RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

DENIAL OF AGGRESSION AGAINST UKRAINE OR OCCUPATION OF ITS TERRITORY: A NEW CASE AMONG THE DENIAL CRIMES

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ABSTRACT

Background: *Denial crimes are considered one of the most controversial topics in modern criminal law. The criminalisation of historical negationism is problematically balanced between two extremes: the need to protect historical memory, public order and the feelings of victims of terrible tragedies and their descendants, and the need to safeguard freedom of expression and academic debate. Despite this tension, the criminalisation of denial crimes has been gaining momentum on the European continent and is constantly expanding.*

For a long time, Ukraine has remained on the sidelines of this complex debate on the prohibition of denials. However, Russian aggression prompted the Ukrainian parliament to criminalise the denial of the aggression against Ukraine and the occupation of its territory. The wording of the law is not trivial and differs from classic European models. Two laws were adopted simultaneously, but they were not synchronised with each other, creating a collision. Despite this, both are widely used.

This article, therefore, demonstrates Ukraine's thorny path to criminalising denials and the legal difficulties that arose from the extreme conditions under which the laws were adopted.

Methods: *In the initial stages of the research process, the authors present a concise overview of the evolution of criminal prohibition of denial across the globe, focusing on recent trends. This is achieved through the application of historical and comparative legal methods.*

The central section of the study is devoted to an examination of the Ukrainian experience, comprising two parts. The first section elucidates the evolution of the concept of criminalisation of these actions in Ukraine through an analysis of legislative initiatives and the outcomes of their assessment. The second section is dedicated to investigating the shortcomings of the legislative process, the challenges encountered in the implementation of adopted amendments, and the formulation of recommendations for the resolution of collision between legal norms, as well as suggestions for improving existing regulatory frameworks. In this endeavour, the authors employ a combination of formal legal and logical methods of cognition.

Results and conclusions: *Europe is at the heart of the movement to criminalise historical negationism. Most European countries criminalise some form of denial. Ukraine, as a candidate country for accession to the European Union, must harmonise its legislation with EU law. Over the past two decades, numerous draft legislation proposals have been submitted to the Ukrainian parliament with the intention of criminalising the denial of specific historical facts and their legal assessment. However, the Ukrainian experience differs significantly from that of its European counterparts, which mainly focus on liabilities for denying the Holocaust, other genocides, crimes against humanity, and war crimes.*
At present, the criminal law of Ukraine provides for the denial of Russian aggression and occupation in two distinct articles of the Criminal Code of Ukraine. Both articles are applied in practice, resulting in legal uncertainty and a violation of the principle of equality. The article proposes an amendment to the Criminal Code of Ukraine to resolve this collision and, in the interim, to resolve the collision of norms by the principle of in dubio pro homine.

1 INTRODUCTION

In March 2022, the Verkhovna Rada of Ukraine passed two laws that criminalised a range of activities, including the so-called denial crimes (or crimes of negationism). For the first time in Ukraine, criminal investigations were initiated for the denial and justification of specific facts, resulting in a surge in the number of criminal cases that surpassed the scale observed in other countries. In fact, Ukraine is not a pioneer in this complex issue. Indeed, the Ukrainian parliament has been delaying this moment for quite some time.

According to scholars, the history of using state coercion as an element of memory policy dates back to ancient times.[1] Nevertheless, the criminalisation of negationism as a distinct legal concept and the wider debates surrounding it only emerged in the latter half of the 20th century. This can be attributed to the reflections prompted by the Second World War in general and the attempts to prevent the repetition of genocidal practices such as the Holocaust. It is, therefore, unsurprising that Holocaust denial represents a key aspect of the phenomenon of denial in general, marking the point at which the modern history of the criminalisation of negationism begins.

The initial direct criminalisation of Holocaust denial occurred in Israel, where the Knesset enacted the Holocaust Denial Prohibition Law in 1986.[2] In France, in 1990, the Gayssot Law was adopted, which established criminal liability for denying or diminishing the Holocaust

1 Emanuela Fronza, 'The Punishment of Negationism: The Difficult Dialogue Between Law and Memory' (2006) 30(3) Vermont Law Review 610; François Ost, *Le Temps du Droit* (Odile Jacob 1999) 145, doi: 10.3917/oj.ost.1999.01.

2 Israeli Law no 5746-1986 of 8 July 1986 'Denial of Holocaust (Prohibition) Law' <https://main.knesset.gov.il/EN/about/history/Documents/kns11_holocaust_eng.pdf> accessed 28 July 2024.

and crimes against humanity defined by the Nuremberg International Tribunal.[3] In Austria, the constitutional law on prohibition (Verbotsgesetz) was supplemented in 1990 with provisions that severely punish those who deny the Nazi genocide or other Nazi crimes against humanity.[4] In Germany, as early as the late 1970s, the courts began to apply the provisions of criminal law that prohibit hate speech and insulting language in cases of Holocaust denial or minimisation (trivialisation) of the number of victims. This was done through the interpretation of existing legislation.[5] However, it was only in 1994 that a specific clause was incorporated into § 130 of the German Criminal Code, which pertains to the denial of genocide perpetrated under the National Socialist regime.[6]

At present, only a small number of EU countries have not explicitly criminalised the denial of certain facts, limiting themselves to general provisions relating to hate speech. However, in the majority of these countries, criminalisation did not end with the denial of the Holocaust. Subsequently, various jurisdictions have also prohibited the denial of other genocides and crimes against humanity, war crimes, crimes against peace, and crimes of the communist regime through criminal law. For example, § 333 of the Criminal Code of Hungary punishes anyone who publicly denies the fact of genocide or other acts against humanity committed by the National Socialist or Communist regimes, questions, diminishes or attempts to justify it.[7]

In some countries, such as Hungary[8] and Germany[9], the prohibition of denial has generally passed constitutional muster (albeit with difficulty) before the relevant constitutional review bodies. There have been several proceedings before the French Constitutional Council on this issue. In the case of the criminalisation of denial of the Armenian genocide, the Council found that it was unconstitutional because the legislator had prohibited denial of what the legislator (and not a particular judicial body) had classified as genocide, which constituted

3 Martin Imbleau, 'Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 257, doi:10.1093/acprof:oso/9780199738922.003.0008.

4 ibid 260.

5 Robert A Kahn, 'Holocaust Denial and Hate Speech' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 87, doi:10.1093/acprof:oso/9780199738922.003.0004.

6 Christian Mentel, 'The Presence of the Past: On the Significance of the Holocaust and the Criminalisation of its Negation in the Federal Republic of Germany' in Paul Behrens, Olaf Jensen and Nicholas Terry (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge 2017) 79, doi:10.4324/9781315562377.

7 Criminal Code of Hungary of 25 June 2012 'Büntető Törvénykönyvről' (amended 01 July 2024) <https://net.jogtar.hu/jogszabaly?docid=a1200100.tv#> accessed 28 July 2024.

8 Decision no 16/2013 (Constitutional Court of Hungary, 20 June 2013) <https://njt.hu/jogszabaly/2013-16-30-75> accessed 28 July 2024.

