Criminal Non-Law and the Simulation of Legality: Codification, Narrative Power, and Transitional Criminal Justice in Ukraine

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Abstract

*This Article develops the concept of **criminal non-law** as a structural condition in which criminal-law institutions retain their formal appearance while losing their capacity to constrain coercive power in accordance with constitutionalism, international human rights, and the rule of law. Criminal non-law is not merely unlawful conduct by public officials, legislative error, or an exceptional abuse of authority. It encompasses norms, practices, and coercive regimes concerning crime and societal reaction to crime that, by their source, asserted authority, substantive orientation, or implementation, violate fundamental rights despite operating under the appearance of legality. The Article distinguishes arbitrariness, non-legal states of affairs, substantively non-legal statutes, political crimes, and quasi-criminal norms issued by de facto authorities. It then examines non-law as a regime of normalisation, drawing on Foucault, Bataille, activity theory, psychological jurisprudence, sociocultural theory, narrative criminology, and algorithmic governance. The Article argues that legality in transitional societies exists through the interaction of codified and uncodified layers: statutory text, constitutional adjudication, professional culture, prosecutorial practice, supranational standards, and public narratives. Ukraine demonstrates this interaction with particular force, as Europeanisation and wartime securitisation proceed concurrently. The Article concludes that neither wholesale recodification nor judicial interpretation alone can secure legality especially in victims treatment contest. A sustainable response requires targeted legislative precision, rights-protective constitutional interpretation, international oversight, institutional accountability, and civil-society monitoring of law in action.*

Keywords: *criminal non-law; legality; criminal justice; Ukraine; transitional justice; rule of law; freedom of expression; occupation; criminalisation; narrative criminology.*

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I. Introduction

The rule of law is commonly assessed through visible institutional markers: a constitution, a legislature, courts, elections, criminal codes, procedural guarantees, and published judicial decisions. These markers are important, but their presence does not itself establish legality. A state may preserve the institutional vocabulary of constitutional democracy while permitting coercive authority to operate through selective enforcement, political expediency, vague penal norms, informal coordination, and the displacement of legal reasoning by moral or security narratives.

This Article describes that condition as **criminal non-law**. It denotes a situation in which criminal-law institutions continue to function, criminal statutes are formally enacted, courts retain jurisdiction, and criminal procedure remains formally available, but the normative substance that ought to limit public power is progressively hollowed out. The central distinction is therefore not between law and a complete legal vacuum. It is between law as a genuine normative constraint and law as a simulation: a language, institutional form, and procedure that validate outcomes substantially incompatible with constitutional and international guarantees.[1]

This inquiry is especially consequential for Ukraine. Ukrainian criminal law is shaped by an unusually dense and contested legal genealogy: imperial legal inheritances, Soviet criminal-law categories, post-independence reconstruction, European human-rights integration, the legal consequences of occupation, and the accelerated criminalisation associated with full-scale war. These layers do not succeed one another in a stable sequence. They act simultaneously. Rights-oriented Europeanisation and security-oriented wartime legislation can therefore affect the same provisions, institutions, and cases at the same time.

The challenge is not to deny the necessity of criminal law in conditions of existential aggression. A democratic state may lawfully criminalise collaboration with an aggressor, war crimes, propaganda amounting to incitement, and conduct that genuinely threatens protected rights or national security. The question is whether the form, scope, interpretation, and implementation of criminal prohibitions continue to meet the requirements of legality: accessibility, foreseeability, precision, proportionality, equality, and effective judicial control.

II. Criminal Non-Law

Criminal non-law may be defined as the aggregate of social norms concerning crime and societal reactions to crime that, by their origin, asserted authority, substantive orientation, or dynamics of implementation, violate constitutionally and internationally guaranteed rights.[1] A norm does not become law in the full normative sense simply because it was enacted by a formally competent legislature. Formal validity is necessary for legality, but it is not sufficient.

