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RIGHT TO FREEDOM OF EXPRESSION AND RESTRICTIONS WITHIN A BAN ON DISSEMINATION OF TOTALITARIAN REGIME SYMBOLICS

Abstract

The Article examines the right to freedom of expression in the context of restrictions on the use of totalitarian regime symbols. It is determined that freedom of expression is not absolute and may be restricted to protect important values in democracies. It is established that the state has the right and the obligation to respond to threats posed by symbols of a totalitarian regime. It analyses the role of symbols of totalitarianism in the identification and the consolidation of supporters of relevant ideas, as well as their comprehensive influence on public sentiment while testing social loyalty. It is emphasized that such symbols, beyond historical memory, can be used to destabilize and manipulate public consciousness. Attention is paid to the Ukrainian experience, and grounds for criminalizing certain actions with symbols of totalitarian regimes. The positions of the Constitutional and Supreme Courts are analysed. Approaches of European states to the constitutionality of restrictions on the use of totalitarian regime symbols are considered, and the significance of national historical context is emphasized.

Keywords

freedom of thought; freedom of expression; restrictions; proportionality; totalitarian regime symbols; constitutionality;, criminalization

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Introduction

Obviously, the issue of establishing a proportional, justified boundary between freedom of expression and certain restrictions of it is extremely sensitive. After all, in democratic states, restrictions on freedom of expression, support for certain positions, directions, and movements are socially significant. Therefore, any justification for restrictions on freedom of expression is obviously under the close supervision of lawyers.

In totalitarian states, this issue does not come up. Usually, all branches of power of such states work to establish the appropriate regime. Therefore, any restrictions are accepted as the norm, and neither the need for justification, nor the proportionality of such restrictions, raises doubts or discussion.

In contrast, in democratic states, representatives of society usually review the appropriateness of any restrictions on freedom of expression, while judicial institutions, such as the Supreme Court or the Constitutional Court, often express their views on this issue in their decisions.

It is worth emphasizing that democratic states may impose certain restrictions on the right to freedom of expression, taking into account national security, territorial integrity, or public safety, to prevent riots or other crimes. However, in any case, it is quite natural in such states for certain provisions of the law that restrict certain rights to undergo a kind of "test of compliance" with the democratic principles of the functioning of the state as a whole.

Such a "test" was passed by the Ukraine Law "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols," and Article 436-1 of the Criminal Code, which provides for criminal liability for the production, distribution, and propaganda of symbols of totalitarian regimes. After the adoption of this Law, a public debate arose regarding the justification, expediency, and proportionality of implementing the relevant restrictions.

The purpose of this publication is to examine issues related to the implementation of the right to freedom of expression, taking into account certain restrictions on this right in the context of the ban on the dissemination of symbols of totalitarian regimes.

From this perspective, it is also important to study the grounds for criminalizing the relevant acts both in Ukraine and in other states, to analyse the historical aspect, and to study the positions of the highest judicial institutions and the European Court of Human Rights (the ECtHR) regarding compliance with the fundamental guarantees of human and civil rights and freedoms in resolving this issue.

In Ukraine, the above-mentioned problem actually remains beyond the attention of legal scientists. The highest judicial institutions (the Supreme Court and the Constitutional Court) have expressed their views on it. However, there are only a few articles on this issue in the academic community. Thus, after the adoption of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Propaganda of Their Symbols," V. Yavorsky[1] expressed his thoughts on the expediency of its existence, conducted a comparative legal study, analysing the legislation of European states. The author of this Article highlighted the approach of the Supreme Court of Ukraine to the prohibition of the dissemination of symbols of totalitarian regimes at an international conference dedicated to the 30th anniversary of the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in the national legal order of Ukraine.[2]

The questions raised in this Article were analysed by legal scientists, and assessed by the Constitutional Courts for constitutionality in other states. Namely, Agata Fijalkowski,[3] Anna Liudva, Oleksii Voloshyn,[4]

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[1] V. Yavorsky, *Analysis of the Law on Prohibiting Communist Symbols*, 2015, available at: http://archive.khpg.org/1430493970 [last accessed: 25.03.2026].

[2] N. Antoniuk, *Supreme Court discusses 75 Years of European and 30 Years of national experience in implementing the European Convention on Human Rights: achievements, challenges, and prospects for strengthening the Convention standards*, 2025, available at: https://court.gov.ua/eng/supreme/pres-centr/news/1939307/ [last accessed: 25.03.2026].

[3] A. Fijalkowski, *The criminalization of symbols of the past: expression, law and memory*, "International Journal of Law in Context", Vol. 10(3), 2014.

[4] A. Liudva, O. Voloshyn, *Prohibition of totalitarian symbols – time to change the approach under freedom of expression standards?* 2026, available at: https://freespeech.dslua.org/prohibition-of-totalitarian-symbols-time-to-change-the-approach/ [last accessed: 25.03.2026].

Pavel Bachmat,[5] Katarzyna du Vall.[6] The European Commission has prepared a Report to the European Parliament and to the Council, "The memory of the crimes committed by totalitarian regimes in Europe."[7]

So, an issue of expediency and the justification for restricting the use, distribution, and propaganda of symbols of totalitarian regimes were in the focus of attention of a number of European states. Each state decided on the solution and the legislative regulation of such actions. However, the war in Ukraine and the Ukrainian experience can serve as a basis for assessing the issues of such a restriction, not only in the context of analysing the balance between memory and law, but also in the context of real threats today.