9 Mathias Hong, 'Holocaust, Meinungsfreiheit und Sonderrechtsverbot – BVerfG erklärt § 130 III StGB für verfassungsgemäß' (*Verfassungsblog: On Matters Constitutional*, 5 August 2018) <https://verfassungsblog.de/holocaust-meinungsfreiheit-und-sonderrechtsverbot-bverfg-erklaert-%c2%a7-130-iii-stgb-fuer-verfassungsgemaess/> accessed 28 July 2024.

an attack on freedom of expression.[10] In another decision, the Council declared that the criminal prohibition of denying crimes against humanity, established by a French or international jurisdiction recognised by France, was compatible with the constitutional provisions on equality and freedom of expression.[11]

At the same time, the Constitutional Court of Spain declared the provision criminalising denial unconstitutional, considering that it could not be established that any denial of genocide objectively contributes to or is likely to create a social atmosphere of hostility. However, the court affirmed the legitimacy of criminalising the justification of genocide.[12] As a result, in 2015, the Spanish Parliament criminalised the public denial, serious diminution and glorification of genocide and crimes against humanity, with an important additional (qualifying) feature indicating that these acts may contribute to an atmosphere of violence, hostility, hatred or discrimination.[13]

The last few years have shown that the criminalisation of denials is only gaining momentum. For example, in 2022, §130 of the German Criminal Code was supplemented with a new part, according to which public denial, approval or gross understatement of genocide, crimes against humanity and war crimes are punishable, regardless of whether they were committed in the past or are occurring in ongoing conflicts and whether they are established by verdicts of international or German courts.[14] Noteworthy, the Israeli parliament successfully passed a preliminary reading of a bill that would criminalise denial, minimisation or approval of the Hamas terrorist attack on southern Israel on 7 October 2023.[15]

In the context of Ukraine's integration into the EU, one cannot fail to mention two European acts. The first one is the "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems", adopted by the Council of Europe on 28 January 2003. According to Art. 6 of the Protocol, the Parties shall take measures to criminalise the intentional dissemination of material "which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final

10 Décision n 2012-647 DC, Communiqué de presse (Conseil Constitutionnel de la France, 28 février 2012) <https://www.conseil-constitutionnel.fr/actualites/communique/decision-n-2012-647-dc-du-28-fevrier-2012-communique-de-presse> accessed 28 July 2024.

11 Décision n 2015-512-QPC, Communiqué de presse (Conseil Constitutionnel de la France, 8 janvier 2016) <https://www.conseil-constitutionnel.fr/actualites/communique/decision-n-2015-512-qpc-du-8-janvier-2016-communique-de-presse> accessed 28 July 2024.

12 Decision no 235/2007 (Constitutional Court of Spain, 7 November 2007) <https://www.boe.es/buscar/doc.php?id=BOE-T-2007-21161> accessed 28 July 2024.

13 Criminal Code of Spain no 10/1995 of 23 November 1995 (amended 11 June 2024) <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444&tn=1&p=20240611> accessed 28 July 2024.

14 Max Bauer, 'Denial of War Crimes: Silent Tightening of Laws' (*Tagesschau*, 27 Oktober 2022) <https://www.tagesschau.de/inland/gesellschaft/volksverhetzung-107.html> accessed 28 July 2024.

15 Sam Sokol, 'Knesset passes preliminary reading of bill banning denial of October 7 massacre' (*Times of Israel*, 7 February 2024) <https://www.timesofisrael.com/knesset-passes-preliminary-reading-of-bill-banning-denial-of-october-7-massacre/> accessed 28 July 2024.

and binding decisions of the International Military Tribunal established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party."[16]

At the same time, the Protocol allows parties to criminalise denial or minimisation on the basis of aggravating circumstances, in particular if they were committed with the intent to incite hatred, discrimination or violence. It should be emphasised here that the aggravating features of denial are only optional, or in other words, parties may criminalise "naked" (direct) denial (without qualifying features). When Ukraine ratified the Protocol in 2006, it exercised this right and abandoned the construction of a "naked" denial, at least for the time being.[17]

The second one is the Council Framework Decision 2008/913/JHA, which obliges EU member states to punish publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Arts. 6, 7 and 8 of the Statute of the International Criminal Court, and the crimes defined in Art. 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Art. 1 (1)).[18] In comparison to the Additional Protocol, the Framework Decision explicitly provides for a mandatory qualifying feature - the ability to incite violence or hatred. Moreover, it also gives Member States "the choice to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting" (Art. 1(2)).[19] This Framework Decision is part of the EU's *aqui communitaire*, which must be implemented in the legislation of the candidate country before joining the EU.

In view of the above additional features, it may seem that Article 161 of the current Criminal Code of Ukraine (*further – CCU*) already indicates compliance, as it provides for punishment for incitement to national, regional, racial or religious hatred and enmity, as well as for humiliation of national honour and dignity, and insulting the feelings of citizens in connection with their beliefs.[20] However, given that the German parliament made the

16 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (28 January 2003) <https://rm.coe.int/168008160f> accessed 28 July 2024.

17 Law of Ukraine no 23-V of 21 July 2006 'On the ratification of the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems' [2006] Official Gazette of Ukraine 31/ 2202.

18 Council Framework Decision 2008/913/JHA of 28 November 2008 'On Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law' [2008] OJ L 328/55.

19 ibid.

20 Criminal Code of Ukraine no 2341-III of 5 April 2001 (amended 8 May 2024) <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 28 July 2024.

above-mentioned amendments in 2022 with this Framework Decision in mind, Ukraine may still have to directly criminalise the acts described in the Framework Decision.

This brief introductory overview demonstrates that in the information society, legislators in different countries are actively turning to criminal law in the formulation and implementation of memory policies. It is also clear that the debate on whether and to what extent it is acceptable for the state to restrict freedom of expression and historical research in this way will only continue. The culmination in the history of crimes of denial seems to be yet to come. With the criminalisation of denial of Russian aggression and occupation, Ukraine has contributed to this discourse and is broadening the scope of the debate. The following sections will show Ukraine's long journey towards this step (Section 3), as well as the formal and legal challenges faced by the Ukrainian legal system in connection with this criminalisation (Section 4 and 5).

2 RESEARCH METHODOLOGY

The first part of this study (Section 3) employed an in-depth analytical approach based on the historical-legal method, focusing on the numerous bills on the prohibition of denials registered in the Ukrainian parliament over the past two decades. This analysis demonstrated the significant complexities and originality of Ukraine's path compared to other countries.

In the second part (Sections 4 and 5), we focused on the legal analysis of the laws that criminalise denial of Russian aggression and occupation. The logical analysis (induction, deduction, analysis, synthesis) allowed us to identify legislative failures that resulted in the double criminalisation of denials that are punished differently, as well as to identify difficulties in applying the adopted amendments. Applying the concept of legal certainty and the *pro homine* principle helped us to propose ways to resolve the collision of laws and formulate recommendations for improving the norms of criminal law.

