.

Article 9(3) Rehabilitation Act obliges national and local authorities to search and maintain graves of persecuted persons within and outside Ukraine, as well as to facilitate the transfer of the remains of persecutees from abroad to Ukraine. Article 297(2) Criminal Code defines the desecration of the graves of World War II soldiers, of fighters for the Ukrainian independence, as well as of victims of Nazi persecution, but not of victims of Soviet state crimes, as a qualified case of the general crime of the desecration of graves.

5.4.2.2. Health

Article 6(5) Rehabilitation Act allows certified repressed persons access to certain health care services if the person became an invalid due to the repression. This means that the repression must have caused a deterioration of the person's health to an extent that (s)he is qualified invalid under the general Ukrainian legislation on invalids.

This provision is problematic in two ways.

First, the threshold of invalidity is high. Since 2024, invalidity is being assessed by the degree to which daily functions are limited by health problems, with requirements being rather strict.⁸⁰ These strict requirements were formulated in order to prevent able-bodied men from avoiding military service but are, due to their abstract nature, applicable in all cases. If the repressive acts damaged the person's health below that threshold, no extra health care is provided. However, any person in Ukraine has access to the general health care system. That system will take care of health problems caused by Soviet state crimes, too – though not under the privileged priority that Article 6(5) Rehabilitation Act defines for persecution-induced invalids.

Second, Article 6(5) Rehabilitation Act requires causation in a medical sense. Only invalidity 'resulting from the repression' qualifies the person for the extra health care under that provision. The experience of post-Nazi and post-socialist countries shows that the cause of health deterioration is often very difficult to establish because the human organism and its health is a multi-factor system. Health

⁸⁰ Decree (постанова) no. 1338 of the Cabinet of Ministers of Ukraine of 15 November 2024 'Some questions regarding the evaluation of the daily functions of a person'.

problems usually have more than one cause, they are the result of several, sometimes interacting and mutually reinforcing factors. A particularly difficult problem is the establishment of causation in the case of what is termed ‘long-term consequences’. Survivors of Nazi concentration camps often developed persecution-induced physical and psychical traumas only decades after they had been liberated. Especially if the persecutees had been incarcerated in the concentration camp in their youth, traumas developed only much later. A very frequent biographical date is the transition into old age pension: this is when many survivors of camps suddenly became physically and psychically ill, and decades after the persecution acts, a reliable causation was very difficult to establish [Maier (1981); Weiss (1981)].

Both these problems are less grave than they may appear at first sight. The health care privileges envisaged in Article 6(5) Rehabilitation Act are not only open to invalid repressed persons, but to all certified repressed persons receiving old age pension [Chapter 5.4.7.4.]. Since Soviet repression ended in 1991, i.e. more than three decades ago, most certified repressed persons are old age pensioners and therefore do not have to show persecution-induced invalidity but enjoy the privileges of Article 6(5) Rehabilitation Act without any further preconditions.

Apart from the benefits provided for in Article 6(5) Rehabilitation Act, Article 6(6) Rehabilitation Act opens to invalid repressed persons access to the special benefits in Article 13 Veteran Act or Article 77(d) Pensions Act or Article 47 Military Pensions Act. This enumeration is alternative, not cumulative. The applicant can choose which benefits (s)he wishes. Article 13 Veteran Act grants generous privileges in health care, housing, the provision with gas, water etc., public transport, workplace, and taxation, furthermore a raise in the old age pension by 30, 40 or 50 per cent, depending on the degree of invalidity. These benefits are available to invalid independence fighters as well. Article 77(d) Pensions Act and Article 47 Military Pensions Act provide for a raise in the old age pension by 50 per cent. The wording of Article 6(6) Rehabilitation Act only requires that invalidity exists but does not mention the requirement of causation. The exact legal position and the scope of claims created by those legislative cross-references are not easy to understand and appear to be contradictory. There is no case-law on exactly how Article 6 Rehabilitation Act is to be understood and applied. In general, Ukrainian court practice with view to contradicting, faulty or incomplete legislation in social matters in general and with view to old age pensions in particular has established the principle that the interpretation most favourable for the applicant is to be applied.⁸¹

⁸¹ Supreme Court (Grand Chamber), decisions no. 812/292/18 of 6 November 2018 and no. 822/524/18 of 13 February 2019.

Article 6(6) Rehabilitation Act and its reference to pension and other privileges in various statutes show that the pension privileges for victims of Soviet state crimes are dispersed over several laws and do not always have the same content. A more stringent legislation could award victims a less confusing and contradictory position, a position more easily to understand for a (potential) beneficiary than the present one.

It must be noted that all benefits for the violation of health are available only to persons who reside in Ukraine. Emigrated persecutees cannot profit from them. It is justifiable for a country with limited means like Ukraine to restrict certain persecution-related benefits to residents. However, there never has been a societal debate on whether or not to include or exclude the Ukrainian emigration into the scope of social benefits for victims of Soviet state crimes. This societal debate must still be held, and if it results in the political wish to extend benefits to victims residing outside Ukraine, the pertinent laws need to be amended.

5.4.2.3. Freedom

Compensation for the loss of freedom consists of two components: a one-time lump sum and privileges in the old age pension.

– Lump sum

Article 5(1) Rehabilitation Act provides for lump sum payments in the amount of one monthly minimum wage for every month of deprivation of personal liberty (including the time in psychiatric institutions). The maximum amount is 75 monthly minimum wages, i.e. the lump sum paid for six years and three months of deprivation of liberty. Only the person who suffered the loss of liberty is entitled to request this payment, whereas the heirs are not. This reflects the personal nature of compensations for the loss of personal rights such as liberty and is a provision which many countries have in their indemnification (and in a wider perspective in their tort) laws.

Article 5(4)–(5) Rehabilitation Act provides for a deadline for applications of three years after the certification of the status as a repressed person. A deadline of three years is rather short, compared to the deadlines in other countries. However, the deadline commences with the reception of the rehabilitation certificate by the repressed person. The persons in question are therefore known to the authorities and may be informed about their rights e.g. in the course of the certification procedure. There is,

however, no normative instrument obliging the authorities to inform a certified repressed person or victim of repression about the rights and claims ensuing from their status.

– *Monthly payments*

The provisions on compensation within the old age pension are more important, due to the monthly recurring character of these pensions. Article 6(1) Rehabilitation Act gives times of deprivation of liberty a triple value in the calculation of the old age pension: every month spent in imprisonment, a psychiatric institution, a place of forceful relocation etc counts as three months in the calculation of the times relevant for the old age pension. Article 58 Pensions Act contains the same provision.

An additional monthly pension supplement of currently 4,200 UAH is paid to certified repressed persons and fighters for independence who suffered a loss of freedom.⁸²

Monthly payments included in the regular pension are preferable to a separate pension for the reasons set out in Chapter 5.3.

Furthermore, certified repressed persons who suffered a loss of freedom are granted some privileges in health care, housing, the provision with gas, water etc., public transport and taxation. Article 6(6) Rehabilitation Act opens the privileges Article 12 Veteran Act provides for certain war veterans to repressed persons whose freedom had been taken away. The privileges in Article 12 Veteran Act are less generous than those in Article 13 Veteran Act which Article 6(6) Rehabilitation Act opens to invalid repressed persons [on the latter see Chapter 5.4.2.2.].

Just like the benefits for the violation of health [Chapter 5.4.2.2.], the benefits for the loss of personal freedom are embedded in the Ukrainian social system – which in itself is a positive decision [Chapter 5.3.] – and therefore available only to Ukrainian residents. This is an automatic reflex of the Ukrainian pension and other provisions, not a conscious and politically discussed decision. The societal debate on the inclusion or exclusion of emigrated victims of Soviet state crimes still needs to be held.

⁸² Articles 1 no. 7, 5(1) Special Merits Pensions Act. In March 2025, 4,200 UAH is about 100 EUR worth; in early May 2026, its equivalent is about 81,50 EUR.

5.4.2.4. Reputation

Article 4 Rehabilitation Act restores all honours, titles etc. that repression measures had annulled. The rehabilitated persons or their surviving family members have the right to request a publication of the rehabilitation in the press, at the residence or workplace etc. This publication is free of charge for the rehabilitated person or family members.

A positive rehabilitation decision is published on the websites of several government agencies, as Article 8(12) Rehabilitation Act sets out. The problems that the automatic publication according to that provision may cause are discussed in Chapter 5.4.1.1.

Fighters for independence are honoured by Article 2(1) Fighters for Independence Act stating that these persons ‘played a pivotal role in the restoration of Ukrainian statehood’. A ‘complete research of the history of the fight and the fighters for independence of Ukraine in the 20th century’ as well as the popularisation of this knowledge through various channels is guaranteed by the state, as Article 5 Fighters for Independence Act sets out. Along with the objective guarantee of research, this provision contains a restoration of the reputation of the freedom fighters.

5.4.2.5. Property

Article 5(2) Rehabilitation Act provides for the restitution in kind of confiscated buildings and other assets as a rule – but only ‘if possible’. This possibility is defined as ‘if the building is not in use and if the assets still exist’. If the building is in use, a restitution in kind is not possible in order not to upset the local community where the building is located. If restitution in kind is not possible, the value of the building or assets has to be compensated in money. The law is silent on whether the value at the time of the confiscation or of the compensation decision is to be paid. This question is answered by the government decree provided for in Article 5(5) Rehabilitation Act: the valuation takes place before the submission of the application by the rehabilitated person.⁸³ The deadline for applications is three years after the certification of the status as a repressed person.⁸⁴

⁸³ Decree (постанова) no. 535 of the Cabinet of Ministers of Ukraine of 19 May 2021 ‘On the approval of a comprehensive plan of measures to protect the rights and interests of persons missing under special circumstances, victims of enforced disappearances, and their family members’.

⁸⁴ Article 5(4)–(5) Rehabilitation Act.

Article 7 Deported Persons Act has a parallel provision about restitution in kind as a rule for deported persons – again with the reservation of ‘if possible’, i.e. if there is no present use preventing this. The ‘if possible’ clause in the context of the Deported Persons Act is problematic in several respects. First, Article 7 Deported Persons Act is impossible to execute without sub-statutory regulations. Those were enacted as late as 2019,⁸⁵ with the courts previously calling upon government to close the normative gap.⁸⁶ Second, the main target group of the Deported Persons Act are Crimean Tatars and members of other ethnic groups deported by the Soviets from the territory of Crimea. That territory has no longer been under Ukrainian jurisdiction since 2014. Therefore, all legal privileges awarded to peoples and persons deported from Crimea, which relate to property situated in Crimea, is a promise for the future when Crimea will be under effective Ukrainian rule again [Chapter 5.4.2.7.3. and sub-chapters]. As long as Crimea was under Ukrainian control, returnees such as Crimean Tatars and others faced serious obstacles in getting their property back [OSCE High Commissioner on National Minorities (2013), pp. 9–15]. Third, the ‘if possible’ refers to the reservation of the priority of the present use, which will in many cases prevent a restitution in kind, given the fact that the buildings in question had been taken away in the 1940s.

The scope of Article 5(2) Rehabilitation Act is smaller than it seems at first sight. It only relates to confiscated property whereas Article 5(3) Rehabilitation Act excludes all restitution and compensation if the property was nationalised on the basis of Soviet legislation. This leaves for Article 5(2) Rehabilitation Act only property which was taken away in the course of some repression measure, e.g. the imprisonment or expulsion – or, according to Article 7 Deported Persons Act, the deportation – against the repressed person.

The fact that Ukraine limited the restoration or compensation of property to cases when property was taken away as part of an individual persecution measure, but does not retribute or compensate property nationalised in the course of the Sovietisation of the economy, is understandable and acceptable. Unlike the East European satellites where the Sovietisation of the economy had taken place in the 1950s and 1960s, the Soviet nationalisations had occurred in the 1920s and 1930s. Furthermore, a restitution in kind would run the risk of restoring Tsarist property relations, i.e. the large estates of the nobility and the church, which is unacceptable today [Küpper (2024), p. 32]. Therefore, Ukraine’s decision not to undo the Sovietisation of the economy, but much rather to privatise the Soviet-style state-held enterprises, is acceptable under the lens of politics of the past and legislation on the past.

⁸⁵ Decree (постанова) no. 357 of the Cabinet of Ministers of Ukraine of 24 April 2019 ‘On the approval of the Order of returning property or compensating its value to deported persons or to their heirs in case of their death’.

⁸⁶ Kyiv District Administrative Court, decision no 826/11821/17 of 24 April 2018.

This said, there may be ways to compensate the descendants of Ukrainian farmers, who suffered immensely under the Soviet programmes of so-called ‘dekulakisation’, beyond restitution in kind or financial compensation for the loss of land and their suffering during the ‘land reforms’. Such compensations could include a privileged access in the privatisation process of state (agricultural) land. Models for this can be found in Hungary where the descendants of the farmers who were dispossessed in the 1950s were granted privileged access to state land under privatisation; the Hungarian rules may also provide an example how such a privileged access can be limited to small and middle-sized farmers – also in Hungary, the legislation on the past did not want to restore the feudal latifundium system and their proprietors [Küpper, Herbert in Schroeder/Küpper (2010), p. 277–285]. Such a preferential treatment may be understood as the appreciation of the Ukrainian farmers’ role in the history of the 20th century.

Former church property is restituted only if the land is still in use for religious purposes [Bokoch (2018)]. The legal instrument for this is not the legislation on the past but the Church Act and its sub-statutory instruments.⁸⁷ Limiting restitution to churches to land in religious use prevents the re-emergence of large-scale land property in the hand of privileged historical churches and is in line with international practice [Schroeder/Küpper (2010)]. The practice of restitution of church buildings is overshadowed by the conflict between the Russian Orthodox and Ukrainian Orthodox churches and by the handling of buildings that had belonged to smaller religious communities no longer existent in large parts of Ukraine such as the Roman-Catholic church.

5.4.2.6. Citizenship

5.4.2.6.1. Reparation of state crimes in the framework of citizenship in the situation of state succession

It was common practice in socialist countries to deprive certain citizens – usually political opponents – of their citizenship and forbid either their return from abroad or force them out of the country (expatriation). In order to repair this form of injustice, awarding the former citizenship is the ‘reparation in kind’ method because it restores the status quo ante [Küpper (2024), p. 31].

This method does not work without modifications for Ukraine. Soviet expatriations withdrew the Soviet citizenship of the victims. Citizenship in the Soviet Union was that of the federation: citizen

⁸⁷ Law of Ukraine no. 987-XII of 23 April 1991 ‘On the freedom of conscience and religious organisations’.

of the Soviet Union.⁸⁸ This Soviet citizenship could not be restored after 1991 because the Soviet Union including its citizenship had ceased to exist. Ukraine could dispose of its own Ukrainian but not the (extinct) Soviet citizenship. In this situation, the best Ukraine could do was to grant victims of Soviet expatriations the new Ukrainian citizenship as a reparation.

Next to the (legally and practically important) Soviet citizenship, Soviet citizens also possessed a republican citizenship⁸⁹ which usually, but not always was the citizenship of the republic of their residence. At first sight, the republican citizenship of a former Soviet citizen might serve as a point of reference for the restoration of the Ukrainian citizenship. However, the republican citizenship was not only legally and practically irrelevant, but it was also difficult to ascertain in practice which Soviet citizen possessed which republican citizenship [Ginsburgs (1968), pp. 19–23; Uibopuu (1975), pp. 66, 70–89].

The only sensible and practicable point of reference was the Soviet citizenship and its withdrawal. This was repaired in kind by awarding the Ukrainian citizenship which the victim of repression, if the persecution had not happened, would have acquired in the normal course of things through the state succession of 1991.

5.4.2.6.2. Foreign practice

Comparing the standards of repairing totalitarian crimes in the field of citizenship (expatriation) in post-Nazi and post-Communist states, a common trait is that victims of totalitarian persecution usually are given the possibility to re-acquire the citizenship that was withdrawn from them. Most post-totalitarian states have pertinent legislation, perhaps because giving back a passport does not cost anything – unlike pensions, restitution of property etc. Furthermore, inviting emigres back into their old citizenship may open up contacts to persons with specialist knowledge valuable in the situation of post-totalitarian reconstruction.

The definition of who can get back the former citizenship varies and is usually adapted to the special forms of the persecution. Mass expulsion of Jews and other groups from Nazi Germany, combined with an ex lege deprivation of citizenship, requires different rules and procedures in the re-acquisition of the German citizenship than, e.g., expatriations from the Soviet Union which happened only rarely

⁸⁸ Article 33(1)1 Constitution of the USSR of 7 October 1977, together with the pertinent legislation.

⁸⁹ Article 33(1)2 Constitution of the USSR of 7 October 1977.

and on an individual basis. Most countries include into the group of beneficiaries not only the persons immediately driven out of the country but also their children and grandchildren who, in the normal course of events, would have acquired *ex lege* the citizenship withdrawn from their parents or grandparents.

Beneficiaries of such legislation usually have a material right to re-acquisition if they meet the legal requirements. This is important because only a material right can right the wrongs of the past. The possibility of filing a request which then depends on administrative discretion does not, in terms of the reparation of past injustice it is at best incomplete.

In most countries, it is immaterial whether the former citizen wishes to return to the old country or not. The withdrawn citizenship can be re-acquired by those who wish to remain in exile – which after sometimes decades of residence there is a very understandable decision – as well as by those who return to the old country once the totalitarian regime is over.

Another common trait is that the restitution of the deprived citizenship does not require the termination of any other citizenship. This is true even for states that firmly uphold the principle that double nationality should be avoided, as Germany did after 1945. The acceptance of double citizenship in cases where past state crimes are redressed has its reason in just those state crimes. In the strict logic of repairing former state crimes, the requirement to give up the new citizenship in order to get back the old, withdrawn one may appear consequent because without the persecution and expatriation, the person in question would not have left the persecuting state, e.g. the Soviet Union, and would have automatically acquired Ukrainian citizenship in 1991 but would have never become the citizen of another state. Yet, this position does not take into account the realities of persons forced into exile: their old citizenship was withdrawn or was, if it was not, worth nothing because it was the citizenship of the persecuting state. They were *de jure* or *de facto* stateless. Exiles need to obtain the citizenship of their new state of residence to avoid statelessness and to be able to live a normal life in their place of exile. Thus, the persecuting state forced the persecutees into a situation where the acquisition of another citizenship became necessary, and can therefore be expected to accept the continued existence this other citizenship when repairing its own crimes in the field of citizenship.

Some states use deadlines and terminate the possibility of re-acquiring the old citizenship whereas others do not. Germany, e.g., keeps its citizenship open to all descendants of victims of Nazi (and less importantly, of Communist) expatriations whereas Hungary closed the possibility of re-acquiring the

lost citizenship after a certain deadline. There is no universal standard in this question [Schroeder/Küpper (2010)].

5.4.2.6.3. Stages of Ukrainian legislation: 1991, 1997, 2001

After 1991, the inclusion of former victims of Soviet state crimes into the citizenship of Ukraine was not the highest priority of Ukrainian citizenship legislation. Having gained independence from a larger empire, Ukraine had first of all to determine who its citizens were: state-building and nation-building required a definition of who was, or was to be, a Ukrainian in the first place [Partlett/Küpper (2022), pp. 83–88]. The fate of former Soviet citizens deprived of their citizenship was only a marginal aspect of the overall endeavour to create a Ukrainian state, a Ukrainian citizenship, and a Ukrainian nation. The reparation of Soviet state crimes in the field of citizenship was necessarily intertwined with the creation of a Ukrainian citizenship as a result of state succession.

Article 2 no. 4 Rehabilitation Act defines the withdrawal of the Soviet resp. Ukrainian citizenship, combined with the expulsion from the territory of the Soviet Union (i.e. expatriation), as one form of Soviet repression. That law does not, however, contain any details or procedures for the redress of this special form of Soviet state crimes, leaving the question to the citizenship laws.

In Ukrainian citizenship legislation, we can distinguish three phases: the Nationality Act of 1991, the 1991 Nationality Act after the 1997 amendments,⁹⁰ and the Nationality Act of 2001.

– 1991

Article 2 nos. 1)–2) Nationality Act 1991 granted Ukrainian citizenship as a rule to residents of the newly independent state as well as to ex-pats, provided they applied for Ukrainian citizenship within one year after the law entered into force. These basic rules did not apply to victims of Soviet expatriations, even those that had resided in Ukraine before their expatriation.

Article 17 Nationality Act 1991 provided for the possibility of applying for Ukrainian citizenship to persons who had been citizens of Ukraine. This was not, however, a restoration but a ‘renewal’ (поновлення)⁹¹ of the Ukrainian citizenship. The decision whether or not to ‘renew’ the Ukrainian

⁹⁰ Nationality Act 1991 as amended by Law of Ukraine no. 210/97-VR of 16 April 1997. A German translation by Antje Himmelreich is available at <<https://nachkriegsukraine.de>> (Working paper no. 24a, second half).

⁹¹ This term is the official title of Article 17 Nationality Act 1991.

citizenship lay in the discretion of the authority: ‘may be renewed’, not ‘shall be renewed’ (може бути поновлено). The applicant had no material right to reacquire the former Ukrainian citizenship, only the procedural right to file an application.

Article 17 Nationality Act therefore did not grant any right to restitution of the expatriated citizenship but in principle opened up the possibility for the competent authorities to restore Ukrainian citizenship to victims of expatriation by exercising their administrative discretion. This avenue was open to persons who themselves had been Ukrainian citizens but not to their descendants.

– 1997

The 1997 amendments in the Nationality Act 1991 changed the situation for victims of expatriation fundamentally. Article 2 no. 3) included persons into the Ukrainian citizenship ‘who had been born on the territory of Ukraine or had their residence there, as well as their descendants (children, grandchildren), if they resided outside Ukraine on 13 November 1991,⁹² did not acquire the citizenship of another state and filed a request for acknowledging their belonging to the citizenship of Ukraine in the procedure fixed in this law’. This opened not only to victims of Soviet expatriations but to all persons of (geographical) Ukrainian origin living abroad, irrespective of the reason of their emigration, a deadline of about two and a half years (prolonged several times, the last deadline expired on 31 December 2004) to file a request to be re-accepted into the Ukrainian citizenship. Given the history of Ukraine with many Ukrainians being deported by Nazi Germany and not wishing to return to Soviet camps and Soviet forced labour, and many others fleeing in 1944/45 and later before the Soviet Army arrived or after, many Ukrainians were forced out of the country without having been ‘expatriated’ in a strict legal sense. Insofar, the neutrality of the Ukrainian law as to the reasons of the emigration is a positive factor because it encompassed in principle all victims of Soviet forceful expatriation. When the persons filing a request for re-acknowledgement of their citizenship met the legal requirements, they were Ukrainian citizens *ex lege*, the authorities not having any discretion.

However, one legal requirement was the absence of another citizenship. Victims of Soviet expatriation usually acquired the citizenship of their new home. Article 2 no. 3) Nationality Act 1991 in its 1997 version did not expect former Ukrainians to take up residence in Ukraine but expected them to give up the nationality of their state of residence. As explained in Chapter 5.4.2.6.2., this is contrary to the spirit of undoing former state crimes.

⁹² 13 November 1991 is the day when the Nationality Act 1991 entered into force.