I. National Context and Criminalization

The Criminal Code of Ukraine contains Article 436-1, which has been in effect since 2015, following its amendment by Law No. 317-VIII of 09.04.2015.[8] This Article provides for liability for the production, distribution, and public use of symbols of communist and national socialist (nazi) totalitarian regimes. That is, the legislator clearly outlined three actions (production, distribution, and public use) that are criminally

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[5] P. Bachmat, *Przestępstwa z art. 256 i 257 k.k. – analiza dogmatyczna i praktyka ścigania*, Warszawa 2005, available at: https://iws.gov.pl/wp-content/uploads/PDF/2005/PRAWO%20KARNE%20I%20KRYMINOLOGIA/P-Bachmat-Przest-z-art-256-i-257-2005.pdf [last accessed: 25.03.2026].

[6] K. du Vall, *Polish Law and Totalitarianisms in the Constitution of the Republic of Poland and the Polish Criminal Code*, 2018, available at: https://wpia.uj.edu.pl/documents/41601/143056640/Streszczenie_Vall_WA.pdf/3d3d58ec-c0c0-44f7-8b06-ed264b0039a4 [last accessed: 25.03.2026].

[7] Report from the Commission to the European Parliament and to the Council. The memory of the crimes committed by totalitarian regimes in Europe, European Commission, Brussels, 22.12.2010 COM(2010) 783 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0783&from=ES [last accessed: 25.03.2026].

[8] Law of Ukraine, "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols", 09.04.2015 No. 317-VIII, available at: https://zakon.rada.gov.ua/laws/show/317-19#n73 [last accessed 25.03.2026].

punishable if they are committed in relation to the symbols of two types of totalitarian regimes (communist and nazi).

It is worth noting that in the Article on criminal law, the legislator has stipulated cases when actions with the above-mentioned symbols of totalitarian regimes are not criminal, as is clearly defined by the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols."

Why does Ukraine provide for restrictions on certain actions with symbols of these two regimes: communist and nazi? After all, there were many other regimes in the world that were also totalitarian and caused a lot of harm to humanity.

It is obvious that the legislator, foreseeing the relevant restrictions, drew on Ukraine's history and the influence of these two regimes, not only in the past, but also in the modern period. This study was published during the war of the Russian Federation (the RF) against Ukraine. Therefore, an issue of "historical memory" about the activities of the communist regime in Ukraine obviously cannot be called only the past, which is not connected with the present. Thus, it is a well-known fact that the cult of the communist regime is constantly promoted in the RF, "nostalgia" for that historical period, the cult of Stalin and Lenin, the glorification of the symbols of the red star, the hammer and sickle, the St. George ribbon, etc.

For decades, the RF has been destroying Ukrainians, the Ukrainian language, traditions, and everything that showed the difference between Ukrainians and the so-called "Soviet citizen" or Russian. A few examples can be cited that demonstrate the systematic and thought-through nature of Russia's strategy. It is about the Holodomor of 1932–1933, the deportation of thousands of Ukrainians to Siberia, the murder of Ukrainian intellectuals, the settlement of Ukrainian cities with a population imported from Russia. For decades, the Ukrainian language was systematically killed, and the true history of Ukraine was silenced.

Agata Fijalkowski[9] makes an apt comparison, considering, in her study, the criminalization of certain actions as "symbols of the past." The author concludes that cases concerning the use of symbols provide

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[9] A. Fijalkowski, *The criminalisation of symbols of the past…*

an excellent illustration of the intersection of memory and law. The author fully agrees that one of the aspects that was the basis for the appearance in the criminal codes of a number of European states of criminal liability for the use of symbols of totalitarian regimes was the "memory effect" of the terrible and cruel things that such regimes did in certain states, the realization that the popularization of the ideas of a totalitarian regime is dangerous, because forgetting the past can create a path for the restoration of a similar regime in the future.

In her research, A. Fijalkowski uses historical, comparative, and contextual methodologies, showing the legal and philosophical complexities of the criminal use of symbolism, the political realities, and the key dimension of transitional justice and its relationship to expression, law, and memory.

However, the Ukrainian example and the war launched by the RF against Ukraine very clearly show that it is hardly only about the intersection of memory and law. Manipulation of human consciousness through symbols can and does have a real impact on modern events and their development. Therefore, the role of the Article of criminal law, which restricts certain actions symbolizing totalitarian regimes, does not end in the context of the past and the use of historical memory, but has a direct impact on the current situation and may even have a future impact. The Ukrainian experience has shown that failure to respond to isolated manifestations of such behaviour led to the formation of groups of supporters of the communist regime or the RF, whose activities had already acquired a completely different legal colour. However, it all started with the actions of one person or several people.

What was happening in Ukraine? Russia did not abandon the idea of using symbols that were supposed to restore people's memory of the communist regime and cause the effect of "nostalgia."

After the proclamation of independence, Russian forces began to use older people and other pro-Russian people who were nostalgic for their communist state to shake the peace in Ukraine, and any attempts to stop the spread of this "nostalgia" began to be perceived as restrictions on freedom of speech. However, when the bus trips of such groups of older people began to lead to mass fights and conflicts, the legislator realized that it was necessary to respond urgently by introducing legislative restrictions on the use, distribution, and propaganda of symbols associated with the communist regime. Criminalization of these actions

was ripe, since it was clearly visible that certain schemes (for example, trips around Ukraine by groups of older people with communist symbols) were being used to the detriment of the national security, sovereignty, and independence of Ukraine.

There are grounds for arguing that the technique of using the memory and symbols of totalitarian regimes is working quite successfully, not only in Ukraine. Democratic states should take a very close look at the psychological technique of inducing "nostalgia" for the past and using it to the detriment of the national security of several states. Democratic states always emphasize ensuring freedom of expression by citizens, but sometimes they do not notice a desire and real possibility of some forces or even special services of other states to use symbols of the past, which are associated with totalitarian regimes, in real time, and thereby to create a pretext for splitting society or shaking public opinion, which, in the absence of a timely response, may even affect the national security of a state as a whole.