3 THE THORNY PATH OF CRIMINALISING DENIALS IN UKRAINE

3.1. Denial of Genocide

In 1991, after the fall of the Soviet curtain, Ukrainian society and the entire world learned about the horrific crimes of the totalitarian communist regime, including the man-made famine of 1932–1933, which prompted new historical and other research. After the Orange Revolution of 2004, the politics of memory began to take a more prominent place in political debate. In 2006, the Ukrainian parliament adopted the Law of Ukraine 'On the Holodomor of 1932–1933 in Ukraine'. The first two articles of this law call the Holodomor of 1932–1933

in Ukraine a genocide of the Ukrainian people, and public denial of the Holodomor of 1932–1933 in Ukraine is recognised as an outrage to the memory of millions of Holodomor victims, a humiliation of the dignity of the Ukrainian people and is considered illegal.[21] At the same time, despite the indication of the unlawfulness of public denial, no mechanisms of responsibility for such denial have been introduced. In its current form, the law only allows for the possibility of filing a civil lawsuit for the protection of honour and dignity. Several such lawsuits were filed but were unsuccessful because the deniers acknowledged the fact of the Holodomor but disagreed with its assessment as genocide. The most famous was the lawsuit for the protection of honour and dignity filed in 2010 against the then President of Ukraine, Viktor Yanukovych, which was dismissed.[22]

The official recognition by the Verkhovna Rada of Ukraine of the Holodomor of 1932–1933 as an act of genocide paved the way for further criminalisation of denial of this fact. The first draft law criminalising the public denial of the Holodomor as an act of genocide was registered in December 2006.[23] The following year, a similar law was initiated by the then-President of Ukraine, Viktor Yushchenko.[24] In both cases, the need to adopt the law was justified by the need to protect the historical memory of millions of victims. According to the conclusions of the Chief Scientific and Expert Department of the Verkhovna Rada of Ukraine Secretariat (CSED), the draft laws proposed were to be rejected on the grounds of unjustified interference with freedom of expression. As a result, they were not even included in the parliamentary agenda. Subsequent draft laws sought to criminalise either only the public denial of the Holodomor of 1932–1933 as genocide[25] or, along with it, the public denial of the Holocaust.[26]

21 Law of Ukraine no 376-V of 28 November 2006 'On the Holodomor of 1932-1933 in Ukraine' [2006] Official Gazette of Ukraine 48/3186.

22 'The Court Acquitted Yanukovych in 2 Minutes in the Holodomor case – "Svoboda" ' (*Ukrainska Pravda*, 8 December 2010) < https://www.pravda.com.ua/news/2010/12/8/5654370/ > accessed 28 July 2024.

23 Draft Law of Ukraine no 2816 of 22 December 2006 'On Amendments to the Criminal Code of Ukraine (Regarding Responsibility for Public Denial of the Fact of the Holodomor of 1932-1933 as Genocide of the Ukrainian People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=29140> accessed 28 July 2024.

24 Draft Law of Ukraine no 3407 of 29 March 2007 'On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (Regarding Responsibility for Denying the Holodomor)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=29881> accessed 28 July 2024.

25 See for example: Draft Law of Ukraine no 1427 of 24 January 2008 'On Amendments to the Criminal Code of Ukraine (Regarding Responsibility for Public Denial of the Fact of the Holodomor of 1932-1933 as Genocide of the Ukrainian People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=31473> accessed 28 July 2024.

26 See for example: Draft Law of Ukraine no 1143 of 07 December 2007 'On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (Regarding Responsibility for Public Denial of the Holodomor of 1932-1933 in Ukraine)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=30993> accessed 28 July 2024.

In 2015, the Verkhovna Rada of Ukraine adopted a resolution recognising the deportation of Crimean Tatars from Crimea in 1944 as genocide of the Crimean Tatar.[27] This restoration of historical truth by the Ukrainian parliament naturally became the formal basis for the emergence of draft laws criminalising the denial of the 1944 genocide of the Crimean Tatar people.[28]

In general, since 2006, after each parliamentary election, one or more bills have been registered in each convocation to criminalise public denial of genocide, but none of them have been adopted. Most of these drafts concerned the prohibition of denying the assessment of the Holodomor of 1932–1933 as an act of genocide against the Ukrainian people, while a smaller number concerned the prohibition of denying the Holocaust and the genocide of Crimean Tatar.

In the Ukrainian parliament, proposals to punish the denial of the genocide of the Ukrainian people are dominated, which makes the problem of the priority of geographical and specific historical conditions in the practices of criminalising denial by different countries as relevant as possible. The criminalisation of Holocaust denial is currently the closest to gaining legal force. A few days before the full-scale Russian invasion, the Verkhovna Rada of Ukraine passed a law that added to Art. 161 of the CCU, which provides for a classic hate crime, the act of manifestations of anti-Semitism.[29] At the same time, the term "manifestations of anti-Semitism" is defined in the previously adopted Law of Ukraine "On Preventing and Combating Anti-Semitism in Ukraine" and includes, among other things, "denial of the fact of persecution and mass extermination of Jews during the Second World War (Holocaust)".[30] This would effectively criminalise Holocaust denial, but at the time of writing, the President of Ukraine has not yet signed the adopted law, which prevents it from entering into force.

Thus, unlike some EU countries that initially criminalised Holocaust denial, the first attempts to introduce a criminal prohibition on denying certain facts in Ukraine concerned the Holodomor of 1932–1933, in particular, its assessment as genocide. Subsequent draft laws also mentioned public denials of the Holocaust and the genocide of the Crimean Tatar people. Only the criminalisation of Holocaust denial was embodied in the adopted law, but even this has not yet been signed by the President.

27 Resolution of the Verkhovna Rada of Ukraine no 792-VIII of 12 November 2015 'On Recognition of the Genocide of the Crimean Tatar People' [2015] Official Gazette of Ukraine 93/3166.

28 See for example: Draft Law of Ukraine no 4120 of 19 February 2016 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Criminal Responsibility for Denial of the Holodomor, Holocaust, Genocide of the Crimean Tatar People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58243> accessed 28 July 2024.

29 Draft Law of Ukraine no 5110 of 19 February 2021 'On Amendments to Article 161 of the Criminal Code of Ukraine to Implement the Provisions of the Law of Ukraine "On Prevention and Counteraction of Anti-Semitism in Ukraine" ' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71166> accessed 28 July 2024.

30 Law of Ukraine no 1770-IX of 22 September 2021 'On the Prevention and Counteraction to Anti-Semitism in Ukraine' [2021] Official Gazette of Ukraine 81/ 5100.

3.2. Denial of Fascist Crimes

Another area is the criminalisation of fascist crimes. In 2010–2012, four draft laws were registered to criminalise the public denial or justification of crimes against humanity committed by the Nazis and their supporters in World War II, some of which also included the ban on denying the Holodomor of 1932–1933 and the Holocaust (drafts No. 4745, 10050, 11150, 11150-1). Identical or similar draft laws were generally not rare.

An analysis of the CSED's opinions on these drafts shows that the main comments were that, firstly, the concepts of "fascism", "Nazism" and other similar terms are vague and lack legal certainty. Secondly, such acts as public approval, denial and justification do not pose a public danger, necessary to recognise them as crimes, and are forms of realisation of the right to freedom of thought and speech and expression. Thirdly, Art. 161 of the CCU, which provides for hate speech, already provides for liability for truly dangerous statements.

Despite the critical perception, on 16 January 2014, during the Revolution of Dignity, the parliamentary majority supporting then-President Viktor Yanukovych adopted a package of laws with significant procedural violations that allowed for significant restrictions on human rights and freedoms, especially in the context of the ongoing protests. These laws were conventionally called dictatorial laws, one of which supplemented the CCU with Art. 436-1 and criminalised public denial and justification of crimes against humanity committed by the Nazis in World War II, in particular crimes committed by the Waffen-SS organisation, its subordinate structures, and those who fought against the anti-Hitler coalition and collaborated with the Nazi occupiers.[31]

The law criminalising the public denial and justification of fascism was re-adopted in the same wording on 28 January 2014. It remained in force for just over a year, although it was never applied. In April 2015, Art. 436-1 was restated in a new wording, which, instead of public denial and justification, still provides for liability for the production, distribution and public use of symbols of the communist and national socialist (Nazi) totalitarian regimes.[32]

Therefore, historically, the first successful (in the sense of the law coming into force) example of the criminalisation of crimes of denial in Ukraine was the public denial and justification of crimes against humanity committed by the Nazis in World War II. It can hardly be argued that this law also included cases of denial or justification of genocide (including the Holocaust) committed by the Nazis since *de jure,* the terms "genocide" and "crimes against humanity" are traditionally distinguished, including in international criminal law. The real intentions of the legislator remain unclear.