The concept includes several overlapping forms:

- **Arbitrariness**, in which an official's will, political preference, or institutional interest replaces the pre-existing rule that should govern the decision.
- **Non-legal states of affairs**, including occupation or de facto administration, which organise conduct through practical coercive force but lack legitimate legal authority.
- **Non-legal statutes**, which comply with the outward forms of legislation but contradict fundamental guarantees of dignity, equality, legality, or freedom.
- **Political crimes**, in which criminalisation, prosecution, or tolerated impunity depends primarily on political usefulness rather than demonstrable social harm.
- **Quasi-laws**, issued by bodies lacking constitutional authority to legislate yet enforced through police, prosecutorial, administrative, or military power.

The case of occupied Ukrainian territory is especially illustrative. The extension of Russian domestic criminal law to Crimea after 2014 and the development of quasi-criminal regimes by self-proclaimed authorities in parts of Donetsk and Luhansk were not merely alternative local legal orders. They represented coercive systems claiming legal force over territory that remained Ukrainian as a matter of international law. Their practical operation did not supply the legal pedigree required by occupation law and the law of state sovereignty.[2]

The same analytical framework applies, although with different legal consequences, to formally enacted domestic legislation. A statute may be valid in the narrow procedural sense while creating a criminal prohibition so vague, politically charged, or selectively enforced that it becomes incompatible with the principle of *nullum crimen sine lege*. Criminal non-law is therefore not a rhetorical synonym for unpopular law. It is a critical legal category for identifying the point at which state coercion retains its form but loses its normative justification.

III. Normalisation and Simulated Legality

Michel Foucault's account of disciplinary power helps explain why non-law often does not appear as an overt destruction of law. Power need not abolish legal institutions; it can redistribute itself through institutions, professional practices, classifications, discourses, surveillance, expertise, and mechanisms of normalisation.[3] Courts may continue to cite statutes and precedents while informal case allocation, administrative pressure, selective prosecution, or security narratives determine the practical outcome.

Under conditions of simulated legality, constitutional rights remain visible but become increasingly conditional. Equality before the law may survive as a textual guarantee while affiliation, social status, ethnicity, political position, language, or perceived loyalty determine actual exposure to criminal coercion. The presumption of innocence may remain doctrinally intact while public rhetoric, media pressure, and institutional presumptions convert accusation into a practical substitute for proof.

Three justificatory narratives commonly sustain this movement:

- **Justice as moral vindication:** the asserted moral gravity of conduct is treated as sufficient reason to relax legality safeguards.
- **Protection of the vulnerable:** the protection of a designated group is invoked to justify procedural or substantive departures that may ultimately weaken universal rights protections.
- **Historical necessity:** emergency, war, collective trauma, or national survival are used to transform exceptional measures into normal instruments of governance.

These narratives may begin from legitimate concerns. Protecting victims, confronting aggression, resisting genocidal propaganda, and responding to atrocity are not inherently hostile to legality. Yet they become dangerous when they operate as substitutes for legal analysis. The more the state relies on affectively compelling narratives rather than precise legal criteria, the greater the risk that criminal law will be used to punish identity, viewpoint, association, or symbolic disloyalty rather than culpable and harmful conduct.

Bataille's image of the "black sun" is useful as a metaphor for this juridical threshold. It identifies moments in which established normative structures lose their justificatory force in the face of trauma, transgression, war, death, ecological catastrophe, or morally unbearable harm.[4] In such moments, legal systems are tempted to rely on flexible value judgments or exceptional assessments. These mechanisms may humanise law when they permit individualisation and mercy. They may also institutionalise uncertainty when they substitute open-ended moral evaluation for foreseeable legal standards. The debate surrounding the Draft Criminal Code of Ukraine, including its use of value-sensitive concepts, illustrates this tension between humanisation and legal certainty.[5]

An activity-based perspective associated with Georgy Shchedrovitsky offers a complementary account. It presents law not as a static normative structure but as an evolving practice capable of reconstructing itself through crises, contradictions, and anomalies.[6] Leon Petrażycki's psychological theory and Pitirim Sorokin's sociocultural theory similarly demonstrate that legal order rests on changing emotional, cultural, and civilisational patterns.[7][8] Contemporary appeals to intuitive justice, in which empathy, narrative, and contextual evaluation influence legal judgment, may further displace formal normativity with experiential and interpretive frameworks.[9]