Ukraine has been implementing appropriate restrictions on the distribution of symbols of the communist regime for a long time, and then, after the appearance of the relevant law and Article in the Criminal Code, has not really applied the mechanism of criminal liability for actions provided for in Article 436-1 of the Criminal Code. In 2014, when the RF's war against Ukraine had begun, several examples of bringing individuals to criminal liability appeared.

Statistical data clearly demonstrate the theses being raised above. Thus, the number of individuals sentenced under Article 436-1 of the Criminal Code is as follows: 2014 – 0, 2015 – 1, 2016 – 0, 2017 – 3, 2018 – 3, 2019 – 2, 2020 – 8, 2021 – 2, 2022 – 30, 2023 – 111, 2024 – 80, 2025 – 53.[10]

The author has focused on the historical significance of the communist regime's activities, the spread of its ideology, and the use of its symbols in Ukraine today to illustrate the criminalization of relevant actions in Ukraine. The historical past of each state testifies to the expe-

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[10] Statistical data of the reports in form no. 6 "Report on persons brought to criminal liability and types of criminal punishment", State Judicial Administration of Ukraine, statistical information on a number of persons convicted of production, dissemination of communist, nazi symbols and propaganda of communist and national socialist (nazi) totalitarian regimes (Article 436-1 of the Criminal Code of Ukraine) in 2014–2025 (according to sentences that have entered into legal force), available at: https://court.gov.ua/inshe/sudova_statystyka/ [last accessed: 25.03.2026].

diency of restricting the spread of certain views in support of a totalitarian regime. That is, the historical aspect is to be one of the criteria for studying the expediency and justification of criminalization.

The next thing that is extremely important in this context is an assessment of the risks of expressing such views at the present time. For Ukraine, when assessing the relevant risk, it is critically important to take into account that the RF is using "nostalgia" for the communist regime to the detriment of Ukraine's national security, considering the territorial proximity, assessing the attitude towards the communist regime and a certain cult of such a regime in the RF, a condition of relations between states, primarily the RF's encroachment on the existence of Ukraine and conducting an active war.

Therefore, there were, and there are, grounds in Ukraine for criminalizing the production, dissemination, and public use of symbols of communist and national socialist (nazi) totalitarian regimes. There can be no doubt about social danger and prevalence (or possible prevalence) of the relevant actions, since historical analysis has clearly demonstrated the use of "communist regime propaganda schemes" to the detriment of Ukraine's national security.

II. Approaches to Criminalizing the Use of Symbols of Totalitarian Regimes in European States

The European Commission, preparing a report on the memory of crimes committed by totalitarian regimes in Europe, stated that the Member States of the European Union accomplished in general relatively quickly the removal of all symbols related to their repressive past (e.g. change of street names, removal of symbols from public places, etc). In some Member States, the use of symbols associated with totalitarian regimes is explicitly prohibited by law. For example, in three Member States (Hungary, Lithuania, and Poland) this prohibition refers to the use of symbols of the communist past.[11]

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[11] Report from the Commission to the European Parliament and to the Council. The memory of the crimes committed by totalitarian regimes in Europe, European Commission, Brussels, 22.12.2010 COM(2010) 783 final…

The Commission has also recalled that it should not be forgotten that four Member States have national legislation on the denial of crimes committed by totalitarian regimes, which explicitly includes the crimes committed by totalitarian communist regimes:

- in the Czech Republic, the criminal code contains a specific offence for a person who publicly denies, puts in doubt, approves of, or tries to justify nazi or communist genocide or other crimes of nazis or communists against humanity.
- in Poland, the public and counterfactual denial of nazi crimes, communist crimes, and other crimes against peace and humanity or war crimes is a criminal offence.
- in Hungary, the public denial, calling into question, or trivialization of the fact of the genocide and other crimes against humanity committed by the national socialist and communist regimes is a criminal offence.
- in Lithuania, publicly condoning, denying, or grossly trivializing international crimes and crimes committed by the USSR or nazi Germany against the Republic of Lithuania or residents thereof is a criminal offence.[12]

Later, the Latvian Criminal Code was amended to include Article 74.1, titled "Acquittal of Genocide, Crime against Humanity, Crime against Peace and War Crimes."[13]

However, after a judgment of the ECtHR in the case "Vajnai v. Hungary"[14] of 8 October 2008, changes occurred in a number of states.

Volodymyr Yavorsky, while investigating an issue of the prohibiting of the use and propaganda of certain symbols, drew attention that in 2000 criminal liability was introduced in Hungary for the distribution or public use or demonstration of the swastika, SS signs, the crossed arrow sign (a sign of the National Socialist Crossed Arrow Party created in 1937), the hammer and sickle, the red star, or any symbols with their use; a fine was established for such actions; it was not a crime to

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[12] *Ibid*., p. 5.

[13] Criminal Law of the Republic of Latvia of 08.07.1998, available at: https://likumi.lv/ta/en/en/id/88966-criminal-law[last accessed 25.03.2026].

[14] *Vajnai v. Hungary,* Application no. 33629/06, Judgement of 08.10.2008, available at: https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-87404%22]} [last accessed: 25.03.2026].

use these symbols for the purposes of education, science, art, or to provide information about history, as well as current symbols of states.[15] In 2000, the Constitutional Court of Hungary found that these provisions did not violate the Constitution. However, in 2008, in the case of "Vajnái v. Hungary,"[16] the ECtHR found a violation of freedom of expression due to the fine imposed on a demonstrator for wearing a red star, and in 2011, in the case of "Fratánolo v. Hungary," the ECtHR again found a similar violation.[17] Ultimately, on 19 February 2013, the Constitutional Court of Hungary declared this ban unconstitutional.

It is very probable that the ECtHR's practice also influenced the development of the situation in Poland. Thus, in Poland in 1997, criminal punishment was introduced for the propaganda of totalitarian ideology, including nazi and communist, as well as the production, sale, purchase, or use of products related to it, including communist and nazi symbols. The punishment was not applied if these actions were carried out for scientific, educational, artistic, or collection purposes. On July 19, 2011, the Constitutional Court of Poland declared these provisions unconstitutional for violating freedom of expression.