As a means of redress for former state crime, Article 2 no. 3 Nationality Act 1991/1997 therefore was incomplete. The positive factor is that Ukrainian citizenship was created *ex lege*, not granted in a procedure with administrative discretion. The negative factors were the comparatively short deadline, which was prolonged, but in a piecemeal and thus unpredictable fashion, and the fact that Ukrainian citizenship was only acknowledged if the former citizens gave up the citizenship of their state of residence. This last element contradicted the lack of requirement of residence in Ukraine: former Ukrainian citizens were not expected to come back to Ukraine to become Ukrainian citizens again, but they were expected to give up the nationality that they obtained to live a normal life in their new home.

Next to Article 2 no. 3, Article 16(2) Nationality Act 1991/1997 provided for the privileged naturalisation of persons who had been born in Ukraine or whose at least one parent or grandparent had been born in Ukraine. Again, this privilege was not reserved for victims of expatriations but encompassed all emigres and their descendants. These persons could be naturalised if they accepted the constitution and the laws of Ukraine, had no other citizenship, were able to converse in Ukrainian and had sufficient sources of income; unlike other applicants, a minimum residence of five years was not required. The requirement to give up any other citizenship again did not take sufficient account of the situation of persons living in a forced exile. On the other hand, the naturalisation according to Article 16(2) Nationality Act 1991/1997 required a residence in Ukraine (though not of at least five years, as is required from other alien citizens). In such a case, the requirement to relinquish other citizenships may not be as onerous as when the person in question maintains a residence outside Ukraine. Another negative factor was that naturalisation was a decision in the discretion of the authorities. This was not a redress of past injustice in the strict sense because the victim of the expatriation was not granted a right to retrieve what had been his or hers. Given an adequate administrative practice, though, the privileged naturalisation procedure may play such a role. Finally, on a symbolical level, the naturalisation created a new Ukrainian citizenship and therefore did not build a bridge to the former Ukrainian citizenship the way the *ex lege* re-acknowledgement of Ukrainian citizenship under Article 2 no. 3 did.

The ‘renewal’ of the Ukrainian citizenship according to Article 17 Nationality Act 1991/1997 was made easier for persons born in Ukraine or descending from at least one such parent or grandparent because in their case as well the law waived the requirement of a minimum residence of five years.

– 2001

The situation changed again under the new Nationality Act 2001. Persons who immigrated into Ukraine after 13 November 1991⁹³ and possess a Soviet passport issued after 1974 and carrying the remark ‘citizen of Ukraine’ inscribed by Ukrainian authorities for internal affairs, may file a request for issuing a certificate of Ukrainian citizenship. Article 3 no. 3 Nationality Act 2001 defines these persons, as well as their under-age children accompanying them, as Ukrainian citizens. On the positive side of this provision stands the fact that all emigres independently from their reason of emigration are beneficiaries. Furthermore, their Ukrainian citizenship exists *ex lege* and does not depend on administrative discretion. On the negative side, this provision is useful only to those victims of Soviet expatriations who wish to reside in Ukraine and still possess the relevant Soviet documents.

Since 2001, the renewal of the Ukrainian citizenship has been possible under Article 10 Nationality Act 2001, a much more elaborate and detailed provision than its predecessor in the Nationality Act 1991. Its provisions refer to persons who once were, but no longer are, Ukrainian citizens, but not to their descendants. They encompass the emigres of the first generation, not their children and grandchildren. The registration of such persons as Ukrainian citizens happens in two different constellations. First, persons who are stateless are registered as Ukrainian citizens irrespective of their place of residence. Second, persons who wish to take up a permanent residence in Ukraine do not have to be stateless but are registered as Ukrainian citizens only if they give up their old citizenship. The positive aspect is that the registration as a Ukrainian citizen happens mandatorily if the applicant meets the legal requirements. There is no administrative discretion. On the negative side, the renewal of the Ukrainian citizenship is available only to first-generation emigres and only if they are either stateless or if they return to Ukraine and give up the citizenship acquired in exile. This is not a full-fledged reparation of state crimes in the field of citizenship.

5.4.2.6.4. Analysis

The situation of Ukraine – as well as other post-Soviet republics – is special with regard to redressing Soviet state crimes in the field of citizenship. It happens in a situation of state succession when the restoration of the withdrawn (Soviet) citizenship is no longer possible. Instead, Ukraine grants its own citizenship.

⁹³ 13 November 1991 is the day when the Nationality Act 1991 entered into force.

If we take the foreign practice as a yardstick, Ukraine has at no point in its post-independence history granted full reparation of Soviet withdrawals of citizenship (expatriations).

On the positive side of Ukrainian legislation is the wide definition of beneficiaries. The legal avenues to obtain Ukrainian citizenship are open to all persons who or whose parents or grandparents lived or were born in Ukraine. The reasons for the emigration are immaterial which is a sensible policy with view to the tempestuous character of history on Ukrainian soil during most phases of the 20th century. Since a previous persecution is immaterial, applicants are not required to show proof of their persecution.

At the same time, birth or former residence on the territory of Ukraine is an appropriate way to circumscribe possible beneficiaries. The former citizenship – i.e. Soviet – does not delimit the beneficiaries satisfactorily. Ukraine does not want to, and cannot be expected to, indemnify all former Soviet citizens who were expatriated, but wishes to concentrate on those with a link to Ukraine. Birth or former residence of the applicant or their (grand)parents is a way to establish that link for rather a wide group of persons and sets criteria which are comparatively easy to prove in the pertinent administrative procedure.

Another positive trait is the requirement of some activity of the individual beneficiary (request). Ukraine does not automatically confer its citizenship to all former Soviet citizens with some link to the country but only to those who show by their request that they are interested in Ukrainian citizenship. This guarantees that nobody is granted citizenship against their will.

The legal consequences of the various constellations in Ukrainian legislation show a mixed picture. In some cases, Ukrainian citizenship is acquired automatically if the applicant meets all the legal requirements, which is in line with the idea of repairing the negative effects of Soviet state crime. In other cases, Ukrainian authorities have administrative discretion which is in principle in conflict with the meaning of restorative justice but may, if handled properly in administrative practice, open doors for such justice. Even then, strictly speaking, a beneficial administrative practice is not a full-fledged reparation of state crime. Only a material right is.

The most negative trait is the requirement of either statelessness or to give up an existing other citizenship. This is contrary to the idea of doing justice in the field of citizenship and one reason for the verdict that Ukraine never had a full reparation of Soviet crimes in this respect. Yet, it is necessary to

take into account the special Ukrainian situation as only one of many successor states of the former Soviet Union. Ukraine had to create its own citizenship and to delimit it from the citizenship of other successor states. This may be a legitimate interest to require persecutees to give up their other citizenship when re-acquiring the Ukrainian (in lieu of the lost Soviet) citizenship. However, this legitimate interest does not justify why a persecutee should be expected to give up the citizenship of their place of exile. In order to define the place of the Ukrainian citizenship in the post-Soviet world among the citizenships of the other formerly Soviet republics, it would suffice to refuse the renewal or re-acquisition of the Ukrainian citizenship if the applicant holds another post-Soviet citizenship, whereas the possession of any other citizenship, which in most cases is the citizenship of the exile, can be tolerated without prejudice to the unambiguity of the Ukrainian citizenship in the post-Soviet world.

Given the decades elapsed since the end of the Soviet Union, justice in the field of citizenship is more and more a question of the second – and in respect to persons driven or displaced out of Ukraine before or immediately after 1945, of the third – generation. The second or third generations were not personally victims of expatriation but are deprived of the Ukrainian citizenship which they would have acquired had their (grand)parents not been victimised by the Soviet authorities. In the question of restoring the deprived citizenship, aspects of justice arguably are somewhat different for the immediate victims on the one hand and their descendants, being affected only indirectly, on the other. Foreign practice is mixed in this question [Chapter 5.4.2.6.2.].

Ukrainian legislation has been open in principle to including descendants into the re-acquisition of Ukrainian citizenship. If Ukraine really wishes to fully repair Soviet crimes in the field of citizenship, it will have to develop mechanisms in its legislation which give the descendants of persons who were either displaced, expatriated or expelled from Ukraine or who fled from there in order to avoid persecution a material right to acquire the Ukrainian citizenship that their parents or grandparents had held, without establishing a permanent residence in Ukraine or terminating an existing other citizenship. The pertinent procedure should be initiated only by the request of the individual to guarantee that Ukrainian citizenship is granted only to persons who so wish. The procedure should be simple. This includes that only those documents have to be produced that prove the legal requirements. Furthermore, such procedures should take into account that persons who once fled or were deported from their country may not possess full documents of former residence, citizenship etc. Data contained in former Soviet and now Ukrainian registers should not be asked from the applicant. This is a general requirement of good administration but is specifically true in administrative procedures aiming at the redress of former state crimes.

5.4.2.7. Homeland

The deprivation of the homeland by deportation of entire ethnic groups into other parts of the country was a variety of socialist state crime practised only by the Soviet Union [Polian (2024)]. The collective aspect of this crime – individual persons were deported because of their belonging to a collective, i.e. an ethnic group – requires special mechanisms to address it [Küpper (2004)]. Furthermore, a comparative survey of what other formerly socialist states did in their legislation on the past does not help because of the unique character of the Soviet deportations. It is true that there were major resettlements of populations in the years following 1945, e.g. between Poland and the Soviet Union or between Czechoslovakia and Hungary, but these usually had an international treaty as a legal basis, which formally created a legal environment different from the arbitrary Soviet deportations. Furthermore, these population changes as well as the expulsions of the German, Hungarian or Italian populations from Poland, Czechoslovakia or Yugoslavia were transborder relocations (ethnic cleansing) whereas the Soviet deportations remained within the country and sometimes resulted in camp-like conditions at the new place of residence. These aspects suffice to define the Soviet deportations as a unique Soviet form of state crime. As such, they require unique legal responses today [Küpper (2024), pp. 34–35].

The reasons for this special form of Soviet injustice have been a matter of debate until today. As stressed before, the Soviet Union was not only an authoritarian dictatorship but also a colonial empire. Colonial structures existed not only between the Soviet Union and its satellite states but also within the Soviet Union, defining the relations between the ethnic Russian centre and the non-Russian periphery. Soviet state crimes victimised not only individuals who were true or imaginary political opponents or ideological enemies. The victimisation of entire ethnic entities was embedded in the logic of the ethnic (racist) character of Soviet colonialism. In the context of Ukrainian territories, the forceful deportation of, inter alia, Crimean Tatars and Germans during and after World War II were the most conspicuous Soviet crimes against entire ethnic groups [Boeckh (2024), pp. 9–11; Conquest (1977); Tkachenko (2024), pp. 10–11]. Given the ethnic (racist) character of these measures, their reparation is being discussed in ethnic and collective terms. Whereas Germans and most other ethnic groups victimised in Soviet times hardly raise their voice in present-day Ukraine, the Crimean Tatars are more outspoken and demand collective and individual reparation. Since their principal grievance is the deportation, the reparation of this grievance, if taken as a ‘restitutio in integrum’ (restitution in kind, i.e. the restoration of the status quo ante), lies primarily in the permission to take residence in the former areas of settlement, i.e. the Crimean Peninsula, as well as in auxiliary financial and social

measures aiding this return by, e.g., help in questions of relocation, housing or integration into the local labour market.

Given the special character of this Soviet crime, it affects not only the persons who were physically deported during and after World War II but perpetuates itself in their descendants, who are still living outside the traditional dwelling grounds of their ethnic group. Therefore, the victims of that Soviet crime are not only the persons deported but also their children and grand-children. In this respect, the loss of the homeland as a form of state crime is comparable to the loss of citizenship:⁹⁴ it, resp. its consequence, is hereditary.

The ethnic (racist) nature of this crime is reflected in the fact that the Crimean Tatars in particular discuss questions of reparation in the context of general minority rights in Ukraine [Tkachenko (2024)]. As a consequence, the care for victims of ethnically motivated Soviet state crimes is not limited to classical reparation, rehabilitation or compensation legislation. A complete assessment of pertinent Ukrainian legislation has to analyse the minority law as well.

5.4.2.7.1. International standards and foreign practice

Both universal and European instruments of international law addressing ethnic minorities concentrate on the rights and duties these parts of the population (should) have at present, as well as on certain objective minority-related state principles looking at the present and the future. Neither of the pertinent treaties contain provisions on the redress of injuries suffered in the past.

However, all legal texts emphasise equal treatment. This means that Ukrainian legislation on the past must not differentiate without good reason between measures for the majority (ethnic Ukrainians) and measures for the, or some, minorities. A good reason for such a differentiation in the reparation of state crimes is the nature of the crime itself. If certain state crimes affected only certain ethnic groups, it is legitimate and adequate to reserve victim-oriented measures for the ethnic group(s) concerned and shape their content according to the special needs that the state crimes have created for these particular groups of victims.

Foreign minority law as well addresses the present status, rights and obligations of the minorities but does not redress former state crimes. Countries addressing former state crimes against minority

⁹⁴ Chapter 5.4.2.6. and sub-chapters.

groups, such as the West German compensation laws for Nazi crimes,⁹⁵ usually create pertinent legislation outside the minority law. The past-related perspective of such law is sufficient ground for regulating it in separate statutes and with a different content.

There is, however, one partial exception. The Soviet Union after Stalin's death, as well as several successor states of the Soviet Union, addressed the forceful deportation of certain ethnic groups during and after World War II. The Soviet Union called this 'rehabilitation of repressed people' (реабилітація репресированих народів). This 'rehabilitation' consisted first of all in the termination of the repressive rules which meant that the members of that people were no longer forced to live in their place of deportation. Second, an official statement repealed the accusation of having collaborated with Nazi Germany and being 'unreliable', thus restoring the collective honour of that group. Third, in some cases, e.g. of North Caucasian peoples such as Chechens, Kabardines, Ingushs or Kalmyks, the dissolved territorial autonomies were restored. This often went hand in hand with some state assistance for individuals who resettled to these autonomous territories, providing them with jobs and housing. However, not all 'repressed peoples' were given this form of restitution in kind. Especially Germans and Crimean Tatars – to name groups deported from Ukrainian territory – were rehabilitated very late and only in respect to their honour. Their former territorial autonomies were not restored, and Soviet authorities were very reluctant to grant to individual members of these groups permissions to resettle to the former dwelling grounds. The Russian law on the rehabilitation of the repressed people⁹⁶ promised all repressed peoples and their members the reinstatement into their old positions, but then the Soviet Union collapsed, and all the laws the enactment of which the rehabilitation law had envisaged were never passed [Küpper (2004), pp. 756–762; Sheehy/Nahaylo (1980); Tkachenko (2024), pp. 10–11].

Ukraine explicitly upholds and adheres to the 'acts of the state authorities of the former USSR concerning the rehabilitation of deported persons forcefully resettled from their permanent residence, and the restoration of their rights'.⁹⁷

After the end of the Soviet Union, the Russian government tried to re-install some of the former German territorial units on the basis of the 1991 law but soon dropped all initiatives when they met

⁹⁵ In this context, it is adequate to stress that such compensation was made in West German but not in East German law. The East German law on the compensation of Nazi crimes concentrated on individual victims of political persecution, ignoring the collective aspect of Nazi crimes against entire ethnic or allegedly ethnic, as well as social, groups [Küpper (2004)].

⁹⁶ Law of the RSFSR of 26 April 1991 'On the Rehabilitation of the Repressed Peoples'.

⁹⁷ Article 3(2) Deported Persons Act; Chapter 5.4.

with the resistance of the local populations. Other post-Soviet republics deal in a similar way with individual deportees returning to their old villages: the state neither opposed nor helped, and the local communities were not always friendly towards the new arrivals. Such were the experiences of, e.g., the Meskhetians returning to their traditional homes in Georgia [Küpper (2004), pp. 771–776], or the Crimean Tatars returning to Ukraine [Chapter 5.4.2.7.3].

5.4.2.7.2. The Ukrainian Constitution

The Const. Ukr. accepts that the Ukrainian people is composed of various ethnic groups with different languages. Alongside the Ukrainian state language, Russian and other minority languages can be used and developed freely.⁹⁸ Cultural rights are vested in the ‘indigenous peoples and national minorities of Ukraine’.⁹⁹ Members of minorities and indigenous peoples enjoy all the guarantees enshrined in the chapter on basic rights, the most important for them being equal treatment [Chapter 1.2.1].¹⁰⁰ Apart from the general basic rights, some articles contain special minority provisions in, e.g., schooling or local government.¹⁰¹ All this constitutional law relates to the present and future situation of the minorities and their members. It does not deal with open questions from the past – which is a legitimate perspective for a constitution and is in line with the practice of practically all states having minority-related provisions in their constitutions.

Since one demographic centre of minorities in Ukraine was and is the Crimean Peninsula, the special status of that territory in Articles 134-139 Const. Ukr. may be of special interest for minorities [Strasser-Gackenheimer (2006), pp. 178–179]. The Autonomous Republic of Crimea is not, however, a territorial autonomy for a minority or minorities the way, e.g., the Gagauzian autonomy is in neighbouring Moldova [Küpper (2018), pp. 847–849]. Nothing in the provisions on the Autonomous Republic suggests that the reason for the autonomy is ethnic diversity. Nevertheless, the Autonomous Republic has certain powers which may help the minorities living there, e.g. cultural development, national harmony, or minority languages.¹⁰² The Autonomous Republic has the power to legislate in housing management¹⁰³ which may be an important competence if Ukrainian and Crimean authorities decide to actively promote and aid the resettlement of the members of ‘repressed peoples’ deported from Crimea.

⁹⁸ Article 10(3) Const. Ukr.

⁹⁹ Article 11 Const. Ukr.

¹⁰⁰ Articles 21(1), 24(1) Const. Ukr.

¹⁰¹ Articles 53(5), 119 no. 3 Const. Ukr.

¹⁰² Article 138 Const. Ukr.

¹⁰³ Article 137(1) no. 4 Const. Ukr.

The main grievance of the Crimean Tatars (and some other minorities deported from Ukrainian territory, mostly Crimea) is the loss of the homeland. Article 33(1) Const. Ukr. guarantees the free choice of residence for everybody who is lawfully in Ukraine. This means that there can be no legal limitations to the return of individual members of the deported peoples and their descendants: they are free to take up residence in their traditional dwelling grounds. This constitutional freedom needs to be qualified in two respects.

First, it protects only persons who stay legally on Ukrainian territory. The places of deportation, however, are outside Ukraine which means that many deported persons return to Ukraine from abroad. This requires mechanisms to allow deportees and their descendants to return legally to Ukraine. These persons usually have a privileged access to Ukrainian citizenship [Chapter 5.4.2.6.2.], which solves their immigration issues on a normative level. The administrative practice of Ukraine was overly bureaucratic and cumbersome but rarely hostile [Tkachenko (2024), p. 12].

Second, the practical implementation of this right requires factual access to homes, labour etc. Persons returning to their old dwelling grounds often meet the passive or even active resistance of the local communities who fear that the returning deportees will want their old residences or land back, thus taking away from members of the local community the assets they took from the deportees. The state has to take an active role in the re-integration of returning deportees and their descendants, taking into account both the special interests of these victims of Soviet state crimes and the legitimate interests of the local communities. In the case of deportees, relying on the basic right of free choice of residence is not enough. The state has to take active measures to repair the consequences of the state crimes the deportees fell victim to.

5.4.2.7.3. Ukrainian legislation

5.4.2.7.3.1. Minorities and indigenous peoples

Ukraine passed its first post-Soviet minority law in 1992 (1992 Minority Act) [Schmidt (1994), pp. 97–136]. It was replaced by a new law in 2022 (2022 Minority Act). Neither the 1992 Minority Act nor the 2022 Minority Act contain any provisions on the reparation of Soviet state crimes.

The two Minority Acts are not the whole story. Apart from the national minorities or communities, Ukrainian legislation identifies another group termed ‘indigenous peoples’ (корінні народи). The indigenous peoples have enjoyed a separate legal basis since 2021: the Indigenous Peoples Act.¹⁰⁴ They are not covered by the 2022 Minority Act [European Commission for Democracy through Law (9-10 June 2023), § 28]. Different legislation on national minorities and indigenous peoples finds its constitutional backing in Article 11 Const. Ukr. which expressly mentions these two categories.

The Indigenous Peoples Act is of relevance because it covers the legal status of, inter alia, the Crimean Tatars and other ethnic groups originating from, and having lived or living in, the Crimean Peninsula. The Crimean Tatars are acknowledged to ‘have formed on the territory of the Crimean Peninsula’, alongside with Karaites and Krymchaks.¹⁰⁵ This means that the law accepts the special relationship of, inter alia, the Crimean Tatars with the Crimean Peninsula.

The Ukrainian term ‘indigenous peoples’ refers to the fact that the peoples protected by that law have been living in their traditional dwelling grounds – the Crimean Peninsula – for a very long time, prior to the establishment of East Slavonic statehoods in that region. This differs from the usual usage in international and foreign public law where ‘indigenous’ usually refers to peoples living in pre-modern conditions, which is not the case with Crimean Tatars, Karaites, or Krymchaks [Alekseev/Terekhov (1997); Petkov/Petkov (1998); Tkachenko (2024), pp. 4–9]. However, the usage of international or foreign national law is not compulsory for national law-makers, and any national legislation is free to use the term ‘indigenous people’ in a different sense. Article 1(1)–(2) Indigenous Peoples Act unequivocally defines the groups under its protection so that the use of the term does not raise any concern – beyond the obvious fact of easily giving rise to misunderstandings outside Ukraine.

Article 2(6) Indigenous Peoples Act guarantees the indigenous peoples protection against genocides, collective coercion or violence. The wording of this guarantee has no retroactive effect. Therefore, it cannot be interpreted to the effect that it guarantees the reparation of former coercion etc. It looks at future collective acts of violence against indigenous peoples, not at past ones. Article 2(6) Indigenous Peoples Act is not unduly stretched, however, if it is seen as a condemnation of Soviet practices that amounted to genocide, collective coercion or violence. Such Soviet practices were especially the forceful deportation of entire ethnic groups such as Crimean Tatars or Germans because of their alleged cooperation with the German-Nazi enemy or ‘unreliability’. Article 3(4) nos. 2–3, granting

¹⁰⁴ On earlier legislative plans, see European Commission for Democracy through Law (8-9 October 2004).

¹⁰⁵ Article 1(2) Indigenous Peoples Act.

protection against forced relocation and forced assimilation, supports this interpretation. In the light of Articles 2(6), 3(4) Indigenous Peoples Act, those ethnic groups including their descendants can argue that such practices would be unlawful under present Ukrainian law and trigger the state's duty to protect. Therefore, Ukrainian law must treat the corresponding Soviet practices of the past as unlawful. In the case of the Crimean Tatars, the Crimean Tatars Genocide Resolution of 2015 clarifies that the deportation of that group was not only simply illegal but amounted to a genocide. The present verdict of the unlawfulness of a Soviet practice does not automatically create a claim for reparation. Even the verdict of a genocide does not per se give rise to claims of the victims because neither the Genocide Convention nor other international materials binding on Ukraine provide for such claims. The verdict of unlawfulness is, however, the logical prerequisite of such claims.