31 Law of Ukraine no 729-VII of 16 January 2014 'On Amendments to the Criminal Code of Ukraine Regarding Responsibility for Denying or Justifying the Crimes of Fascism' [2014] Official Gazette of Ukraine 8/239.

32 Law of Ukraine no 317-VIII of 9 April 2015 'On the Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of their Symbols' (amended 27 July 2023) <https://zakon.rada.gov.ua/laws/show/317-19> accessed 28 July 2024.

However, this case was definitely not successful in terms of the actual application of the law in practice. In the end, the prohibition of symbols, which has significant advantages in terms of legal certainty, seemed much more practical to the legislator. Court statistics later confirmed this, as 160 people were convicted under Art. 436-1 of the CCU (as amended) in 2015-2023.[33]

3.3. Denial of Russian Aggression and Occupation

Russia's ongoing aggression against Ukraine, which began in 2014, was hybrid and covert until the open invasion in 2022. The Russian Federation has referred to the hostilities in Donbas as a civil war within Ukraine, denied its decisive influence on the so-called Donetsk National Republic ('DNR') and Luhansk National Republic ('LNR'), and disseminated these narratives in the international arena and among the Ukrainian population. It is, therefore, not surprising that draft laws on criminal penalties for denying the facts of Russian aggression against Ukraine and its occupation of Ukrainian territory have been introduced in the Ukrainian parliament.

Three draft laws were registered in the Verkhovna Rada of Ukraine of the VIII convocation (2014–2019), which proposed to supplement the CCU with an article on public denial or justification of the Russian Federation's aggression against Ukraine and one draft law on criminalising public denial of the occupation of Ukraine's territories by the Russian Federation (drafts No 2080, 2486, 3771, 7354). None of these drafts were adopted. We can assume this was due to the negative opinions received from various law schools and legal experts. The CSED noted that public denials of the facts of aggression and occupation are a form of exercising the constitutional right to freedom of thought and speech, to the free expression of one's views, and that the public danger is posed by the crimes against peace and security of mankind (including aggression), not by judgments as to whether certain individuals or organisations committed such crimes and whether an act of aggression by a particular state took place in a particular case.[34] Indeed, it is understandable to argue that it is necessary to try those responsible for crimes, but it is much more problematic that the law is used to punish those who deny the actions of the perpetrators.[35]

33 'Judicial Statistics: Annual Reporting' (*Judicial Power of Ukraine*, 2024) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 28 July 2024.

34 Conclusion of the Chief Scientific and Expert Department of the Verkhovna Rada of Ukraine Secretariat to the Draft Law of Ukraine no 7354 of 5 December 2017 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Criminal Liability for Denying the Fact of Military Aggression of the Russian Federation against Ukraine)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63059> accessed 28 July 2024.

35 Lawrence Douglas, 'From Trying the Perpetrator to Trying the Denier and Back Again: Some Reflections' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 50, doi:10.1093/acprof:oso/9780199738922.003.0003.

In the Parliament of the current IX convocation, there are more than ten similar draft laws with different options for introducing liability. Interestingly, as if responding to the criticism expressed, most of the drafts limited the scope of criminalisation in one way or another: only public figures (primarily national), including officials, were proposed to be punished for public denials. The CSED continued to be critical of such initiatives in its scientific conclusions, pointing out that a person's value judgements cannot entail liability (the latter is not necessary and appropriate).

In contrast to these drafts, Draft Law 5102 of 18 February 2021 provided for the addition of Art. 436-2 to the CCU to criminalise the justification, recognition as lawful, denial of Russian aggression against Ukraine and the occupation of its territory, and glorification of the aggressor and its representatives.[36] Later, in the context of the full-scale Russian invasion, the draft law was passed into law. It is interesting to note that this time, the CSED, emphasising that the draft was reviewed in a short time and under extraordinary conditions, made a number of comments. Still, none of them were concerned about the criminalisation of denials.

At the same time, the parliament was working on adding an article on collaborationism to the CCU. Among a number of documents, Draft Law No. 5144 of 24 February 2021 provided for a broad list of acts recognised as collaborationist activity, including public denials of aggression against Ukraine and the occupation of its territory.[37] In the extraordinary circumstances of a large-scale Russian offensive in March 2022, this draft law was also adopted as law without synchronisation with the adopted draft law 5102. Here, too, the CSED did not comment on the criminalisation of denials.

Thus, in the face of the threat of losing the Ukrainian statehood and under martial law, the Ukrainian parliament established criminal liability for denying Russian aggression and occupation. Despite the fact that all previous attempts at criminalisation had faced severe criticism from the expert community, the new realities allowed the risks of unjustified interference with freedom of speech and expression to be ignored. Theorists and practitioners have faced the difficult task of trying to understand how such a step is compatible with the values of a democratic state that is nevertheless struggling to exist.

36 Draft Law of Ukraine no 5102 of 18 February 2021 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products)' <https://itd.rada.gov.ua/billInfo/Bills/Card/25645> accessed 28 July 2024.

37 Draft Law of Ukraine no 5144 of 24 February 2021 'On Amendments to Certain Legislative Acts (Regarding Establishment of Criminal Liability for Collaborationist Activity)' <https://itd.rada.gov.ua/billInfo/Bills/Card/25699> accessed 28 July 2024.

4 A BANAL MISTAKE OR CONSCIOUS DOUBLE CRIMINALISATION?

4.1. The Problem of Double Criminalisation of Public Denial

The full-scale Russian aggression in February 2022 forced parliamentarians to quickly press the 'play' button to criminalise denial of aggression and occupation. It is only natural that with Russian troops on the outskirts of Kyiv, there was no time to thoroughly discuss the controversial issues and improve the drafts before they were adopted. Both laws criminalising denial were adopted on the same day—3 March 2022, the second week of the full-scale Russian invasion of Ukraine. Table 1 compares the content of these laws.

Table 1. Comparison of the texts of Articles 111-1 and 436-2 of the CCU

Part 1 of Article 111-1 of the CCU (Collaborationist activities), Law No. 2108-IX (draft law 5144)	**Part 1 of Article 436-2 of the CCU** (Justification, recognition as lawful, denial of the aggression of the Russian Federation against Ukraine, glorification of its participants), Law No. 2110-IX (draft 5102)
A *citizen of Ukraine* punished if he/she: 1) *publicly* denies: a. aggression against Ukraine, b. the establishment and approval of the occupation of a part of the territory of Ukraine, 2) *publicly calls* for: a. support for the decisions or actions of the aggressor state, armed formations or occupation administration of the aggressor state, b. cooperation with the aggressor state, armed formations or occupation administration of the aggressor state, c. non-recognition of the extension of the state sovereignty of Ukraine to the occupied territories of Ukraine.	A *person* is punished if he/she: 1) denies: a. the aggression of the Russian Federation against Ukraine, which began in 2014, including by presenting the aggression of the Russian Federation against Ukraine as an internal civil conflict, b. the occupation of part of the territory of Ukraine, 2) *justifies or recognises the above facts as legitimate*, 3) *glorifies*: a. persons who carried out the aggression of the Russian Federation against Ukraine, b. representatives of the armed forces of the Russian Federation / of irregular illegal armed formations / of the occupation administration of the Russian Federation (…)
punishment: only deprivation of the right to hold certain positions or engage in certain activities for a period of 10 to 15 years	the maximum penalty is imprisonment for up to 3 years

The naked eye can notice significant differences between the two provisions: the first one provides only for public denials, while the second one refers to denial as such (i.e., both public and non-public); the first one punishes only a citizen of Ukraine, while the second one – any person; the first refers to any aggression/occupation (at least formally), while the second refers only to those committed by the Russian Federation since 2014; the first alternatively provides for public calls for certain actions, while the second provides for justification, recognition of certain facts as legitimate and glorification of the relevant participants in the aggression/occupation. It is equally important that Art. 111-1 is included in Section I of the Special Part of the CCU "Crimes against the Bases of National Security of Ukraine", while Art. 436-2 is part of the last section, which contains crimes against the peace and security of mankind and international law and order (such as the crimes of aggression, genocide, war crimes, etc.).