Subsequently, scholars who studied this issue wrote that the ECtHR should better consider the historical peculiarities of each country, making the level of attention comparable to the association of certain symbols with armed activities. It should also attach less weight to the alleged reconciliation, since older Communist symbols, for instance, may be weaponized in new contexts by new players.[18]

Supporting this approach, I am absolutely convinced that it is necessary to rethink old approaches that underestimated the possibility of using symbols of totalitarianism as a tool in the hands of some groups, organizations, or even states, to fight or disrupt peace and security in democratic states.

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[15] V. Yavorsky, *Analysis of the Law on Prohibiting Communist Symbols…*

[16] *Vajnai v. Hungary,* Application no. 33629/06…

[17] *Fratanolo v. Hungary*, Application no. 29459/10, Judgement of 08.03.2012, available at: https://hudoc.echr.coe.int/eng?i=001-107307#{%22itemid%22:[%22001-107307%22]} [last accessed: 25.03.2026].

[18] A. Liudva, O. Voloshyn, *Prohibition of totalitarian symbols – time to change the approach under freedom of expression standards?*, 2026, available at: https://freespeech.dslua.org/prohibition-of-totalitarian-symbols-time-to-change-the-approach/ [last accessed" 25.03.2026].

It is worth noting that the ECtHR took into account historical context and modern war, speaking about the restriction on the use of the St. George ribbon in Ukraine,[19] and such a decision has shown that the court sees risks to national security and peace in democratic states through the use of manipulation and propaganda of symbols of totalitarian regimes.

Some scholars studying the issue of establishing certain restrictions, including criminal liability for the use, distribution, and propaganda of symbols of totalitarian regimes, have concluded that the issue lies at the border of three branches of law: constitutional, criminal, and administrative.[20]

This issue involves both the constitutional aspect of the implementation of human and citizen rights and freedoms, and the restrictions that may follow from the norms of administrative and criminal law.

While analysing the Polish legislation, the author prudently emphasizes that issues related to certain restrictions on the expression or use of symbols are highly sensitive, as they interfere with core democratic values, such as assembly and freedom of speech.[21]

The author also explores the issue of decriminalizing actions and argues that, in her opinion, the ban on certain parties and organizations is quite effective.[22]

In those states where there is a threat of influence from the RF, it is necessary to preserve the criminal law ban on the use, distribution, or propaganda of symbols of totalitarian regimes, since it is difficult to ensure the normal functioning of democratic institutions by refusing to criminalize certain actions related to certain restrictions on the use of symbols only by banning the activities of parties of a certain orientation.

Based on the real situation in Ukraine, a ban on the activities of certain parties or organizations was important by itself, but could not replace the criminal law ban on the use of symbols of totalitarian regimes.

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[19] *Yuriy Mykolayovych BORZYKH v. Ukraine*, Application no. 11575/24, Decision of 19.11.2024, available at: https://hudoc.echr.coe.int/eng?i=001-238740 [last accessed: 25.03.2026].

[20] K. du Vall, *Polish Law and Totalitarianisms…*

[21] *Ibid*.

[22] *Ibid*.

Ukrainian courts were quite loyal in imposing sentences for crimes under Article 436-1 of the Criminal Code. In fact, convicted persons were released from criminal liability on probation. That is, they did not serve the actual sentence imposed by the court. However, if during the period determined by the court, they committed another or the same criminal act, then such persons would have to serve the sentence in fact.[23]

III. Position of the Constitutional Court on Assessment of the Constitutionality of Limitations Introduced by a State on Use of Symbols of Totalitarian Regimes

It is important to determine whether the restrictions established by the legislator, limiting actions involving the symbols of totalitarian regimes in each state, are proportional. Therefore, it is absolutely natural that the Constitutional Courts of Ukraine and European states assessed the provisions of laws and the Criminal Code for compliance with the Constitution.

Such an assessment was conducted by the Constitutional Court in Ukraine.

After studying the experience of European states and in particular the judgment of the ECtHR "Vainái v. Hungary,"[24] the Ukrainian legislator took measures to ensure that in the special law concerning the condemnation of communist and national socialist (nazi) totalitarian regimes in Ukraine and the prohibition of propaganda of their symbols,[25]

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[23] Verdict of Dniprovskyi district court of Dniprodzerzhynsk city of Dnipropetrovsk oblast of 01.11.2023, Case no. 173/1926/23, available at: https://reyestr.court.gov.ua/Review/114573139 [last accessed: 25.03.2026].

Verdict of Cherkaskyi district court of Cherkasy oblast of 30.01.2023, Case no. 707/2235/21, available at: https://reyestr.court.gov.ua/Review/108716892 [last accessed: 25.03.2026]; Verdict of Ternivskyi district court of Kryvyi Rih city of Dnipropetrovsk oblast of 15.07.2025, Case no. 215/5458/25, available at: https://reyestr.court.gov.ua/Review/128840548 [last accessed: 25.03.2026].

[24] *Vajnai v. Hungary,* Application no. 33629/06…

[25] Law of Ukraine, "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols"...

cases that exclude criminal or any other liability are maximally prescribed. That is, it is about a proportional restriction on actions symbolizing totalitarian regimes, so that the corresponding prohibition is not absolute, is understandable, and complies with the provisions of Article 8 of the Convention.

However, it became a subject of assessment, and the Constitutional Court of Ukraine[26] has expressed an opinion on the constitutionality of provisions of the above-mentioned special law and Art. 436-1 of the Criminal Code.

Before the full-scale invasion of Ukraine by the RF, 46 people's deputies addressed the Constitutional Court of Ukraine (the CCU) with a constitutional submission on the compliance of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" with the Constitution of Ukraine.