Narrative criminology reinforces this analysis by showing that crime is constructed through discourse, identity, and power relations. The "black sun" is thus not merely a philosophical metaphor; it also functions as a narrative device through which actors articulate trauma, justify transgression, and negotiate legitimacy. Criminal law increasingly incorporates these narrative dimensions, notably through the growing importance of personal motivation and context in assessments of culpability.[10]

The danger becomes sharper under algorithmic governance. Predictive policing, risk assessment, automated screening, and data-driven allocation of enforcement resources can diffuse responsibility. Decisions affecting liberty or equality may appear neutral because they are produced through technical systems, even though the data, objectives, thresholds, and institutional incentives behind those systems embed prior social and political choices. Algorithmic administration can thus intensify non-law by making coercive discrimination less visible and more difficult to attribute to a legally responsible actor.

IV. Codified and Uncodified Legality

A. Two Dimensions of Legality

Codified legality comprises formally valid criminal-law sources: criminal codes, special penal statutes, constitutional provisions relevant to punishment, criminal-procedure rules, and directly applicable international obligations. In the civil-law tradition, codification has historically promised accessibility, systematic coherence, democratic authorship, and resistance to arbitrary power. A publicly available code was intended to displace hidden privilege, local custom, and discretionary decree.

Yet codification is a promise rather than a permanent achievement. The systematic form of a code can become a vessel for arbitrariness when substantively defective provisions are inserted into it. A rule may be accessible and formally enacted, yet still fail the demands of precision, proportionality, equality, or legitimacy.

Uncodified legality includes the normative practices through which statutory language acquires operative meaning:

- Constitutional and supreme-court jurisprudence.
- Prosecutorial policies and police regulations.
- Judicial interpretive habits.
- Legal doctrine and professional culture.
- European Court of Human Rights jurisprudence.
- European Union standards and accession-related conditionality.
- International criminal-law and international humanitarian-law norms.[11]
- The practical conduct of defence counsel, investigators, judges, prosecutors, journalists, and civil society.

A criminal code is never self-executing. Two jurisdictions may have identical statutory language yet produce radically different criminal-justice outcomes because one treats ambiguity as a reason for restraint and the other treats ambiguity as a licence for expansion. The code is therefore the skeleton of criminal legality, not its complete living body.

B. Ukraine’s Layered Criminal-Law Genealogy

Ukraine’s criminal law cannot be understood solely through the 1960 Criminal Code of the Ukrainian SSR or the 2001 Criminal Code of Ukraine. Its genealogy is substantially more complex.

Before Soviet codification, the territories that now form Ukraine were governed by divergent criminal-law traditions. Eastern and central regions fell principally within the legal order of the Russian Empire. Galicia and Bukovina were shaped by the Austro-Hungarian Criminal Code of 1852. The interwar period multiplied this fragmentation: Ukrainian populations were governed under Polish, Romanian, Hungarian or Czechoslovak, and Soviet Ukrainian legal systems. These regimes differed materially in their concepts of culpability, complicity, attempt, public order, state protection, and judicial authority.

Occupation during 1941–1944 introduced another, categorically different, layer. Nazi and Romanian occupation authorities imposed coercive ordinances and summary jurisdictions that departed from the obligation of occupying powers to respect the existing legal order, subject to narrow exceptions under international humanitarian law. Racially defined liability, collective punishment, summary adjudication, and criminalised identity represented forms of non-law operating under the external appearance of criminal jurisdiction.

