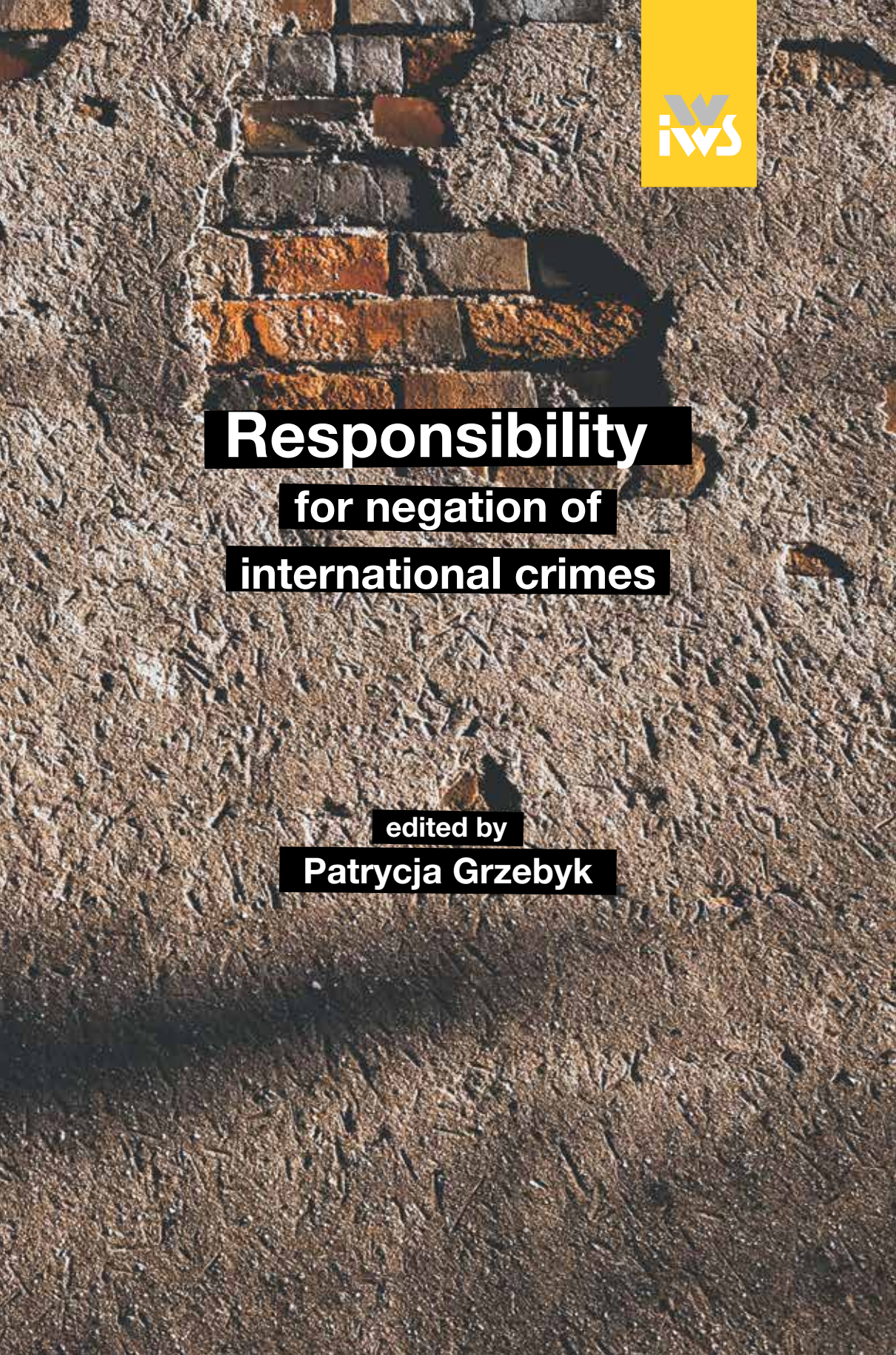

Responsibility for negation of international crimes

edited by

Patrycja Grzebyk

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Introduction

History is no longer the exclusive domain of historians, but is now often used as a tool for politics. It is not without reason that the term "state historical policy" has been coined, which must be a kind of aberration for those who believed that the role of history is to objectively determine the course of events. The fact is, however, that the distortion of historical facts, the concealment of crimes is now part of the "information war," as was stated in September 2019 by the European Parliament in its resolution on the importance of European remembrance for the future of Europe.[1] The Parliament recognised that the falsification of history is a threat to European unity and democratic values. The resolution stresses the importance of preserving the memory of "horrific totalitarian crimes against humanity and systemic gross human rights violations" as a condition for reconciliation. The European Parliament called on the Member States to "condemn and counteract all forms of Holocaust denial, including the trivialisation and minimisation of the crimes perpetrated by the Nazis and their collaborators, and to prevent trivialisation in political and media discourse."

More than a decade earlier, in November 2008, the European Council adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,[2] under which the Member States were required to "ensure that the following intentional conduct is punishable: (…) c) publicly condoning, denying or grossly trivialising crimes

[1] European Parliament Resolution of 19 September 2019, 2019/2819 (RSP).

[2] Council Framework Decision of 28 November 2018, 2008/913/JHA, Official Journal of the European Union, L 328/55, 6.12.2008.

of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group; d) publicly condoning, denying or grossly trivialising the crimes defined in Art. 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group." However, it is not specified in what way "denying" or "grossly trivialising" is supposed to be understood. There is therefore no clear indication as to whether the punishment should only be for undermining the fact that certain persons have committed the crime or for contesting the legal qualification of the crime, the number of victims or the participation of other persons. States have to determine for themselves how they understand denial or gross trivialisation, which may lead to abuse. In many cases, when introducing criminal law provisions, States wish to decree historical truth, to establish once and for all the general facts and determine who was the victim, and who was the perpetrator. This does not have to be the result of bad will, but of a desire to exclude the possibility of nuance, which could turn into dangerous trivialisation. The problem of denial of crimes also reveals a kind of rivalry between crime victims, manifested, for example, in the desire to guarantee a special status for the Holocaust in comparison with other mass international crimes and the resulting differentiation of the importance of denial according to the crime in question.

The above problems have been faced by the Polish legislator since the adoption of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, where a provision (Art. 55) was introduced from the very beginning introducing a criminal penalty (fine or imprisonment of up to 3 years) for public and counterfactual denial of crimes referred to in Art. 1 point 1 of the Act (Nazi, communist crimes, other crimes constituting crimes against peace, humanity or war crimes committed against persons of Polish nationality or

Polish citizens in the period from 1 September 1939 to 31 December 1989; other repressions on political grounds committed by Polish law enforcement officers or judicial bodies or persons acting on their behalf; or activities of state security bodies[3]). In addition, which was mainly motivated by the desire to combat the term "Polish concentration/death camps," suggesting that these camps were set up and run by the Polish authorities,[4] an amendment to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation[5] was adopted in January 2018, which enforced prosecution of public and counterfactual, both intentional and unintentional, attribution to the Polish Nation or the Polish State of responsibility or joint responsibility for the Nazi crimes committed by the Third German Reich as defined in Art. 6 of the Charter of the International Military Tribunal or of other crimes constituting crimes against peace, humanity or war crimes or otherwise grossly diminishing the responsibility of the actual perpetrators of these crimes (Art. 55a–b). The January amendment also introduced civil law provisions concerning the protection of the good name of the Republic of Poland and the Polish Nation (Art. 53o–q). This amendment aroused great legal and diplomatic controversy.[6] The critical

[3] As a result of subsequent amendments, the catalogue of crimes was extended to include the crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich, and the period including the crimes referred to in Art. 1(1)(a) was extended in order to cover crimes committed in the period from 8 November 1917 to 31 July 1990.

[4] See Print no. 806, Government Bill to amend the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Act on War Graves and Cemeteries, the Act on Museums, the Act on the Responsibility of Collective Entities for Criminal Offences and the Act on the Prohibition of Promoting Communism or Other Totalitarian System by the Names of Buildings, Objects and Public Facilities, http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=806.

[5] Journal of Laws, item 369.

[6] See the series of articles in the "Polish Yearbook of International Law" (PYIL): A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standard*, "PYIL" 2019, vol. 38, p. 59 et seq.; K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, "PYIL" 2017, vol. 37, p. 275 et seq.; P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law*, "PYIL" 2017, vol. 37, p. 287 et seq.; as well as legal opinions of the Bureau

approach led to the repeal of the penal provisions in June 2018,[7] but leaving the civil-law provisions nevertheless disputable.

The controversies related to the regulations introduced in the above-mentioned Act on the Institute of National Remembrance led to the need to organise a conference on 7–8 October 2019 by the Institute of Justice and the University of Warsaw (Faculty of Political Sciences and International Studies), entitled "The Punishment of Negationism. Memory Law – International Crimes and the Problem of the Denial." This publication is largely a follow-up to the conference, where the difficulties in holding accountable for denial of international crimes were discussed.