The Crimean Tatars Genocide Resolution of 2015 goes beyond the 'rehabilitations' of the Soviet time. The Soviet 'rehabilitations' stated that the peoples in question were not culpable of collective collaboration and treason. They were not perpetrators. In addition, the Crimean Tatars Genocide Resolution acknowledges that the Crimean Tatars were exposed to injustice constituting a genocide. The Crimean Tatars not only were not perpetrators, they were and are victims and, more specific, victims of a(n attempted) genocide.

The Indigenous Peoples Act refers to the 'revival' of the culture etc. of the indigenous peoples but does not give the reasons why these cultures have reached a status where they need to be revived. On the whole, the Indigenous Peoples Act, like the two Minority Acts, regulates the present situation of the indigenous peoples and tries to open for them a perspective into the future, but does not address the injustices of the past. The same is true for the parliamentary resolution of 2014 on the Crimean Tatars which may be considered a forerunner of the Indigenous Peoples Act.¹⁰⁶

It must be noted that the Indigenous Peoples Act refers to Crimean groups only. It was enacted in 2021 when Crimea was no longer under factual Ukrainian jurisdiction and is therefore symbolic law without any real substance. At best, it may be seen as future law for a time when Crimea will have returned under Ukrainian jurisdiction, as a promise which for the time being lacks all preconditions for fulfilment.

¹⁰⁶ Resolution of the Verkhovna Rada of Ukraine no. 1140-VII of 20 March 2014 'On the Declaration of the Verkhovna Rada of Ukraine on the Guarantee of the Rights of the Crimean Tatar People within the Ukrainian State'.

From a procedural point of view, the general provisions on the use of minority languages in administrative and court procedures has an impact on the particular aspect of the benefits for victims of Soviet crimes as well. If these victims have another mother language than Ukrainian, it may be helpful for them to use that language in the administrative procedures deciding on granting benefits and privileges for victims of Soviet state crimes. Where the 1992 Minority Act and other legislation had no satisfactory provisions on the use of minority languages in the public administration [European Commission for Democracy through Law (12-13 March 2004), §§ 37–38; European Commission for Democracy through Law (6-7 December 2019), §§ 59–61; Schmidt (1994), pp. 106–107], the 2022 Minority Act has brought some improvements. However, the relevant provisions of the 2022 Minority Act need to be developed in order to create a situation in line with the international commitments of Ukraine [European Commission for Democracy through Law (9-10 June 2023), §§ 58–60]. This is a general problem of minority law, not a specific of handling eventual claims of victims of Soviet state crimes. For this reason, our project does not pursue the question any further.

5.4.2.7.3.2. Deported peoples

Independent Ukraine set out as a rule that rehabilitated persons as well as their families were allowed to return to their old homelands.¹⁰⁷ Apart from this principle which, due to its vagueness, did not really help deported persons, Ukraine neither opposed the resettlement of members of the deported peoples from their place of deportation to their old places of residence on their own initiative, nor helped those individuals with special measures on the labour market or in respect to housing. As a result, Crimean Tatars started to return to the Crimean Peninsula but had to fend for their own, often against a latent resistance of the local population who feared, inter alia, that the returning deportees would claim their old land and houses back. The same is true for members of other deported minorities who returned to independent Ukraine [Küpper (2004), pp. 771–775; OSCE High Commissioner on National Minorities (2013), pp. 4–8; Tkachenko (2024), pp. 13–18].

Only in 2014, when Crimea was no longer under Ukrainian control, did the Ukrainian parliament pass a law designed to address the shortcomings identified in the previous sub-chapters. The Deported Persons Act identifies in Article 3(1) the ‘deportations of peoples, national minorities and individuals (...) on the basis of decisions taken by state authorities of the former USSR or union republics as illegal and criminal acts’ and declares the restoration of the rights of the persons in question as one of the ‘priority areas of political, socio-economic, cultural and spiritual development of the society’.

¹⁰⁷ Article 4(1) Rehabilitation Act.

This formal acknowledgement of the illegal character of the deportation restores the honour and reputation of the deported peoples and individuals. It may be noted that this acknowledgement is not limited to peoples and individuals deported from the territory of Ukraine. Article 3 Deported Persons Act encompasses all peoples and persons deported by Soviet federal and republic authorities.

Other provisions set a link to Ukraine. Article 3(1) Deported Persons Act limits the political goal of the restoration of rights to ‘the citizens of Ukraine from among the deported persons’, and Article 4(1) Deported Persons Act expressly states that Ukrainian citizenship is a prerequisite for the status of a deported person.¹⁰⁸ Article 3(4) Deported Persons Act defines as a policy goal the promotion of the ‘voluntary return to Ukraine’. The word ‘return’ suggests that this only relates to peoples and individuals who lived in Ukraine before their deportation. The political goals of using the historical pre-deportation place names and to protect the rights and legitimate interests of the residents of areas of return, as defined in Article 3(5)–(6) Deported Persons Act, are also operable within Ukraine only.

The Deported Persons Act does not only define political goals but also grants specific rights. Article 4(1) Deported Persons Act limits these rights to Ukrainian citizens who are Crimean Tatars – the only group that the law explicitly names – or belong to other peoples deported from the territory of present Ukraine. The fact that the law mentions only the Crimean Tatars explicitly may be seen as problematic under the requirement of equal treatment. However, this difference in treatment remains on the symbolic level because the material rights are granted to all deportees and pertinent ethnic groups. Therefore, the effect of this ‘preferential treatment’ of the Crimean Tatars is limited. If, however, the practice developed under this law denies members of other deported ethnic groups those rights with the argument that their ethnic group is not named explicitly, then this wrong application of the law would raise concerns under the constitutional requirement of equal treatment.

Beneficiaries of that law are the persons who were deported or forcibly resettled as well as persons born in the place of deportation before the Deported Persons Act entered into force. It includes the descendants of the deported individuals and thus acknowledges the fact that also the descendants are deprived of their homeland. Persons who were deported or born in deportation may apply for the status of a ‘Deported Person’. Article 5 Deported Persons Act contains rather detailed provisions on the procedure including the case that the deported person is unable to show documents proving the deportation. The procedure is free of charge.

¹⁰⁸ The restoration of citizenship is discussed in Chapter 5.4.2.6.3.

This status invalidates all deprivations of titles, awards etc caused by the deportation, and the restoration of these titles etc may be made public by the state if the person in question so wishes.¹⁰⁹

The status of a deported person is lost if the individual in question obtains a foreign citizenship or takes up residence outside Ukraine. Given the fact that the purpose of that law is to repair the loss of the traditional homeland by remigration (creation of the status quo ante), these restrictions may not be necessary but they are not unreasonable either. Article 6 Deported Persons Act enumerates the concrete rights of certified deported persons. These rights include taking up residence in the territorial unit from where they or their ancestors were deported,¹¹⁰ the reimbursement of travel costs to Ukraine, state housing or state subsidies for private building activities, land to build a house or for agricultural purposes,¹¹¹ as well as certain social benefits including pension privileges and privileges for disabilities. The provisions related to housing refer to persons who return to the places they or their ancestors were deported from. The restitution of buildings and movables seized as a result of the deportation depends on the practical possibility¹¹² which probably means that houses and flats are not returned if they are now inhabited by other persons. If restitution in kind is not possible, the deportee may apply for a compensation in money. These rules follow the concept general rules of the restitution of, and compensation for, taken property [Chapter 5.4.2.5.].

The main target of the Deported Persons Act are peoples deported from Crimea. Among these, the Crimean Tatars are the only ethnic group to voice political demand of some sort of reparation on both a collective and an individual level [Chapter 5.4.2.7.]. This is shown by the fact that the only group explicitly named are the Crimean Tatars in Article 4(1). Most other peoples deported from Ukrainian territory were taken from Crimea as well: Armenians, Bulgarians, Germans, Greeks or Italians [OSCE High Commissioner on National Minorities (2013), p. 3]. Some of the rights the Deported Persons Act grants are independent from territory: restoration of the reputation and honour, travel imbursements, certain social benefits. Other rights concerning, e.g., housing or restitution, presuppose a residence in the pre-deportation place. Persons and peoples deported from Crimea cannot exercise these rights as long as Ukraine has no control over that peninsula. Outside Crimea, the most numerous Soviet deportations from Ukrainian territory probably hit the Germans in Galicia, Volhynia and the Black Sea Coast. Germans deported from those parts of Ukraine enjoy in principle the full scope of

¹⁰⁹ Article 4 Rehabilitation Act contains parallel provisions in favour of all victims of Soviet repression: Chapter 5.4.2.4.

¹¹⁰ Given the basic right of free choice of residence in Article 33(1) Const. Ukr. (see Chapter 5.4.2.7.2.), this provision of the Deported Persons Act is merely declaratory.

¹¹¹ All certified repressed persons can apply for similar housing aids and loans, provided that their present residential situation is insufficient: Chapter 5.4.3.

¹¹² Article 7(1) Deported Persons Act.

rights granted in Articles 5–7 Deported Persons Act, as do the members of other deported ethnic groups.

Given the strong focus on peoples and persons deported from Crimea, the Deported Persons Act is in large parts a blank cheque to be cashed in an uncertain future.

If the status of a deported person is lost, Article 5(13) Deported Persons Act orders all payments delivered on the basis of the Deported Persons Act to be paid back to the state. This is only partly compatible with the standards of the rule of law. The deported person status is lost if it was obtained by fraud, but also if the person in question adopts a foreign citizenship or takes up residence outside Ukraine.¹¹³ The duty to pay back all payments seems reasonable if the beneficiary deceived the authorities. Fraud must not pay. If the beneficiary adopts a foreign citizenship or moves abroad, they make use of their basic right of free movement. Article 33(1) Const. Ukr. limits this freedom to the territory of Ukraine but Article 22(1) Const. Ukr. says that the enumeration of rights in the Const. Ukr. is not exhaustive. It is therefore reasonable to extend the constitutionally protected right of free movement to emigration, as many international documents and foreign constitutions do.¹¹⁴ In this light, the duty to return state payments made under the Deported Persons Act in the case of acquiring a foreign citizenship or residence restricts the constitutionally protected freedom to freely chose residence including foreign residence and citizenship. Furthermore, the purpose of the Deported Persons Act does not require this sanction. The Deported Persons Act's purpose is to restore the homeland to deported persons. If a deported person returns to their or their ancestors' traditional homeland, aided by the Deported Persons Act, but finds after a while that socio-economic integration does not work or that life in the traditional homeland is unsuitable for other reasons or that life elsewhere offers more advantages, the purpose of the Deported Persons Act is not frustrated if that persons moves to another place of residence: the deported person has tried, has made use of a right designed to counterbalance former injustice, and this is all the Deported Persons Act can do. It is not, and for constitutional reasons cannot be, the purpose of that law to keep returned deportees in their new-old residence against their will by threatening to ask back state payments. Even without the dangers of war, there may be good reasons not to stay in the old homeland, and the wish to move on is protected by basic rights. Therefore, the duty to pay back state payments ought to be limited to applicants who deceived in the verification procedure or persons who leave Ukraine only very shortly after receiving benefits under the Deported Persons Act.

¹¹³ Article 5(10) Deported Persons Act.

¹¹⁴ One example is Article 2(2) Protocol No. 4 to ECHR which is binding on Ukraine.

For the sake of completeness it should be noted that Russia, after the occupation and annexation of the Crimean Peninsula, enacted legislation promising that the Russian state would help members of ‘repressed peoples’ that had been deported from Crimea to take up residence in Crimea. Organisations of the main target group of these legislative promises, Crimean Tatars and Germans, report, however, that their material and political situation has deteriorated considerably since 2014 [Fabritius (2014); Tkachenko (2024), pp. 19–20; the positive picture that Geistlinger (2023) paints seems to have little to do with the realities in Crimea under Russian occupation]. The Crimean Tatars Genocide Resolution deplores in no. 3 the ‘systematic pressure’ that Russian authorities in the occupied territories exercise on the Crimean Tatar people, its institutions and representations.

5.4.2.7.4. Analysis

The question of the return of deported peoples to their homeland largely concentrates on the Crimean Peninsula. This has been under Russian control since 2014. Deplorably, the Ukrainian law-maker has reacted to the wish to return only after that, legislating on the return to Crimea which Ukrainian authorities no longer can control or advance, let alone guarantee. The pertinent Ukrainian legislation to re-install deported peoples and their members, first of all Crimean Tatars, in their rights is a promise for an uncertain future.

The return from the places of deportation to the Ukrainian state (in the territories free from Russian occupation) is possible. Immigration and citizenship procedures are sometimes a bureaucratic burden to applicants but this is a general feature of Ukrainian administration and not a sign of malevolence against returning deportees. Still, there is room for improvement in the implementation of the pertinent legislation. Social benefits and cultural and other rights in Ukraine appear acceptable. In this field as well, the most important rights such as restoration of the old lands and houses or state aids for returning to the pre-deportation place of residence remain mere theory as long as Crimea is not under Ukrainian control.

A positive trait of the Ukrainian legislation is that it includes the generations born in the place of deportation. Deportation is a form of state crime the negative effect of which is hereditary. It is therefore legitimate and desirable to include the descendants of deported individuals into the scope of the pertinent laws, as Ukraine does [Voloshyn (2019)].

A flaw on the law and possibly a violation of the Const. Ukr. is the duty to pay back state payments if the beneficiary later – that is after a certain time in the traditional homeland – decides to adopt another citizenship or to move to another country. The sanction of paying back should be limited to cases of deceit, fraud and immediate emigration.

In sum, Ukraine shows considerable good-will to help the Crimean Tatars, and perhaps other deported peoples, to re-settle to Crimea. This good-will took concrete legal forms only when Crimea was lost to Russia so that most rights are a promise but not a reality for time being.

Practically no information is available about the return of members of deported peoples to other parts of the Ukraine. The largest pertinent group are probably the Germans deported from, inter alia, Galicia, Volhynia and the South-West of Ukraine. Since these areas are under Ukrainian jurisdiction, the full range of rights in connection with the return from the place of deportation applies. Whether there is sizeable demand for these rights at all, and if there is, how the Ukrainian authorities react to this demand, is a question that only field-work can shed some light on – field-work which for the duration of the war is impossible to conduct.

5.4.3. Social benefits for victims of Soviet state crimes

Ukrainian legislation provides to a certain extent for social benefits for the victims of Soviet state crimes. These social benefits do not compensate former loss or damage but react to a present social need.

One important aspect are old age pensions. Several past-related circumstances raise the old age pension without the necessity to show any particular damage to individual rights, e.g. deprivation of freedom. Article 77(d) Pensions Act and Article 47 Military Pensions Act raise the pensions of certified repressed persons by 50 per cent. Their family members who were forcefully resettled within the Soviet Union receive a raise of 25 per cent of the minimum pension. The latter provision is not quite clear: the fact of resettlement is in itself an act of repression under Article 1.1 Repressed Persons Act so that everybody who suffered resettlement – be it as a family member of an otherwise repressed person or not – is a repressed person who can claim the full amount of benefits available to certified persecutees. The Supreme Court of Ukraine applies this somewhat inconsistent law in a rather formal manner: the pension raise of 50 per cent is awarded to persons who are certified as repressed persons, possessing a formal certification, whereas other victims as well as family members of repressed per-

sons receive 25 per cent, irrespective of the fact of whether or not they were affected directly by the Soviet resettlement measures. This interpretation by the Supreme Court raises questions of material justice but has the advantage that it provides a clear and unequivocal criterion for the pension authorities which are thus spared the need to assess themselves whether or not the recipient of a pension was exposed to Soviet injustice (resettlement) in a degree to qualify them as repressed or persecuted etc. The Ukrainian authorities and lower courts follow the line of the Supreme Court.

Article 57 Pensions Act qualifies the time spent in partisan units as military service years: fighters for independence are granted pension claims for their fighting years. Furthermore, Article 77(d) Pensions Act raises their pensions by 50 per cent.

A certified repressed person enjoys priority in the access to living space if they ‘require an improvement of their residential conditions’, as Article 6(2) Rehabilitation Act puts it. Article 6(3) Rehabilitation Act extends this right to spouses, parents and children of deceased repressed persons. Alternatively, repressed persons living in rural areas may receive an interest-free state loan to build a house.¹¹⁵ Similar rules apply under the special legislation for deported peoples; in contrast to the provisions of the Rehabilitation Act, the Deported Persons Act reacts to former state crimes resulting in present need [Chapter 5.4.2.7.3.2.].

The privileged access to certain health care services that Article 6(5) Rehabilitation Act grants invalid repressed persons [Chapter 5.4.2.2.] is available to all certified rehabilitated persons once they reach the pension age, irrespective of the damages that the persecution caused to their health. The somewhat less generous benefits and privileges for victims of Soviet imprisonment etc. in health care, housing, gas, water, public transport and taxes are granted to all independence fighters qualifying as ‘participants in combat action’ [Chapter 5.4.2.1.]. If these fighters for independence are invalid, they may claim the more generous benefits and privileges under Article 13 Veteran Act, including a raise of their old age pension by 30, 40 or 50 per cent, depending on the degree of invalidity.

5.5. Overall analysis of benefits for the victims of state crimes

An overall analysis of the benefits and privileges for the victims of Soviet state crimes shows a mixed picture. Before discussing the missing points and the points that need improvement, it is important to state that Ukraine is really willing to do something for the victims, which is more than can be said of

¹¹⁵ Article 6(4) Rehabilitation Act.

most post-Soviet countries. The legal provisions are nevertheless problematic in respect of both the definition of the recipients and the benefits they receive.

5.5.1. Repressed persons, victims of repression, fighters for independence

Ukrainian law differentiates between repressed persons and victims of repression. Repressed persons are the persons who suffered persecution. The category of victims of repression widens the group of possible recipients of benefits to the family members of the repressed persons, family members who do not qualify themselves as repressed persons. This inclusion of family members into indemnification legislation is in line with foreign practice and takes account of the fact that state crimes usually affect not only the targeted person but also that person's family. A special status for these family members that does not give them access to all but only to a limited number of benefits is in line with foreign practice. The major problem of Ukrainian legislation in this point is that it does not define sufficiently the benefits that the family members ('victims of repression') are entitled to: this is still to be done. Another problem is that the rules on deported persons use the differentiation between repressed persons and victims of repression but do not take into account that the special state crime of deportation affects all (deported) members of a household equally so that this differentiation loses its meaning when applied to deportations.

A positive trait of the definition of repressed persons and victims of repression is that there is one legal definition in the central piece of legislation, the Rehabilitation Act, to which other laws refer. This ensures a uniform definition of Soviet persecutees throughout Ukrainian law. This definition was very wide from the start and has been widened by later amendments. The endeavour to include as many persecutees and forms of persecution as possible into the legal definition is a positive trait. This endeavour, particularly later amendments, have led to a very casuistic definition which mixes criteria of different levels (motives, measures, affected rights). That definition should be streamlined.

Despite the wide definition of persecution in the Rehabilitation Act, its casuistic enumerations do not cover all forms of Soviet state crimes. There are, e.g., no provisions to include the 'stolen children' and their families [Küpper (2024), p. 32] into the scope of the law. The same is true for victims of pseudo-medical experiments or sportspersons whose health was damaged by doping substances given to them without their consent, without their knowledge even. It is true that Articles 1.2 no. 5 and 2 no. 23 Rehabilitation Act open the enumerations to a certain extent, but this seems insufficient to cover all forms of possible Soviet state crimes.

The privileges for repressed persons and victims of repression require a certification of that status. A centralised verification and certification procedure is a positive solution and better than leaving the decision of whether or not a given person is a repressed person to a variety of pension and other social authorities. However, the certification procedure is not without faults, either. The pluralistic composition of the deciding bodies lacks entirely the interest representations of the various groups of repressed persons. Their NGOs should be included because they can provide first-hand knowledge of the practices of persecution and enhance the legitimacy of the decisions taken. A second problem is the automatic publication of the decisions about applications for certification. A negative decision may easily create the impression that the applicant was dishonest even in situations when the application was turned down because of missing a deadline or formal mistakes or because the form of persecution is not covered by the definition of repressed persons. The automatic publication of positive decisions, too, may create problems because the applicant who does not wish his or her status to be known has no instrument to prevent the publication. This is contrary to the data protection rights in Article 32 Const. Ukr.

The definition of the fighters for independence is problematic as well. The list of organisations having fought for Ukrainian independence in Article 1 Fighters for Independence Act seems to contain some formations involved in massive human rights violations, be it in collaboration with occupying Nazi Germany or on their own accord. It is advisable to (1) revise this list and exclude such formations, as well as to (2) include a clause that individual fighters guilty of certain crimes, e.g. genocide, war crimes or crimes against humanity, are excluded from the status of a fighter for Ukrainian independence.

5.5.2. Benefits and privileges

The Ukrainian law as it stands since 2018 concentrates on material benefits and privileges. Before 2018, the preamble of the Rehabilitation Act mentioned in its third paragraph compensation for material as well as ‘moral damages’ [компенсація (...) моральної шкоди]:

“The Verkhovna Rada (...) seeks to provide, to the extent possible at this time, compensation for material and moral damage caused by unlawful repressions to rehabilitated persons and their families.”

This part of the preamble was repealed in 2018. A separate opinion of Constitutional Justice Kolisnyk referred in 2019 to that wording.¹¹⁶

The termination of the intention to provide ‘moral damages’ is in itself no reduction of the standards of benefits that the victims of Soviet state crimes are to receive. The concept of ‘moral damages’ is unclear in Ukrainian law. If the expression in the preamble of the Rehabilitation Act meant that the violation of immaterial rights is to be part of the legislation in favour of the victims, then Ukrainian legislation has taken into account this promise by re-establishing the victims’ honour and dignity by condemning the Soviet rule as unjust [Chapter 3. and sub-chapters], by providing protection through criminal law [Chapter 7.2. and sub-chapters], or by including the victims of Soviet state crime into the overall societal reconciliation [Chapter 9.], as well as by providing special remedies for Soviet measures in the field of immaterial rights such as nationality [Chapter 5.4.2.6. and sub-chapters] or vulnerable personal data [Chapter 4. and sub-chapters]. If the term ‘moral damages’ is understood to include the immaterial side of the compensation given for all sorts of Soviet crimes, i.e. a compensation for, e.g., the suffering that accompanied all Soviet measures of repression, then as well the Ukrainian legislation provides for at least some degree of ‘moral damages’ because the benefits and privileges for the victims do not reflect the exact amount of material damage caused but are designed as lump sums the amount of which has a certain relation to the degree of injustice and suffering. Such lump compensations cover both the material and the immaterial side of the damage caused by the Soviet measures.

Today, the benefits and privileges awarded to repressed persons and victims of repression are defined in a larger number of laws. This in itself creates a confusing situation for both the recipients and the authorities concerned. It also leads to conflicting provisions on who is to receive which benefits. Provisions especially on pension payments for persecutees should be either centralised in one piece of legislation or, if they remain in various statutes, harmonised with each other in order to increase transparency for both the authorities and the beneficiaries. There is no need, e.g., to set out the triple value of times of deprivation of personal liberty in the calculation of the old age pension both in Article 6(1) Rehabilitation Act and Article 58 Pensions Act. It is true that identical rules in parallel pieces of legislation is a general legislative technique in Ukraine but this nevertheless raises the danger that a contradictory legal situation arises if only one but not both of these provisions are modified by the law-maker.