Contemporary occupation reproduces the problem in a different form. The Russian Federation's application of its criminal law in Crimea and the quasi-criminal regulations developed by de facto entities in parts of Donetsk and Luhansk illustrate the persistence of coercive criminal governance without lawful territorial authority. These systems should not be treated as merely peripheral facts of conflict. They are part of the contemporary legal environment within which Ukrainian criminal law, victims, displaced persons, detainees, and international institutions must operate.[2][12]

Four additional layers are frequently treated as the principal story:

Layer	Principal feature	Risk for legality
Soviet-era legacy	Social defence, expansive state-security concepts, ideological criminalisation	Elasticity and priority of state interests over individual culpability
Post-independence reconstruction	De-ideologisation and adoption of the 2001 Code	Retention of broad doctrinal structures and inherited enforcement culture
Europeanisation	ECtHR jurisprudence, Convention standards, EU-accession conditionality	Uneven domestic implementation and dependency on external correction
Wartime criminalisation	Collaboration, aggression-related propaganda, assistance to the aggressor, national-security offences	Affective legislation, vague drafting, and expansion of preventive punishment

Ukraine's distinctive condition is that Europeanisation and wartime securitisation are occurring concurrently. There is no settled period in which rights-oriented interpretation can fully consolidate before a new security-driven amendment is introduced. This compression places exceptional pressure on courts, legislators, prosecutors, defence lawyers, scholars, and civil society.

V. Reactive Criminalisation and the "Ukrainophobia" Debate

The proposed criminalisation of "ukrainophobia" provides a current illustration of reactive criminalisation. Draft Law No. 15186, registered on 22 April 2026, proposed amendments to Article

161 of the Criminal Code concerning manifestations of "ukrainophobia," including incitement to hatred, humiliation of national honour and dignity, and public denial of Ukrainians' right to self-determination.[17]

The legislative concern is understandable. Denial of Ukrainian statehood, denial of Ukrainians' right to self-determination, and propaganda portraying Ukrainian identity as illegitimate have been used as instruments of aggression and domination. Comparable issues arise in legal responses to denial of Soviet occupation in the Baltic states, genocide denial, and propaganda connected with mass atrocity.

Nevertheless, a legitimate objective cannot cure defective legislative construction. The principal concerns are fourfold.

First, expressions such as "humiliation of national honour and dignity" and "public disdain" risk leaving the prohibited conduct insufficiently defined. Criminal liability requires citizens, law-enforcement agencies, prosecutors, and courts to identify in advance what conduct is prohibited and what remains protected as criticism, scholarship, satire, political dissent, artistic expression, or even harsh and offensive speech.

Second, the proposal risks shifting the protected interest from identifiable persons or groups to an abstract conception of the state's "subjecthood." Criminal law is least secure when it is used to protect symbolic state dignity rather than individuals against concrete harm, discrimination, threats, or incitement. The EU Framework Decision on racism and xenophobia, by contrast, is directed toward publicly inciting violence or hatred against groups or members of groups defined by protected characteristics.[13]

Third, the relationship between the proposed offence and existing Article 161 prohibitions requires careful justification. Duplication creates discretion in charging and interpretation, which may itself facilitate selective enforcement.

Fourth, the proposal should be assessed against European freedom-of-expression standards. The ECtHR permits restrictions in narrowly defined circumstances, including speech linked to incitement, hate speech, or the denial of legally established mass atrocities. However, Article 10 protection remains particularly strong for political expression, debate about state institutions, historical interpretation, and opinions that offend, shock, or disturb.[14][16] The legal question is therefore not whether Ukraine may counter hostile propaganda. It plainly may. The question is whether the criminal prohibition is sufficiently precise, necessary, proportionate, and linked to identifiable harmful conduct.

The ECtHR judgment in *Société d'Exploitation d'un Service d'Information – CNews v. France* illustrates the importance of context. The case concerned regulatory action against a broadcaster in connection with controversial on-air statements and requirements related to pluralism. It does not authorise general criminalisation of controversial speech. Rather, it demonstrates that carefully bounded regulatory mechanisms, tailored to a broadcaster's specific obligations and subject to judicial review, differ substantially from vague criminal offences directed at evaluative or political language.[15]

A constitutionally defensible response to hostile propaganda should therefore be structured around clearly defined conduct: direct and public incitement to discrimination, hostility, violence, or other legally specified harm; intentional dissemination of material in circumstances demonstrating a concrete risk; and safeguards ensuring that critical, scholarly, artistic, and political speech is not transformed into criminal conduct merely because it is unpopular, provocative, or offensive.