The aim of this publication is to specify the reasons for holding accountable for denial of international crimes, indicate legal obligations in this respect, look at the Polish case, both in terms of criminal provisions (partly repealed) and standards of a civil law nature, and compare the Polish regulation with the legal systems of other states, which were chosen because of the region (Central and Eastern Europe) or due to having current problems with denial of crimes or doubts about prosecution on this account. The above-mentioned aims are matched by the structure of the book. In the first part (*Negation and Memory Law*), the causes and consequences of negationism (Bieńczyk-Missala) and the doctrinal-philosophical basis of punishment for negating certain crimes (Papacharalambous) are indicated. The next part (*Negation of International Crimes and Human Rights*) presents the state of human rights regulations, which are the basis for introducing provisions on responsibility for denial of crimes into the national order (Parisi), highlighting at the same time possible exceptions from the prohibition to challenge international crimes (Górski) and the specificity of the regulations of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as

of Research, Chancellery of Sejm by Jarosław Wyrembak (http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=806), Polish Ombudsman by Ireneusz Kamiński (https://legislacja.rcl.gov.pl/docs//2/12282660/12339404/12339407/dokument212956.pdf [access: 20.02.2020]), the Supreme Court (https://legislacja.rcl.gov.pl/docs//2/12282660/12339404/12339407/dokument217721.pdf [access: 20.02.2020]), the National Council of the Judiciary (https://legislacja.rcl.gov.pl/docs//2/12282660/12339404/12339407/dokument212955.pdf [access: 20.02.2020]), and the Institute of National Remembrance (https://legislacja.rcl.gov.pl/docs//2/12282660/12339404/12339407/dokument210313.pdf [access: 20.02.2020]).

[7] Journal of Laws, item 1277.

regards the regulation of freedom of expression and the need to protect the rights of victims of crimes, and in particular time-delayed crimes (Kamiński, Gliszczyńska, Mężykowska). The following part (*Responsibility for Negation in Selected National Orders*) starts with an essay comparing regulations in Poland with those adopted in other states (Tsesis) and papers on criminal (Pohl, Burdziak) and civil (Lackoroński, Bachmann) regulations introduced into the Polish order to bring those who negate certain crimes to justice. Apart from discussing the specifics of Polish regulations, this publication will give the reader a critical analysis of German (Fahrner), Czech (Bilkova), Hungarian (Hoffman) and Ukrainian (Nekoliak) regulations, i.e. those of the countries of the Central and Eastern European region which face similar experiences of two totalitarian regimes to Poland. What is presented moreover are the cases of former Yugoslavia (Smailagić), Turkey (Baranowska) and Greece (Kagiaros, Tzevelekos, Chouliaras), i.e. of those legal systems that are widely discussed, either because of their strictness (Turkey), reference to recent crimes (former Yugoslavia) or general interest in raising problem of responsibility for crimes from the period of World War II (Greece). In the final part, the reader will find reports from both days of the conference and biographies of the authors.

The main theses, which are present in a number of papers comprising this publication, indicate that the norms of international law (mainly in the field of human rights protection) concerning the denial of international crimes are still in the process of development. Current regulations adopted, for example, within the European Union are often imprecise and thus threaten freedom of expression. It is therefore not surprising that individual states usually fail to adequately regulate the responsibility for denial of crimes, and that they place their hope in the proper practice of local judges. This means, however, that the courts are put in a very difficult situation, as they not only have to interpret unclear rules, and define crimes, etc., but at the same time determine the historical truth, for which they are not prepared. This brings the need for close cooperation between lawyers and historians who use different instruments and thus find it difficult to establish a common language (see the disputes over the definition of genocide).

There is no doubt that a discussion on how to regulate responsibility for denying international crimes cannot be avoided. There are clear expectations

of the victims of crimes and their families who consider denial of crime as another attack on their dignity, or the next stage of criminal activity. Enforcing accountability for denial can be an effective tool to protect the truth and prevent crimes, in particular those motivated by hatred. At the same time, ill-considered regulation can contribute to divisions in society and reinforce this hatred.

The papers collected in this publication are to serve as a basis for in-depth deliberations on the shape of the so-called memory laws and, in particular, the provisions on liability for denial of crimes. This issue will return in the context of responsibility for both historical crimes and those committed today.[8]

Patrycja Grzebyk
Warsaw, 27 July 2020

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[8] The problem is already discussed in the literature, see, e.g. U. Belavusau, A. Gliszczyńska-Grabias (ed.), *Law and Memory. Towards Legal Governance of History*, Cambridge 2017; E. Fronza, *Memory and Punishment Historical Denialism, Free Speech and the Limits of Criminal Law*, Springer 2018; A. Radwan, M. Berent (red.), *Prawda historyczna a odpowiedzialność prawna za jej negowanie lub zniekształcanie*, Warszawa 2019.

AGNIESZKA BIEŃCZYK-MISSALA

The Causes and Consequences of Negationism

One of the consequences of mass crimes is negationism, which consists in denying scientifically proven historical facts by deliberately concealing them and spreading misleading information. In this case, the matter is not about different interpretations of events based on objective data or scientific research. Deniers to a lesser or greater extent consciously deny facts that occurred in the past and try to diminish their significance. The Holocaust, or more specifically the Holocaust denial, and the Armenian Genocide are the best-known examples of negationism.

The reasons for negationism can be analysed from various perspectives, i.e. psychological, sociological, philosophical, legal or political, and with the use of the tools typical of a given science. The relationship between the subject and the crime inclines to search for either individual or collective motives that perpetrators, witnesses, third parties, countries responsible or partly responsible for crimes, third countries, groups and social movements have. Due to the interdisciplinary nature of the problem, it cannot be exhaustively analysed in this article. The main goal is to present the main causes and consequences of negationism. It is worth emphasising that negationism never arises from a single aspect, or problem, but it is usually associated with many inter-related factors.[1]

[1] As an example in relation to the Holocaust, see: S.E. Atkins, *Holocaust Denial as An International Movement*, London 2009, pp. 1–5; M. Shermer, A. Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?*, Berkeley 2009; R.A. Kahn, *Holocaust Denial and the Law. A Comparative Study*, New York 2004.

Causes

Gregory Stanton recognises negationism as the final stage of genocide that comes down to destroying compromising evidence, killing or intimidating witnesses, blocking investigations, and wanting to stay in power at all costs so as to ensure impunity of the perpetrators.[2] Therefore, the main reason for negationism is **the desire to avoid justice**. Hence negationism begins already when the crime is in progress and consists in a deliberate and conscious concealment of the truth. The contributing factor is the psychological mechanism of denial, which is often manifested as the so-called selective memory.[3] It is characteristic of temporary offenders rather than organisers, and it disappears over time.[4]

The management of guilt is used for avoiding responsibility usually by perpetrators, collaborators, but also by bystanders. The perpetrators look for external circumstances justifying the crimes, often taking into account, among others, the reality of war, security reasons and the need to defend sovereignty. In addition, they blame third parties, including victims. Collaborators, on the other hand, usually blame only the perpetrators and present themselves as victims of the situation. In Turkey, this problem occurs at the state level, because history textbooks used at school portray cases of Armenian rebellion, their lack of loyalty and plotting with Russia against Turkey as the justifiable reasons forcing the Turkish authorities to take appropriate action.[5]

Negationism, especially the one of state status, is also related to **financial issues**. By confessing to committing a crime or recognising a given act as genocide or a crime against humanity, states are afraid of being liable for meeting compensation claims. Turkey's attitude towards the Armenian

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[2] G.H. Stanton, *Dziesięć stadiów ludobójstwa*, [in:] *Jan Karski a odpowiedzialność za ochronę*, red. E. Smolar, B. Szewczyk, Warszawa 2015, pp. 65–70.

[3] I.W. Charny, *The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars*, "Journal of Social Issues" 2001, vol. 6(1); I.W. Charny, *'Innocent Denials' of Known Genocides: A Further Contribution to a Psychology of Denial of Genocide (Revisionism)*, "Human Rights Review" 2000, vol. 1(3), pp. 15–39.

[4] See stories of perpetrators of the genocide in Rwanda in J. Hatzfeld, *Sezon maczet*, Wołowiec 2012.

[5] R. Bilali, *National Narrative and Social Psychological Influences in Turks' Denial of the Mass Killings of Armenians as Genocide*, "Journal of Social Issues" 2013, vol. 69(1), p. 16, 19.

massacre was partly due to fears of losing territory. This is one of the reasons why the Turkish authorities historically refused to grant autonomy to ethnic minorities. This reason originated from the fear of disintegration of the state. The 1920 Treaty of Sèvres, under which European powers attempted to divide the Ottoman Empire, resulted in the so-called Sèvres syndrome – fear of territorial losses.[6]

The reasons for the negationism of the states that are perpetrators should also be looked for in broadly understood political interests formulated for the needs of domestic and foreign policy. The narrative related to the past, including crimes and atrocities, affects memory, shapes culture and the attitude towards one's own history and nation. In the case of strong nationalisms, negationism contributes to one's taking pride in belonging to a given country, which does not help in holding discussions on the so-called black cards in the history. However, most often negationism serves the regime and its interests so that the desire to gain, or strengthen the power can be fulfilled, and people of specific ethnic groups can be controlled and denied the right to self-determination, whereas the crimes committed against them concealed.