The submission stated that restrictions on the rights to freedom of expression and belief are possible only in the interests of national security, territorial integrity, or public order, with the purpose of preventing riots or crimes, of protecting public health, of protecting the reputation or rights of other people, of preventing the disclosure of information received in confidence, or of maintaining the authority and impartiality of justice. It also contained a thesis that it is necessary to conduct open debates on the topic of history.[27] The submission stated that the law is not clear enough, which creates a risk of arbitrariness on the part of the authorities, and also legal uncertainty.

However, the CCU did not agree with such arguments and in its judgment emphasized that the right to freedom of thought and speech,

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[26] Decision of the Constitutional Court of Ukraine in the case on the constitutional submission of 46 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Propaganda of Their Symbols" of 16.07.2019, Case no. 1-24/2018 (2019/17), available at: https://zakon.rada.gov.ua/laws/show/v009p710-19#Text [last accessed: 25.03.2026].

[27] Constitutional submission on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Propaganda of Their Symbols" of 09.04.2015 no. 317-VIII, available at: https://ccu.gov.ua/sites/default/files/3_1919.pdf [last accessed: 25.03.2026].

to freely express one's views and beliefs is not absolute, and its exercise may be limited by law in the interests of national security, territorial integrity, or public order with the purpose of preventing riots or crimes, and in other cases provided for in Part Three of Article 34 of the Constitution of Ukraine.[28]

It should be noted that the CCU examined in detail the essence of the communist regime and drew attention to its crimes in Ukraine. In particular, important theses in the CCU judgment are the statement that after seizing state power, the communist regime introduced a one-party political system and political censorship, liquidated all opposition parties, and made the existence of democratic institutions impossible, depriving citizens of democratic rights and freedoms.

The court also stated that the main components of the ideology of the communist regime were the ideas of the "dictatorship of the proletariat," "world revolution," "revolutionary terror," and the elimination of the "exploitative" classes and "enemies of the people;" numerous official documents issued during the rule of the communist regime contained direct instructions on the organization of mass repressions using Soviet punitive bodies. The basis of the communist regime in the USSR was the ideology of Marxism, which over time transformed into the ideology of Leninism and Stalinism, and the main idea of this regime was the thesis of building the so-called communist society through the implementation of the world socialist revolution and the creation of a world socialist republic.

Besides, the CCU has focused on the irreparable impact that the communist regime had on Ukraine. In particular, it was emphasized that the establishment of the communist regime on Ukrainian lands was associated with the liquidation of the Ukrainian independent state by this regime and its gradual occupation by the armed forces of this regime, the implementation of a state repressive policy, judicial and extra-

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[28] Decision of the Constitutional Court of Ukraine in the case on the constitutional submission of 46 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Propaganda of Their Symbols" of 16.07.2019, Case no. 1-24/2018 (2019/17), available at: https://zakon.rada.gov.ua/laws/show/v009p710-19#Text [last accessed: 25.03.2026].

judicial reprisals with falsified charges, torture, mass violations of the principles of justice and procedural norms, deprivation of the right to defence at all stages of criminal proceedings, and creation of intolerable conditions for detention of repressed persons.

The CCU paid attention to the fact that the communist regime and the nazi regime exploited slogans that were attractive to the people and were based on social utopias, but their practical implementation led to numerous violations of human rights, the violent liquidation of democratic institutions, and the targeted and organized destruction of people.

The author mentioned the grounds for criminalizing the use, production, and dissemination of symbols of totalitarian regimes in the context of assessing the impact on events currently taking place, driven by the manipulation of citizens' consciousness through the "phantom achievements" of these regimes.

The CCU has also noted that the red star, the hammer and sickle depicted crosswise, and other symbols of the communist regime have been widely used by anti-Ukrainian forces for several decades to spread an atmosphere of fear, hatred, and aggression, to deny the right of the Ukrainian people to their own independent state, including after Ukraine gained independence, for anti-Ukrainian propaganda in many regions of Ukraine, especially during the Orange Revolution and the Revolution of Dignity, to justify the annexation by the RF of the Autonomous Republic of Crimea and the city of Sevastopol, as well as the armed aggression and temporary occupation by the RF of parts of the Donetsk and Luhansk regions, where illegal armed formations were created, supported, and financed by the RF.

The CCU concluded that the ban on the use of this symbolism and propaganda of totalitarian regimes has a legitimate goal, which is to prevent a return to the undemocratic functioning of public power, and to prevent violations of fundamental human rights. Given the history of the formation of the Ukrainian independent state, the historical context, and the threats that arose before it in connection with the temporary occupation of part of its territory, Ukraine has the right to uphold constitutional principles, including by prohibiting the propaganda of totalitarian regimes and the use of their symbolism.

Thus, the "test of constitutionality" of the relevant provisions of the Law of Ukraine "On the Condemnation of Communist and National

Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" has passed through the CCU. The purpose of adopting this Law was clarified, and a comprehensive analysis was conducted. The CCU concluded that the propaganda of the communist regime and the nazi regime, and the public use of their symbols is an attempt to justify totalitarianism and a denial of constitutional principles and democratic values, protection of which is the duty of all state authorities.

IV. Conclusions as for Crime "Production, Dissemination of Communist, Nazi Symbols and Propaganda of Communist and National Socialist (nazi) Totalitarian Regimes" (Article 436-1)

Statistical data on the number of cases under Article 436-1 of the Criminal Code that have become the subject of consideration by the cassation instance are quite illustrative. Thus, during 2014-2022, no such case was considered.[29] In 2023 and 2024 – one per year, and in 2025 – 5 cases.