¹¹⁶ Constitutional Court of Ukraine, decision no. 9-т/2019 of 16 July 2019.

In general, the decision to include many pension-like payments into the old age or invalid pension is a positive one, better than awarding separate ‘reparation pensions’, as West Germany did with victims of Nazi persecution. In a country like Ukraine, raising the old age pension is socially more acceptable than separate pensions for a certain group of persons, e.g. repressed persons. It may also reduce the bureaucratic effort. However, a societal debate needs to be held whether or not the – until now primarily factual – exclusion of non-residents from the benefits for victims of Soviet state crimes is politically wanted, and, depending on the outcome of that debate, provisions need to be created for emigrated persecutees who, due to their emigration, do not have access to the social instruments into which Ukrainian legislation embeds benefits for victims of Soviet state crimes.

Some repression-related violations and losses are not regulated satisfactorily in the light of international standards, constitutional provisions and/or foreign practice.

First, the surviving family members of persons killed in the course of repression receive little legislative attention although life is considered the most valuable right a person can have. Financial benefits seem to be of lesser importance after at least three and a half decades have elapsed since the loss of life. An individual form of acknowledgement may nevertheless help the psychic situation of the survivors by showing them that their grief is shared by the state. The relative neglect of surviving family members corresponds with the legislative neglect in defining the benefits for family members (‘victims of repression’) [Chapters 5.4.1.1.1.2., 5.5.1.].

Second, the requirement of repression-induced invalidity as a prerequisite for the access to the privileges set out in Article 6(5) Rehabilitation Act should be dropped. Once repressed persons reach the pension age, they are given this access without further requirements. The few repressed persons who have not yet attained the pension age should not be kept away from the healthcare and other privileges of Article 6(5) Rehabilitation Act by the high material and procedural threshold of invalidity and causation.

Third, Article 5(2) Rehabilitation Act should specify the value of the compensation for deprived property: the value at the time of the confiscation, or at the time of compensation? A question of such relevance should not be left to a government decree.

Fourth, the withdrawal of citizenship has never been remedied in full by nationality legislation, despite the fact that Article 2 nos. 4, 6 Rehabilitation Act explicitly acknowledges expatriation as one

form of Soviet state crime. It is true that Ukrainian nationality laws have to include the restoration of withdrawn Soviet citizenship into their post-independence endeavour to build a new, Ukrainian citizenship in the course of state succession. This, however, is no reason to refuse repressed persons the restoration of their withdrawn citizenship if they do not reside in Ukraine or possess another citizenship. With respect to another citizenship, the fact that the repressed person holds the citizenship of another successor state of the Soviet Union may be considered a legitimate reason for exclusion because Ukraine, as all other successor states to the Soviet Union, needs to unequivocally define its citizens from among the citizens of the former Soviet Union. There is no reason, however, to force victims of expatriation to renounce their citizenship of exile in order to remedy the state crime of withdrawal of Soviet citizenship. Finally, the restoration of Ukrainian citizenship should be made available not only to the exiled persons but also to their descendants because, given the *ius sanguinis* nature of Soviet and Ukrainian citizenship, the withdrawal of that citizenship creates a hereditary loss.

Fifth, the provisions relating to the loss of homeland, i.e. for the deported peoples, are partly deficient. They were enacted at a moment when the most important territory of deportation, Crimea, was no longer under Ukrainian control. Therefore, they remain empty law for the time being. There is no information available how the provisions of the Deported Persons Act work for persons deported from areas under Ukrainian control, e.g. Germans deported from Galicia, Volhynia or the Black Sea Coast. Finally, the deprivation of the status of a deported person should happen only in cases of fraud or immediate emigration but not in cases when the deported person acquires after some time a foreign citizenship or residence, making use of their basic right of free movement. This is in conflict with the Const. Ukr.

Sixth, Ukrainian legislation does not take into account repression resulting in a thwarted professional life, e.g. the exclusion from higher education or a certain profession for political reasons. Compensation for the so-called ‘losses in education and professional career’ was a central part of the German indemnification of both Nazi and Communist persecution [Küpper (2004), pp. 277–282, 649–651; Küpper (2024), p. 35]. Other special forms of persecution-induced violations such as forced names did not occur in the Soviet Union and therefore do not require means of redress.

6. Punishment of the Perpetrators

“Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators and ensure a

measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity.”¹¹⁷

In line with the quoted UN report, the Parliamentary Assembly of the Council of Europe very much stresses the punishment of the perpetrators of state crimes in its past-related resolutions [Parliamentary Assembly of the Council of Europe (27 June 1996); Parliamentary Assembly of the Council of Europe (25 January 2006)]. Questions of criminal justice constitute more than half of the entire text of the resolution on dismantling the communist heritage and a considerable part of the condemnation resolution. Insofar, the Parliamentary Assembly paints an exaggerated and one-sided picture because politics of, and legislation on, the past consist of much more than bringing the perpetrators to (criminal) justice. It is correct, however, that the punishment of the perpetrators of former state crimes is an important part of the past-related activities of the post-totalitarian (or post-colonial) state, though it is neither its only nor its paramount aspect. The post-totalitarian (as well as the post-colonial) state is well advised to pay considerable attention to the punishment of the perpetrators. The far-reaching German Amnesty Act of 1949, which terminated the criminal liability for, inter alia, minor Nazi crimes, is today seen as a failure in dealing with the Nazi past [Löhnig (2025)].

Soviet rule in Ukraine lasted from 1917 (or latest from 1921) until 1991. The international documents stress that criminal justice is important in the ‘transitional contexts’. In order to fulfil their social role, e.g. in promoting societal reconciliation, criminal trials and tribunals need to be organised soon after the change of system, as long as the ‘transitional context’ lasts. In the mid-2020s, the transition from socialist to post-socialist, from Soviet colonialism to independence, has been over for more than three decades. Bringing Soviet perpetrators to court can no longer serve the purposes of ‘transitional justice’ but happens in the course of ordinary rule of law-justice – and may make the Ukrainian public more resilient against Russian propaganda on how beautiful the Soviet Union allegedly was.

Time is relevant in another context as well. It is obvious that the perpetrators of the crimes committed during the first decades of the Soviet period are dead. More than three decades have elapsed since the end of Soviet rule in 1991 which means that many state crimes even of the last years of the Soviet period lie in an ever more distant past. As a result, more perpetrators have died, and more and more crimes fall under the statute of limitation.

¹¹⁷ United Nations Secretary General (23 August 2004), § 39.

If Ukraine wishes to punish the surviving perpetrators of Soviet state crimes, it either has to restrict criminal prosecution to those crimes that did not fall under any statute of limitation according to the Soviet-Ukrainian criminal legislation of the time, or it has to ignore the fact that the prosecution of the crime in question is time-barred.

Ukraine is not alone with this dilemma of time. Many formerly socialist states face the problem of the statute of limitations in their endeavour to punish perpetrators of communist state crimes.

6.1. Standards in constitutional and international law

The Const. Ukr. sets standards for material criminal law and criminal procedure common to the rule of law-based states of Europe.

In particular, Article 58 Const. Ukr. forbids retroactive legislation, especially if it has an onerous effect on the individual. Criminal responsibility in particular can only be established for acts that were an offence at the time when they were committed. This means that criminal procedures against perpetrators of Soviet state crimes must apply the Soviet-Ukrainian material criminal law as it was in force at the time of the act. The practice of other post-socialist countries that prosecuted state crimes more actively than Ukraine did, illustrates that the application of Soviet-era material criminal law usually provides an adequate basis for finding just decisions because homicide, bodily and psychic harm, the violation of personal freedom, perversion of justice, the abduction of children and many other practices of Soviet human rights violations constituted criminal offences under Soviet law [Eser/Arnold (2000); Schroeder/Küpper (2010)].

Article 61(2) Const. Ukr. which reads ‘The legal liability of a person is of an individual character’ requires criminal prosecution to be conducted on the basis of individual guilt. Every accused has to answer for the acts he or she committed, no less, no more. The principle of individual guilt does not allow the Ukrainian state, e.g., to prosecute a person who belonged to the Soviet secret police for all crimes that the secret police in Ukraine committed. The individual secret police member can be tried only for the acts and omissions they committed, either personally or, as a part of the hierarchy of command, while sitting at their desks. This ‘individualisation of legal liability/responsibility’ [індивідуалізація юридичної відповідальності] is accepted by the Ukrainian Constitutional

Court¹¹⁸ and the legal literature [Tatsiy (2011), Article 61] and enshrined in Article 65(1) Criminal Code.

This concentration on individual responsibility is in line with the position of the ECtHR [Uerpmann-Wittzack (2024), pp. 7, 9–11] and the Council of Europe:¹¹⁹

“The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly emerged democracy.”

Criminal procedures must respect the constitutional requirements of Articles 29, 59 and 61–63 Const. Ukr. Even if the crimes under indictment and the material criminal law applicable to them are pre-constitutional, the procedure is not, but is conducted under the Const. Ukr. This is also the position of the Parliamentary Assembly of the Council of Europe:¹²⁰

“A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves.”

This constitutional framework for criminal justice is relevant in a very basic sense, too: criminal procedures have to concentrate on individual guilt and are therefore an inadequate forum for discov-

¹¹⁸ Constitutional Court of Ukraine, decision no. 15-rp/2004 of 2 November 2004.

¹¹⁹ Parliamentary Assembly of the Council of Europe (27 June 1996), § 12. This quotation relates to lustration but may be applied to criminal justice as well since both fields of law regulate present sanctions for misconduct under the old regime.

¹²⁰ Parliamentary Assembly of the Council of Europe (27 June 1996), § 4.

ering how the dictatorship worked. The criminal procedures against deceased Soviet leaders in order to establish their criminal responsibility for the Holodomor illustrate this vividly [Chapter 3.4.2.]. Although the Ukrainian debate stresses that the advantages of a criminal court decision consist in restoring the honour of those persons under suspicion of participation in the crime who are cleared by the court as well as in providing a starting point for eventual civil claims of victims, these points appear marginal as opposed to the general mischief of criminal procedures against deceased persons in order to uncover historical responsibilities. The role of ‘naming names’ and establishing historical individual and structural responsibilities is much better fulfilled by historical research and active archives [Chapter 9].

The most difficult problem in the prosecution of old state crimes is, as international practice shows, a question on the border of material and procedural law: the statute of limitations. Soviet criminal law contained provisions that criminal offences were no longer indictable after the lapse of a certain period. The graver the crime, the longer this period. For very grave crimes, the court could find that prescription was inapplicable.¹²¹ Article 58 Const. Ukr. requires the application of the criminal law of the time of the act, i.e. Soviet criminal law. Whereas Article 58(2) Const. Ukr. relates to the material criminal law, Article 58(1) Const. Ukr. gives a general rule on all legislation: ‘(l)aws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person.’

The question arises whether this constitutional requirement of non-retroactivity includes the rules of statutory limitation. Would a Ukrainian law that annuls the time-barred character of certain Soviet state crimes be unconstitutional under Article 58(1) Const. Ukr.? The argument in favour is that the principle of non-retroactivity, being an integral part of the rule of law, does not allow to worsen the legal situation of the perpetrator of a crime after the fact. The counter-argument is that the non-retroactivity is one aspect of the ‘nulla poena sine lege’-rule which covers the material law only. The rules on statutory limitation do not establish material criminal law but are merely procedural requirements which may be altered retroactively to the detriment of the perpetrator because the rule of law does not protect the perpetrator’s faith in a stable procedural environment. Article 58(1) Const. Ukr. seems to favour the second argument. Its wording refers to the existence of a ‘responsibility’ (відповідальність) which is a material category, but not to the preconditions of how that responsibility is put into

¹²¹ Article 48(4) Criminal Code of the Ukrainian SSR of 28 December 1960, in harmony with Article 41(5) Law of the USSR on the Approval of the Principles of the Criminal Legislation of the USSR and the Union Republics of 11 February 1957, provided for certain exceptions from the application of statutory prescription, leaving the question in principle to the discretion of the individual court.

reality through procedure. On the other hand, ‘responsibility’ is a category for the exceptions whereas the rule of non-retroactivity refers neutrally to ‘laws and other normative acts’ [(з)акони та інші нормативно-правові акти]. This wide wording may be interpreted to include a law or other normative act that alters the rules of the statute of limitations retroactively to the detriment of the perpetrator. In this interpretation, Article 58(1) Const. Ukr. opposes the annulment of the time-barred character of Soviet state crimes.

Ukrainian legal debate is silent on this question. Only Zakharov interprets Article 58(1) Const. Ukr. in a way that it forbids all onerous retroactive legislation, relying on the norm’s rather wide and unspecific wording. In combination with Articles 9 and 151 Const. Ukr., giving the Const. Ukr. priority over international treaties (e.g. on the statute of limitation for genocide, war crimes and crimes against humanity), he sees no way that Ukraine can lift statutory limitation without changing Article 58 Const. Ukr. first. *De lege ferenda* Zakharov proposes to add to the Const. Ukr. an Article 58(3): ‘This article shall not preclude the judicial handling and punishment of any person for any act or omission which, at the time of its commission, constituted a crime or criminal offence in accordance with the general principles of law recognised by civilised nations’ [Zakharov (2013), pp. 31-35]. That wording, if adopted, would create problems of its own, *inter alia* because of the reference to ‘civilised nations’.

On a comparative level, state practice in post-totalitarian countries varies strongly from country to country [Küpper (2024), pp. 17–22]. Romania chose from the beginning to limit criminal prosecution to the atrocities committed during the collapse of the communist regime and not to prosecute earlier state crimes so that the question of statutory limitation did not arise [Bormann, Axel in Schroeder/Küpper (2010), pp. 170–174]. Similarly, the very few criminal procedures in Russia were conducted against participants in the coup of 1991, but there were no procedures against perpetrators of Soviet-time state crimes. The reason was not the respect for the rule of law or statutory limitation but the lacking political and judicial will to identify the Soviet past as criminal [Himmelreich, Antje in Schroeder/Küpper (2010), pp. 214–216]. The Bulgarian attempts to prosecute high-ranking representatives of the socialist regime failed due to a mixture of sloppiness, obstruction from the political sphere and relying on the argument of statutory limitation [Ivanova, Stela in Schroeder/Küpper (2010), pp. 18–21]. In Hungary, the Constitutional Court saw the rules on statutory limitation as a material prerequisite of criminal liability and therefore opposed any legislative attempt to dilute the rules in force at the time of the crimes, arguing that that was against the rule of law [Küpper, Herbert in Schroeder/Küpper (2010), pp. 304–308]. The Czech Constitutional Court and the German Federal

Constitutional Court accepted the retroactive cancellation of achieved statutory limitation by the legislator with the argument that the socialist state had not exercised its punitive power against official perpetrators and material justice demanded a punishment at least of grave state crimes [Bohata, Petr in Schroeder/Küpper (2010), p. 235–237, 252–254; Schroeder, Friedrich-Christian/Küpper, Herbert/Bormann, Axel, *ibid.*, p. 82]. Whereas the Hungarian Constitutional Court stressed the formal side of the rule of law, its Czech and German counterparts relied on the material side of that principle. In the background of the Czech and German decisions we find the argument that the perpetrator of a state crime should not profit from the factual non-prosecution by the dictatorial state; consequently, in this line of thinking, the deadlines of statutory limitation do not count during the time of the dictatorship, but start from the end of the dictatorship. The same logic underlies, e.g., Article U)(6) Hungarian Constitution (2011) which, overruling the mentioned earlier decisions of the Constitutional Court, says:

“Those grave crimes that were defined in the law and committed during the communist dictatorship in the name or interest of the party state or with its connivance against Hungary or individuals, do not count as falling under the statute of limitations if they were not prosecuted for political reasons, setting aside the criminal law in force at the time when they were committed.”

The Parliamentary Assembly of the Council of Europe clearly shares the Czech and German view:

“The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt”.¹²²

As soft law, this resolution has only persuasive authority. The UN General Assembly as well advocated the duty of states under international law ‘to submit to prosecution the person allegedly respon-

¹²² Parliamentary Assembly of the Council of Europe (27 June 1996), § 7.

sible for the violations and, if found guilty, the duty to punish her or him'.¹²³ This resolution, however, is not binding and does not, due to its pioneering character, reflect customary international law [Méndez (2012), p. 1280]. The ECtHR allows the extension of still open time limits but opposes any prosecution of crimes once they are statute-barred,¹²⁴ except for international crimes mentioned in Article 7(2) ECHR.

The problems of the rule of law in domestic law can be circumvented by relying on international law. Ukraine signed the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968¹²⁵ in January 1969 and ratified that treaty on 19 June 1969. According to its Article 1, “(n)o statutory limitation shall apply to the following crimes, irrespective of the date of their commission”; the ‘following crimes’ mentioned are war crimes and crimes against humanity in the sense of the Nuremberg Trials, the Geneva Conventions of 12 August 1949 and the Genocide Convention of 1948. Even if we leave aside the question of whether or not the New York Convention is self-executive (as its wording suggests: ‘no statutory limitation shall apply’) as well as the exact effect of ratified international treaties in the Ukrainian SSR according to its constitutions of 30 January 1937 and 20 April 1978, it is obvious that Ukraine was not to apply statutory regulations to any crimes falling under the definition of ‘war crimes’ and ‘crimes against humanity’. Consequently, no perpetrator of such crimes could trust in the existence of a time bar for their crimes in Ukraine. Since the perpetrators could not trust in the lapse of time, they do not have any position that the rule of law-based Ukraine is obliged to respect. The punishment of ‘war crimes’ and ‘crimes against humanity’ is therefore possible irrespective of the lapse of time.

Arguably, there has been identical customary international law since the Nuremberg Trials, i.e. since 1946. Even without the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, this customary international law has bound at least the signatories of the so-called Nuremberg Charter,¹²⁶ including the Soviet Union.

The existence of a customary international rule that grave state crimes do not fall under national statutes of limitation is confirmed by European international soft law. The 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 [European Parliament (23 August 2008)] says in lit. C

¹²³ United Nations General Assembly (16 December 2005), § 4.

¹²⁴ ECtHR, judgement of 22 June 2000, Coëme et al. ./ Belgium, 32492/96.

¹²⁵ UN General Assembly resolution 2391 (XXIII).

¹²⁶ London Agreement on the Charter of the International Military Tribunal of 8 August 1945.

that ‘under international law, statutory limitations do not apply to war crimes and crimes against humanity’.

The exact subsumption of what socialist state crimes fall under the notion of ‘war crimes’ and ‘crimes against humanity’ and are therefore exempt from statutory limitation, is the task of the national criminal courts. In Hungary, where, prior to the new constitution of 2011, the constitutional case law left the international rules on the non-application of statutory limitations as the only loop-hole to get round the prescription under Hungarian law, the criminal courts accepted charges against perpetrators (in particular: communist militia men) of extra-legal mass executions of insurgents in 1956/57 and argued that these acts amounted to crimes against humanity. The perpetrators were sentenced accordingly on the basis of the substantive criminal law of 1956/57. It has to be noted, however, that the ECtHR, with 11 to 6 votes, ruled that those decisions violated the ban on retroactive criminal legislation in Article 7 ECHR because it was not equivocal in 1956/57 whether the international crime of ‘crimes against humanity’ covered acts like extra-legal mass executions so that the perpetrators could trust that their acts did not constitute an international, but merely a national crime and therefore fell under the Hungarian statute of limitations. The dissenting opinions criticise both the doctrinal weakness and the political absurdity of the majority’s argument.¹²⁷ In the Kononov case as well, the majority of the Grand Chamber of the ECtHR included statutory prescription into the guarantee of Article 7 ECHR whereas four judges state in their concurring opinion that statutory limitation did not affect the essence of criminal responsibility but merely the technicality of prosecution and was therefore not covered by the ban on retroactive legislation in criminal law.¹²⁸ On the whole, criminal prosecution of the perpetrators loses its legitimacy if it violates human rights standards [Méndez (2012), p. 1276], but the question of which human rights standards are considered legitimate may vary from state to state and society to society. Therefore, the Ukrainian debate should develop its own standards whether the application of international law-based exceptions from statutory limitation is acceptable under post-Soviet rule of law-standards and which particular Soviet crimes fall in the category of ‘war crimes’ or ‘crimes against humanity’.¹²⁹

¹²⁷ ECtHR, judgement of 19 September 2008, *Korbely v. Hungary*, 9174/02.

¹²⁸ ECtHR, judgement of 17 May 2010, *Kononov v. Latvia*, 36376/04, as well as the joint concurring opinion of judges Rozakis, Tulkens, Spielmann and Jebens.

¹²⁹ The ‘particular rule of law and justice needs’ of the state in question is also stressed by the United Nations Secretary General (23 August 2004), § 14.

6.2. Ukrainian legislation

Former Soviet state crimes have to be judged on the basis of the substantive law valid at the time and place of their commission, i.e. on the basis of the criminal codes of the Ukrainian SSR. Retroactive changes in those rules are only possible in favour of the perpetrator. If an act or omission did not entail criminal responsibility at the time, it cannot be prosecuted today.

The procedure is governed by today's law: the Criminal Procedure Code of 2012/13 and the relevant guarantees in the Const. Ukr. Special procedural rules on the prosecution of Soviet state crimes are neither needed nor advisable. Social reconciliation is best achieved if perpetrators of state crimes are tried and sentenced on the basis of the substantive law at the time, in a procedure where they enjoy all the privileges and guarantees any accused has [Parliamentary Assembly of the Council of Europe (27 June 1996), § 7].

The most difficult legal question is the statute of limitations. In the light of international law, comparative state practice, and the guarantees of the Const. Ukr., it seems reasonable to exempt war crimes and crimes against humanity from the statute of limitations. Since Ukraine has been a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity since 1969, these crimes have never fallen under the Ukrainian statute of limitations. Therefore, they can be prosecuted today without any further legislative steps [Küpper (2024), p. 22; Uerpmann-Witzack (2024), pp. 10–11]. The difficulty in this strategy lies in defining which crimes were grave enough to fall under the international notion of war crimes and crimes against humanity. War crimes relate to a state of war and therefore are not applicable to the Soviet crimes on Ukrainian soil, at least not after 1945 (the perpetrators of crimes committed before 1945 will hardly be still alive). Crimes against humanity are of a very grave nature, and it is at least questionable whether the Soviet repression after the end of Stalinism amounted to that level [Boeckh (2024), pp. 15–16]. Still, whether a crime constitutes a crime against humanity is a question to be answered in the individual case and not in the categories of eras and epochs. It may be noted that Article 5(1) Totalitarian Regimes Condemnation Act mentions ‘crimes of genocide, crimes against the individual and humanity, and war crimes’ only in a historical perspective, as the object of academic and other research but not of criminal prosecution. This shows that the Ukrainian law-maker in 2015 (when that law was adopted) was of the opinion that the perpetrators of those crimes were beyond the reach of Ukrainian criminal justice: dead or abroad.