The state's image is also an issue here. Governments believe that acknowledging responsibility for crimes reduces their prestige on the international political scene. Therefore, measures to hide the truth are taken. By promoting one interpretation of history, the Soviet Union tried to build a certain myth of its role in the world and restricted the freedom of science, preventing free research and manipulating historians. In China, research and publication censorship occurs as well, of which the Tiananmen Square massacre is a very well-known example, most often referred to as an incident, even though 10,000 people were killed.[7]

The reasons for negationism often have an **ideological character**. After World War II, the Soviet Union did not disseminate knowledge about the Holocaust, treating killed Jews as the general group of victims of fascism, not

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[6] *Recognition of the Armenian Genocide by Turkey is a Secondary Issue*, REGNUM News Agency, 10 October 2010; N. Ghazaryan, *A Centenary of Denial. The Case of the Armenian genocide*, [in:] *Holocaust and Genocide Denial. A Contextual Perspective*, eds. P. Behrens, N. Terry, O. Jensen, Oxon 2017, pp. 171–175.

[7] "Independent", 4 July 2019, https://www.independent.co.uk/news/world/asia/tiananmen-square-massacre-anniversary-beijing-tank-man-china-protests-facts-death-toll-a8382111.html (access: 28.07.2020).

emphasising the racial and ethnic nature of Nazi crimes. From the historical point of view, communism did not construct a substantive critique of fascism. Developed for the purposes of the Comintern meeting in 1935, Georgi Dimitrov's definition of fascism focused on the criticism of reactionary and chauvinistic elements as well as the imperialism of financial capital.[8] It did not refer to fascist ideology, racial discrimination, or the issue of dehumanisation of Jews. This policy had an impact on the approach to the victims of the war in the Soviet republics and socialist countries of Central and Eastern Europe, where after the war Jewish victims were not distinguished among other victims listed in the former extermination places such as Babi Yar, Auschwitz or Theresienstadt. In the same countries, the significance of involvement of some authorities, groups and individuals in the extermination of Jews was lessened, or even skipped.[9] This approach strengthened the phenomenon of anti-Semitism that after the war was hidden under the slogans such as anti-Zionism and anti-cosmopolitanism.[10]

In many cases, political and ideological causes of negationism overlap. Mahmoud Ahmadinejad, the president of Iran, called the Holocaust a myth and stated that he did not believe in the death of six million Jews during World War II, at the same time undermining Israel's right to be a state.[11] In 2006, he organised "Review of the Holocaust: Global Vision" which was the convention of negationists legitimising their views and actions.[12]

The Holocaust denial usually comes down to simple anti-Semitism and xenophobia, as well as the desire to promote Nazi and racist ideologies. Neo-Nazi movements, active in Germany since the 1970s, used negationism to

[8] T. Friling, R. Ioanid, M.E. Ionescu, *International Commission on the Holocaust in Romania*. *Final Report*, Bucharest, 2005, pp. 333–380.

[9] See: M. Shafir, *Between Denial and "Comparative Trivialization": Holocaust Negationism in Post-Communist East Central Europe*, January 2002, pp. 5–6, https://archive.jpr.org.uk/download?id=6029 (access: 28.07.2020).

[10] R.S. Wistrich, *Negationism, Antisemitism, and Anti-Zionism*, [in:] *Holocaust Denial. The Politics of Perfidy*, ed. R.S. Wistrich, Jerusalem–Berlin 2017, pp. 257–268.

[11] BBC Online, *Holocaust Comments Spark Outrage*, 14 December 2005, http://news.bbc.co.uk/2/hi/middle_east/4529198.stm (access: 28.07.2020).

[12] P. Behrens, *Holocaust Denial in Iran. Ahmadinejad, the 2006 Holocaust conference and international law*, [in:] *Holocaust and…*, pp. 158–169.

gain popularity and possible supporters.[13] Many of them intended to create conditions enabling the return of the Nazi ideology, which required the rehabilitation of Adolf Hitler. The denial of Nazi crimes was to serve this purpose.[14] David Irving, who was sentenced to three years in prison for challenging the systematic nature of the extermination of Jews during World War II, gained the status of a pro-Nazi polemist.[15]

On the other hand, some negationists present leftist views. In France, such concepts derived from extreme pacifism, which in the 1930s opted for avoiding the war in Europe and therefore supported the Vichy government collaborating with fascist Germany. Then, prioritising peace, it somehow justified the slaughter of Jews, and finally led to the denial of the Holocaust and the refusal to accept the existence of the state of Israel.[16] Another point raised by negationists in leftist movements was the necessity to regulate the pre-war problem related to the treatment of workers. It was believed that instead of focusing on the workers' problem, too much attention was unnecessarily given to Jewish issue as if it was to divert public attention from the priorities, such as the one mentioned above.

Finally, the question arises as to why scientists and experts practice negationism. It happens to be related to their ignorance and lack of knowledge. However, most often negationism results from **identification with the authorities** and the ideology they promote, or the desire to gain individual, prestigious and financial benefits, e.g. in the form of promotions or government grants. For instance, the Turkish authorities created a programme of such "cooperation" with scientists, expecting from them to be consistent with the

[13] H. Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (transl. Arthur Goldhammer), Cambridge 1991, pp. 151–52. D. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, New York 1993.

[14] Ch. Mentel, *The Presence of the Past. On the Significance of the Holocaust and the Criminalisation of Its Negation in the Federal Republic of Germany*, [in:] *Holocaust and…*, pp. 70–76.

[15] "Independent", 21 February 2006, https://www.independent.co.uk/news/world/europe/irving-gets-three-years-jail-in-austria-for-holocaust-denial-346727.html (access: 28.07.2020).

[16] This problem is interestingly described in E. Yakira, *Post-Zionism, Post-Holocaust. Three Essays on Denial, Forgetting and Deligitimation of Israel*, Cambridge 2010, pp. 1–62.

government's views on the Armenian massacre.[17] Sometimes, however, the negationists are not the citizens of the state perpetrating the crimes. In this case, the reasons for negationism may be quite trivial and may refer to a marketing procedure aimed at gaining popularity and developing one's career, or resulting from demoralisation and a lack of good will in seeking the truth.

Consequences

Negationism would not exist if it were not profitable. Unfortunately, most perpetrators do not face the responsibility for the consequences of their crimes, and in many cases they are even protected by the state justice system, at the same time remaining untouchable for international judiciary. Negationism significantly contributes to the weakness of the functioning of international criminal courts.

The consequences of negationism are of ethical, legal, social and political character. Negationism contributing to the avoidance of responsibility for the committed crime has **ethical consequences** for both perpetrators and victims. It has a demoralising influence on the former, whereas in the group of victims and their families it intensifies the feeling of harm. Unsettled crimes most often lead to a deficit of trust in domestic policies, deepen the need for government control over society, cause racism, xenophobia, violations of human rights, and eventually even result in crimes. Hiding the truth to a great extent hinders the process of drawing conclusions from historical events and counteracting violence.

The scale of negationism, especially in the context of the Holocaust but also the genocide of Armenians, or Tutsi in Rwanda, resulted in appropriate **state regulations**. Many countries have introduced laws that provide for penalties for denial of the Holocaust and other recognised genocides, though to a different extent. These include Australia, Belgium, Bosnia and Herzegovina, the Czech Republic, France, Greece, the Netherlands, Liechtenstein, Lithuania,

[17] The mechanism is interestingly presented in: R.W. Smith, E. Markusen, R.J. Lifton, *Professional Ethics and the Denial of Armenian Genocide*, "Journal of Holocaust and Genocide Studies" 1995, vol. 9(1), pp. 1–22.

Luxembourg, Germany, Poland, Russia, Slovakia, Switzerland, Hungary and Italy. Rwanda entered a provision on the fight against genocidal ideologies in the constitution and adopted provisions penalising the denial, diminution and justification of genocide, as well as violence against survivors. In addition, a special commission on combating genocide with the inclusion on negationism was established (National Commission for the Fight against Genocide).[18]

Apart from the adoption of laws in the area of criminal law and the involvement of state institutions in the fight against negationism, the establishment of remembrance days for victims of crime has played a significant role in recent years. This applies both to state and international organisations. In response to the negationism of historical events, the United Nations established 27 January (the day of Auschwitz liberation) as the International Holocaust Remembrance Day pursuant to General Assembly Resolution 60/7 of 1 November 2005.[19] On 22 July 2016, the Sejm of the Republic of Poland adopted a resolution establishing 11 July as the National Remembrance Day for the Victims of Genocide committed by Ukrainian nationalists on the citizens of the Second Polish Republic.[20] In this case, the law is used as an instrument to care for the truth and memory.[21]

The problem of reconciliation between perpetrators and victims is the most critical **social consequence** of negationism. The confrontation with the facts is a prerequisite for the reconciliation process. Disregarding, undermining or minimising the facts is equivalent to disrespecting the truth and makes

[18] For the related controversy, see Y.O. Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, "Northwestern Journal of International Human Rights" 2016, vol. 12(4), pp. 191–213.

[19] General Assembly Resolution, United Nations, A/RES/60/7, 1 November 2005, https://www.un.org/en/holocaustremembrance/docs/res607.shtml (access: 28.07.2020).