The position of the Supreme Court on bringing criminal liability for the production, dissemination, and public use of symbols of communist and nazi totalitarian regimes was formed in 2025.[30] This also indicates that, although the criminal law prohibition and Art. 436-1 of the Criminal Code have existed in Ukraine for a long time, in practice, cases of bringing persons to criminal liability for the specified actions have occurred quite rarely. In fact, society and the state realized the necessity and effectiveness of this criminal law prohibition after the start of the full-scale invasion of the RF into Ukraine and after raising the threat

[29] Information on the results of consideration of cassation complaints of criminal proceedings on the production, dissemination of communist, nazi symbols and propaganda of communist and national socialist (nazi) totalitarian regimes (Article 436-1 of the Criminal Code of Ukraine) in 2014–2025 (in accordance to the Automated Document Management System of the Supreme Court, Ukraine).

[30] Determination of the First Judicial Chamber of the Criminal Cassation Court within the Supreme Court, Ukraine, of 14.10.2025, Case no. 707/2235/21, proceedings no. 51-4354км23, available at: https://reyestr.court.gov.ua/Review/131282432 [last accessed: 25.03.2026].

level to the highest level since the restoration of Ukraine's independence in 1991.

The author of this Article was one of the judges who wrote a legal opinion on the application of Article 436-1 of the Criminal Code (case no. 707/2235/21, proceedings no. 51-4354км23).

In these proceedings, the person convicted had been disseminating for a long time on his page in the social network images of state flags, coats of arms, and other symbols of the USSR, the Ukrainian SSR (UkrSSR), attributes with the reproduction of a sickle and hammer, the five-pointed star, other symbols of the Communist Party, images of persons who held leading positions in the Communist Party, etc. These are images of the leaders of the communist regime (for example, an image of Stalin with a quote about the real enemies of the people), images of a hammer and sickle, and a number of other images featuring symbols of the communist regime.

The defence argued in its cassation appeal that the actions of the convicted person did not constitute the crime charged against him, since it had not been proved that his actions contained propaganda, which constitutes an objective element of a criminal offence under Article 436-1 of the Criminal Code, or that there was an intention to carry out such propaganda. The defence also stated that there was no decision by an international court to recognize the communist regime of the USSR as a crime, and that the current government condemned the previous government.

The Supreme Court did not agree with such arguments of the defence and considered that Article 436-1 of the Criminal Code is understandable, and the defence's disagreement with the criminalization of the relevant actions by the state is not a basis for avoiding criminal liability.

First of all, the Supreme Court noted that the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" stipulates that the Verkhovna Rada of Ukraine, on behalf of the Ukrainian people, condemned the communist and national socialist (nazi) totalitarian regimes in Ukraine, determined the legal basis for the prohibition of the propaganda of their symbols, and established the procedure for the elimination of symbols of the communist totalitarian regime.

Thus, the Verkhovna Rada of Ukraine expressed the position of the entire Ukrainian people, and this position corresponds to the perception of the communist and Nazi regimes by other democratic states.

Part 1 of Article 4 of the above-mentioned Law stipulates that the production, dissemination, and public use of the symbols of the communist totalitarian regime, the symbols of the national socialist (nazi) totalitarian regime, including in the form of souvenirs, the public performance of the anthems of the USSR, the UkrSSR, other union and autonomous Soviet republics or their fragments throughout the territory of Ukraine is prohibited. As a result, the legislator provided for criminal liability in Article 436-1 of the Criminal Code for violation of the specified prohibition.

The objective element of this crime can be committed in one of the following forms: 1) production, 2) dissemination, 3) public use of the symbols of communist, national socialist (nazi) totalitarian regimes, 4) public performance of the anthems of the USSR, the UkrSSR, other union and autonomous Soviet republics or their fragments throughout the territory of Ukraine.

The Supreme Court of Ukraine indicated that the acts of production, dissemination, and public use are obviously closely related to the phenomenon of propaganda, since the content of propaganda consists in the dissemination of information, ideas, views, or facts in order to attract attention to them, influence public opinion, and demonstrate certain views and ideas.

Article 1 of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" defines propaganda of communist and national socialist (nazi) totalitarian regimes as:

- public denial of the criminal nature of the communist totalitarian regime of 1917-1991 in Ukraine, the national socialist (nazi) totalitarian regime,
- dissemination of information aimed at depicting as justified the criminality of communist, national socialist (nazi) totalitarian regimes, the activities of Soviet state security bodies, the establishment of Soviet power on the territory of Ukraine or in separate administrative-territorial units,
- persecution of fighters for the independence of Ukraine in the 20th century,

- production and/or dissemination, as well as public use of products containing the symbols of communist, national socialist (nazi) totalitarian regimes.

Therefore, the Supreme Court emphasized that all forms of the crime provided for in Article 436-1 of the Criminal Code (production, dissemination, public use, public performance) are in themselves a manifestation of propaganda. Therefore, the very fact of proving the intentional commission of the above-mentioned actions by a person is sufficient to establish the availability in his actions of both the signs of the objective element and the signs of the subjective element of this crime.

Regarding the absence of a judgment by an international court recognizing the communist regime of the USSR as criminal, the Supreme Court noted that each state decides on the validity and appropriateness of criminalizing certain actions, taking into account a number of factors. Among them, the fact of the activity of a certain totalitarian regime on the territory of the relevant state is of great importance, as well as taking into account the actions that such a regime committed. The court also emphasized that the international community has repeatedly condemned totalitarian regimes, and in a number of states, the production, dissemination, and public use of symbols of totalitarian regimes are also criminally punishable.

Thus, the Parliamentary Assembly of the Council of Europe adopted two resolutions on the condemnation of totalitarian communist regimes: Resolution No. 1096 (1996)[31] on measures to eliminate the legacy of former communist totalitarian systems and Resolution No. 1481 (2006)[32] on the need for international condemnation of the crimes of totalitarian communist regimes. In this context, it is also appropriate to mention Resolution No. 1495 (2006)[33] on combating the revival of nazi

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[31] Res. 1096 (1996) of the Parliamentary Assembly of the Council of Europe of 28.06.1996, *Measures to dismantle the heritage of former communist totalitarian systems*, available at: https://pace.coe.int/en/files/16507/html [last accessed: 25.03.2026].