Soviet state crimes not constituting as a war crime or a crime against humanity are not covered by international law and therefore fell under the statute of limitation that the Ukrainian legislation of the time provided for those crimes. Unless the old law provided for an exception from the statute of limitations, as Soviet criminal law did to a certain extent [Chapter 6.1.], it is necessary to annul retrospectively the time-barred character of the old state crimes. As the example of several European countries show, this can be done in a way compatible with the rule of law. In this case, Ukraine would have to pass a law defining exactly which crimes are covered and how the exception from the statute of limitation works. The most wide-spread model in Eastern Europe is a law saying that the time of the communist dictatorship does not count into the limitation period because the state had no political will to prosecute the crimes the self-same state had committed or ordered to commit. This would not help much in Ukraine because it means that the deadlines count from 1991. Given the length of Soviet statutory limitation periods, they have expired by 2025, making later prosecution illegal.

Public debates in the countries that applied that solution show that some parts of the population find it hard to accept. Lifting the time-barred character for a special group of crimes and perpetrators seems to lead to unequal treatment and to question the standards of the rule of law. Indeed, this is the ‘post-totalitarian dilemma of the punishing rule of law-state’:¹³⁰ the formal side of the rule of law advocates the application of the general rules even if that means that perpetrators of state crimes go free, whereas the material side of the rule of law requires the punishment of those perpetrators and accepts, with view to the historically unique and therefore exceptional situation, certain exemptions from the general rules in order to achieve material justice. Examples from Eastern Europe show that some states opted for the formal (e.g. Hungary) and others for the material (e.g. Czechia) side of the rule of law. Both solutions are acceptable options for a post-socialist rule of law-based state. It is a question for the political debate in Ukraine which part of the rule of law it values higher in its present situation, particularly with view to its effect on societal reconciliation. Will the punishment of former state crimes on the basis of tailor-made exceptional rules pacify or upset Ukrainian society?

6.3. Ukrainian practice

So far, Soviet state crimes have gone unpunished not only in post-socialist Russia, but also in post-socialist Ukraine. Whether or not Ukraine wants to deviate from this course is largely a political question.

¹³⁰ This expression (“Das posttotalitäre Dilemma des strafenden Rechtsstaats”) was coined by Küpper (2004), pp. 145–151.

Given the more than three decades that have elapsed since the end of the Soviet Union, not many perpetrators can be expected to be still alive. Crimes of living perpetrators are comparatively recent ones, committed during the last decade or so of Soviet rule, which means that they did not happen in the particularly cruel and repressive Stalinist era but later, when Soviet repression took milder forms [Boeckh (2024)]. For this reason, Article 5 Totalitarian Regimes Condemnation Act defines the state’s task in the ‘investigation of the crimes of genocide, crimes against humanity and war crimes committed in Ukraine by representatives of the Communist and (or) the National-Socialist (Nazi) totalitarian regime’ principally in historical research and documentation in order to paint a truthful picture of the fate of the victims, thus contributing to restore their dignity. Article 5 does not look at the perpetrators and their criminal liability for the simple reason that the perpetrators of the grave crimes that Article 5(1) mentions can be taken to be dead by now.

However, the Soviet rule committed numerous crimes and violated human rights also in the 1970s and 1980s. Some of these perpetrators may still be alive, and it may be possible to prove their individual crimes and individual guilt. In the light of the Parliamentary Committee of the Council of Europe, Ukraine, if it decides to bring the surviving perpetrators before court, has to treat them fairly and not to make show trials out of their cases because ‘it would then be not better than the totalitarian regime’.¹³¹

6.4. Analysis

Ukraine did not punish perpetrators of Soviet state crimes. On the face of it, this seems to contradict the universal and European soft law in this question. That soft law, however, refers to situations immediately after the end of a totalitarian or colonial rule. More than three decades after the end of that rule, the soft law loses its persuasive authority.

The Ukrainian way of not punishing the perpetrators is not the result of a conscious decision but much rather of inactivity, which has never been the object of a wide-spread social debate. This debate should be held as soon as possible: does the Ukrainian society wish to put the last surviving perpetrators of Soviet state crimes before court? Or does Ukrainian society accept their factual impunity and make its peace with this solution? If this debate is held now, the question cannot be undug and instrumentalised at some later point by Ukrainian or external political forces in order to torpedo societal reconciliation or weaken Ukraine.

¹³¹ Parliamentary Assembly of the Council of Europe (27 June 1996), § 4.

Given the time elapsed since the end of the Soviet Union, criminal prosecution of the perpetrators does not happen in the context of transition and therefore is no longer the instrument for knowing the truth that international documents say it is [United Nations Economic and Social Council (8 February 2005)]. Discovering the truth is a function of the archives [Chapter 4. and sub-chapters] and societal deliberations [Chapter 9.]. The Ukrainian debate on whether or not to prosecute the last surviving perpetrators can therefore be conducted without the additional burden of instrumentalising criminal law for unveiling the historical truth.

If Ukraine decides in favour of a criminal prosecution, there are various ways to do so under its rule of law-constitution. First, Ukraine may limit the prosecution to perpetrators of acts qualifying as crimes against humanity, war crimes, or genocide and thus falling under the non-applicability of statutory limitation in international law. Second, Ukraine may annul existing limitations. The method of counting the limitation period from 1991 does not help because even with this later starting point, statutory limitation has occurred in most cases. Therefore, only the lifting of the achieved time-barred status can help. It can be argued that in the conflict between the material side of the rule of law (which requires a certain material justice, including the punishment of perpetrators of grave state crimes) and its formal side (which requires the respect for the ban on retroactive deteriorations), the material side should prevail in a post-totalitarian or post-colonial situation. Such a decision should not, however, be taken by judicial authorities but by the Parliament on the basis of a wide societal debate. Without this wide societal debate, the punishment of the last perpetrators would lose its potentially beneficial effect on societal reconciliation. A stronger legal argument, used in several post-socialist countries, suggests that the statute of limitation is merely a procedural, but not a material rule, whereas the ban on retroactive onerous criminal legislation affects only material law. In this line of argument, the rule of law does not oppose the annulment of an existing limitation.

7. The Communist Party and its Symbols

Every political system issuing from a previous totalitarian one-party dictatorship has to answer the question what the future of the former state party shall be. This question has several aspects.

First, should the former state party be forbidden? This may rid the political life of the new system from a (the) proponent of the old, dismantled order. Particularly if the former state party continues its values and programmes and thus opposes the new system, the concept of a ‘defensive democracy’

may suggest the ban of that party. On the other hand, the ban of a political party is in principle contrary to the basic idea of a multi-party democracy which the new system strives to create.

Second, if the old state party is not forbidden, but may continue its political work in the new system: should that party be dispossessed of the assets acquired during the old system? During the socialist dictatorships, the state parties had subsidiaries everywhere, in every town and village, at every workplace and social entity of relevance. Some former state parties amassed a considerable fortune during their dictatorial rule. The omnipresence of its organisational structures as well as its wealth provide the former state party with an – unfair? – advantage over all other competing parties which, after the end of the dictatorship, have to start from zero. Some post-socialist states decided to allow the former state party to continue but stripped it of the assets acquired during the one-party rule so that it had to start its new political life under similar conditions as the other evolving parties.

Third, the new system has to decide whether or not it accepts the symbols of the former state party and its political orientation in public. These symbols stand for a totalitarian regime. It may be unacceptable not only for the victims of that totalitarian regime but also for the new democratic forces to face these symbols in political life. If the former state party itself is forbidden, the ban of its political symbols is a logical consequence. But even if the former state party is allowed to operate in the new order, there may be a legitimate social or political wish to ban its symbols.

7.1. The Ukrainian CP

In the successor states of the Soviet Union, these questions relate to the respective republican branch of the CPSU – in Ukraine to the Ukrainian CP.

7.1.1. International law and East European state practice

The international legal commitments of Ukraine do not encourage the ban of political parties. As a member of the Council of Europe, Ukraine is bound to ‘genuine democracy’¹³² as well as to the rule of law and the respect for human rights. In the European context, genuine democracy is understood as a multi-party system which, as a rule, does not allow easily to outlaw a given political party. The human rights obligations of Ukraine are even more unequivocal. Both the International Covenant on Civil and Political Rights and the ECHR guarantee the individual citizen’s right to form, join, or leave

¹³² Preamble to the Statute of the Council of Europe (London Treaty) of 5 May 1949.

political parties.¹³³ This civil right is violated by the ban of a political party which means that parties may be prohibited only in exceptional circumstances, e.g. if the party actively opposes democracy and therefore is banned in the line of a ‘defensive democracy’.

International soft law with particular reference to the post-totalitarian states of Eastern Europe seems to take a somewhat different position. In the resolution of the Parliamentary Assembly of the Council of Europe on the need for international condemnation of crimes of totalitarian communist regimes, we read:

“public awareness of crimes committed by totalitarian communist regimes is very poor. Communist parties are legal and active in some countries, even if in some cases they have not distanced themselves from the crimes committed by totalitarian communist regimes in the past.”¹³⁴

This text suggests that the Parliamentary Assembly thinks it possible, if not desirable to outlaw the former CPs for their role in the past as well as their continuing positions on that past. It must be noted that that resolution was adopted not shortly after the demise of the totalitarian communist regimes but in 2006, i.e. more than two and a half decades after that demise. This suggests that the Council of Europe considers past-related considerations to be strong enough to justify a prohibition of the CP even decades after the end of its dictatorial rule.

In the years after the collapse of socialist rule, quite a few successor states of the Soviet Union were unsure what to do with their CPs [Küpper (2024), pp. 12–13]. Russia, e.g., forbade the CP which, however, was partly quashed by a decision of the Federal Constitutional Court.¹³⁵ The same decision also quashed large parts of the presidential decree to nationalise the assets of the CP. This inconsistent and doctrinally poor decision reflects in its inner contradictions the half-hearted Russian attempt to make the CP illegal [Himmelreich, Antje in Schroeder/Küpper (2010), pp. 218–224; Luchterhandt (1995); Nußberger (2007)]. Today, the successor of the CPSU, the CP of the Russian Federation, is a legal party.

Quite the opposite happened in the Czech Republic. The Czech condemnation law defines the CP as ‘criminal’, and special legislation nationalised the party’s assets in late 1990. On the other hand, the

¹³³ Article 22 ICCPR; Articles 11, 16 ECHR and, more indirectly, the right to free elections in Article 3 Protocol no. 1; also ECtHR, judgement of 12 April 2011, *Republican Party of Russia v. Russia*, 12976/07.

¹³⁴ Parliamentary Assembly of the Council of Europe (25 January 2006), § 6.

¹³⁵ Decision of the Russian Constitutional Court no. 9-P of November 30, 1992, on the unconstitutionality of the Russian CP.

CP was never formally dissolved or forbidden and continued to be represented in the Czech parliament [Bohata, Petr in Schroeder/Küpper (2010), pp. 233–237, 257–260]. A seizure of the assets without a formal ban of the CP was the procedure not only in the Czech Republic but also, e.g., in Bulgaria, Poland (where the CP decided its own dissolution) or Romania [Stela, Ivanova; de Vries, Tina; Bor-mann, Axel in Schroeder/Küpper (2010), pp. 24–25; pp. 151–152; pp. 176–178].

Other countries applied different solutions, adapted to their special political situations. In Hungary, e.g., the CP, which had enacted and orchestrated the change of system, had given back its property rights in buildings to the state in 1989 by its own free will so that there was little left to nationalise in 1990. In Croatia, the Croatian CP had supported the country's fight for independence from Yugoslavia which in the eyes of many Croats whitewashed the party from its crimes of the past, and neither a ban nor a seizure of assets were considered – which distorted the political competition in the first years after independence because the successor party of the CP had considerable organisational and other property which all the new-founded competitors lacked [Küpper, Herbert; Pintarić, Tomislav in Schroeder/Küpper (2010), pp. 117–118; pp. 313–316].

7.1.2. Prohibitions and seizure of assets in Ukraine

Like in Russia, the reaction of the post-socialist state wavered in Ukraine as well. In 1991, the CP was first suspended and then banned by way of two decrees of the Verkhovna Rada.¹³⁶ The second decree contained some provisions on the seizure of the party assets. Some months later, the CP Assets Nationalisation Act declared the assets of the CPSU and its Ukrainian republican formations, including party enterprises and investments, to be the property of the Ukrainian state, the Autonomous Republic of Crimea, or the local governments. The exact recipient (state, Crimea, or local government) depended on the nature of the specific assets. The Ukrainian Constitutional Court, established in 1996, declared in a controversial decision the ban of 1991 to have been unconstitutional.¹³⁷

In 1993, the CP of Ukraine was founded as the successor party of the Soviet-time CP of Ukraine, and was allowed to work legally. At times, it was represented in the Verkhovna Rada, where it advocated Soviet nostalgia [Shevel (2014), pp. 153–154]. The CP did not manage to win the necessary threshold

¹³⁶ Decree of the Presidium of the Verkhovna Rada no. 1435-XII of 26 August 1991 'On the temporary suspension of the activities of the Communist Party of Ukraine'; Decree of the Presidium of the Verkhovna Rada no. 1468-XII of 30 August 1991 'On the prohibition of the activities of the Communist Party'.

¹³⁷ Constitutional Court of Ukraine, decision no. 20-rp/2001 of 27 December 2001, including separate opinions by, e.g., Justice V. Skomorokha.

of 5 per cent of the votes in the general elections of 2014 and has ceased to be represented in the Ukrainian parliament since then.

Ukrainian authorities banned the CP of Ukraine and two other extreme left-wing parties in spring 2015 from standing in elections because they violated Ukrainian law, in particular by supporting the insurgents in the so-called ‘people’s republics’ in the East of Ukraine. This ban was confirmed in court later that year.¹³⁸ In 2022, the ban of the CP was renewed by another court decision because CP officials were reported to have supported the Russian attack on Ukraine. The party’s assets were seized [European Commission for Democracy through Law (6-7 October 2023), §§ 6–11; Pleines (2025), p. 464].¹³⁹

The present ban of the CP does not relate to the party’s role during the Soviet rule but to its present support of attacks against Ukraine. It is not part of the legislation on the past but of the present fight against Russia. Since the party is forbidden and its assets are seized because of its present activities, the questions of a past-related ban and seizure of the assets no longer arises.

If the party were not forbidden for its present stance, a past-related ban would be quite possible. In principle, a positive evaluation of the Soviet past and its repression would suffice to outlaw the CP or any other political party under Article 3(2)-(5) Totalitarian Regimes Condemnation Act.

7.2. The symbols of the CP and the denial of communist crimes

7.2.1. International law and foreign practice

Many post-totalitarian states forbid the use of the symbols of a previous dictatorship. This is true, e.g., for Germany and Austria where the symbols of the National-Socialist Party are banned and their use constitutes a criminal offence.¹⁴⁰ Several formerly socialist countries enacted a ban on the public display of the symbols of the former CP [Küpper (2024), pp. 13–14; Schroeder/Küpper (2010)]. The Parliamentary Assembly of the OSCE confirms that a totalitarian regime and its legacy must not be glorified and any glorification can be forbidden by the post-totalitarian state [OSCE Parliamentary Assembly (29 June-3 July 2009)].

¹³⁸ Regional Administrative Court of Kyiv, decision of 16 December 2015.

¹³⁹ Administrative Court of Lviv, decision of 6 July 2022.

¹⁴⁰ § 86 German Criminal Code; § 3d Austrian Prohibition Act (1947).

The use of political symbols is as a rule protected by the freedom of opinion, expression and, as the case may be, (political) association and elections. Thus, a ban of such symbols requires a justification strong enough to authorise the limitation of the said human rights. The totalitarian character of a political symbol may be such a justification.

The ECtHR has no objection against the ban and criminalisation of Nazi symbols but takes a differentiated position in the case of symbols of the extreme left. Unlike Nazi symbols, the symbols of the former ruling communist parties, e.g. the five-armed red star or hammer and sickle, are shared by non-totalitarian left-wing parties and other organisations such as, e.g., trade unions. Since these symbols are not unequivocally totalitarian but used by democratic parties and organisations as well, their unconditional ban violates the rights of those democratic parties and organisations. The ECtHR accepts such a ban in a formerly socialist country for a transitional period of time because the political life of those countries has to rid itself of the totalitarian heritage, but on the long run, formerly socialist countries, too, have to legalise the mentioned symbols or limit the criminalisation of their use to situations where that use unequivocally advocates a totalitarian rule.¹⁴¹ The ECtHR developed this case law predominantly in Hungarian cases, and the Hungarian parliament promptly reacted with a resolution saying that that decision was unacceptable to Hungary and that the country would continue to criminalise the use of the five-armed star as a ‘symbol of a totalitarian rule’. Nevertheless, Hungary applies in its criminal law a differentiation similar to the one the ECtHR requires, punishing the use of symbols of a totalitarian rule only ‘if it is capable of upsetting public peace, particularly if it violates the dignity or commemoration of the victims of the totalitarian systems’ [Küpper (2019), pp. 158–160].¹⁴²

The penalisation of denial crimes is closely linked to the penalisation of the use of the symbols of the totalitarian CP. The legitimacy of taking ‘denial crimes’ on the statute book is an object of debate. On the one hand, the dignity of the victims may require a criminalisation of the denial, distortion, relativisation or trivialisation of the crimes committed against them. On the other hand, denial crimes are a limitation of the freedom of speech and opinion, the way the ban on totalitarian symbols is. The criminalisation of certain statements on the past may serve to keep uncomfortable questions or unorthodox opinions away from public debate and, in the worst case, can be instrumentalised to immunise the state-sponsored version of the ‘historical truth’ against criticism [Gliszcyńska-Grabias (2019); Kopusov (2018)]. Given this ongoing debate, there are no established standards, neither in interna-

¹⁴¹ ECtHR, decisions of 8 July 2008, *Vajnai v. Hungary*, 33629/06, and of 3 November 2011, *Fratanoló v. Hungary*, 29459/10.

¹⁴² § 335 Act 2012:C on the Criminal Code of 13 July 2012.

tional law nor in foreign practice. Every state has to find its own balance which ought to take into account the historical facts in that state including the nature of the crimes the memory of which is to be protected, the constitutional background and the societal debate.

7.2.2. Ukrainian law and practice

In Ukraine, Article 4(1) Totalitarian Regimes Condemnation Act of 2015 introduced a comprehensive ban on ‘the production, dissemination as well as public use of symbols of the Communist totalitarian regime and symbols of the National-Socialist (Nazi) totalitarian regime’. Article 1 no. 4) Totalitarian Regimes Condemnation Act defines ‘symbols of the communist totalitarian regime’ in a very wide sense, including, inter alia, the state symbols (e.g. flags, coats of arms, or hymns) of the Soviet Union, the Ukrainian SSR, other republics of the Soviet Union and foreign socialist states, the political symbols of the communist movement in general (red star; hammer, sickle and plough) and of the CPSU in particular, pictures and commemorations of high-ranking officials of the Soviet Union or the CPSU as well as of events celebrating the power of the CP (with the exception of the victory over Nazi Germany¹⁴³) including geographical or company names carrying these symbols. On the other hand, this definition is narrow because it embraces the historical totalitarian regime of the Soviet Union and its satellite states but does not include the symbols of the present-day totalitarian variants of communist ideology. This definition of the ‘symbols of the communist totalitarian regime’ shows the double intention of the ban. It includes, first, the political legacy of Soviet communism, and second, the colonial legacy of Ukraine’s belonging to the Soviet empire. Article 4(2)–(3) Totalitarian Regimes Condemnation Act exempts from the ban original documents and war decorations from before 1991 (so that Ukrainian citizens born before 1991 may still produce their birth certificates despite the fact that they show socialist-Soviet symbols), the use of those symbols in museums, school books, art and science as well as in private archives.

Along with the symbols, Article 3 Totalitarian Regimes Condemnation Act outlaws any propaganda for the totalitarian Communist and Nazi regimes. This propaganda is defined in Article 1 no. 2) Totalitarian Regimes Condemnation Act as the public denial of the criminal character of the Communist and Nazi regimes in Ukraine or the dissemination of information aiming at justifying the crimes of Soviet repression organs. Insofar, Article 3 forbids a positive evaluation of the past Communist and Nazi regimes. This is in line with the purpose of the ban that Article 3(1) Totalitarian Regimes Con-

¹⁴³ The de-communisation and de-Sovietisation, combined with the appropriation (Ukrainization) of the memory of the 1945 victory, are regulated in detail in the 1945 Victory Act. For more detail, see Chapter 3.5.

demnation Act defines: such propaganda is considered a ‘mockery’ (наруга) of the memory of the victims. In the categories of human rights, the protection of the dignity of the victims, which includes the criminalisation of the denial of, e.g., the holocaust justifies the limitation of the freedom of expression. The pertinent legislation must be careful to respect proportionality, i.e. not to curtail human rights such as the rights of free expression and free media beyond the strictly necessary level [European Commission for Democracy through Law / OSCE (18-19 December 2015); Küpper (2024), pp. 14–15; Simon (2016)].

Article 7 Totalitarian Regimes Condemnation Act amended the Criminal Code in order to protect the substantive prohibitions of the law by criminalising their violation.

The Ukrainian Criminal Code, in its XX. chapter (‘Crimes against Peace, the Security of the Population, and the International Legal Order’), has a special provision on the ‘Production and Dissemination of Communist and Nazi Symbols and Popularisation of the Communist and National-Socialist (Nazi) Totalitarian Regimes’. This Article 436.1 was introduced, then repealed, introduced again in 2014 and amended in 2015 by the Totalitarian Regimes Condemnation Act. The criminal sanction relates to all ‘symbols of the communist and national-socialist (Nazi) totalitarian regime, including in the form of souvenirs’, which must not be produced, sold or used in public, as well as ‘the public performance of the hymns of the USSR, the Ukrainian SSR (UkrSSR) or the other union or autonomous Soviet republics or their fragments’. The wording of ‘symbols of the communist totalitarian regime’ seems to encompass symbols like the red star, hammer and sickle in every context, including the use by a democratic party or trade union. However, the wording relates these symbols to the ‘totalitarian system’ which may be interpreted in a way that only the Soviet-nostalgic or present-day totalitarian, but not the present-day democratic use is penalised. Such an interpretation is supported by the fact that Article 436.1 Criminal Code refers to the Totalitarian Regimes Condemnation Act which defines the ‘symbolics of the communist totalitarian regime’ in its Article 1 no. 4): these are the symbols of the historical Soviet Union and its satellites but not the symbols of present-day totalitarian or other communist movements. If the term ‘symbols of the communist totalitarian regime’ in Article 436.1 Criminal Code is interpreted on the basis of Article 1 no. 4 Totalitarian Regimes Condemnation Act, which is the obvious thing to do because the Criminal Code itself refers to the Totalitarian Regimes Condemnation Act and thus creates the connection between the two laws, it does not criminalise the present-day use of those symbols by democratic leftist parties and institutions [Babak/Filei (2018); Petkov et al. (2015), Article 436-1]. There is neither court practice nor academic literature on the non-totalitarian use of those symbols. The court practice on the totalitarian use of

those symbols tends to be strict rather than lenient, especially since 2022 [Nekoliak (2025a); Pysmenskyy (2024a), pp. 10–14; Pysmenskyy (2024b)].¹⁴⁴

Furthermore, the exceptions laid down in the Totalitarian Regimes Condemnation Act for, e.g., the use of old documents or scientific or artistic purposes apply in Article 436.1 Criminal Code as well: what is not forbidden under the Totalitarian Regimes Condemnation Act is not penalised by the Criminal Code.