[20] Resolution of the Sejm of the Republic of Poland of 22 July 2016 on paying tribute to the victims of the genocide committed by Ukrainian nationalists on the citizens of the Second Republic of Poland in 1943–1945, „Monitor Polski" Warszawa, 29 July 2016, pos. 726, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WMP20160000726/O/M20160726.pdf (access: 28.07.2020).

[21] See polemics: E. Fronza, *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, "Vermont Law Review" 2006, vol. 30, pp. 609–623, https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/fronza.pdf (access: 28.07.2020); P. Bloch, *Response to Professor Fronza's The Punishment of Negationism*, "Vermont Law Review" 2006, vol. 30, pp. 627–643, https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/blochresponse.pdf (access: 28.07.2020).

reconciliation virtually impossible, prolongs victimisation and creates a sense of danger. Tolerating or justifying criminal acts increases the likelihood of these acts happening again, either on the same group of victims or any another minority group, or on perpetrators, as an act of vengeance. For this reason, in many post-conflict situations, truth and reconciliation commissions were set up so as to establish the facts and prepare appropriate reports, as in the case of South Africa affected by the problem of apartheid.

Acknowledgment of crime and guilt is particularly important in the case when perpetrators are in power. It can be an introduction to the peaceful transformation and consolidation of a democratic state. Negationism strengthens divisions, and excludes democracy, practical creation of the state on axiological foundations and the promotion of social solidarity.[22] Bosnia and Herzegovina may serve as an example of a country dealing with such a problem, i.e. the disagreement over crime, guilt and punishment, not only in relation to Srebrenica massacre in 1995, which prevents a common narrative of events and post-conflict reconciliation.[23]

Political consequences have an impact not only on the sphere of domestic policy, as it has been mentioned, but also on foreign policy. Denying the crime has a destructive effect on bilateral relations between the state: the perpetrator responsible for the crime and the state that the victims identify with. On the other hand, recognition of the crime as genocide can result in very good bilateral relations, as in the case of Russia and Armenia. Without a consistent interpretation of the Holocaust, it would be impossible to create any relationship between Germany and Israel.

Countries often fear that admitting directly to deliberate criminal activities is a shameful act that negatively affects their international image. However, in times of wide access to information, relatively easily accessible evidence of crime and simultaneous recognition of international human rights standards,

[22] See M.R. Amstutz, *Healing of Nations: The Promise and Limits of Political Forgiveness*, Oxford 2005, pp. 18–40. Numerous cases of the reconciliation process are presented in A. Barahona De Brito, C.G. Enriquez, P. Aguilar, *The Politics of Memory: Transitional Justice in Democratizing Societies*, New York 2001.

[23] G. Parent, *Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)*, "Genocide Studies and Prevention: An International Journal" 2016, vol. 10.

it seems the opposite. Hiding the truth or denying it and glorifying people who organised mass crimes do not serve the image of a modern democratic state. On the contrary, it can be a problem in foreign policy, including integration with international structures such as the European Union.

* * *

Negationism tends to be a defence mechanism, a manifestation of ignorance and demoralisation, or an instrument used for political and ideological benefits. Denying, justifying or belittling mass crimes against historical facts prolongs their consequences for victims, society and the entire international community. States respond to negationism with political criticism and legal instruments. However, what is equally important is solid education and instilling critical thinking that makes people resistant to manipulative attempts and distorting history.

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CHARIS PAPACHARALAMBOUS

Incrimination of Negationism: Doctrinal and Law-Philosophical Implications

1. Introduction

My interest in this paper concerning the topic of criminal law and negationism ("denialism") is a strictly criminal law-theoretical and a law-philosophical one. I am not going to delve into the well known dispute as to the constitutional right to freedom of expression, since this is more or less sufficiently dealt with within the scope of Art. 10 and 17 ECHR.[1] I am also not willing to touch the question as to whether incrimination of negationism protects directly or collaterally an alleged right to historical truth, as is the case with the French "memory laws" (*lois mémorielles*).[2] Finally, I consider as settled the issue as to whether negationism and historical revisionism are to be in such a way distinguished that the latter should remain outside criminal law's domain. I principally affirm this distinction if it is done in good faith, namely when the rules of scientific research are not blatantly violated, so that one might persuasively differentiate between Nolte and Irving.[3]

[1] Cf. critically as to the wide exception from the free speech principle as to negationism, L. Pech, *The Law of Holocaust Denial in Europe: Toward a (Qualified) EU-wide Criminal Prohibition*, [in:] *Genocide Denials and the Law*, eds. L. Hennebel, T. Hochmann, Oxford 2011, p. 202, 210 et seq.

[2] See on these, e.g. D. Fraser, *Law's Holocaust Denial. State, Memory, Legality*, [in:] *Genocide…*, p. 22 et seq.; E. Fronza, *The Criminal Protection of Memory: Some Observations about the Offence of Holocaust Denial*, [in:] *Genocide…*, p. 156 et seq.

[3] See E. Fronza, *op. cit.*, pp. 160–161.

2. Criminal Law Theory

At a criminal law-theoretical level what impresses is the fact that, otherwise than hate crimes, negationism does not require a link to a possible harm. Core crimes of hate mean usual crimes with a discriminatory *mens rea* concerning and covering effects beyond the utterance; hate crimes not occasioning actual harm should at least endanger legal goods. Such acts can still be interpreted according to classical rules: instigation or its attempt, violation of public order, etc. Negationism in its pure form ("bare denial") does not require anything of these; it is a clear incrimination of the pre-stages of harm, even prior to concrete endangerment of protected goods. What is regulated is the "substance" of the speech, not its consequences; we have to do with "conduct/formal crimes," not "result crimes." As such bare denial can be labeled an "abstract endangerment," against which, in general, theory has launched a poisonous critique, according to which this doctrinal construct is incompatible with the very meaning of a "liberal criminal law."[4] But even if we accept abstract endangerment as presentable, the abstract danger the lawmaker has in mind has still to do with harms which remain palpable even if only in last instance (e.g. driving carelessly at deep night in an empty avenue). The harm of negationism is not palpable; neither is it properly captured when conceived of as merely "over-generalized." Something strange and uncanny comes to us closer here. The harm is that much deep that becomes invisible. To say that harm is "immaterial" or a judicial ascription[5] [does not suffice; I would name it an *"infinite" harm*, of which protection of the psyche of the

[4] See on these topics with the occasion of Greek anti-racist and anti-denialist legislation, Ch. Papacharalambous, *Legislating on Hate. The Example of the Anti-racist Law No. 4285/2014*, "Nomiko Vima" 2016, vol. 64(1), p. 209 et seq.; see also T. Hochmann, *The Denier's Intent*, [in:] *Genocide…*, p. 307.

[5] Cf. L. Hennebel, T. Hochmann, *Introduction. Questioning the Criminalization of Denials*, [in:] *Genocide…*, p. xliv.

survivors,[6] preemption against the far-rightists[7] or prevention of repetition of the crimes denied,[8] are only symptoms.

But what does "infinite harm" mean? A criminal lawyer would find this outrageous, doctrinally unacceptable. Does this not mean that we are simply penalize "bad intent", psychic features, without requiring their externalization beyond the mere fact of an utterance? Do not we violate the principle of not making cogitations criminal? Do not we subjectivize wrongfulness totally here by blurring the limits between the latter and blamefulness; more than that: don't we found wrongfulness on blame? My answer is clearly in the affirmative, although with a reasoning not condemning this shift of doctrinal notions but, in the opposite, justifying it. Incrimination of negationism represents, I think, a total reversal of criminal law as we knew it. It is a culmination of a new paradigm of criminal law, which is not henceforth based exclusively in repelling a legally identifiable harm, but all the more in defending preemptively fundamental rights: a rights-based criminal law succeeds here a harm-based one. A whole law-historical development testifies to the shift: from combating women's rights violations to comprehensive anti-discrimination laws and from protecting the vulnerable to upgrading victims' rights, criminal law is here to fight and proactively protect. Negationism is thus the most pure example of this development, whereby sober safekeeping of order is displaced through militant imposition of rights-guarding values.[9]

But then, the argument goes, we install what has been critically labeled "symbolic penal law;" we display the resolve and in fact by-pass the problem; we complaisantly commit ourselves to values in exchange of not overburdening the judicial system and society with really carrying out the commitment. Even if this is only partly true, since there have been persons sentenced for Holocaust denial, sentences may be found indeed lenient and sporadic

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[6] See, e.g. R. Kahn, *Holocaust Denial and Hate Speech*, [in:] *Genocide…*, p. 94, 103; M. Imbleau, *Denial of the Holocaust, Genocide, and Crimes Against Humanity. A Comparative Overview of Ad Hoc Statutes*, [in:] *Genocide…*, p. 269.

[7] See, e.g. L. Hennebel, T. Hochmann, *op. cit*., p. xxxiv, footnote 75.

[8] See, e.g. R. Kahn, *op. cit*., pp. 94–103; M. Imbleau, *op. cit*., pp. 276–277. Cf. the critical position of L. Hennebel, T. Hochmann, *op cit*., pp. xlvi–xlvii.