VI Post-War Victimological Jurisprudence

In the post-war period, victimological jurisprudence must move beyond the traditional, predominantly criminal-procedural or Convention-based understanding of the victim. In the classical model of an individual's interaction with the European Court of Human Rights, the logic is generally structured as follows: "victim — violation — legal remedy." After the war, however, another sequence will become increasingly important: "harm actually suffered — legal status — administrative classification — entitlement to payment, housing, compensation, benefit, or social service — individual administrative decision — internal appeal — Convention review."

Under these conditions, the victim appears not only as a person who has suffered harm as a result of a war crime, destruction of property, forced displacement, unlawful deprivation of liberty, injury, loss of a close relative, or another violation. The victim also becomes the holder of a specific administrative-law status upon which the practical possibility of obtaining restoration of violated rights depends.

This change has not only terminological but also systemic significance.

In a post-war state, the right to reparation, compensation, or social support does not arise automatically from the fact that harm has been suffered. Its implementation is mediated by the activities of public authorities, registers, commissions, digital platforms, verification procedures, and evidentiary processes.

It is the administrative mechanism that determines whether a person will be entered in a register; whether his or her claim will be recognised as admissible; whether the submitted evidence will be considered sufficient; whether a causal link will be established between the wartime event and the claimed harm; and in what amount and form compensation will be granted. Thus, what becomes legally significant is not only the original fact of the violation, but also the subsequent decision of the state concerning its official recognition and legal consequences.

This is one of the central challenges of post-war victimological jurisprudence.

The decisive question will concern not only whether a person is a victim in a factual, moral, or criminal-law sense. It will also concern who has the authority to recognise that person as a victim; according to which criteria such a classification is made; which evidence is considered sufficient; what legal consequences follow from the relevant status; and through which remedies a person may challenge a refusal.

It is precisely here that the danger arises of a gap between factual victimhood and legal visibility.

A person may unquestionably suffer harm as a result of war, yet remain outside the compensation mechanism because documents were destroyed during hostilities; because it is impossible to obtain certificates from temporarily occupied territory; because time limits are interpreted formally; because the list of admissible evidence is excessively restrictive; or because legislation defines too narrowly the categories of persons entitled to a particular form of support.

In such circumstances, the administrative procedure itself may generate a phenomenon of secondary victimisation.

A person who has already suffered from war may be subjected to further adverse treatment by the state—not in the form of direct violence, but through bureaucratic inaccessibility, formalism, inconsistent decisions, the humiliating requirement to prove obvious circumstances repeatedly, or the practical impossibility of making use of a proclaimed right. This risk may be particularly acute for internally displaced persons; residents of de-occupied and temporarily occupied territories; older persons; persons with disabilities; civilians who have survived captivity or violence; and families of those killed or missing. For these categories, the classical model of proof, designed for the stable functioning of public institutions and the preservation of documents, will often be inadequate.

Therefore, in the post-war period, not only the substantive grounds for granting compensation but also the procedural standards governing its allocation will be of particular importance.

This concerns presumptions in favour of the affected person; a flexible approach to evidence; the admissibility of alternative and indirect sources of confirmation; the duty of public authorities to assist in gathering relevant information; clear reasoning in decisions; accessibility of procedures for persons who have lost documents or lack digital capacity; and a real, rather than merely formal, mechanism for administrative and judicial appeal.

From this perspective, the fairness of a reparations mechanism is determined not only by the amount of payment or the list of available benefits. It is also determined by the extent to which the procedure enables an individual to establish a connection with the harm suffered without imposing an excessive and disproportionate burden.

This is also where the importance of the European Convention on Human Rights becomes more pronounced. Potential post-war disputes may concern not only the original violations caused by war, but also deficiencies in domestic systems designed to address them.

Convention review may focus on the effectiveness of domestic remedies, access to procedures, the reasonableness of the time taken to examine claims, the adequacy of the reasoning given for refusals, the availability of independent review of administrative decisions, and the absence of discrimination among different categories of affected persons.