[32] Res. 1481 (2006) of the Parliamentary Assembly of the Council of Europe of 25.01.2006, *Need for international condemnation of crimes of totalitarian communist regimes*, available at: https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17403&lang=en [last accessed: 25.03.2026].

[33] Res. 1495 (2006) of the Parliamentary Assembly of the Council of Europe of 12.04.2006, *Combating the resurrection of nazi ideology*, available at: https://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17427&lang=en [last accessed: 25.03.2026].

ideology and Resolution No. 1652 (2009)[34] on the treatment of monuments with a controversial historical interpretation in the member states of the Council of Europe.

The Supreme Court has emphasized that it does not consider that the fact of adherence of individuals to the communist or nazi regime allows them to violate the prohibitions established by the laws of Ukraine or to justify violations committed by other individuals. Such individuals may hold a position that does not coincide with the position of the majority of citizens of a state, but they must refrain from public statements, the dissemination, or the production of symbols of the communist regime.

The Supreme Court has also focused on the analysis of possible violation of the rights of a convicted person to freedom of expression and noted that it does not find that the criminalization of actions provided for in Article 436-1 of the Criminal Code may be considered as a violation of Article 10 of the Convention, which states that everyone has the right to freedom of expression.

In my opinion, this approach is correct, since, in accordance with Article 10, paragraph 1, of the Convention, the right to freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas, without interference by public authority and regardless of frontiers.

At the same time, paragraph 2 of this Article states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Ukrainian legislator in Article 4 of the Law of Ukraine "On the Condemnation of Communist and National Socialist (Nazi) Totalitarian

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[34] Res. 1652 (2009) of the Parliamentary Assembly of the Council of Europe of 29.01.2009, *Attitude to memorials exposed to different historical interpretations in Council of Europe member states*, available at: https://pace.coe.int/en/files/17713/html [last accessed: 25.03.2026].

Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" provided for a large number of cases that are not covered by the ban. That is, the state did not establish an absolute ban on the use of symbols of totalitarian regimes, but did take into account a number of factors when actions did not fall under the specified ban.

As a result, the Article of the criminal law (Article 436-1 of the Criminal Code) indicates when a person's actions do not constitute a crime: "except for the cases provided for in Parts 2 and 3 of Article 4 of the Law of Ukraine On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols."

For example, if private collections contain items depicting the corresponding symbols of the communist regime, such actions do not entail criminal liability.

So, the legislator established a criminal prohibition only on actions that consist of the production, dissemination, and public use of the symbols of communist, national socialist (nazi) totalitarian regimes, and public performance of anthems.

As a result, such a restriction complies with Part 2 of Article 10 of the Convention, since it is not absolute, and it is necessary in a democratic society in the interests of national security, territorial integrity, or public safety, which is especially important in the context of the ongoing aggressive war against Ukraine.

Such a conclusion was supported by the Criminal Cassation Court within the Supreme Court, and it has put an end to an issue regarding the effective use of criminal justice mechanisms in matters of the production, dissemination, and public use of symbols of totalitarian regimes, including the communist regime.

V. Analysis of Case Law of the European Court of Human Rights within the Ukrainian context

For a comprehensive analysis of the issues raised in this article, it is worth examining the ECtHR's case law on the right to freedom of expression and this court's position on possible restrictions imposed by states.

The ECtHR has stated in a number of judgments that every time a state needs to apply the principle of "democracy capable of defending itself" to justify interference with the rights of an individual, it must carefully assess the boundaries and consequences of the envisaged measures in order to maintain a balance between the requirements of protecting a democratic society and the requirements of protecting the rights of an individual.

The key approaches of the ECtHR to the implementation of restrictions on freedom of expression are contained in the following judgments:

Acceptability of a concept of a "democracy capable of defending itself" (§ 51, § 59 of the judgment in the case of "Vogt v. Germany"[35] of 26 September 1995).

Pluralism and democracy are based on a compromise that requires certain concessions on the part of individuals who must, in some cases, accept restrictions on certain freedoms available to them in order to ensure greater stability for the country as a whole (§ 99 of the judgment in the case of "Refah Partisi (the Welfare Party) and Others v. Turkey"[36] of 13 February 2003).

There is a need for a certain balance between the requirements of defending a democratic society and the requirements of defending individual rights (§ 32 of the judgment of the ECtHR in the case of "United Communist Party of Turkey and Others v. Turkey"[37] of 30 January 1998).

At the same time, when freedom of expression is exercised as political speech, limitations are justified only in so far as there exists a clear, pressing, and specific social need; consequently, the utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings; in such situations there is a risk that a blanket ban on such symbols may also restrict their use in

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[35] *Vogt v. Germany*, Application no. 17851/91, Judgement of 26.09.1995, para 51, 59, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58012%22]} [last accessed 25.03.2026].

[36] *Refah Partisi (the Welfare Party) and Others v. Turkey,* Application no. 41340/98, 41342/98, 41343/98 and 41344/98, Judgement of Grand Chamber of 31.07.2001, para 99, available at: https://hudoc.echr.coe.int/eng?i=001-59617 [last accessed: 25.03.2026].

[37] *United Communist Party of Turkey and Others v. Turkey,* Application no. 133/1996/752/951, Judgement of 30.01.1998, para 32, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58128%22]} [last accessed: 25.03.2026].

contexts in which no restriction would be justified (§ 51 of the judgment of the ECtHR in the case of "Vajnai v. Hungary"[38] of 8 October 2008).