[9] See on this type of legislation with regard to anti-discrimination criminal laws, Ch. Papacharalambous, *Discrimination and Hate: Over-Criminalization or New Normativity?*, "International Law Research" 2013, vol. 2(1), p. 200 et seq.

compared to those imposed for hate crimes.[10] To a significant extent it is true that anti-denial criminal laws are somehow parasitic on a more fundamental social function, namely the enhancement of moral conscience through law. But this is not to say that there is a lack of legitimacy of anti-denial criminal law. It rather says that something more complicated is here at stake.

According to traditional doctrine, negationism has to somehow refer to public order violation to remain positive law. But the public order implicated here is not the usual notion; criminalizing denial may, realistically considered, produce disorder if society is indifferent and malevolent groups of deniers make "big noise." What anti-denial criminal law presupposes is a public order of substantive justice, not of morally neutral well-functioning of the societal machine. Incriminating and punishing negationist conduct aims at disrupting "order" through imposition of such justice, thus, allowing to be portrayed as public only what is morally just. Now we can perhaps come closer to what incrimination of denial protects: the inviolability of the core of human dignity, which as such is the axis of the European Constitutions. Because this value cannot be entirely absorbed by the criminal law doctrinal discourse, it can (and also should) function as the latter's "shadow," enriching substantially the notion of public order. Thereby, to remain within the terms of art of this discourse, negationism features as a kind of "spiritual high treason."[11]

We must now see what this means as to the constitution of the *mens rea* of a denier, if the latter is the genuine basis of the respective wrong. When one justifies or trivializes the Holocaust, then the deed, far from being an equilibrated scientific opinion, is an apology and indicates the intent. But what if someone simply denies the very truthfulness of the genocide without taking sides? How can incrimination be justified if we accept that a link to a concrete danger is not required? It is here that the "spiritual" element of the wrong does apply. Mankind's memory is distorted, the souls of the martyred are set in unrest, the survivors are psychically attacked, the quintessence of our post-war moral fantasy gets out of joint: purely spiritual, quasi religious terms, indeed. But I think we cannot do away with them, if we are really

[10] For a critical standpoint towards symbolic criminal law, see already W. Hassemer, *Einführung in die Grundlagen des Strafrechts*, München 1981, p. 69.

[11] See on the "public order" topic in Ch. Papacharalambous, *Legislating…*, parts III and IV.1; idem, *Discrimination…*, pp. 199–200.

willing to see things in their existential significance and transpire them in a phenomenological manner. This may also explain why judges take judicial notice of the Holocaust as a fact of common knowledge inferring the *mens rea* of the defendant *ex ipso facto* of the denial: what thus deeply distorts cannot feature as innocent opinion (where the topic of "historical truth" shows its use-value).[12]

3. Law-philosophical implications

All this lets law philosophy enter the scene: which are the law-philosophical implications as to the very normativity of criminal law? One may, on the one hand, discern such meta-theoretical repercussions on the nature of intent, the foundations of criminal policy and the aims of punishment. On the other hand, there are conclusions to be drawn as to retaliation in relation to denialism, when retaliation is considered from a certain viewpoint within the philosophy on ethics and justice.

3.1. On criminal law meta-theory

As to the nature of intent: there is no more intention at play (as the criminal law episteme knows it); what we are confronted with is a revival of the *dolus malus*, where epistemic intent yields to the motives and the inner structure of the personality, where intent and character get intertwined (and of course, no specific intent is required beyond the awareness of making the utterance).[13] Anti-denial criminal law provisions become re-moralized at the subjective level proportionally to the re-connection of legal harm and moral wrong at the objective one.

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[12] See on this also M. Imbleau, *op. cit*., pp. 247, 249–255, 277. Cf. the critique on the judicial use of "metaphysical-theological" arguments of L. Douglas, *From Trying the Perpetrator to Trying the Denier and Back Again. Some Reflections*, [in:] *Genocide…*, p. 65 et seq.

[13] For the irrelevance of "bad faith" or of any significance of the volitional element of *mens rea* regarding anti-denial laws, see T. Hochmann, *op. cit*., p. 298 et seq. See also Ch. Papacharalambous, *Discrimination…*, p. 201.

What does this mean for the criminal law policy? Which should be the model squaring properly with these traits of negationism? Two are the crucial issues here: on the one hand, the expressivity of the penalty, its stigmatizing function, and on the other, the question about the appropriateness of criminal law as a vehicle of preemptively combating "moral monsters" as enemies to be "ex-communicated" instead of recurring to it as a tool serving traditional aims of punishment. I refer here to the model of the "penal law of the enemy" (introduced into the discussion long ago by Günther Jakobs) insofar as it replaces common criminal law norms with "combat" norms. Subjective foundation of the wrong, elimination of the discursive element of the procedure (e.g. the lift of the burden of proof promoted by the Gayssot-Law in France) and the subsequent social marginalization of the convict seem justifiable only through this model. But I know that the dispute on the "penal law of the foe" is deep and rather unsolvable. I will not insist on it.[14]

I want only to touch upon the more general question about whether in universal core crimes (of which negationism is the softest but not less the purest form) the traditional notion of an "aim" of the sanction beyond retaliation can still make sense and if it does not, whether the retaliation in place can be confined in law. Claus Roxin, e.g. (noting on the *Oskar Gröning* case),[15] denies any aim of punishment whatsoever as to such crimes; he is satisfied with the re-assurance of victims and with penal expressionism. But what if we see things otherwise? What if incrimination is not secondary, subsidiary or redundant but on the contrary absolutely necessary, though being always short of an even minimal retaliation proper? What if criminal law is needed but remains poor and trivial? In other words: how and with which purpose is it feasible to combat not a criminal act but, as we saw, *the presence of the Evil* with the means of secular criminal law?

[14] On the merits and frictions of Jakobs' model, see in details Ch. Papacharalambous, *The Penal Law of the Foe Revisited: Politically Overcoming Liberalism or Trivially Regressing to State's Glorification?*, "European Journal of Law Reform" 2015, vol. 17(1), p. 33 et seq. On the lift of prosecutorial burden of proof, see also M. Imbleau, *op. cit*., p. 246 et seq.

[15] See C. Roxin, *Note on BGH decision of 20.9.2016 – 3StR 49/16* (transl. into Greek by Afr. Voli), "Criminal Justice" 2017, p. 1100 et seq.

3.2. Theorizing on ethics and justice

To answer the latter question, I would like to revisit in brief some respective crucial thoughts of Hannah Arendt, Emmanuel Levinas and Vladimir Jankélévitch. Arendt has said, as it is well known, on the occasion of the Eichmann trial, that the defendant represented the "banality of evil." Despite her condemnation by her compatriots as having trivialized the Holocaust, Arendt wanted to stress that evil is omnipresent. In any case, she affirmed the execution of the mass killer, whereas others showed reluctance. In her mind the *talio*, i.e. the very notion and spirit of *jus talionis* (pure retaliation), was unsurpassable, even if such monstrosities should not have taken place, namely even if the harm has been irreparable and any sanction appeared useless.[16] Levinas thought no differently; retaliation and impossibility of forgiveness feature as clear outcomes of his thinking. For him, no "third party" (i.e. the positive law) could properly retaliate. The Nazi crimes are the most genuine manifestation of "ontological violence" which justice should eradicate. Punishment is a necessity both as metaphysical-ethical demand and as a performative act within the secular world. To illustrate: for Levinas, retaliating justice against the Holocaust is not the judicial imposition of hanging to Eichmann but the very act of his extra-judicial abduction.[17]

The case of Jankélévitch is, finally, very interesting. After he wrote the book *Le pardon*, where he said that a crime the law declares perennial, beyond any statute of limitations, might nevertheless be forgivable, he writes in *L'imprescriptible* that regarding the Holocaust, pardon "died in the concentration camps," that forgiveness is impossible, that necessary is not to forgive. Jankélévitch had said about the Germans: "they killed 6 million Jews. But they sleep well, eat well and their currency is the healthiest". One might say: this is resentment! Jankélévitch does not deny it; he said that resentment is exactly experiencing the lack of expiation, that non-resenting is "shameful

[16] See, e.g. *passim* H. Arendt, Über das Böse. *Eine Vorlesung zu Fragen der Ethik*, München 2006; see also her correspondence with Scholem in G. Scholem, H. Arendt, *Two Letters on the Banality of Evil* (transl. into Greek by P. Tsiamouras), Athens 2017, passim.