On the other hand, even a brief reading of their content leads to the conclusion that public denial of Russian aggression and occupation, if committed by a citizen of Ukraine, is twice criminalised. It is important to note here that public denials and those committed by a citizen of Ukraine are, quite understandably, the most common cases of denial crimes in practice. Both articles provide for liability for this, but the punishments differ significantly: for public denial as a type of collaborationism, a person faces 'symbolical' punishment (as a result, such denial is not even a crime, but only a criminal offence), while for denial under Para. 1 of Art. 436-2, a person faces 3 years in prison (a minor crime), and in the presence of aggravating circumstances under Part 3 of this article (if the denial is committed by an official, repeatedly, or by an organised group, or with the use of the media) - 8 years in prison (a serious offence).

4.2. The Collision

The parallel existence of these two articles has given rise to a substantive collision that national criminal law has never faced before. The tangle of different features has turned out to be so complicated that classical methods of interpretation still lead researchers to a dead end.

On the one hand, Pt. 1 of Art. 111-1 of the CCU describes acts that are specified by method (publicity) and person (citizen of Ukraine), which indicates its narrower content and special nature. On the other hand, there are grounds for the opposite conclusion - Art. 436-2 of the CCU refers only to the denial of aggression/occupation of the Russian Federation, not aggression/occupation in general and is placed in the section on crimes against peace.

In practice, it is not surprising that the investigation authorities used both articles. In similar circumstances, some Ukrainian citizens were convicted under Pt. 1 of Art. 111-1 of the CCU, while others were convicted under the more severe Art. 436-2 of the CCU. Official statistics show staggering figures: since these provisions came into force on

31 December 2023, 374 people were convicted under Art. 111-1(1) of the CCU and 672 under Art. 436-2 of the CCU.[38]

Although it is clear that both articles provide for not only public denial but also other related acts (public calls, justification, glorification), this does not change the overall picture, as a significant part of the sentences under both articles relates to public denial committed by Ukrainian citizens.

When analysing the law's provisions, lawyers first try to understand the legislator's goal and intentions. However, when two laws criminalising the same behaviour with different degrees of punishment are adopted almost simultaneously, this task becomes more complicated. In this regard, it is most likely that due to the extreme conditions, the two draft laws, which had been lying in the committees of the Verkhovna Rada of Ukraine for more than a year, were accidentally adopted without their coordination. At the very least, it can be assumed that they could have been synchronised in terms of denials if there had been more time.

We consider this a serious defect that *de facto* makes a person's punishment completely dependent on which article (less or more severe) the investigator chooses, as there is no criterion for distinguishing between them. This creates high corruption risks, violates the principles of equality, and undermines the already weak arguments for criminalising denial offences.

4.3. The Option of Resolving the Collision by the Protected Object Rule

The conflict of Laws 2108-IX and 2110-IX gives rise to legal uncertainty, repeatedly noted in scientific publications. According to N. Antoniuk, in case of collision between Arts. 111-1 and 436-2 of the CCU, the latter should be given preference, given that it is placed in Chapter XX of the Special Part of the CCU and, therefore, protects the peace and security of mankind.[39]

However, the fact that a particular article is placed in a certain section cannot in itself be a decisive criterion for distinction. Firstly, it can hardly be argued that the bases of national security of the state, which are protected by the first section of the Special Part, are inferior in their importance to other values. At least in this regard, there are no legislative grounds or interpretations of judicial practice. Secondly, it would not be wrong to state that Art. 436-2 of the CCU is aimed at protecting the peace and security of mankind (the main object of protection) and indirectly at protecting the national security of Ukraine (an additional object). But at the same time, Art. 111-1, although primarily protecting national security (the main object), is indirectly aimed at protecting peaceful relations between states and

38 Judicial Statistics (n 33).

39 Natalia Antoniuk, 'Amendments of the Crimes against National Security of Ukraine: Criminalization or Differentiation of Criminal Liability' (2022) 11 Law of Ukraine 47, doi:10.33498/louu-2022-11-037.

peoples (an additional object). If there is aggression against a state and illegal occupation of its territory, this obviously leads to the intersection of the issues of national security of that state, on the one hand, and peace and international law and order, on the other.

4.4. The Rule of Temporal Collision

Another criterion was proposed by M. Khavroniuk. According to the researcher, if the collision cannot be resolved by the content of the laws, it should be resolved by the time the laws come into force (temporal collision).[40] This approach is based on the recently adopted Law of Ukraine "On Lawmaking," which formulates a rule for resolving a temporal collision: in the event of a collision between legal acts of equal legal force, provided that none of them is special in relation to the other, the rules contained in the legal acts that came into force later have priority in application. [41]

The fact that according to the official website of the Parliament, despite the simultaneous adoption, Law 2110-IX entered into force on 15 March 2022, while Law 2108-IX came into effect a day later, on 16 March 2022. This timing gives grounds to assert that the newer law – namely, Art. 436-2 of the CCU – is applicable.[42]

We cannot agree with the appropriateness of the temporal collision rule for the analysed situation. It should be noted that this rule is a reflection of a long-standing legal tradition and a generally accepted doctrinal approach, so its reasonableness is generally unquestioned. However, a separate argument could be developed about the inapplicability of this rule to cases where competing laws are adopted simultaneously because then the reasonableness of giving priority to one of them only because it came into force a day later becomes meaningless.

More importantly, a more compelling argument cancels out the rule of temporal collision in this context. The point is that, according to the final provisions, Law 2108-IX was set to enter into force "from the day of its publication," whereas Law 2110-IX was set to enter into force "from the day following the day of its publication". Since both laws were published in the official newspaper on the same day (15 March), it may seem that the former allegedly entered into force on the same day and the latter – from 00:00 the next day (16 March).

However, in the criminal law of Ukraine, a narrow approach to the interpretation of the phrase "from the date of its publication" is generally accepted. Given that citizens must have at least a certain minimum time to familiarise themselves with the law, the phrase

40 Mykola Khavroniuk, 'For Justifying the Armed Aggression of the Russian Federation against Ukraine – Criminal Responsibility' (*Center for Political and Legal Reforms*, 29 April 2022) <https://pravo.org.ua/blogs/kolaboratsijna-diyalnist-nova-stattya-kryminalnogo-kodeksu/> accessed 28 July 2024.

41 Law of Ukraine no 3354-IX of 24 August 2023 'On Law-Making Activity' (amended 18 September 2024) <https://zakon.rada.gov.ua/laws/show/3354-20> accessed 28 September 2024.