At the beginning of this study and throughout the process, it is repeatedly emphasized that democratic states sometimes underestimate the threats that certain actions may pose to national security as a whole. Totalitarian regimes do not care about the above-mentioned issues at all. Democratic states, fearing that limiting certain freedoms may not react in time to actions that could lead to unrest within the state, or even to larger-scale consequences, take a step-by-step approach that threatens the existence of democracy as a separate state in general. Moreover, it is the totalitarian state that uses such "manipulation" when weighing the proportionality of restrictions and the approach of democracies to this.

Thus, in Ukraine, the RF has been manipulating the consciousness of citizens for decades on issues of assessing communism, using symbols of the communist regime, which has repeatedly led to clashes between citizens who considered the communist period to be evil for Ukraine and knew about the crimes committed by the communist regime. The author would like to emphasize once again that Russia has repeatedly and demonstratively used ideological signs and symbols that are clearly associated with the communist regime in the war against Ukraine, starting in 2014.

The so-called "St. George ribbons" have been a marker of "one's" identity in the Donetsk and Luhansk regions since the very beginning of the war against Ukraine, that is, since 2014.

So even when the issue of public wearing of the St. George ribbon became subject to the ECtHR's assessment, the Court took into account and emphasized the Ukrainian context, which is obviously important. After all, as is above noted, it is not so much about historical memory and the possibility of using symbols of the communist regime, but about their active use by the aggressor state.

Thus, on December 12, 2024, the ECtHR made a decision in the case of "Yuriy Mykolayovych BORZYKH against Ukraine" (No. 11575/24),[39] concerning the ban on wearing the St. George ribbon in Ukraine. The applicant was a former military officer who complained of a violation

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[38] *Vajnai v. Hungary,* Application no. 33629/06…

[39] *Yuriy Mykolayovych BORZYKH v. Ukraine*, Application no. 11575/24…

of his rights under Articles 8, 10, and 14 of the Convention, arguing that the ribbon symbolized his family's military history. He noted that due to a legislative ban, he could not wear the ribbon in public on Victory Day.

The ECtHR found that Ukraine had not violated the applicant's rights. The court has also emphasized that the St. George ribbon had become a symbol of Russian military aggression and was actively used by armed groups in the Donetsk and Luhansk regions, and after the 2022 invasion by the Russian armed forces.

Besides, the court mentioned in its judgment the experience of other European states (Estonia, Latvia, Lithuania, Poland) and Moldova, where bans on similar symbols were also introduced to protect national security. Attention was also drawn to the fact that, in Russia, since 2005, the St. George ribbon has acquired a new meaning as a symbol of "military glory."

In conclusion, the ECtHR confirmed that the ban on the St. George ribbon in Ukraine is justified in connection with its modern symbolic meaning and role in the aggression against Ukraine.

Conclusions

This conducted study allows us to draw several important conclusions regarding the implementation of the right to freedom of expression and possible limitations on this right in the context of the ban on the dissemination of symbols of totalitarian regimes.

In democratic societies, there may be certain restrictions on freedom of expression, since democracies must be able to defend themselves, including by establishing understandable and necessary limitations.

Restrictions on the use, dissemination, and propaganda of symbols of totalitarian regimes cannot be assessed solely through the relationship "memory – law." After all, we are talking about symbols that personify, demonstrate, remind, and "recognize" a certain regime. Totalitarian states that still exist today use symbols of totalitarian regimes as a tool to destabilize peace in other states or use them to commit actions that even encroach on national security.

Symbols of totalitarianism allow us to identify supporters of certain ideas, unite them, and test the level of society's "loyalty" to their use.

A fact that in Ukraine, for a long period of time, both the state and society were indifferent to the propaganda and praise of the symbols of the communist regime has obviously had its effect.

A democracy that is unable to defend itself ceases to exist. This harsh thesis should be remembered. And it is very important to respond in time to the level of social danger posed by certain actions, which at first may seem like the usual exercise of one's rights to wear symbols, for example, communist ones. However, after a few weeks, the same symbols can become markers of the distinction between "friend-stranger" in aggressive encroachments on the existence of the state as a whole.

This situation can be clearly demonstrated by the example of the St. George ribbon in Ukraine. At first, it was used to recall the Second World War and to travel around Ukraine, supposedly to lay flowers for fallen soldiers. In reality, society's loyalty to the promotion of certain ideas was assessed.

And after a few years, when neither state nor society appreciated in time that the symbols of the totalitarian regime were used as an instrument in completely different actions, in Donetsk and Luhansk regions, St. George ribbons began to be issued to those who actively carried out actions to seize the territory of Ukraine and create separate pseudo-republics.

Therefore, it is worth remembering that limitations on the use of such symbols, first and foremost, are not absolute, since in many cases there are no problems with storing them, using them for scientific purposes, or storing them in collections, etc. Such actions are absolutely legal.

However, when it comes to public demonstrations by other citizens, their adherence to totalitarian regimes, in fact, propagates a positive attitude towards them, and the state can establish limitations and consider such actions criminally punishable.

For a long time, a number of European states have been discussing the constitutionality of certain restrictions on actions involving symbols of totalitarian regimes. For these states, this issue was sensitive, since their own historical experience gave reason to fear the potential use of symbols of totalitarian regimes as a tool to violate public and national security. However, the answer to the question of constitutionality was different, since, of course, it is worth assessing the national context and

the grounds for introducing restrictions on the use of symbols of totalitarian regimes in each state separately.

Along with that, it seems worth emphasizing that the Ukrainian experience is unique in the context of studying the expediency, proportionality, and timeliness of criminalizing actions that consist in establishing criminal liability for the production, dissemination, and public use of symbols of communist, national socialist (nazi) totalitarian regimes.

One should not underestimate the danger of such actions, and hope that they can be dealt with without criminal liability for their commission. In each case, it is necessary to, first of all, examine the national aspect, the influence of a certain totalitarian regime on a specific state and the potential threats associated with the manipulation of public opinion, precisely in the aspect of the public use of such symbols.