This ban appears to be balanced. Communist propaganda is forbidden only if it is in favour of the totalitarian regime of the past so that present-day non-totalitarian communist political opinions are not outlawed by Article 3 Totalitarian Regimes Condemnation Act. Communist symbols such as the red star or hammer and sickle, on the other hand, are forbidden in toto by Article 4 Totalitarian Regimes Condemnation Act. The question arises whether this very comprehensive prohibition is in line with the human rights in the Const. Ukr. and the ECHR. The Ukrainian Constitutional Court accepted that law as constitutional because the symbols of the old Soviet rule were used by the Russian aggressors to disunite Ukrainian society and destabilise the Ukrainian state as well as stabilise the insurgent regimes in Eastern Ukraine. The Constitutional Court, ‘aligning with the government’s decommunization policy’ [Nekoliak (2020)], recounts the Soviet history and the present activities of Russia against Ukraine and how Ukraine needs to defend its statehood and democracy, but the court fails to weigh – beyond some platitudes – that public interest against the limitation of the basic rights that the Totalitarian Regimes Condemnation Act touches.¹⁴⁵ Relying on the general case law of the ECtHR which accepts this sort of limitation of the freedoms of opinion, expression and association in a post-totalitarian state for a transitional period, Ukrainian law seems to be in violation of the ECHR.

However, the Ukrainian legislation is not only post-totalitarian but also post-colonial, as the decision of the Ukrainian Constitutional Court points out. As a rule, a post-colonial ban of certain political symbols may be taken to underlie the same human rights rules as a post-totalitarian one: for a transitional period after independence, a ban is acceptable, but the longer the colonial rule is over, the less convincing is the past as an argument to limit the present freedoms of opinion, expression, and association. This argument seems to suggest that the Ukrainian legislation curtails human rights to an

¹⁴⁴ Supreme Court of the Ukraine, decision no. 707/2235/21 of 14 October 2025.

¹⁴⁵ Constitutional Court of Ukraine, decision no. 9-р/2019 of 16 July 2019.

exaggerated, unproportional extent because both the totalitarian and colonial rule ended more than thirty years ago.

One must bear in mind, however, that Ukraine has been the victim of hybrid aggression since 2014 and open war since 2022, and that the aggressor state Russia uses Soviet and communist nostalgia as a means to disunite Ukrainian society and to weaken the country's will to self-defence. Insofar, the Soviet rule over Ukraine is not some event of the past (which, as such, perhaps may no longer justify the limitation of certain human rights, as the essence of the Vajnai-decision of the ECtHR points out) but an element of Russia's propaganda warfare against Ukraine. The central criminal norm to fight off Russian war propaganda is Article 436.2 Criminal Code, introduced by Law no. 2110-IX of 3 March 2022 and amended by Law no. 3342-IX of 23 August 2023. But also Article 336.1 Criminal Code, together with the pertinent provisions of the Totalitarian Regimes Condemnation Act, must be understood, *inter alia*, in the context of the Russian war. The Constitutional Court distinguishes the Ukrainian situation from the *ratio decidendi* in the Vajnai case with the argument that the socialist danger in Hungary was over whereas the Russian aggression, instrumentalising the Soviet past and its symbols for its purposes, is present.¹⁴⁶

Alongside with Soviet symbols, Ukraine outlawed in 2017 the ribbon of Saint George (Георгиевская лента, Георгіївська стрічка) which was in use in Soviet times but has gained the function of supporting Russia's aggression against domestic opposition and foreign states.¹⁴⁷ The justification of the limitation of the freedoms of opinion, expression and association must therefore be judged according to the requirements of a country at war, i.e. of a country in a defensive war, not of a country merely dealing with an unpleasant past. The protection of certain parts of the national commemoration through criminal law is 'an important component of Ukraine's national security strategy' [Nekoliak (2025b); Pysmensky (2024a), pp. 3, 7, 10]. In line with this argument that the criminalisation of certain past-related acts is a necessity in times of the Russian war against Ukraine, cases of criminal investigation, indictment and sentencing on the basis of Article 436.1 Criminal Code have risen significantly since 2022 [Nekoliak (2025a); Pysmensky (2024a), pp. 11–14]. Article 64(2) Const. Ukr. as well as Article 15 ECHR permit restrictions in the case of war. Since the aspect of the limitation of human rights due to a state of war is beyond the scope of our project, it is not pursued any further.

¹⁴⁶ Constitutional Court of Ukraine, decision no. 9-р/2019 of 16 July 2019, § 14.

¹⁴⁷ Article 173.3 Misdemeanour Code.

On a more technical level, the Venice Commission questions the clarity of the penal norms in Article 436.1 Criminal Code and the Totalitarian Regimes Condemnation Act. The definition of the symbols, of propaganda and other central terms of the law is not clear and unequivocal to the extent required from criminal norms. The ‘denial of crimes’ should relate to specific crimes, grave enough to justify a criminal sanction, and not to the ‘criminal character’ of the Soviet rule in general. The individual, when reading the pertinent text of the Criminal Code, does not know unequivocally what is forbidden and what is not, and the prosecution organs are given discretion of a width that arbitrariness appears possible [European Commission for Democracy through Law / OSCE (18-19 December 2015)].

Another aspect of this legislation is that the borderline between allowed and forbidden in the Totalitarian Regimes Condemnation Act and the parallel borderline between allowed and criminal in the Criminal Code appear quite complicated. On the one hand, general clauses outlaw a wide field of activities, trying to remove the totalitarian and colonial legacy as widely as possible from the public sphere. On the other hand, numerous and rather casuistic exceptions exempt what may be termed the ‘un-political every-day use’ of Soviet symbols from the ban and criminal liability. It is fair that citizens may still use their old official documents that necessarily bear the symbols of the Soviet state, that they may show in public their Soviet war-time decorations and other medals that Soviet citizens received on ever so many occasions. It is also fair that a use of these symbols in the fields of art and science is free because this exception respects the pertinent human rights. As a result, however, it is very difficult to ascertain whether or not a given use of a Soviet symbol is forbidden, perhaps even criminal. This requires a synoptical interpretation of several articles of the Totalitarian Regimes Condemnation Act and the Criminal Code. This may violate the constitutional rule of law requirement that criminal law in particular has to be unequivocal and easy to understand so that every citizen can see without doubt what is forbidden and what is not, what the law expects him or her to do and not to do. It is therefore advisable to draw the line between the forbidden and the allowed use of the symbols of the Soviet rule in Ukraine in a more simple and less casuistic way, concentrated in a concise text in one law only, ideally the Criminal Code.

The concentration of the rules on criminal offences in relation to glorifying the totalitarian past and its symbols in the Criminal Code would be in line with Article 3(2)–(3) Criminal Code which stipulates that criminal liability is determined by the Criminal Code only and that separate laws establishing criminal offences are to be incorporated into the code.

7.3. Analysis

The present ban of the Ukrainian CP as well as some other political parties with a purportedly leftist agenda is not justified with the CP's role during the Soviet rule but with their position towards Russia's aggression against Ukraine. The same is true for the seizure of the assets of those parties. Outlawing the CP is not past-related and thus lies beyond the scope of this study.

Since the question of the legality of the CP and the seizure of its assets is resolved with mechanisms addressing present mischiefs, there is no need for Ukrainian authorities to deal with these questions in terms of politics of the past. The most important reason to outlaw the old state party and nationalise its assets after the end of a totalitarian one-party rule is to neutralise the organisational, financial and other advantages the former state party has over its newly founded competitors, thus ensuring a democratic start with chances as equal as possible for all political parties. This aspect has lost all importance more than 30 years after the end of the USSR. Therefore, it is questionable whether past-related reasons are strong enough to ban a former state party for an indefinite period of time. Much rather, a present ban of a political party – CP or other – has to comply with Articles 36–37 Const. Ukr. A political party may be dissolved because of its present totalitarian agenda but not because of its role in a bygone totalitarian (and colonial) regime.

There is nothing to do right now for Ukrainian authorities with regard to the legality of the CP.

The situation is different with regard to the criminal sanctions for the use of symbols, propaganda and similar offences.

The criminalisation of the symbols of the CP and of denying the criminal nature of the Soviet rule is in itself acceptable [European Commission for Democracy through Law / OSCE (18-19 December 2015), §§ 86–88, § 116, § 118 and passim].

Article 436.1 Criminal Code and the pertinent parts of the Totalitarian Regimes Condemnation Act need to be (re-)phrased in a way that delimits more clearly the scope of the prohibition in order to punish only extreme acts which, in the perspective of proportionality, deserve to be punished so that the freedom of expression, of media and other human rights are not limited more than necessary. In this weighing, the fact that Ukraine is attacked by Russia and that Russia actively uses the symbols of the Soviet past to support its aggression may be taken into account by the law-maker. The results

of this weighing must be laid out with the degree of clarity and intelligibility required from criminal sanctions. An everyday citizen must be in the position to grasp which use of communist symbols is permissible, and which is not. One aspect of this legislative clarity is that all pertinent rules are concentrated in one law (the Criminal Code) so that it no longer will be necessary to ascertain the valid criminal law by comparing two separate pieces of legislation.

8. Lustration and Decommunisation of the Power Structures

Just like the question of whether or not to outlaw the former state party, the question of whether or not to continue to employ its (former) followers in public service is of actuality during the change of system and in the years immediately after the end of the totalitarian (or colonial) rule. The dismissal of politically doubtful administrative and other public employees in formerly socialist countries is called decommunisation.

In the field of decommunisation, there is a potential conflict between the dependence of the new order upon a loyal public service on the one hand and the political affiliation of the existing public servants on the other. Special questions arise in jobs protected by a secure tenure in order to guarantee independence (judges and similar positions, university professors, and the like). Another potential conflict arises between the wish to rid the public service from the servants of the bygone totalitarian (or colonial) regime on the one hand and the need for specialist knowledge necessary to keep the state apparatus going on the other, a knowledge that only the politically tainted old personnel have. These lines of conflict take different forms in every country. A state like Hungary where the socialist rulers had depoliticised the public service since the 1960s and issued the parole ‘Who is not against us is for us’¹⁴⁸ could take a more relaxed attitude in this question than a country like Czechoslovakia where the socialist rulers had demanded active political allegiance from everybody, especially from the persons working in the public sphere. In East Germany, it was easy to replace old communists with West German specialists whereas most other formerly socialist states did not have such a vast resource of well-trained specialists unquestionably loyal to the new order.

¹⁴⁸ ‘Aki nincs ellenünk, az velünk van’. This parole was issued by head of the CP János Kádár on the congress of the Patriotic People’s Front in December 1961 and shaped the political practice until the end the communist rule.

8.1. International standards and foreign practice

International soft law sees the vetting of the public service as an important element of transitional justice. If done properly, this process helps to ‘facilitate a stable rule of law’.¹⁴⁹

Under the ECHR, lustration and the removal from office of officials with a tainted past is not per se a violation of the human rights enshrined in the Convention. The ECtHR insists on proportionality¹⁵⁰ but grants post-totalitarian states a considerable margin of appreciation in other respects. Lustration procedures must comply with the standards of Article 6 ECHR and procedural fairness [European Commission for Democracy through Law (19-20 June 2015), § 20; Uerpmann-Witzack (2024), p. 7].¹⁵¹

Given the strong differences between the various formerly socialist states, pertinent international soft law is rather reluctant. The Venice Commission stresses that lustration is ‘one of the tools of transitional justice’ [European Commission for Democracy through Law (12-13 December 2014), § 15]. This implies that lustration and similar measures are closely linked to the period of transition and have little meaning decades after the end of a totalitarian (or colonial) rule. The ECtHR shares this view.¹⁵²

The Parliamentary Assembly of the Council of Europe is basically in favour of decommunisation in order to identify unreliable persons in high positions and remove them from office so they cannot do any harm. At the same time, the Parliamentary Assembly warns that lustration and decommunisation procedures must comply with the rule of law:

“(11) Concerning the treatment of persons who did not commit any crimes [...], but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no

¹⁴⁹ United Nations Secretary General (23 August 2004), § 52.

¹⁵⁰ ECtHR, decision of 16 March 2006, *Ždanoka v. Latvia*, 58278/00, § 100: if lustration measures are ‘defending the democratic society on the one hand and protecting individual rights on the other’, they are admissible under the Convention.

¹⁵¹ ECtHR, decision of 17 October 2019, *Polyakh and others v. Ukraine*, 58812/15 (...).

¹⁵² ECtHR, decision of 24 June 2008, *Ādamsons v. Latvia*, 3669/03.

commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

(13) The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process.”¹⁵³

A comparative analysis of other formerly socialist states is inconclusive. Some states did nothing at all (e.g. most successor states of the Soviet Union, Mongolia), others enacted lustration laws in order to decommunise parts or the entirety of the public sector or, in the Baltic state, to decolonise it, e.g. to rid it from the servants of the Soviet colonial rule.¹⁵⁴ Lustration laws vary strongly from country to country in many points:

- Which offices in the new system are the object of lustration?
- Which activities or positions in the old system disqualify for the new system?
- What is the exact consequence of a tainted past?

Given the clear idiosyncrasies of the legislation of the various states, it is difficult to distil general standards. Where the constitutional courts reviewed pertinent laws, they usually strongly relied on equal treatment as a yardstick [Küpper (2024), p. 23–29; Schroeder/Küpper (2010)].

8.2. The Constitution of Ukraine

The Const. Ukr. came into effect in 1996, i.e. several years after the end of the Soviet rule. The reasons that speak in favour of lustration and decommunisation, i.e. the removal of potentially hostile or unreliable persons from high positions in the public service, demand a speedy procedure which should have been finished by the time the new Ukrainian Constitution was enacted. However, this did not happen.

Under the new Const. Ukr., Article 126 protects appointed judges against removal from office on other grounds than stipulated in the Const. Ukr. None of these constitutional grounds relate to the judge’s activities or position under Soviet rule. It may be possible to construe an exceptional reason for dismissal in the historically extraordinary situation of the end of a totalitarian (or colonial) rule.

¹⁵³ Parliamentary Assembly of the Council of Europe (27 June 1996). An annex contains the ‘Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law’ as a reference text.

¹⁵⁴ The post-colonial aspect is not taken into account sufficiently by the ECtHR in its decision of 3 September 2015, *Sõro v. Estonia*, 22588/08.

Countries like Czechoslovakia, Germany or Hungary relied on this constitutional argument in order to remove politically tainted judges from their offices – but they did so in the years immediately after the end of socialism. In the Ukrainian case, it is very difficult to apply this argument more than three decades after the end of the Soviet empire although Article 126(6) no. 3 Const. Ukr. may be used as a normative anchor for this argument.

Another position protected against premature ending is that of a member of parliament. Article 81(2) Const. Ukr. enumerates the cases of an early termination of the mandate.

Other parts of the public service do not enjoy constitutional protection. The law-maker is constitutionally free to remove persons from their offices for former misconduct. Such a consequence must, however, be in line with the requirements of the rule of law such as proportionality as well as with basic rights such as equal treatment. More than three decades after the end of the Soviet regime, the former misconduct must carry a considerable weight in order to justify a dismissal after such a long time. Membership in, or work for the secret police and other particularly brutal repression organs might be considered to be of such a gravity.

8.3. Decommunisation in Ukraine

In the first decades after independence, Ukraine had neither a public debate nor legislation on decommunisation and lustration. The ‘Orange Revolution’ and Yushchenko’s presidency in 2006 and even more so the end of Yanukovich’s presidency and the events around ‘Euromaidan’ 2014 led to a change. Suddenly, questions were asked about who worked for the state and what that meant for a democratic Ukraine [David (2018); Polivanova/Nykolyna/Stepanenko/Myroslavskyi/Puktetska (2022), pp. 12–13; Viatrovych (2024)].

8.3.1. Removal from positions in the public sphere

As was emphasised before, a long time has elapsed since the end of the Soviet regime. This means that for biographical reasons alone, there are not many persons who were old enough in Soviet times to conduct activities which today are considered as disqualifying from public employment and who, at the same time, are still young enough to be on a job in the public sphere today.

In this situation, Ukraine enacted the Lustration Act in 2014, i.e. nearly 25 years or one generation after the collapse of the Soviet Union. It was in force for a period of ten years and expired in 2024.

The main focus of that law did not lie on the Soviet time but on political activities in post-independence Ukraine [David (2018); Harashchuk/Georgiievskiy/Deineko (2021); Stein (2014)]. In short, the main reasons disqualifying a person under the Lustration Act were the support of the Russian aggressions against the country and the attempt to suppress the protests known as ‘Euro-Maidan’. Proceedings before the Constitutional Court to examine the constitutionality of the Lustration Act were initiated in 2015 but the court has postponed the case which is still pending [Shcherbanyuk (2021)].¹⁵⁵ With the law in question having expired in 2024, it is unclear of what use a post-fact decision of the Constitutional Court would be. The higher administrative courts ordered court cases scrutinising the legality of individual dismissals to continue and not to wait for the Constitutional Court judgement.¹⁵⁶

Article 2 Lustration Act contained a long list of public offices the holders of which face lustration. The Venice Commission as well as legal scholars argued that the list was too long because it contained offices the holders of which could not seriously harm the state and its post-totalitarian order [Chernovol (2023); European Commission for Democracy through Law (12-13 December 2014), §§ 50–55; European Commission for Democracy through Law (19-20 June 2015), § 33].

Judges were subject to double lustration first under a special law¹⁵⁷ and second under the Lustration Act. In both cases, however, the disqualifying factor was not their position or behaviour before 1991 but merely their sentencing practice in and after 2013 [European Commission for Democracy through Law (12-13 December 2014), §§ 71–81, 95; European Commission for Democracy through Law (19-20 June 2015), 34].¹⁵⁸ For this reason, the lustration of judges thus lies beyond the scope of our project.

¹⁵⁵ As of May 2026, the most recent information on the website of the Constitutional Court of Ukraine, dated 6 July 2025, states that the Constitutional Court concluded the hearing in the open part of the plenary session and is now in the phase of the closed part of deliberation. A decision has not yet been adopted: <<https://ccu.gov.ua/novyna/ksu-zavershyv-na-vidkrytyi-chastyni-plenarnogo-zasidannya-sluhannya-spravy-shchodo-1>> (last accessed 6 May 2026).

¹⁵⁶ Kyiv Administrative Court of Appeal, judgement of 22 June 2017, case no. 826/1003/17 concerning a former CP official and KGB agent, quoted in ECtHR, decision of 17 October 2019, Polyakh and others v. Ukraine, 58812/15 (...), § 94. §§ 95-103 of that ECtHR decision describe the Ukrainian case law in procedures about dismissals on grounds of more recent misbehaviour: these procedures, too, are not suspended in spite of the case pending before the Constitutional Court.

¹⁵⁷ Law of Ukraine no. 1188-VIII of 8 April 2014 ‘On the restoration of trust in the judicial power in Ukraine’.

¹⁵⁸ On the lustration of judges and their right to privacy ECtHR, decision of 14 October 2021, Samsin v. Ukraine, 38977/19.

However, the post-independence history is not the only point of reference of the Lustration Act. Its Article 3(4) enumerated the criteria with reference to activities in the Soviet Union that disqualified between 2014 and 2024 from higher positions in the public sphere: high-ranking CP officials, starting from the rank of a secretary of a district committee, anywhere in the former Soviet Union; leading positions in the Communist Youth Union of Ukraine; leading employees or agents of the secret police (KGB) anywhere in the former Soviet Union. The leading position as such is sufficient reason for disqualifying these persons; it is not necessary to show individual misbehaviour. In the case of high positions in the Soviet system, this is acceptable [European Commission for Democracy through Law (12-13 December 2014), § 64]. These persons were banned for a period of ten years – which in their case probably means until they reach the pension age – from higher public positions. The Venice Commission was doubtful whether lustration could serve the purpose of fighting off dangers for the new regime if it took place more than two decades after the end of the old regime but accepted that late lustration might be acceptable if Ukraine showed ‘cogent reasons’ [European Commission for Democracy through Law (12-13 December 2014), §§ 35–37; European Commission for Democracy through Law (19-20 June 2015), §§ 69–70]. There has been a continuity between the Soviet rule over Ukraine and Russia’s attacks and war against Ukraine since 2014 because Russia more and more relies on Ukraine’s belonging to the Soviet Union as an argument why it should belong to Russia now [Chapter 2.2.].¹⁵⁹ Russia’s war forces the past back, using the Soviet time as a source of legitimacy, which is a situation different from all other post-socialist countries. This special situation qualified as a ‘cogent reason’ to extend lustration to leading posts under the Soviet rule. Persons who were in leading positions during Soviet times may accept Russia’s arguments of bringing the past back and switch their loyalty from Ukraine to the aggressor state, which in times of actual war is a risk that justifies limitations of human rights. However, this argument may not be taken absolute, but the restriction of the individual’s rights must be weighed against their behaviour in the past and the threat to Ukraine they may pose in their position from which they are to be removed.¹⁶⁰

Few people met the criteria of Article 3(4) Lustration Act because of the lapse of time. In the case of Polyakh and four other applicants before the European Court of Human Rights, only one applicant had been dismissed because of his Soviet past: a leading position in a district department of the Ukrainian CP from 1990 to 1991. He sought judicial protection relying on the argument that personal misbehaviour needed to be shown and that a mere party position was no sufficient ground to restrict his human rights, but the Ukrainian administrative courts upheld the dismissal, relying on the wording

¹⁵⁹ The Constitutional Court of the Ukraine describes this in lengthy detail in its decision no. 9-r/2019 of 16 July 2019.

¹⁶⁰ ECtHR, decision of 17 October 2019, Polyakh and others v. Ukraine, 58812/15 (...), relying on earlier case-law such as the decision of 24 June 2008, Ādamsons v. Latvia, 3669/03.

of the law. The ECtHR considered the dismissal unproportional because of the long period of time elapsed since the end of the Soviet Union, the lack of evidence that the applicant committed human rights violations in his CP position, and most of all the low-level employment from which the applicant was dismissed [Polivanova/Nykolyna/Stepanenko/Myroslavskyi/Puktetska (2022)].¹⁶¹ Relying on the Polyakh decision, the Supreme Court ruled that an individual assessment of concrete misbehaviour had to take place in any lustration procedure even if the Lustration Act did not provide for such a mechanism.¹⁶² Therefore, the lustration with regard to activities and positions during Soviet rule may be considered predominantly symbolic.