In particular, if legislation or administrative practice creates unjustified distinctions between civilians and military personnel; between persons who were in government-controlled territory and those who were in occupied territory; between owners of registered property and persons whose property was factually theirs but not formally registered; or between people capable of submitting a digital application and those who lack such access, this may raise questions as to the compatibility of the relevant mechanisms with the requirements of non-discrimination, effective remedy, and adequate protection of property rights.

European standards proceed from the principle that the mere existence of a procedure does not itself amount to the existence of an effective legal remedy. Such a remedy must be accessible, practically effective, capable of ensuring an adequate examination of the complaint, and, where appropriate, capable of providing adequate redress.

The Ukrainian context gives these questions particular urgency. Reconstruction and reparations will require not isolated court judgments, but the operation of a large-scale system for the mass processing of claims. Compensation for damaged or destroyed housing; determination of the legal status of persons affected by armed aggression; assistance for families of those killed; provision of housing; restoration of documents; medical and psychological rehabilitation; social adaptation; compensation for harm suffered by civilians; and support for persons who survived unlawful deprivation of liberty will create a complex field of interaction between individuals and public administration.

At the same time, the international compensation mechanism for Ukraine envisages the further development of a system in which claims by affected persons will be registered, assessed, and examined by specialised institutions.

Accordingly, a promising direction of research lies in reconsidering the category of the victim as a complex legal status arising at the intersection of international humanitarian law, international human rights law, criminal law, administrative law, social-security law, and the law of compensation for harm.

Post-war victimological jurisprudence must examine not only how the state establishes the fact that harm has been suffered, but also whether it transforms the procedure for recognising that harm into a new source of inequality and exclusion. Its subject matter should encompass the entire trajectory of changes in an individual's status: from the factual experience of war to the receipt of concrete, timely, and effective restoration of rights.

From this perspective, the principal criterion for assessing the adequacy of a post-war protection mechanism will not be the declaratory existence of victim status or a compensation programme. Rather, it will be the real ability of an individual, without discriminatory, disproportionate, or practically insurmountable barriers, to transform his or her status into an effective right to compensation, protection, and restoration of dignity.

VII. Conclusion

Criminal non-law is not the opposite of law in the simple sense of institutional collapse. It is more difficult to recognise because it works through legal forms. Courts continue to sit, statutes continue to be published, and rights continue to be proclaimed. Yet the actual operation of criminal justice becomes increasingly dependent on power, status, security narratives, institutional culture, moral panic, and selectively applied concepts of social protection.

The distinction between codified and uncodified legality explains why neither a new criminal code nor a favourable judicial judgment is, by itself, enough to secure the rule of law. A code can contain vague or politically available offences. Judicial interpretation can correct some of them, but only where a case reaches an independent court and where the correction is genuinely absorbed by police, investigators, prosecutors, and lower courts. Conversely, professional culture and supranational oversight can make a formally imperfect statutory system more rights-protective, though they cannot permanently substitute for legislative precision.

Ukraine's legal situation requires a combined strategy:

- **Targeted legislative reform** should replace vague criminal prohibitions with clear definitions of conduct, fault, causation, and harm, while preserving strict *lex certa*, proportionality, and *lex mitior* safeguards.
- **Constitutional and judicial review** should construe security-related offences narrowly and reject interpretations that criminalise political disagreement, identity, criticism, or symbolic dissent without a demonstrable connection to legally cognisable harm.
- **European and international supervision** should remain a source of legal discipline, particularly where domestic institutions face political pressure or wartime incentives toward expansion.
- **Institutional accountability** should make prosecutorial decisions, police practices, judicial allocation, and algorithmic tools transparent and reviewable.
- **Civil-society and academic scrutiny for victims** should test whether formal guarantees are realised in lived practice, especially for vulnerable groups, defendants in politically charged cases, and persons affected by occupation or displacement.

The central task is not to choose between legality and security, morality and law, or national survival and human rights. A democratic state confronted with aggression must defend itself. However, it must do so through criminal law that remains recognisably law: public, foreseeable, non-retroactive, proportionate, reviewable, and directed at culpable conduct rather than politically useful categories of personhood or opinion.

Only in this way can criminal justice resist becoming a simulation of legality: an apparatus that speaks in the language of law while operating according to the logic of non-law.

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