42 Khavroniuk (n 40).

"from the day of publication" means no earlier than 00:00 the next day, i.e. the legislative phrases "from the day of publication" and "from the day following the day of publication" mean the same thing.[43]

Only in this way can the presumption of knowledge of the law have a rational basis and the requirement of accessibility of the law as part of the principle of *nullum crimen sine lege* be met. Accessibility means that a citizen is given the opportunity to know the provisions contained in the law.[44] Thus, both laws came into force on the same day (16 March 2022), excluding the application of the rules for resolving temporal collision.

4.5. Nullum Crimen, Nulla Poena Sine Lege and the Principle of Equality

In this regard, the question arises of whether the apparent legal uncertainty means that none of the articles can be applied. Indeed, legal certainty requires, inter alia, "that legal rules are clear and precise, and aim to ensure that situations and legal relationships remain foreseeable".[45] In the case of criminal law, these requirements constitute the *lex certa* component of the interpretation of the fundamental principle of criminal law *nullum crimen, nulla poena sine lege*.[46] From this point of view, the intended law acts as a legal guideline when a person chooses a particular type of behaviour (negative or positive) and is always associated with the absence of gaps and contradictions.[47]

As demonstrated above, not only has no clear (unambiguous) national judicial practice been formed in more than two years, but the views of scholars do not allow for an unambiguous position. However, this does not mean that prosecution for public denial committed by a citizen of Ukraine is excluded. It can be argued that it is unclear to a citizen (even when seeking legal advice or analysing case law) under which article his or her actions will be punished. However, it is obvious to everyone what actions are prohibited by the criminal law. That is, the fact that public denial is punishable is reasonably foreseeable, as it can be read from both articles. It is only unclear whether this

43 See more in: Vyacheslav Borysov, 'Validity of the Law on Criminal Liability in Time and Space' in V Tatsii, V Tiutiuhin and V Borysov (eds), *Criminal Law of Ukraine: General Part* (Pravo 2020) 51; Yurii Ponomarenko, *Validity and Effect of Criminal Legislation Over Time* (Atika 2005) 84-6; Nazar Stetsyk, '"From the Day" or "From the Day Following the Day" of Official Publication: Concerning the Problem of Uncertainty of the Entry into Force of Legal Normative Acts' (2016) 63 Visnyk of the Lviv University: Series Law 29, doi:10.30970/vla.2016.63.5020.

44 Mykola I Panov, 'The Principle of Legal Certainty in the Practice of the European Court of Human Rights and the Quality Problems of the Criminal Legislation of Ukraine' (2015) 128 Problems of Legality 9, doi:10.21564/2414-990x.128.52082.

45 European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law* (2011) <https://rm.coe.int/1680700a61> accessed 28 July 2024.

46 Svitlana V Khyliuk, 'Nulla Poena Sine Lege as a Part of the Legality Principle in the Practice of the European Court of Human Rights' (2013) 2 Scientific Journal of Lviv State University of Internal Affairs: Law 339.

47 Panov (n 44).

liability will be less severe (Art. 111.1(1) of the CCU) or more severe (Art. 436.2 of the CCU). *Sensu stricto*, the rules on public denial provide predictability in the context of the *nullum crimen* element, but not in the context of the *nulla poena* element.

The requirement of predictability of the law is directly related to ensuring the principles of equality and justice guaranteed by the Constitution of Ukraine. The absence of an explicit criterion for distinguishing between the two articles has resulted in some citizens being convicted of a criminal offence (Art. 111.1(1) of the CCU) and others of a minor or serious crime (Art. 436.2 of the CCU) for the same act. Being bound by the rule on the scope of the trial, according to which the court shall consider the case only within the scope of the charges brought by the prosecutor, judges ignore the question of the relationship between the two articles. Thus, the choice of the article to be applied in a particular case is entirely based on the decision of the investigation body, which is not based on any reasonable criterion. A situation where the degree of liability depends entirely on which side of the coin falls in each particular case (or, in other words, which article is preferred by a particular investigator or prosecutor) clearly indicates the arbitrary application of the law due to a violation of the *lex certa* requirement. This also undermines the constitutional provisions on equality and fairness.

It is important to note that Art. 64 of the Constitution of Ukraine does not allow for the restriction of the right to know one's rights and obligations (Art. 57 of the Constitution) and the rule of *nullum crimen, nulla poena sine lege* (Art. 58 of the Constitution), which implies the requirement of *lex certa*, even in a state of martial law or emergency.[48] Art. 15 of the ECHR also does not allow for any derogation from these rules.[49] Therefore, the extreme conditions of martial law in Ukraine cannot serve as an excuse for the violation of legal certainty.

4.6. In Dubio Pro Homine (Pro Personae)

In our opinion, *de lege lata*, the collision between Art. 111-1(1) and Art. 436-2 of the CCU should be resolved in favour of the former, which has priority due to the less severe sanction. If there are serious and insurmountable doubts as to which law should be applied, such doubts should be resolved in favour of the party against whom the law is to be applied. This approach is the basis of the argumentation of Yu. Ponomarenko who notes that the collision between these articles can be overcome by applying the rules of *in dubio pro reo* and *non bis in idem*.[50] As for the prohibition to be held liable twice for the

48 Constitution of Ukraine of 28 June 1996 (anmended 02 February 2019) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-вр> accessed 28 July 2024.

49 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) <https://rm.coe.int/1680a2353d> accessed 28 July 2024.

50 Yurii Ponomarenko, 'The Main Challenges Faced by the Criminal Law of Ukraine with the Beginning of the Large-Scale Phase of the War, and the Responses of the Legislator to Them' (Criminal Law Responses to Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, 5 May 2022) 25.

same thing, it is a good argument. Still, it is not currently relevant since we have not encountered any cases where the same individual has been convicted for the same act of public denial under both articles at the same time.

As for the principle of *in dubio pro reo*, according to Pt. 3 of Art. 62 of the Constitution of Ukraine, "the prosecution may not be based on evidence obtained illegally, as well as on assumptions. All doubts as to the proof of a person's guilt shall be interpreted in his/her favour".[51] However, the content of the second sentence is usually considered *sensu stricto* only as a procedural principle that prioritises the interests of the defence (accused) in case of reasonable doubt when evaluating evidence, as indicated by the practice of the Constitutional Court of Ukraine and the ECtHR.[52]

Even if the principle of *in dubio pro reo* is considered to be exclusively procedural (in the field of evidence), it is clearly a manifestation of the broader legal maxim *in dubio pro homine* (*pro personae*), which in controversial cases dictates that the law enforcement officer should interpret and apply the law in the manner most favourable to or in the benefit of the individual. The *pro personae* principle not only guides the application and interpretation of a statutory provision that is more favourable to the individual and his or her rights but also intends to resolve meta-interpretive disputes.[53] This principle can be seen "as a response to the horror and atrocities that occurred during the Holocaust; this principle is at the heart of post-Second World War international human rights law. Accordingly, human rights instruments, created by states themselves, establish a system centred on the human person".[54] As S. Kowalska notes, "the aim of the *pro homine* principle is to make human rights a reality to the fullest extent possible".[55]

Although the *pro personae* principle is usually not explicitly enshrined in positive law, its application in such cases has long been known in the countries of the Romano-Germanic legal system, including Ukraine. In common law countries, this principle in criminal law is also known as the *rule of lenity*. As D. Romantz states, "It is a rule of statutory construction

51 Constitution of Ukraine (n 48).

52 See: Decision no 1-p/2019 case no 1-135/2018(5846/17) (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291; *Barberà, Messegué and Jabardo v Spain* App no 10590/83 (ECtHR, 6 December 1988) <https://hudoc.echr.coe.int/eng?i=001-57429> accessed 28 July 2024; *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002) <https://hudoc.echr.coe.int/eng?i=001-65362> accessed 28 July 2024; *Sievert v Germany* App no 29881/07 (ECtHR, 19 July 2012) <https://hudoc.echr.coe.int/ukr?i=001-112283> accessed 28 July 2024.