[17] See on this in details Ch. Papacharalambous, Retributive *Punishment Between the Ethics of Otherness and the Imperative of Sovereignty: a Levinasian Gesture*, [in:] *Sovereignty, Otherness and Rights*, eds. Ch. Papacharalambous, Ch. Papastylianos, Athens 2013, p. 179 et seq.

amnesia." What Jankélévitch says to us is that forgiveness regarding the hyperbole of evil of the Holocaust, a hyperbole going beyond any notion of "radical evil" of the Kantian type, is misplaced, that justice and revenge are merged into each other.[18]

What finally all these thinkers want to stress is the *uniqueness of the Holocaust*, which explains why generalization of the denial also to other analogous crimes is not only unnecessary when deemed a token of non-selective incrimination[19] but also ushers in an unintentional marginalization of this uniqueness through making the Holocaust a mere example subsumable under a general legal provision according to the usual legal reasoning.[20] This correlates with what I have earlier called "infinite harm" concerning negationism. The harm is not finite or measurable but not because of that less real; because it is real, negationism is not tantamount to "blasphemy" if blasphemy establishes a taboo, a formal ban on heretic faith or atheist queries.[21]

Of course, law philosophy or the philosophy on justice cannot automatically guide the lawmaker; however, they offer traces for an insight on incrimination of negationism by crucially contributing to explaining why, despite legal objections as to such incrimination, we still feel intimately forced by something mysterious, ungraspable und holy, *not to omit it…*

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[18] See on these theses of Jankélévitch, J. Derrida, *Pardonner, L'impardonnable et l'imprescriptible* (transl. into Greek by V. Bitsoris), Athens 2017, p. 17 et seq. as well as the detailed notes 14, 23–25, 99 and 102 of the translator at p. 71 et seq. Derrida contradicts Jankélévitch by recurring to the notion of an unconditional forgiveness. However, it is a fundamental question in how far such "transcendentalism" is really able to "confute" the later standpoint of Jankélévitch; the topic is immense and due to lack of space cannot properly be dealt with here.

[19] Cf. the critique of E. Fronza, *op. cit*., p. 160 et seq., arguing that penalization of denialism in general is selective as improperly "juridifying" the conflicts on historical truth, which are rather of ethico-political than legal nature.

[20] See respectively, T. Adorno, *Minima Moralia* (trasl. into Greek by L. Anagnostou), Athens 1990, p. 128; idem, *Das beschädigte Leben (Der Paragraph)*, [in:] »*Ob nach Auschwitz noch sich leben lasse*«. *Ein philosophisches Lesebuch*, Hrsg. R. Tiedemann, Frankfurt am Main 1997, pp. 93–94. On the uniqueness of the Shoah, see also D. Fraser, *op. cit*., pp. 45–46.

[21] See analogously, R. Kahn, *op. cit*., pp. 103–106.

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PIERGIUSEPPE PARISI

The Obligation to Criminalise Historical Denialism in a Multilevel Human Rights System

Introduction

As a growing number of countries seeks to tackle the phenomenon of historical denialism by adopting laws that criminalise it, this paper addresses the question as to whether international law, and in particular international human rights law, require states to adopt such legislation. To answer this question, an analysis of the relevant provisions under general international human rights law is complemented by an appraisal of the European human rights framework, including the relevant EU legislation and the most important sources within the system of the Council of Europe.

In this paper, the term "historical denialism" is preferred over the unqualified terms "negationism" and "denialism." The reasons underpinning this choice are linked to the genesis of the term "negationism," which was coined by French historian Henry Rousso to refer to the politically motivated denial of the Holocaust (*négationnisme*).[1] As pointed out in this paper, while the scope of the term "negationism" (or its synonym, "denialism") seems to include denialist statements about the Holocaust only, the broader term "historical denialism" encompasses a wider range of denialist statements, which concern other historical atrocities, namely international crimes as defined

[1] H. Rousso, *Le syndrome de Vichy*, Paris 1987 (translated by A. Goldhammer, *The Vichy Syndrome. History and Memory in France Since 1944*, Massachusetts 1994); see also A. Finkielkraut, *L'avenir d'une négation. Réflexion sur la question du genocide*, Paris 1982 (translated by M. Byrd Kelly, *The Future of a Negation: Reflections on the Question of Genocide*, Lincoln 1998, p. 125). Rousso argued that negationism, intended as the politically motivated denial of the Holocaust, had to be distinguished from historical revisionism, which is a legitimate re-interpretation of the past in light of new information acquired through sound research practices.

under the Rome Statute of the International Criminal Court and the Statute of the Nuremberg Tribunal.[2]

1. Does general international law provide for an obligation to criminalise denialism?

International law does not provide for any explicit obligation to criminalise historical denialism. Rather, the phenomenon of historical denialism is framed under the scope of the right to freedom of speech. This implies that any repressive measure must comply with the admissible limitations to freedom of speech under general international law. In order to identify these limitations, the following section zeroes in on a number of international instruments that regulate freedom of speech and its limitations. As shown below, the regulatory pattern adopted in these instruments unveils a structural tension between, on the one hand, expressive rights and, on the other, the attempt to stymie discriminatory hate speech, which replicates itself in most of such instruments.[3]

1.1. Freedom of speech and possible limitations under international human rights law

The structural tension described above stems from the post-WWII international community's attempt to prevent the future use of propaganda to fuel racist sentiments and violence, in the way the Nazi regime had done prior and during the war.[4]

The Universal Declaration of Human Rights (UDHR) protects freedom of opinion and expression under Art. 19, which stipulates that "this right includes freedom to hold opinions without interference and to seek, receive

[2] E. Fronza, *Memory and Punishment. Historical Denialism, Free Speech and the Limits of Criminal Law*, Bologna 2018, pp. 4–7.

[3] G.S. Gordon, *Atrocity Speech Law. Foundation, Fragmentation, Fruition*, New York 2017, p. 62.

[4] *Ibidem*.

and impart information and ideas through any media and regardless of frontiers."[5] The general clause under Art. 29 of the UDHR seeks to limit the abuse of the other rights listed in the Declaration, including freedom of opinion and expression, by reference to the democratic principle, the equality principle and the principle of non-discrimination. The same preventative rationale that guided the drafting of the UDHR underpins Art. III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which prescribes the criminalisation of "direct and public incitement to commit genocide."[6] The negotiations that led to the adoption of this provision were informed by an intense debate on the implications that adopting an inchoate offence would generate for freedom of speech.[7]

Similar to the UDHR, Art. 19 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of opinion, which includes the "right to hold opinions without interference," and expression, which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[8] Par. 3 of the same Art., similar to Art. 29 of the UDHR, seeks to limit the abuse of this right by imposing that its exercise does not impinge on the rights or reputation of others and by prescribing that it does not harm national security, public order, public health or public morality. Moreover, Art. 20 of the Covenant prohibits propaganda promoting war and incitement to national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

An explicit reference to criminal law can be found in Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which provides that "States Parties (…) (a) Shall declare an offence

[5] UN General Assembly, 10 December 1948, Universal Declaration of Human Rights, UN Doc. A/RES/3/217 A.

[6] Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948.

[7] W.A. Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd ed., New York 2009, pp. 319–324.

[8] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."[9] This provision, in particular, includes an obligation for states to adopt criminal legislation to sanction the expression of ideas or incitement to acts of violence, provided that these are motivated by discriminatory reasons. While this provision does not explicitly include conducts amounting to historical denialism, states may decide to pass legislation that criminalises denialist statements, provided that these are intended to incite violence or are motivated by discriminatory reasons.[10]

From this cursory overview of the relevant international instruments, it can be concluded that under general international human rights law, states are not obliged to criminalise denialism *per se*. However, a criminal prohibition of denialist statements may be admissible as long as these carry an additional layer of offensiveness, as defined in the international instruments overviewed above. This form of denialism is also referred to as "qualified denialism."[11]

Pronouncements of the UN General Assembly[12] as well as of Special Procedure mandate holders, in particular the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,[13] have condemned all forms of historical denialism. However, in

[9] International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969.

[10] By way of example, the Italian Law that ratifies the Convention, as last amended in 2016, provides the aggravating circumstance of historical denialism specifically to give further effect to this provision.

[11] T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression. Etude de droit comparé*, Paris 2012, p. 24; W. Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, "Tulane European and Civil Law Forum" 2005, vol. 17, p. 15 et seq.; T. Wandres, *Die Strafbarkeit des Auschwitz-Leugnens*, Berlin 2000, p. 96 et seq.

[12] See, in particular, UN General Assembly, Resolution 61/255, *Holocaust Denial*, 22 March 2007, UN Doc. A/RES/61/255.

[13] For example, UN Human Rights Council, *Rapport du Rapporteur spécial sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et de l'intolérance qui y estassociée*, M. Doudou Diéne, Mission enItalie, 15 February 2007, UN Doc. A/HRC/4/19/Add.4.

none of these cases, have they gone so far as to recommend states to adopt a criminal prohibition of historical denialism.

1.2. The case law of the UN Human Rights Committee

The case law of the UN Human Rights Committee, the body entrusted with overseeing the implementation of the ICCPR and with receiving individual communications regarding alleged violations of the Covenant, confirms the observations formulated in the previous section. The emblematic case of *Faurisson v. France* is demonstrative of the tension between freedom of speech and the criminal repression of denialist conducts.[14]

In the late 1970s, French historians Robert Faurisson and Paul Rassinier started to disseminate denialist ideas regarding the Holocaust, which included, for example, the allegation that gas chambers had never existed. These ideas started to spread quickly by the 1980s to the point that the French Parliament decided to counter the rampaging racism in the country by adopting the Gayssot Act 1990,[15] which amended the Freedom of the Press Act of 1881. Specifically, it introduced the criminal offence of historical denialism with Art. 24 *bis*, which punishes "those who question the existence of one or more crimes against humanity as defined by Art. 6 of the Statute of the International Military Tribunal annexed to the London Agreement of August 1945, which have been committed either by a member of an organization declared criminal under Art. 9(d) of the Statute or by a person found guilty of such crimes by a French or international court."[16]

Shortly after the adoption of the new law, Faurisson was interviewed by the French monthly magazine *Le Choc du Mois* and insisted that no gas chambers had ever existed in Nazi concentration camps. Following a series of criminal

[14] UN Human Rights Committee, 2 January 1993, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996); V. Igounet, *Robert Faurisson: Portrait d'un négationniste*, Paris 2012; X. Tracol, *L'affaire Faurisson devant le Comité des droits de l'homme des Nations-Unies*, « Légipresse » 1997, N°141 II:57.