The exact number of cases assessed under Article 3(4) Lustration Act is not publicly known. The total number of lustration procedures showing a tainted past amounted to 585 by 14 February 2025.¹⁶³ This number includes all aspects of a questionable past because the official statistics do not differentiate between grounds lying in Soviet times and later grounds. It is safe to assume, however, that most cases concern post-1991 elements. There is an official register of persons with a tainted past,¹⁶⁴ but under the regime of martial law, access is restricted [Kotel'va (2023)]. Of the abovementioned 585 lustration decisions, 207 were appealed in court,¹⁶⁵ but again, the official statistics do not contain further differentiations as to the time factor of the tainted past. Some relevant court decisions in lustration procedures on the ground of activities in the Soviet Union, i.e. under Article 3(4) Lustration Act, are accessible on the internet, most of them in favour of the person subject to lustration,¹⁶⁶ but not all of them.¹⁶⁷

Even as a predominantly symbolic law, lustration with view to Soviet times may serve (might have served) a purpose. The main focus of the Lustration Act lies on pro-Russian and anti-democratic

¹⁶¹ ECtHR, decision of 17 October 2019, *Polyakh and others v. Ukraine*, 58812/15 (...), §§ 23, 35, 53–59, 75(iii), 199, 217–220, 228–230, 257–261, 316–322. The applicant failed to observe the procedural deadlines with view to fair procedure but kept the deadline with view to private life. Therefore, the ECtHR decided the merits of his application on the ground of an alleged violation of privacy only. The court held that the dismissal was unproportional because of, first of all, the low-rank position of the applicant at the time of the dismissal: ‘No serious argument has been made that the applicant, a local official working in agriculture, could conceivably pose a threat to the newly established democratic regime’ (§ 322).

¹⁶² Supreme Court of Ukraine, decision no. 817/3431/14 of 3 June 2020.

¹⁶³ Ministry of Justice of Ukraine, official information no. 22826/PI-A-553/13 of 14 February 2025.

¹⁶⁴ Its legal basis is laid down in a regulation, approved by Order of the Ministry of Justice no. 1704/5 of 16 October 2014.

¹⁶⁵ Ministry of Justice of Ukraine, official information no. 22826/PI-A-553/13 of 14 February 2025.

¹⁶⁶ Kyiv Administrative Court of Appeal, decision no. 826/25225/15 of 6 September 2016, <<https://reyestr.court.gov.ua/Review/61193268>>; Donetsk District Administrative Court, decision no. 805/3334/15-a of 20 February 2018, <<https://reyestr.court.gov.ua/Review/72316173>>; Eighth Administrative Court of Appeal, decision no. 807/1280/15 of 20 October 2020, <<https://reyestr.court.gov.ua/Review/92457499>>; Odesa District Administrative Court, decision no. 420/12070/20 of 20 November 2020, <<https://reyestr.court.gov.ua/Review/92982918>>, all web sources last accessed 6 May 2026.

¹⁶⁷ Zhytomyr Administrative Court of Appeal, decision no. 806/484/17 of 25 October 2017: case of a former KGB employee whose complaint was turned down, <<https://reyestr.court.gov.ua/Review/69762268>>, last accessed 6 May 2026.

activities in post-independence Ukraine. By adding certain reprehensible activities of Soviet times, the law shows that the more recent disqualifying activities are as bad as the Soviet-time activities enumerated in Article 3(4). The Venice Commission has doubts whether the Yanukovich years are really as bad as the – undoubtedly bad – Soviet period was but leaves this assessment, which is political by nature, to the Ukrainian authorities [European Commission for Democracy through Law (12-13 December 2014), §§ 26–34]. These doubts lie beyond the scope of our project; therefore we do not pursue them any further.

The level of legislative disapproval of Soviet-time and post-independence misbehaviour is equal. A combination of actual and symbolic lustration provisions is a reaction to the nexus that Russia tries to establish between former Soviet and new Russian imperialism. Such a combination can be found in other post-socialist countries as well. Hungary’s 1994 lustration law defined as disqualifying not only leading positions in, or work for, the socialist secret police but also the membership in Hungary’s National-Socialist party – a party which was dissolved in 1945 so that hardly anybody who had been a party member in 1945 could still be in a professional position in 1994. Nevertheless, it was important for the Hungarian law-maker to show equal disapproval of National-Socialist and Communist totalitarianism [Küpper (2024), pp. 27–28]. Since legislation on the past always carries at least some symbolic meaning, aspects in a lustration law being for biographical reasons more or less symbolic seem acceptable under the standards of the rule of law.

The Venice Commission raised serious questions as to privacy, procedure and judicial protection under Ukrainian law [European Commission for Democracy through Law (19-20 June 2015), §§ 98–106]. Since the lustration procedures are closed and no new procedures or legislation is envisaged [Zubkova (2024)], there is no need for this study to go into these details.

8.3.2. Old age pensions for work for the totalitarian regime?

A last aspect that post-totalitarian states have to address in the context of the work for the former totalitarian power structures is the question of pensions. Should persons who worked in the repression organs of the totalitarian system receive an old age pension or, as the case may be, an invalidity pension or similar social benefits for their work? Is it acceptable for the post-totalitarian state to pay pensions to former oppressors, torturers, KGB officers? In a post-colonial situation, the answer may be quite simple: let the former colonial power support their henchmen, bailiffs, helpers. As a matter of fact, this is what Russia does: it pays the old age pension to former employees of the KGB and

other repression services residing in Russia and other former Soviet republics. The latter group (persons with residence in another former Soviet republic) is included if their state of residence does not provide for them.¹⁶⁸ Insofar, Russian and Ukrainian post-colonial perspectives may complement each other. A post-totalitarian state does not have this option because the oppression did not come from the outside (a colonising power) but from the state itself, i.e. from the state's previous government. The question is whether or not to dispossess one part of the population of the social positions and rights they acquired with tainted services for the totalitarian regime. This aspect lies on the border between the decommunisation/lustration on the one hand and criminal law on the other.

8.3.2.1. International law and foreign state practice

The Parliamentary Assembly of the Council of Europe recommends that there should be no, at least no automatic repercussions in the pension laws so that the cancellation of pensions could at best be a reaction to individual crimes, e.g. as a consequence of a criminal sentence or a reaction to abusively high pensions for the former elite:

“the Assembly recommends that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level”.¹⁶⁹

These principles may be applied to persons who were not discharged in lustration procedures but had worked in ‘tainted’ positions, reaching the pension age before or after the end of the dictatorship.

Whereas the international soft law tried to keep pension law free from past-related disadvantages, state practice differs in this respect. The Baltic republics, after independence, refused to pay pensions for work in the KGB and other organs that had conducted human rights violations in order to stabilise the Soviet rule over these states. In practice, the Soviet Union and after its collapse Russia continued to pay pensions to these persons which means that the Baltic states chose the procedure typical for post-colonial states, and the Soviet Union / Russia assumed their responsibility towards their former servants [Chapter 8.3.2.]. A Slovak law to curtail over-average pension claims of socialist high functionaries and members of security organs was quashed by the constitutional court; the court held that in principle curtailing particularly high pension claims of socialist leading personnel was legitimate

¹⁶⁸ Russian Federal law no. 4468-FZ of 12 February 1993 ‘On pension provisions for persons who served in military service, service in internal affairs bodies (...) and their families’.

¹⁶⁹ Parliamentary Assembly of the Council of Europe (27 June 1996), § 14.

but the concrete law did so in a way that violated the property and social guarantees of the constitution.¹⁷⁰ Article U)(5) of the Hungarian Constitution (2011) allows explicitly for curtailing the old age pensions of ‘leaders of the communist dictatorship’; the relevant laws, however, do not apply this provision. On the other hand, the West German policy on the past reiterated after 1945 that there should be no ‘pension criminal law’ (‘Rentenstrafrecht’) and that every work in the public service, irrespective of its nature, entitled to an adequate pension. Yet, this policy was not undisputed. In the 1980s, there was a vivid public debate why the widow of Roland Freisler, the ‘president’ of Hitler’s personal criminal court (‘Volksgerichtshof’) and personally responsible for thousands of staged death sentences against true or imaginary opponents of the Nazi government, received the same pension as a widow of a president of any regular supreme court (Freisler himself was killed in an air raid in February 1945 so that the question of his pension never arose). Furthermore, there was an outcry that work in the SS qualified for old age and invalidity pensions¹⁷¹ whereas slave labour for Germany, even in ghettos and concentration camps, did not [Deutscher Bundestag (1990)].

8.3.2.2. Ukrainian pension laws

Ukraine after independence never conducted a systematic lustration and never looked into the past of the persons who had worked in the Soviet state service [Chapter 8.3.1.]. The same can be said about the criminal prosecution of perpetrators of Soviet state crimes: it never happened [Chapters 6.2.–6.4.]. Consequently, the pension legislation does not contain any past-related curtailment or abolition of pension rights [Pilipenka (2010), pp. 306–309]. On the contrary: Articles 1–2 Military Pensions Act expressly provides for pensions being paid to former employees of Soviet state security bodies and internal affairs bodies which includes even KGB personnel.

Only the Special Merits Pensions Act allows in Article 11 for the termination of the special merits pension – not of the basic regular pension – if the recipient is convicted of crimes related to the Soviet regime. There is no relating court practice, and legal literature does not discuss this – so far theoretical – possibility of sanctioning Soviet perpetrators in the pension system.

¹⁷⁰ Slovak Law no. 283/2021 Z.z. on the Revocation of Undeserved Privileges of Representatives of the Communist Regime; Slovak Constitutional Court, judgement of 20 December 2023, ÚS 2/2022-119.

¹⁷¹ Until the late 1990s, Germany paid secret pensions to Belgian, Danish, Dutch or Latvian former SS members in breach of Belgian, Danish, and Dutch legislation. There was the famous case of a Latvian Jew stating that his neighbour received a regular pension from Germany for his former SS membership whereas he, a holocaust survivor, got nothing from Germany: Küpper (1996).

This neutrality of pension law towards the Soviet past is in line with the recommendation of the Parliamentary Assembly of the Council of Europe.

The Soviet Union ended in 1991 which means that all incriminating ‘tainted’ work happened more than three decades ago. Given the long time-lines in pension systems, it is probably still possible to disqualify the work for repression organs such as the KGB from counting for pension claims, both for persons who already receive pensions (meaning that their pensions are reduced or even annulled) or who apply for a pension when they reach the pension age (meaning that their pension does not contain any payments for the times of tainted work).

Such a measure would raise questions of constitutional law as well as societal reconciliation. From a constitutional perspective, the retroactive disqualification of tainted work times in the pension reduces present or future pensions. Since this disqualification relates to facts before 1991, the persons affected have no means to alter the relevant facts. Therefore, this legislation is retroactive in a strict sense, and it affects persons negatively. Persons who receive an old age or invalidity pension will find it hard to replace the cancelled monthly income. Persons who are still active in a profession will also face problems because if they worked before 1991 for Soviet repression organs, they are now not too far from the pension age, having little chance to replace the pension claims that they will not get due to the retroactive pension legislation.

Retroactive changes in legislation to the detriment of the individual are at least questionable under the rule of law¹⁷² and are, as a rule, forbidden by Article 58(1) Const. Ukr. If the reduction or even annulment of current or future pensions causes social hardship, concerns in connection with the social state arise.¹⁷³ Citizens have a constitutional right to receive an old age pension which must not be lower than the legal minimum standard of living,¹⁷⁴ and new or amended laws must not diminish ‘the content and scope of existing rights’, as Article 22(3) Const. Ukr. sets out. Therefore, retroactive reductions of current or future pensions face considerable constitutional thresholds.

Some countries consider acquired pension rights as covered by the constitutional guarantees for property. In Ukraine, this discussion is ongoing. The Constitutional Court stresses the contractual nature of pensions which means that they are probably not covered by the property clause whereas regular

¹⁷² Article 1, Article 8(1) Const. Ukr.

¹⁷³ Article 1 Const. Ukr.

¹⁷⁴ Article 46(1), (3) Const. Ukr.

courts concentrate on the human rights aspect, relying on the Strasburg case law [Shabanov (2019)].¹⁷⁵

Pension claims constitute a separate constitutional right in Article 46 Const. Ukr. which makes the application of the concept of property to these claims questionable. Still, if Ukraine interpreted its constitution in this way, any lowering of acquired pension rights would have to conform to Article 41(4)1 Const. Ukr. as well, along with Article 58(1). However, the property clause only forbids an ‘unlawful’ deprivation of property. Lawful deprivations may take place, i.e. that the state may take away property rights by way of legislation which has to conform, however, to the Const. Ukr.

All in all, the property clause of the Const. Ukr. does not give rise to additional constitutional problems. The main obstacles in the Const. Ukr. against a reduction of current and future pension claims lie in the retroactivity of the negative effect, which raises objections under the rule of law and the pension-related constitutional provisions. In principle, it is possible to overcome these objections, relying on an argument that the German Federal Constitutional Court used with view to the legislation on the socialist past of East Germany: that the collapse of a totalitarian regime created a historically exceptional situation in which the material aspect of the rule of law (‘historical justice’) may justify certain deviations from the formal side of the rule of law, constitutional rights and other constitutional safeguards, provided that they were proportionate [Schroeder, Friedrich-Christian/Küpper, Herbert/Bormann, Axel in Schroeder/Küpper (2010)].

This argument would probably hold strong in Ukraine as well, given the fact that the country liberated itself from a both colonial and totalitarian rule. However, the pension claims of, e.g., former KGB officers have existed now for more than three decades under the laws of independent, post-socialist Ukraine. The argument of the historically exceptional situation may be appropriate in the moment of independence and some short period thereafter but seems questionable, even abusive after more than three decades.

Next to these constitutional objections, the Ukrainian legislator has to consider carefully whether or not a change in the pension system to the detriment of former employees of Soviet repression organs might upset societal peace. Pension questions are always sensitive, inter alia because the persons concerned have little chances to obtain alternative sources of income, and changes are liable to cause

¹⁷⁵ Constitutional Court of Ukraine, decision no. 25-rp/2009 of 7 October 2009; Supreme Court of Ukraine, decision no. 805/402/18 of 3 May 2018, referring to Sukhanov and Ilchenko v. Ukraine as well as Article 1 or Protocol no. 1 ECHR.

considerable unrest. One reason for the German post-Nazi policy to grant pensions also for the time served in repression organs was that former Nazis should be given the chance to reconcile with the new democratic state and that the state itself made such a reconciliation, perhaps acceptance difficult, even impossible if former helpers of the dictatorship faced pension reductions under and by the new system. On the other hand, it may upset societal peace if the former ‘perpetrators’ enjoy a better living and higher state benefits in the new system than their ‘victims’ do.

In the case of Ukraine, there is another factor to be considered. If Ukraine lowered or annulled the pensions of the former ‘henchmen’ of the Soviet rule, e.g. KGB officers, a look at the Baltic republics reveals what would happen: Russia takes over and pays their pensions. This means that the loyalty of those persons would quite certainly tend towards Russia and their emotional ties to Ukraine would loosen. Ukraine would run the danger of creating a Russian ‘fifth column’ of dissatisfied pensioners with a Soviet past.

8.4. Analysis

Ukraine decided at a very late point in time to lustrate certain office holders. The reason to start lustration in 2014 was not the Soviet past but the much closer Yanukovich years and the start of the Russian aggression. The extension of the lustration onto holders of high offices in Soviet times was not more than a side-line of the lustration legislation. Russia linked its aggression to the Soviet past, using it as a source of legitimacy for its war, which was the reason for Ukraine to encompass in its lustration present pro-Russia activities as well as high-ranking positions in the Soviet Union. The value of the inclusion of the Soviet time is symbolic rather than practical because few persons who were in high positions before or in 1991 were still in high positions in 2014. However, symbolic considerations have a certain legitimation in legislation on the past.

Lustration is closed now. If there were any Soviet ‘survivors’ in high positions in Ukraine, they either resigned or were removed. This question is no longer of actuality. Future lustrations, if there will be any, will not have to include the Soviet time as one of the tainted periods.

Unlike lustration, the questions of old age or invalidity pensions for persons who held certain offices in the Soviet Union is still of some actuality. As of 2026, few persons who held responsible positions in Soviet times can be expected to be still in employment. The number of persons receiving old age or invalidity pensions is much higher. So far, Ukraine has not applied any repercussions in the pen-

sions of persons who were in high positions, in the secret police or other potentially incriminating positions during Soviet times, with the theoretical exception of cancelling extra special merit pensions. Striking the times of employment in, e.g., the secret police from the times that count for pension claims is one possible reaction of a post-totalitarian (or post-colonial) state. Being part of the endeavour to create ‘transitional justice’ (with emphasis on ‘transitional’), such a reaction should be introduced, however, soon after the end of the totalitarian (or colonial) regime. If it is introduced more than three decades after the end of such a regime, this raises serious concern as to the proportionality of the restrictions involved. The reduction of current or future pension claims for persons who worked for certain parts of the Soviet regime is therefore questionable. Furthermore, if Ukraine were to cut pension claims for former Soviet officials, it would have to weigh very carefully the effect this has on societal peace and reconciliation as well as on creating new pro-Russian groups within its population.

In sum, there is no need for further action in the field of lustration, and it is too late now for the Ukrainian law-maker to become active in the field of pension claims for tainted work in Soviet times.

9. Societal Reconciliation

The overall aim of politics of the past and legislation on the past is societal reconciliation. After a time of arbitrary abuses, injustice, human rights violations, and state crimes, perpetrators, victims and other persons have to live together in the same society. This is true for, *inter alia*, post-totalitarian as well as post-colonial situations. For this reason, international law very strongly focuses on the future development of the society in question: restorative and transitional instead of retributive justice [Teitel (2014); Uerpman-Witzack (2024)]. The Ukrainian measures analysed in Chapters 3. to 8. are elements that, each in its own field, are supposed to further and serve societal reconciliation by addressing with legal means the wounds that Soviet injustice caused, by making clear who did wrong and who suffered wrong, and by preventing a repetition of past injustice (‘never again’).

The Const. Ukr. sets out among the goals in its preamble the ‘care for the strengthening of civic harmony on Ukrainian soil’ (пiклюючись про змiцнення громадянської злагоди). This can be read as a constitutional acknowledgement of the need for societal reconciliation. Ukraine’s post-totalitarian and post-colonial societal reconciliation, the country’s coming to terms with its burdensome past serve another goal, too. Russia ‘justifies’ its aggressions and war against Ukraine with the narrative that the Soviet times were good and that the Soviet Union should be restored under Russian leader-

ship. If Russia were given its way, the glorified Soviet times would come back for all peoples united under Russian rule: this is what Russian propaganda says or insinuates. Open wounds within Ukrainian society stemming from the glorified Soviet times are a welcome starting point for Russian propaganda to disunite the country and weaken its defence. In this situation of a military and propagandistic aggression, societal reconciliation necessarily plays a different role than in ‘normal’ post-totalitarian or post-colonial states.

In international law and the more recent national politics on the past (the latter usually in the Global South), truth and forgiveness are seen as the ultimate instrument to open a path into a common future, and ‘truth telling’ is seen as a central measure [Klumpp (2001); Méndez (2012), pp. 1274–1275; Uerpmann-Witzack (2024), p. 13]. In the years following the end of the totalitarian (or colonial) regime, ‘truth commissions’ or ‘truth and reconciliation commissions’ are seen as the ideal tool to achieve truth and forgiveness:

“Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations.”¹⁷⁶

Truth commissions seem to have been quite successful in some countries of the Global South. However, their success is partly based on the fact that they adapt to the particularities of traditional societies. In East European societies with their long tradition of statutory law, such commissions may not be the best tool available [Uerpmann-Witzack (2024), pp. 5, 13]. Nevertheless, their mode of operation, i.e. unveiling the truth through societal debate and dealing with guilt and forgiving in an open as well as societal (i.e. not limited to the individual level) process, may in principle be adapted to post-socialist societies.

A more adequate role model than post-colonial truth commissions may be state-sponsored research such as the two parliamentary Commissions of Inquiry on the history and consequences of the communist dictatorship in Germany. Formally, the federal parliament installed a commission of inquiry which in turn appointed research commissions composed of experts who produced in an academically sound quality a description and an analysis of the East German dictatorial regime, its injustices and its consequences for reunified Germany [Deutscher Bundestag (1995); Deutscher Bundestag (2000); Krüger (2011)]. It is important to state that that state-sponsored research into East German history

¹⁷⁶ United Nations Secretary General (23 August 2004), § 50.

was not the only and not even the most important piece of research but it demonstrated that the German federal parliament, being the democratic representation of the reunified German people, was interested in the past and the mechanisms to overcome its legacies, but did not politicise the question in the sense of party politics but much rather hired a large number of neutral experts to provide the necessary knowledge.

In the case of Ukraine, the role of ‘truth and forgiveness’ for reconciliation and ‘civic harmony’ must bear in mind that the Soviet regime ended over 35 years ago. After such a time, the instruments developed for tackling the questions of the past immediately after the end of that past may need to be modified to the needs and possibilities of a society one and a half generation after the facts in question. Furthermore, Ukrainian politics of and legislation on the past refer to an era which now is instrumentalised by the aggressor to ‘justify’ its war and to disunite Ukrainian society. This links the Soviet past in a unique way to the country’s present situation when reconciliation and civic harmony are defined in terms of resilience against the Russian propaganda war. That unique link is reflected, e.g., in Ukraine’s lustration laws which examine the past of public officials under the aspects of both having served the Soviet rule and collaborating with Russia now [Chapter 8.3.]. The special Ukrainian situation that internal societal peace is endangered by the centre of the former colonial empire, instrumentalising the era of empire for its present aggression, reduces the function of foreign practices and experiences as a role model. Still, ‘truth and forgiveness’ are a good way for Ukraine, too, but have to be achieved in genuinely Ukrainian ways.

In a comparative perspective, one central question of truth commissions and similar institutions is whether they should be allowed or even obliged to ‘name names’. Some think that this will further reconciliation whereas others argue that this will rather stand in the way of a true reconciliation [Méndez (2012), pp. 1274–1275]. This question is no problem in Ukraine because the archive laws say that information about perpetrators, at least one group of particularly tainted perpetrators (former agents of the secret police etc.), is open to everybody [Chapter 4.4.2.]. Ukrainian law answers the question of ‘naming names’ with a ‘yes’, which seems to be the appropriate answer several decades after the end of the Soviet rule. Apart from its effect on societal reconciliation over the Soviet past, ‘naming names’ may have an effect of general prevention on potential collaborators with Russia in the present war: they can never be sure that their misdeeds will be shielded from public knowledge forever.

Apart from truth-telling and forgiving, hereditary and ongoing rights violations must be addressed because they are liable to cause discontent, thus hindering reconciliation and civic harmony. Hereditary violations are the withdrawal of the citizenship and the expulsion from the homeland. Both grievances do not only violate the rights of the persons immediately affected but also of their descendants. As far as the legitimate interests of expatriated and deported persecutees and their children and grandchildren are not addressed in a satisfactory manner, societal reconciliation cannot be deemed to have been achieved in this respect. This is especially true for expulsions from the homeland because those were not only individual but collective crimes. Their unsolved open wounds are collective as well. The Crimean Tatars are a good example because they have made their partially unsolved resettlement an issue in Ukrainian politics. An ongoing potential violation is the material in the Soviet repression archives because their documents and contents have violated from the day they were written and collected the privacy and data protection rights of the persons who are the object of the files. Today's management of these files and documents must make sure that the potential danger for human rights does not materialise, as well as that a legitimate use of these documents for, e.g., historical research, court and administrative procedures, or 'truth telling' in general is ensured.