53 Gerardo Mata Quintero, 'El principio pro persona: la fórmula del mejor derecho' (2018) 1(39) Cuestiones Constitucionales: Revista Mexicana De Derecho Constitucional 204, doi:10.22201/iij.24484881e.2018.39.12654.

54 Valerio O Mazzuoli ken Dilton Ribeiro, 'The Pro Homine Principle As a Fundamental Aspect of International Human Rights Law' (2016) 17 Meridiano 47 e17003, doi:10.20889/M47e17003.

55 Samanta Kowalska, 'Pro Homine Principle: An Axiological Compass in Interpretation Norms in the Field of Human Rights' (2021) 16 The Age of Human Rights Journal 207, doi:10.17561/tahrj.v16.6175.

that requires a court to resolve a statutory ambiguity in favour of a criminal defendant, or to strictly construe the statute against the state".[56]

The principle of *pro homine* has recently been reflected in the legal opinions of the Ukrainian Supreme Court, albeit in cases of administrative jurisdiction. The Court noted:

> "*47. [...] the principle of interpreting the law in favour of the individual is one of the basic principles of the legal system, which indicates that courts should try to interpret laws and their provisions in such a way as to protect the rights and interests of the individual to the maximum extent possible.*
> *48. This principle is also often known as "in dubio pro persona" or "in dubio pro homine" (in Latin), which means "beyond a reasonable doubt in favour of the person".*[57]

In the structure of criminal law relations arising from a criminal offence, the state's position is dominant, as it has the exclusive right to adopt laws and bring justice for their violation. In contrast, the individual is in a weaker position. Therefore, if the legislature has written the law in such a way that no lawyer can predict which of the two articles will be applied, this cannot negatively affect the weaker party. The article that provides more favourable consequences for the accused shall be applied.

This approach neutralizes the violation of the requirement of clarity of the law. As long as the legislator does not synchronise the two counteraction articles, public denials of aggression and occupation committed by a citizen of Ukraine should be qualified under Pt. 1 of Art. 111-1 of the CCU, while the relevant wording of Art. 436-2 of the CCU should be rejected due to the *pro personae* principle.

5 DE LEGE FERENDA: RESOLVING OF THE COLLISION

Resolving a collision within a law by applying its most favourable provisions only treats the symptom, not the disease. Full relief is possible only by amending the CCU. The way to do this is to clarify the purpose of the laws that supplemented the CCU with the articles that gave rise to the collision. Laws 2108-IX and 2110-IX, despite their similarity, had different content and purpose.

Law 2108-IX was intended to establish criminal liability for collaborationist activities, which follows both from the title of the law itself and its content. It supplemented the CCU exclusively with Art. 111-1 on collaborationism and amended related articles necessary to

56 David S Romantz, 'Reconstructing the Rule of Lenity' (2018) 40(2) Cardozo Law Review 524.

57 Case no 240/4894/23 (Supreme Court of Ukraine, 10 January 2024) <https://reyestr.court.gov.ua/Review/116241970> accessed 28 July 2024.

activate the former.[58] It was initiated by more than three dozen MPs representing the party that formed the parliamentary majority.

Law 2110-IX aimed to strengthen criminal liability for the production and dissemination of prohibited information products and protect information security in the context of growing Russian propaganda. This law not only supplemented the CCU with Art. 436-2 but also criminalised threats and insults to the honour and dignity of a serviceman, as well as incitement to hatred and enmity on a regional basis.[59] It was initiated by a group of MPs, mostly from opposition parliamentary factions.

While Law 2110-IX protects the information space more comprehensively, criminalising various manifestations of information acts, Law 2108-IX addresses these issues only in terms of combating collaborationism. Given the political affiliation of its initiators, it is likely that Law 2110-IX would not have been adopted under ordinary circumstances. But, the Russian invasion in 2022 and the risk of losing statehood put the contradictions between the majority and the opposition on the back burner.

It became evident that criminalising not only collaborationist activities – including public denial of aggression and occupation – but also the justification of aggression and occupation, glorification of the aggressor, and insults or threats against Ukrainian servicemen was essential. As a result, both laws were adopted without discussion and proper legal expertise on their compatibility. Delay in such extreme conditions would not be justified.

There is a certain consensus in the Ukrainian criminal law academia that collaborationist activity should be considered a privileged (mitigating) type of high treason. The ideal scenario is that, like high treason, collaboration is committed by a citizen of the state and consists of certain assistance to a foreign ("alien") entity – another state. Its separation from high treason is based on specific features of cooperation – it takes place under conditions of occupation of the territory, in favour of the occupier and to the detriment of the state whose territory is occupied. Mitigation of liability for collaborationist activity is due to the occupation conditions in which the act is committed.[60]

58 Law of Ukraine no 2108-IX of 3 March 2022 'On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Collaborationist Activity' [2022] Official Gazette of Ukraine 32/1686.

59 Law of Ukraine no 2110-IX of 3 March 2022 'On Amendments to Certain Legislative Acts of Ukraine on Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products' [2022] Official Gazette of Ukraine 33/1719.

60 For more information, see: Mykola Rubashchenko and Nadiia Shulzhenko, 'Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory' (2024) 7(3) Access to Justice in Eastern Europe 10, doi:10.33327/AJEE-18-7.3-a000315.

From this perspective, it seems logically justified that public denial as a type of information collaborationism under Art. 111-1(1) of the CCU is punished rather symbolically and less severely than public denial under Art. 436-2 of the CCU. The reasoning is that someone who denies under the occupier's rule should be punished less severely (if at all) than someone who is in a "free" territory. However, since the legislator did not indicate the "conditions of occupation of the territory" as a mandatory feature under Pt. 1 of Art. 111-1 of the CCU, legal practice does not take this feature into account and, as a result, both those who committed denial in the occupied territory and those who denied outside the conditions of occupation are punished under this provision of the CCU (with the latter being more numerous).

If the legislator had indicated this feature in Pt. 1 of Art. 111-1 of the CCU, then the comparable articles could have been easily distinguished. Public denials, in general, would be punishable under Art. 436-2 of the CCU (general rule), while denials committed in the context of the occupation of the territory would fall under Pt. 1 of Art. 111-1 CCU (special rule), which provides for less severe liability. The legislator's negligent mistake could have been rectified through investigative and judicial practice, which would have been sufficient to ensure legal certainty. However, this correction has yet to occur.

Therefore, resolving the collision would involve supplementing Pt. 1 of Art. 111-1 of the CCU with an indication that the denial must occur under the conditions of occupation of the territory. This would clearly differentiate between Pt. 1 of Art. 111-1 and Art. 436-2 of the CCU in terms of public denial, following the well-known rule principle *lex specialis derogat legi generali*. An alternative option, already proposed in the academic literature, would be to exclude public denials from Pt. 1 of Art. 111-1 of the CCU[61] entirely so that all cases of denials would be governed by Art. 436-2 of the CCU. An even more radical option would be to exclude Pt. 1 from Art. 111-1 of the CCU. While these options are generally better than the current version of the law, their implementation would ignore the difference between acts committed under occupation and outside of such conditions.