[15] *Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acteraciste, antisémiteou xenophobe*, JORF No. 0162 of 14 July 1990, p. 8333.

[16] *Loi du 29 juillet 1881 sur la liberté de la presse*.

complaints brought against him by French associations of former deportees, Faurisson was convicted under the new criminal offence. The conviction was confirmed on appeal. He then applied to the Human Rights Committee alleging that his right to freedom of expression and academic freedom had been interfered with by the new French law. The Committee, while finding against Faurisson, clarified that the Covenant did not allow for any general prohibition of a criminal nature of speech that denies facts which constitute international crimes, unless such denial constitutes incitement to violence or racial hatred. The Committee held that Faurisson had intended to foster anti-Semitism and, therefore, his conviction was within the boundaries of the permissible limitations of freedom of speech.[17]

2. Regional Level

The most interesting developments with regard to the obligation to criminalise historical denialism have occurred at the regional level, especially in Europe. Both bottom-up (from the domestic level to the supranational level) and top-down (from the supranational level to the domestic level) inputs have contributed to shaping the current legal framework for the criminalisation of historical denialism.[18] The following sections focus on the European context, where both judiciaries and parliaments have been rather active in countering historical denialism in response to the creeping anti-Semitism that has characterised the last decades.

[17] UN Human Rights Committee, *Faurisson v France*, Communication no. 550/1993, 16 December 1995, UN Doc CCPR/C/58/D/550/1993.

[18] See E. Fronza, *op. cit.*, pp. 51–53.

2.1. European Union

In 1996, the Joint Action to combat racism and xenophobia by the Council of the European Union recommended states to criminalise the public denial of the crimes listed by Art. 6 of the Nuremberg Statute (Title 1(A)(a)).[19]

The EU Framework Decision 2008/913/JHA, unanimously adopted in 2008 by the Council of the European Union, requires states to punish the following conducts:

> (…) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such group (Art. 1 let. c);
> (…) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such group (Art. 1 let. d).

The history of the negotiations that led to the adoption of the Framework Decision show that the first proposal put forward by the Commission in 2001 only entailed the criminalisation of Holocaust denial.[20] Seven years of intense negotiations and the influence of countries whose domestic legal

[19] Council of the European Union, 15 July 1996, *Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia*, 96/443/JHA, in Official Journal of the European Union, L 185/5.

[20] Council of the European Union, 26 March 2002, *Proposal for a Council Framework Decision on combating racism and xenophobia*, in Official Journal of the European Communities, COM (2001)/664, C 75 E/269.

frameworks already provided for the criminal offence of historical denialism, which included the denial of international crimes other than those listed in the Statute of the Nuremberg Tribunal, led to the existing framework.[21]

It is worth noting that both offences under letters c) and d) include a mandatory clause that limits punishment to those conducts that are carried out in a manner likely to incite violence or hatred against a protected group or members thereof. Hence, the Declaration seems to embrace a notion of "qualified historical denialism."[22] Moreover, Art. 1 of the Framework Decision introduces two additional optional clauses that limit punishment. On the one hand, Art. 1(2) stipulates that "Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting." This generates questions regarding, in particular, what interest does the Framework Decision – and specifically the offence of historical denialism – is meant to protect – historical memory, public order or human dignity?[23] On the other hand, Art. 1(4) allows for the possibility to limit the punishment of the denial or gross trivialisation of the crimes indicated in Art. 1 only in such cases when these crimes "have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only". Pursuant to this formulation, the judiciary is placed at the centre of the construction of memories of international crimes. This would seem to imply that judicial truth equates to historical memory.[24] It may also be argued that limiting the scope of protected memories under the Framework Decision to crimes established by arguably Eurocentric courts is likely to generate allegations of neo-colonialism. As explained above, countries like France have decided to introduce this optional clause with reference to French and international tribunals only. But what about crimes perpetrated under French colonial rule in countries such as Algeria? It is unlikely that a tribunal would recognise these events as international crimes for the purposes of the Framework Decision.

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[21] See L. Pech, *Ruling Denial Prohibition*, [in:] *Genocide Denials and the Law*, L. Hennebel, T. Hochmann (eds.), Oxford 2011, pp. 183–234; E. Fronza, *op. cit.*, p. 56.

[22] See E. Fronza, *op. cit.*, p. 59.

[23] *Ibidem*, p. 60.

[24] *Ibidem*, pp. 60–61.

It can be concluded that the Framework Decision leaves states with a considerable margin of appreciation when it comes to modelling the offence of historical denialism, provided that the mandatory clauses described above are met and, thus, freedom of expression is not unduly limited.

2.2. Council of Europe

Within the system of the Council of Europe, of particular interest is the Additional Protocol to the Convention on Cybercrime of 2003.[25] According to its Art. 6,

> (…) each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

While this provision allows for the criminalisation of "unqualified denialism" – that is, denialist conducts *per se* – according to its par. 2, states are allowed to either not implement the said provision or part thereof or limit its application to cases where the conduct is carried out with the intention to incite hatred, discrimination or violence for reasons of race, colour, origin, nationality, ethnicity or religion.

The European Court of Human Rights (ECtHR) has generally framed historical denialism as a hate speech crime and therefore allowed for its

[25] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003, ETS No. 189.

prosecution under domestic criminal law. Moreover, the Court has made use of those clauses included in the European Convention of Human Rights (ECHR)[26] that allow for a limitation of fundamental rights. Under Art. 10 of the ECHR, for example, freedom of expression

> (…) may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and must be 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.

In a similar but more general way, Art. 17 of the Convention prohibits the abuse of rights by rights-bearer. The development of the case law of the ECtHR can be summarised in three stages.[27] Initially, the Court made extensive use of the limitations provided for under Article 10 of the Convention, which places the burden of proving that the limitation was necessary in a democratic society and complies with the other requirements on the state.[28] In the second stage, Art. 17 is invoked as an interpretative tool in support of the arguments formulated under Art. 10 of the Convention.[29] In the third stage, Art. 17 is used to sift through the complaints, even before any analysis of their merit under Article 10 is carried out ("guillotine effect"). This shifts the burden of proof on the applicant.[30]

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[26] European Convention of Human Rights, 4 November 1950.

[27] P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, "The European Journal of International Law" 2015, vol. 26(1); L. Daniele, *Negazionismo e libertà di espressione: dalla sentenza Perincek c. Svizzera alla nuova aggravante prevista nell'ordinamento italiano. Per una democrazia tollerante, anziché "militante"*, "Diritto Penale Contemporaneo" 2017, vol. 10, pp. 88–89.

[28] See, e.g. ECtHR, *Lowes v. United Kingdom*, appl. no. 13214/87, Decision of 9 December 1988.

[29] See, e.g. ECtHR, *Kühnen v. Federal Republic of Germany*, appl. no. 12194/86, Decision of 12 May 1988.

[30] See, e.g. ECtHR, *Lehideux and Isorni v. France*, Grand Chamber, appl. no. 24662/94, Judgment of 23 September 1998.

However, recently, in the ground-breaking decision in *Perinçek v Switzerland*,[31] the ECtHR found a violation of Art. 10 of the Convention. Perinçek, who had publicly denied the Armenian genocide branding it as the fruit of an international conspiracy, had been convicted by Swiss courts under Art. 261-bis (racial discrimination) of the Swiss Criminal Code. The Strasbourg judges found that Art. 17 was not to be engaged with because the Applicant had not clearly abused his right. The conviction had to be assessed on its merit against the permitted limitations to freedom of expression under Art. 10 of the ECHR. In particular, the Court had to determine whether the conviction was legitimate, pursued a legitimate objective and was necessary in a democratic society. None of these grounds were found to be present in the case at hand. In particular, the Court stated that the legitimacy of the restriction of freedom of expression is inversely proportional to the geographical and temporal distance of the crime denied from the actual domestic context. However, the Court made sure that the case of Holocaust denial would be treated as an exception to the rule in *Perinçek*. Such an approach creates a sort of presumption of compatibility of any sanction against Holocaust denial with the Convention, given its intrinsic potential to unsettle the public order.[32] This has been confirmed, for example, in the most recent decision in *Pastörs v. Germany*, where the Court stated that:

> In the present case, the applicant intentionally stated untruths in order to defame the Jews and the persecution that they had suffered during the Second World War. Reiterating that it has always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there exists a pressing social need for interference with rights under the Convention and that, in the light of their historical role and experience, States that have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis [stress added by the author].