Other fields of post-totalitarian and post-colonial transitional or reparatory justice are of limited importance in today's Ukraine. Therefore, they do not have a major impact on societal reconciliation. There is hardly any legal debate and not much political discussion about whether surviving perpetrators of state crime should be put before court. In the employment in public offices, the question of present collaborators with Russia is much more pressing, and therefore receives much more attention, than the question of former high-rank Soviet officials. The fate of the perpetrators is no longer a central element of 'reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal' [European Parliament (2 April 2009), § 16]. The same is true for the indemnification of the victims. Apart from hereditary and potentially ongoing human rights violations, the question is hardly ever discussed in the legal as well as the general press. Any legislative or administrative activity in this field will hardly contribute to, or torpedo, societal reconciliation, unless the victims in question manage to make it a political issue the way the Crimean Tatars have made their quest for resettlement into Crimea a question of public concern.

Finally, on a factual level, the erection of new monuments as well as the care and recontextualization of Soviet monuments¹⁷⁷ is a question which continues to cause debates in Ukraine. International soft law recommends to retain monuments of the totalitarian rule and put them into a new context through

¹⁷⁷ On the 'plurality of monuments' in pre-2014 Ukraine Portnov/Dathe (2008).

societal debate [Parliamentary Assembly of the Council of Europe (29 January 2009)]. Ukrainian legislation advocates the care of existing, as well as the creation of new monuments for the victims of repression,¹⁷⁸ for the fighters and victims of World War II as well as for the victory in that war¹⁷⁹ but prohibits the reference to certain monuments defined as ‘symbols of the communist totalitarian regime’¹⁸⁰ and orders national authorities and local governments to demolish monuments and objects of commemoration for perpetrators of Holodomor, of persecution of fighters for Ukrainian independence or of repression in general as well as persons in high party or state position of the Soviet era, and to change toponyms containing their names [Portnov (2015)].¹⁸¹ Later legislation such as the so-called Decolonisation Act, enacted after Russia’s open attack in 2022, prescribed an even stronger decommunisation, de-Sovietisation and de-Russification of toponyms, monuments, commemoration sites and similar objects reminding of the Soviet rule.

The re-naming of geographic places, which is an object of strong debate in Ukraine, concerned 84 towns including Dnepropetrovsk and more than 900 villages [European Commission for Democracy through Law / OSCE (18-19 December 2015), § 38, relying on data by the UINC; Kasjanow (2016); Viatrovych (2024), pp. 6–7] as well as numerous streets and similar objects [Gironi (2023)]. The Ukrainian Institute of National Commemoration is involved in identifying objects, names etc. bearing a colonial heritage [Hörbelt (2017)]. This Ukrainian practice is only partly in line with international soft law because it promotes commemoration of the fight for independence, the victims of Soviet repression and the victory in World War II, i.e. the ‘non-shameful’ parts of Ukrainian history, but actively fights back anything reminding of the Soviet rule. The latter is contrary to international recommendations.

However, Ukraine cannot take the relaxed attitude towards the monuments of Soviet rule the international documents advise because of the ongoing Russian war which instrumentalises the Soviet heritage – to be more precise, an invented version of the Soviet past – in its war against Ukraine [Richter (2018)]. Ukraine therefore does not have the peace and rest to recontextualise Soviet monuments but needs to fight off Russian aggression. Local resistance against renaming and recontextualisation is therefore highest in those parts of Ukraine where many Russians, identifying themselves with Soviet-Russian and not Ukrainian narratives, live [Kovalov (2022); Prymachenko (2021)]. International soft law, too, acknowledges that renaming geographical names in order to eliminate the memory of, and

¹⁷⁸ Article 9(2) no. 3 Rehabilitation Act.

¹⁷⁹ Article 2(1) no. 2, Articles 3–5 1945 Victory Act.

¹⁸⁰ Article 1 no. 4(e), (f), Article 4 Totalitarian Regimes Condemnation Act.

¹⁸¹ Article 7 Totalitarian Regimes Condemnation Act.

propaganda for, a former totalitarian (or colonial) regime is legitimate and may serve societal reconciliation and peace, but only if these changes are not decreed top-down but result from inclusive debates in the locations in question and in society on the whole [European Commission for Democracy through Law / OSCE (18-19 December 2015), §§ 100–101]. Ukraine must be careful not to overdo the Ukrainization which might alienate a part of its population, the state’s narrative needs to respect other views, interpretations and research [Stryjek (2015)]. An imposed state-sponsored truth will achieve the opposite of societal reconciliation [Coynash (2015); Zhurzhenko (2022)]. Given the country’s unique situation, Ukraine’s policy seems adequate in most questions, though not in every detail. In any case, state policy of de-communisation, de-Russification and Ukrainization, i.e. typical post-colonial nation-building, should in any case involve more societal debate including NGOs.

In sum, societal reconciliation in Ukraine today should concentrate on ‘truth and forgiveness’ adapted to the special situation the country is in. Given the distance in time, ‘forgiveness’ perhaps is no longer a central issue, but ‘truth’ is and will continue to be so. This means that ‘telling the truth’ is not only important for the re-integration of the victims of persecution into the society and, arguably, for the identification of the perpetrators but also for falsifying the Russian narrative of ‘Soviet glory’ and the conclusions Russia draws from it. ‘Telling the truth’ on an individual level (victims and perpetrators) and on a societal or national level (historiography) interact in the special Ukrainian case.

The Const. Ukr. offers a suitable framework: it guarantees the individual freedoms of speech and of receiving information, and it makes commemoration and research on the Soviet past a task for the state. In this respect, it is important to stress that memory and research must not be monopolised by the state but must be predominantly a societal activity. Only a strong societal debate will create the reconciliation and resilience necessary to fight off Soviet-Russian narratives of an invented past. This means primarily that the state must provide room and fora for private research, ‘story telling’ etc., but it means more than this. The state should actively promote societal initiatives for debate, research or commemoration, e.g. by supporting relevant NGOs and, perhaps, by including these NGOs in commissions on archives, on the recognition of repressed persons [Chapter 5.4.1.1.2.] etc. Ukraine can do much more in this respect than it has done already. The general goal of strengthening civil society in post-socialist countries is of particular relevance in the field of politics of the past [Parliamentary Assembly of the Council of Europe (27 June 1996), § 16].

An important institutional backbone for ‘truth telling’ is the archive system [European Parliament (2 April 2009), § 6]. Their societal role can be expanded. Until now, their role has been rather a serving

one, providing infrastructure for state-sponsored or private research and taking over certain official functions in special administrative procedures. Adequate changes in the pertinent legislation can charge these institutions with a more active role in the publication and advertisement of their materials and the findings deducted from them. On the other hand, the archive legislation must be amended to give persons the right to add a protest to the contents of the files the repression organs wrote and collected about them. Without this right to protest, their constitutional right of correcting wrong archival information is violated and, perhaps even more important, societal reconciliation will be hampered if victims of Soviet persecution get the feeling that the present Ukrainian state continues to disseminate the lies that Soviet agents invented about them.

So far, Ukrainian law has given societal debate a wide field because its criminal legislation on the protection of the public debate against distortion, e.g. by denying certain legal facts, is more reluctant than in other countries. It is a question of public policy whether or not to tighten criminal legislation and penalise certain public statements deemed irreconcilable with the historical truth. In the special situation of Ukraine, a debate as free as possible seems to be one of Ukraine's strong points – as opposed to Russia where criminal law punishes more and more public statements not in line with the government's arguments [Küpper (2025)]. Free speech constitutes a free society, and a free society is perhaps Ukraine's best weapon against Russia's enticements. This means that distortions of the past, conscious lies and unconscious errors, the denial or trivialisation of historical traumas should be countered by facts and arguments, not by criminal prosecution [Portnov (2015); Portnov (2017)]. Again, archives and the UINC may play a more active role by publishing materials on debated historical truths.

Finally, Ukraine has to answer the question of how to combine its politics of, and legislation on, the past with the fight against Russia's propaganda war. As was said before, the ongoing war puts Ukraine in a special situation which is difficult to compare with 'ordinary' post-totalitarian or post-colonial states. The war causes new atrocities, human rights violations and injustice, and these events, too, need to be discussed and processed in an open debate. It is again a question of public policy whether the state, in its endeavour to promote public debate, should link the 'truth telling' about the Soviet past with its self-defence against Russian propaganda. In some fields, interests run parallel, e.g. when repressed persons tell their stories and thus falsify the idyllic picture Russia paints about the Soviet past. Telling the truth about Soviet crimes is one instrument to prevent the repetition of such crimes, and this prevention, this 'never again' function is considered to be one of the central features of post-totalitarian or post-colonial 'truth telling' [Klymenko (2017); Parliamentary Assembly of the Council

of Europe (25 January 2006), § 7]. In other fields, interests may be less reconcilable, and the question arises whether the present war legitimises the state or social actors to instrumentalise the ‘truth telling’ and other politics of the Soviet past for purposes of the ongoing warfare. The heroization of some groups of fighters for Ukrainian independence is such a field. This question of public policy should not be answered by the state in an authoritative manner but should be the result of a wide and inclusive societal debate. Here again, free speech, free debate, free research and free discursive procedures, perhaps supported, but not dominated by the state, relying on a strong and independent civil society, are the best answer for societal reconciliation in the special situation of an ongoing war which uses the totalitarian and colonial past as a source of legitimisation.

Conclusions

The end of both a totalitarian dictatorship and a colonial rule leave behind extensive past-related tasks for the post-totalitarian and / or post-colonial state and society. All former satellites of the Soviet Union reacted in some way to this legacy. Some enacted a comprehensive legislation on the past, others limited themselves to some measures. Ukraine’s situation may be summarised in the statement that Ukraine did some steps on the path of politics of, and legislation on, the past but stopped mid-way in many fields.

Looking at the typical areas of the East European politics of and legislation on the past, and projecting them onto present Ukraine, some conclusions can be drawn. The main difference between the post-socialist East European states of the 1990s and present-day Ukraine lies in the distance towards the bygone dictatorship. Whereas Eastern Europe started to deal with its past soon after the end of socialism, Ukraine is now more than three decades away from that past. This makes a difference in various respects.¹⁸²

– First, the question of the perpetrators has lost its importance for biographic reasons. Most of the perpetrators of the more atrocious Soviet crimes are dead. The number of surviving perpetrators of crimes of some weight is probably small. This reduces the practical importance of criminal justice, both in a rule of law perspective and with respect to societal reconciliation.

¹⁸² More detailed assessments of what has been achieved, where improvements are advisable, and which questions have not been addressed at all, can be found in the sub-chapters titled ‘analysis’ at the end of every topic.

This is even more valid for the question of whether or not to keep Soviet public employees in the state service. After more than thirty years, there will be hardly anybody who worked in the Soviet public service in a position where they could have seriously compromised themselves, and who is still in active state or communal employment in Ukraine. These persons, if they exist at all, are very close to the pension age so that in their case, a proportional solution might be an early retirement rather than a dismissal.

Furthermore, in present-day Ukraine questions of the lustration for collaboration with the Russian enemy overlay the lustration for positions in Soviet repression organs. Since the glorification of the Soviet past is one Russian strategy to ‘justify’ its war and to win the support of Ukrainian citizens, both aspects are interdependent. Nevertheless, nowadays the question of who is unreliable for reasons of a Russian affiliation is more urgent and more current than the question of who is unreliable with view to their Soviet past. The only question of some practical impact in relation to the individual’s Soviet employment history is whether or not old age pensions should be paid for ‘odious’ work, e.g. in the Soviet repression organs.

– Second, not only the perpetrators grew older, but so did the victims of state crimes, too. In their case, however, the acknowledgement of their status as victims, eventually some sort of material acknowledgement (payment, pension), never comes too late. This includes the acknowledgement of groups of victims resp. special forms of repression that so far are not covered by the Ukrainian politics of, and legislation on the past, such as, e.g., stolen children or abused sportspersons. As long as victims live, it is reasonable for the Ukrainian state to address their needs. One possible measure would be to streamline the pertinent legislation to make it easier to handle.

Special attention should be paid to forms of Soviet injustice which are ongoing or hereditary and therefore do not lose their importance in the course of time. Three forms of Soviet state crimes can be considered to be hereditary or ongoing. This means that their consequences are of actuality today.

(1) The materials in the archives of the repression services contain data that violate the privacy and other human rights of those persons who are the object of information. The Soviet repression organs gained and stored this information in ways that are illegal today. Therefore, the violation of individual rights by the archive materials did not stop with the end of the Soviet Union but continues as long as these materials exist. This is especially true if the persons who are the object of information are still alive. But even if they are dead, their dignity did not end with their death but continues to exist and has to be respected.

(2) The withdrawal of the citizenship affects not only the person whose citizenship is unlawfully terminated. In a *ius sanguinis*-system such as Ukraine it also deprives the descendants of that person who, without the withdrawal of their (grand)parent’s citizenship, would in due course have inherited it.

(3) Many members of the deported ethnic groups continue to live in their place of deportation or elsewhere outside their traditional homeland. The mass deportations violated, *inter alia*, the rights to the privacy of the home, to live one’s culture in the setting of the traditional community, and to chose the residence freely. This violation of rights affected the persons who were deported and continues in their descendants who still cannot live in their traditional communities in their traditional homelands and villages. One aim of the Soviet deportations was to disrupt the cultural and social life of the ethnic groups in question which puts the deportations close to a genocide.

Since the effects of the Soviet violations are ongoing, they can and need to be addressed with other means than the exclusively past injustice.

– Third, Ukrainian legislation on the past provides not only for the victims of Soviet repression, but also for the fighters for Ukrainian independence. In this context, it is necessary to make sure that formations and individuals participating in gross violations of human rights receive neither an honouring memory nor financial or other benefits.

– Forth, Soviet legacies in geographical names, names of institutions etc. did not and do not violate individual rights. They are not crimes of the past, they are not unjust, merely a legacy. Nevertheless, they may be considered undesirable or offensive, perhaps even disruptive of social peace and reconciliation, because they remind of and, as the case may be, celebrate Soviet rule, particular Soviet crimes or individual Soviet perpetrators. Soviet names continue to be present in Ukraine; the question is still open, particularly in the Eastern and Southern parts of the country. Re-naming may solve the issue.

When re-naming places, institutions etc., other principles apply as when dealing with perpetrators or victims. Both perpetrators and victims are human beings, having certain rights which have to be taken into account and which need to be weighed against the post-totalitarian public interest. The names of places etc. do not touch individual rights.¹⁸³ As a result, it is a question of public interest only. There-

¹⁸³ A recent (German) decision of the Administrative Court in Appeal of Berlin and Brandenburg of 22 August 2025, nos. OVG 6 S 70/25, 71/25 and 72/25, states that the renaming of a street does not infringe on the individual right of the neighbours because there is no right to retain the existing (street) name. Its reasoning may apply to Ukraine as well.

fore, they are more open to political debate than the punishment of the perpetrators or the care for the victims are – which have to be conducted, in the individual case, in the strict framework of rule of law-based legal and administrative procedures. Naming and renaming underlies wide political and administrative discretion. Since the central aim of renaming is to achieve and further societal reconciliation, this discretion should be exercised in an inclusive way, inviting the persons concerned and society on the whole to take part in the discussions about proper naming. The relevant provisions in Article 7(2) no. 6 Totalitarian Regimes Condemnation Act settle the decisions about place names exclusively on the public authorities. Whether or not they include public debates is open to their discretion. The law should be changed in this point in order to open decisions about place and other names to public debate. One possible solution would be to include the neighbours in the decision-making on renaming by way of (facultative or obligatory) local referenda.

– All in all, Ukraine’s situation is special not only in respect to the time elapsed since the end of Soviet rule, but also in respect to Russia’s war against it. This war aims at the destruction of the Ukrainian state and, if Russia’s propaganda is to be believed, at the annihilation of the Ukrainian people and its identity. At the same time, Russia uses a partially invented Soviet past and the nostalgia attached to it as a means to divide Ukrainian society. This means that Ukraine’s past-related policy and legislation must bear in mind to a much higher degree than usually the effect they have on social reconciliation as well as social resilience. Social reconciliation is a key factor in all post-totalitarian and post-colonial states but it is even more vital if that state becomes the victim of an aggressive war waged by the former colonial power. This gives the legislative gaps and inadequate regulations identified in our pilot project a special relevance.

Insofar, the change of the name of one’s street or locality may cause some practical concern for a transitional period of time but does not touch any existing rights.

Ukrainian legislation¹⁸⁴

- 1945 Victory Act: Law of Ukraine no. 315-VIII of 9th April 2015 ‘On the Perpetuation of the Victory over Nazims in World War II 1939-1945’ [Working Paper no. 12]
- 1992 Minority Act: Law of Ukraine no. 2494-XII of 25th June 1992 ‘On the National Minorities of Ukraine’
- 2022 Minority Act: Law of Ukraine no. 2827-IX of 13th December 2022 ‘On the National Minorities (Communities) of Ukraine’
- Archive Fund Act: Law of Ukraine no. 3814-XII of 24th December 1993 ‘On the National Archive Fund and the Archives’
- Const. Ukr.: Constitution of Ukraine of June 28, 1996, last amended on February 7, 2019; this study relies on the version published on the website of the Constitutional Court of Ukraine: <https://ccu.gov.ua/sites/default/files/konstytuciya_ukrayiny.pdf>
- CP Assets Nationalisation Act: Law of Ukraine no. 2004-XII of 20th December 1991 ‘On the Transfer into State Property of the Assets of the Communist Party of Ukraine and of the CPSU’ [Working Paper no. 16]
- Crimean Tatars Genocide Resolution: Resolution of the Verkhovna Rada of Ukraine no. 792-VIII of 12th November 2015 ‘On the Recognition of the Genocide of the Crimean Tatars’
- Criminal Code: Law of Ukraine no. 2341-III of 5th April 2001 ‘Criminal Code of Ukraine’ [Working Paper no. 15]
- Criminal Procedure Code: Law of Ukraine no. 4651-VI of 13th April 2012 ‘Criminal Procedure Code of Ukraine’.
- Decolonisation Act: Law of Ukraine no. 3005-IX of 21st March 2023 ‘On the Condemnation and Prohibition of Propaganda for Russian Imperial Policy in Ukraine and the Decolonisation of Toponyms’
- Deported Persons Act: Law of Ukraine no. 1223-VII of 17th April 2014 ‘On the Restoration of the Rights of Persons Deported on Grounds of Nationality’ [Working Paper no. 26]
- Fighters for Independence Act: Law of Ukraine no. 314-VIII of 9th April 2015 ‘On the Legal Position and the Honouring of the Memory of the Fighters for the Independence of Ukraine in the XXth Century’ [Working Paper no. 11]
- Holodomor Act: Law of Ukraine no. 376-V of 28th November 2006 ‘On the Holodomor 1932-1933 in Ukraine’ [Working Paper no. 10]

¹⁸⁴ The references to working papers mean the working papers of the project, published on the project website <<https://nachkriegsukraine.de>>. The working papers contain the German translation of the Ukrainian law.

- Indigenous Peoples Act: Law of Ukraine no. 1616-IX of 1st July 2021 ‘On the Indigenous Peoples of Ukraine’
- Information Act: Law of Ukraine no. 2658-XII of 2nd October 1992 ‘On Information’
- Lustration Act: Law of Ukraine no. 1682-VII of 16th September 2014 ‘On the Cleansing of the Power’ [Working Paper no. 19]
- Military Pensions Act: Law of Ukraine no. 2262-XII of 9th April 1992 ‘On the payment of pensions to persons dismissed from military service and certain other persons’ [Working Paper no. 21]
- Misdemeanour Code: Law of Ukraine no. 8073-X of 7th December 1984 ‘Misdemeanour Code of Ukraine’ [Working Paper no. 23]
- National Identity Act: Law of Ukraine no. 2834-IX of 13th December 2022 ‘On the Basic Principles of the State Policy in the Field of the Strengthening of the Ukrainian National and Civic Identity’ [Working Paper no. 18]
- Nationality Act 1991: Law no. 1636-XII of 8th October 1991 ‘On the citizenship of Ukraine’ [Working paper no. 24a]
- Nationality Act 2001: Law no. 2235-III of 18th January 2001 ‘On the citizenship of Ukraine’ [Working paper no. 24b]
- Pensions Act: Law of Ukraine no. 1788-XII of 5th November 1991 ‘On the payment of pensions’ [Working paper no. 20]
- Rehabilitation Act: Law of Ukraine no. 962-XII of 17th April 1991 ‘On the Rehabilitation of the Victims of Repressions of the Communist Totalitarian Regime 1917-1991’ [Working Paper no. 9]
- Repression Archives Act: Law of Ukraine no. 316-VIII of 9th April 2015 ‘On the Access to the Archives of the Repression Organs of the Communist Totalitarian Regime of 1917–1991’ [Working Paper no. 13]
- Special Merits Pensions Act: Law of Ukraine no. 1767-III of 1st July 2000 ‘On Pensions for Special Merits for Ukraine’ [Working Paper no. 17]
- State Succession Act: Law of Ukraine no. 1543-XII of 12 September 1991 ‘On the Legal Succession of Ukraine’
- Totalitarian Regimes Condemnation Act: Law of Ukraine no. 317-VIII of 9th April 2015 ‘On the Condemnation of the Communist and National-Socialist (Nazi) Totalitarian Regimes in Ukraine and the Ban on Propaganda of their Symbols’ [Working Paper no. 14]
- UINC Charter: Decree of the Cabinet of Ministers of Ukraine no. 684 of 12th November 2014 ‘Some Questions of the Ukrainian institute of national commemoration’ [Working Paper no. 25b]

UINC Decree: Decree of the Cabinet of Ministers of Ukraine no. 292 of 9th July 2014 ‘Questions on the Ukrainian institute of national commemoration’ [Working Paper no. 25a]

Veteran Act: Law of Ukraine no. 3551-XII of 22nd October 1993 ‘On the legal position of war veterans and the guarantees of their social protection’ [Working Paper no. 22]

Abbreviations

BVerfGE: Collection of the decisions of the German Federal Constitutional Court (volume/page)

CIS: Commonwealth of Independent States

Const. Ukr.: Constitution of Ukraine of June 28, 1996

CP: Communist Party

CPSU: Communist Party of the Soviet Union

DPs: Displaced Persons

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

GDR: German Democratic Republic

ICCPR: International Covenant on Civil and Political Rights of December 16, 1966

KGB: Komitet gosudarstvennoy bezopasnosti (Комитет государственной безопасности – Soviet secret police)

OSCE: Organization for Security and Co-operation in Europe

OUN: Organisation of Ukrainian Nationalists

RSFSR: Russian Soviet Federative Socialist Republic

SS: Schutzstaffel (the armed wing of the German Nazi party, responsible, inter alia, for running the concentration camps)

SSR: Soviet Socialist Republic

UAH: Ukrainian Hryvna (Gryvna)

UINC: Ukrainian Institute of National Commemoration (Український інститут національної пам’яті, alternative translation: Ukrainian Institute for National Remembrance)

UK: United Kingdom of Great Britain and Northern Ireland

UN: United Nations

UNESCO: United Nations Educational, Scientific and Cultural Organisation

UPA: Ukrainian Insurgent Army

USSR: Union of Soviet Socialist Republics

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