6 CONCLUSIONS

The idea of criminalisation of the denial of genocide and other international crimes is rooted in the bloody legacy of the Second World War. This legacy, and in particular the spectre of the Holocaust, also underlies the concept of militant democracies that protect individual and collective social values by limiting freedom, including freedom of expression. The modern history of crimes of denial dates back to the prohibition of Holocaust denial, and later criminalisation naturally covered a much more comprehensive range of denied facts: other genocides, crimes against humanity, war crimes, and crimes against peace.

61 Roman O Movchan, *Military' Novels of the Criminal Code of Ukraine: Law-Making and Law-Enforcement Problems* (Norma prava 2022) 56.

Ukrainian's approach to the criminalisation of denial has followed a distinctive trajectory. Unlike other European countries that began by criminalising Holocaust denial, Ukraine still does not have such a provision in its criminal law. At present, Ukraine does not explicitly punish denial of genocide, crimes against humanity, or war crimes. At the same time, Art. 161 of the CCU provides for liability for hate speech, which is characterised by general and rather vague wording that is rarely used in practice.

The geographical context played a role in criminalising the denial of the Russian Federation's aggression against Ukraine and the related occupation of Ukrainian territory. Under the threat of losing statehood, the changes reflected in two articles of the CCU, which simultaneously provide for liability for public denial of Russian aggression and occupation committed by a citizen of Ukraine, were born in extraordinary circumstances. Neither scholars nor judicial practice have been able to find a unified approach to resolving the collision between the two articles, which has increased legal uncertainty and unequal application of the law in proceedings with similar circumstances. This collision should be resolved based on the principle that the law most favourable to the accused should be applied. However, this method is temporary. To resolve the collision, it is necessary to amend the criminal law in one of two ways: a) to supplement Pt. 1 of Art. 111-1 of the CCU with a feature indicating that the crime must be committed under occupation; b) to exclude Pt. 1 (or only the denial) from Art. 111-1 of the CCU.

The originality of Ukraine's approach to criminalising denial stems from at least two circumstances. Firstly, the prohibition of denial of specific crimes of aggression and illegal occupation is not typical for the criminal law of other countries, including those in Europe. Secondly, it is not just a denial of a fact that occurred decades ago but a denial of an ongoing history. This fact strengthens the ability of the original criminal ban to withstand the test of the legitimacy of interference with freedom of expression and also indicates that this prohibition is unlikely to be temporary.

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

The research was supported by a grant from the National Research Foundation of Ukraine (NRFU) within the framework of the project "Collaborationism in the Temporarily Occupied Territories: Problems of Legal Assessment, Guaranteeing Human Rights and Freedoms and Reintegration of Territories" (project No. 2021.01/0106). The theses explained here represent the ideas of the authors and do not necessarily reflect the views of the NRFU.

ABOUT THIS ARTICLE

Cite this article
Rubashchenko M and Shulzhenko N, 'Denial of Aggression Against Ukraine or Occupation of Its Territory: A New Case Among the Denial Crimes' (2024) 7(4) Access to Justice in Eastern Europe 11-37 <https://doi.org/10.33327/AJEE-18-7.4-a000115>

DOI https://doi.org/10.33327/AJEE-18-7.4-a000115

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Keywords: *denial crimes, historical negationism, Holocaust denial, collaborationism, criminal law, in dubio pro homine.*

DETAILS FOR PUBLICATION

Date of submission: 20 Sep 2024
Date of conditinally acceptance: 09 Oct 2024
Date of acceptance: 11 Oct 2024
Date of publication: 15 Nov 2024
Whether the manuscript was fast tracked? - No
Number of reviewer report submitted in first round: 2 reports
Number of revision rounds: 1 round, revised version submitted 10 Oct 2024

Technical tools were used in the editorial process:
Plagiarism checks - Turnitin from
iThenticate https://www.turnitin.com/products/ithenticate/
Scholastica for Peer Review https://scholasticahq.com/law-reviews

RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАПЕРЕЧЕННЯ АГРЕСІЇ ПРОТИ УКРАЇНИ АБО ОКУПАЦІЇ ЇЇ ТЕРИТОРІЇ: НОВИЙ ВИПАДОК СЕРЕД ЗЛОЧИНІВ ЗАПЕРЕЧЕННЯ

Микола Рубащенко* та Надія Шульженко

АНОТАЦІЯ

Вступ. *Заперечення злочинів вважаються однією із найбільш дискусійних тем у сучасному кримінальному праві. Криміналізація історичного негаціонізму проблемно балансує між двома крайнощами: ефективним захистом історичної пам'яті, громадського порядку та почуттів жертв жахливих трагедій та їхніх нащадків з одного боку, і гарантуванням свободи вираження та свободи академічних дебатів з другого боку. Попри це вона набирає обертів на європейському континенті та постійно розширюється.*

Тривалий час Україна знаходилась осторонь від складних дебатів про заборону заперечень. Проте російська агресія стимулювала український парламент криміналізувати заперечення агресії проти України та окупації частини її території. Формулювання закону є нетривіальними та відрізняються від класичних європейських зразків. Одночасно було прийнято два закони, які не були синхронізовані між собою і породили колізію. Незважаючи на це, вони часто застосовуються.

Тож ця стаття демонструє тернистий шлях України до криміналізації заперечення та показує юридичні складнощі, які виникли у зв'язку з екстремальними умовами прийняття законів.

Методи. *У процесі дослідження спершу автори за допомогою історико-правового та порівняльно-правового методів коротко описують еволюцію кримінальної заборони заперечень у світі та тенденції останніх років.*

Основна частина дослідження концентрується навколо українського досвіду і містить два блоки. Перший демонструє розвиток ідеї криміналізації цих діянь в Україні за допомогою аналізу законодавчих ініціатив та результатів їхнього розгляду. Другий зосереджується на аналізі законодавчих прорахунків, на труднощах застосування прийнятих поправок і пропонує варіанти подолання колізії законів, а також рекомендує вдосконалити чинні норми. При цьому автори спираються на формально-юридичний та логіко-правовий методи пізнання.

Результати та висновки. *Європа є ядром руху криміналізації історичного негаціонізму. Більшість європейських країн передбачають кримінальну відповідальність за ті чи інші форми заперечення. Україна, як країна-кандидат на вступ до Європейського Союзу, має гармонізувати своє законодавство з правом ЄС. За останні двадцять років в українському парламенті було зареєстровано десятки проєктів, в яких було запропоновано встановити кримінальну заборону на заперечення тих чи інших історичних фактів та було здійснено юридичну оцінку цих заперечень. Однак український досвід значно відрізняється від європейських аналогів, які переважно передбачають відповідальність за заперечення Голокосту, інших геноцидів, злочинів проти людяності та воєнних злочинів.*

Наразі за кримінальним законом України заперечення російської агресії та окупації передбачено одночасно двома різними статтями Кримінального кодексу України, при цьому обидві статті застосовуються на практиці, що породжує правову невизначеність та порушує принцип рівності. У статті було запропоновано внести зміни до КК України з метою ліквідації колізії, а до цього часу вирішувати конкуренцію норм за принципом in dubio pro homine.

Ключові слова: *заперечення злочинів, історичний негаціонізм, заперечення Голокосту, колабораціонізм, кримінальне право, in dubio pro homine.*