[31] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, appl. no. 27510/08, Judgment of 15 October 2015.

[32] L. Daniele, *op. cit.*, p. 93.

The case law of the ECtHR shows a progressive liberalisation in the approach to freedom of expression and its limitation by curtailing the states' ability to interfere with it – in particular, through the use of Art. 17 as an *extrema ratio* and by anchoring the possibility of interfering with this freedom to stringent requirements of legality and necessity in a democratic society. This seems to suggest that criminal law should have only a limited role in this matter. Unless, on the one hand, the denial is aimed at inciting violence or hatred or, on the other, the denial concerns the Holocaust. In the latter case, the Court seems to allow for a presumption of offensiveness of the conduct, given the specific geographical and historical context in which it takes place.

3. Conclusion: The role of criminal law

The international legislation and case law – especially within the European context – are demonstrative of a trend towards a broadened paradigm of criminalisation of historical denialism. This is confirmed by the emergence of new grassroot voices arguing for the criminalisation of denialist statements concerning events other than the Holocaust (including, for example, the so-called Holodomor, that is the famine of 1932–1933 perpetrated by the Soviet regime in Ukraine[33]). However, this trend seems to have come to a partial halt with the decision in *Perinçek*, which reaffirms the general scope of Art. 10 of ECHR and limits the applicability of Art. 17 to extreme cases. Yet, Holocaust denial seems to maintain its "special" status which merits the imposition of a criminal sanction. While the need for context-dependent sensitivity is undeniable, especially in light of the recent waves of racism, xenophobia and even anti-Semitism, the intrinsic risk is to create a hierarchy of memories – the Holocaust, on the one hand, and all other international crimes, on the other. According to this model, only the former deserves full unqualified protection under the restrictions of freedom of expression. The latter can only fall within the admissible limitations under freedom of expression if qualified by the necessary link to incitement to violence or hatred (discrimination).

[33] See P. Lobba, *Punishing Denialism beyond Holocaust Denial: EU Framework Decision 208/913/JHA and Other Expansive Trends*, "New Journal of European Criminal Law" 2014, vol. 5, pp. 71–72.

Under general international law, though, recourse to criminal law is only admissible insofar as the conduct carries an additional layer of offensiveness. In other words, in order to be criminally relevant, the denialist conduct must harm arguably more tangible values than memory, such as equality and public order.

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MARCIN GÓRSKI

The Art of Negationism. Balancing Freedom of Artistic Expression and the Right to Truth?

The interplay between combating negationism and freedom of expression has attracted some attention of legal scholars recently.[1] Negationist speech is a manifestation of the active aspect of freedom of expression (right to impart information or opinions).[2] Moreover, negationist speech can also be analysed in the context of freedom of artistic expression as it may be undertaken in the context of an (allegedly) artistic activity.[3] This work concentrates on proposing the interpretations contributing towards the reduction of certain normative tensions likely to occur in the context of balancing freedoms of

[1] See, e.g. S. Garibian, *Taking Denial Seriously. Genocide Denial and Freedom of Speech in the French Law,* "The Cardozo Journal of Conflict Resolution" 2008, vol. 9(2), pp. 479–488; Y.-O. Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, "Northwestern Journal of International Human Rights" 2014, vol. 12(2), pp. 191–213; C.M. Cascione, *Genocide Denial and Freedom of Expression in the Perinçek Case: A European Overruling or a New Approach to Negationism?*, "Questions of International Law" 2016, vol. 28, pp. 5–18; T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression, étude de droit compare*, Paris 2012; F. Dubuisson, *L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression*, « Revue de Droit Université Libre de Bruxelles » 2007, vol. 35, pp. 135–195; L.B. Lidsky, *Where's the Harm? Free Speech and the Regulation of Lies*, "Washington & Lee Law Review" 2008, vol. 65, pp. 1091–1101; A. Pietruszka, *Zmiany ustawy o IPN w kontekście wolności debaty historycznej. Uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, „Monitor Prawniczy" 2018, nr 24, pp. 1315–1322.

[2] See, e.g. Judgment of ECtHR (GC) of 15 October 2015, *Perinçek v. Switzerland*, appl. no. 27510/08, § 117.

[3] See, e.g. Decision of ECtHR of 20 October 2015, *M'Bala M'Bala v. France*, appl. no. 25239/13. The case concerned a comic show entitled *J'ai fait l'con* allegedly including certain anti-Semitic statements.

the negationist speaker imparting artistic expressions and the members of his audience. There are several elements or questions that need to be addressed.

The first question is whether negationist speech as such is always a statement of fact or whether it may constitute opinion. In the latter case, at least the severity of the legal sanction should be reduced. If, however, negationist speech is the statement of facts – is the society entitled to reproach the speaker? The interpretation of historical events is a complex and ever-changing effort. On the other hand, the risks resulting from the contamination of knowledge about history by false statements are significant.

Allegedly, negationist speech analysed in *Perinçek* had not constituted – at least according to the applicant – "a denial of events as such, simply their characterisation as genocide."[4] In other words, it was an opinion but not a statement of facts. As the Grand Chamber pointed out, penalisation of expressions of opinions should not be deemed compatible with international free speech instruments.[5]

If one absolutizes free speech – and this approach indeed appears very attractive – by following the Millian thought of the "marketplace of ideas"[6] and believes that "the best remedy for bad speech is more speech"[7] – one understands the ostensibility of the alleged divergence of views of the US Supreme Court in *New York Times v. Sullivan*[8] and *Hustler Magazine v. Falwell*.[9] In the former case, the Court held that "false statement can make a valuable contribution to public debate," whereas in the latter case it held that "false statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas." But eventually, in *Hustler*, the Supreme Court graciously awarded rather strong protection to the "ideas" promoted by Hustler Magazine, justifying that stance by the fear of chilling effect. Thus, at the end of the day, free expression of false statements prevailed. The principled position of the US Supreme Court remained

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4 ECtHR (GC), *Perinçek*, at § 159.

5 ECtHR (GC), *Perinçek*, at § 265.

6 J.S. Mill, *On Liberty*, Boston, 1863.

7 L. Friedman, *Freedom of Speech: Should It Be Available to Pornographers, Nazis and the Klan?*, [in:] *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence*, M.H. Freedman, E.M. Freedman (eds.), Connecticut 1995, p. 317.

8 376 US 254 (1964).

9 485 US 46 (1988).

the one reflected in *Dennis v. United States* where the Court held that "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies."[10]

But prohibition of Holocaust denial (as the most common example of negationist speech) seems more understandable and excusable in societies which themselves experienced the horror of Nazi atrocities.[11] Is this approach legally tolerable? It depends on the axiology applied: whether one believes in the power of the marketplace of ideas (which seems to be a characteristic feature of the dominating position in the US Supreme Court) or not. Although in *Monnat*, the ECtHR agreed with the Swiss Federal Court that there is no "sole historical truth,"[12] yet in *Lehideux*, the ECtHR, to the contrary, distinguished between statements on historical facts as such and on their interpretation, the former being protected from revision or negation by Article 17 ECHR.[13]

One may easily point out that the boundary between statements on historical facts and on their interpretation is both narrow and slippery. Apparently being aware of that, the Court held in *Perinçek* that "the justification for making [the] denial a criminal offence lies *not so much* in that [there] is a clearly established historical fact but in that, (…) its denial, even if dressed up as impartial historical research, must invariably be seen as *connoting an antidemocratic ideology and anti-Semitism*."[14] Thus, it seems that the Court did not assume the incontestability of historical facts any more, but rather it applied the assessment of necessity of interference with freedom of expression from the standpoint of underpinning values of the Convention, which appears more plausible.

The second element of the analysis is the situation of the audience member: is he entitled to receive reliable (true) information (is there a right to information of a certain quality?) or just any sort (quality) of information?

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[10] *Dennis v. United States*, 341 U.S. 494, 515 (1951).

[11] ECtHR (GC), *Perinçek*, at §§ 242–243.

[12] Judgment of ECtHR of 21 September 2006, *Monnat v. Switzerland*, appl. no. 73604/01, at § 68.

[13] Judgment of ECtHR (GC) of 23September 1998, *Lehideux and Isorni v. France*, appl. no. 55/1997/839/1045, at § 47.

[14] ECtHR (GC), *Perinçek*, at § 243, emphasis added.

Also, is he entitled to receive the negationist information (opinion?) if that is exactly what he had been looking for? In other words, is the "freedom to receive information" (as referred to e.g. in Art. 10 ECHR) to be interpreted as meaning the right to truth or just freedom of access to a whole range of different types of information, including those of low (or no) quality and to have a choice?

Art. 10 ECHR encompasses the right to "receive information and ideas." It certainly means more than just the right of access to state-held information, yet the vast majority of scholarship is focused on the latter issue.[15] Nevertheless, the ECtHR confirmed that "the right to freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him"[16] and "particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive."[17]

Normally, in cases concerning negationist speech,[18] it is the imparter who challenges the interference applied by state authorities. The scholarship also normally focuses on the protection of the speaker's (imparter's) right.[19] But there is no particularly weighty reason to deprive the receiver of the freedom enjoyed likewise, especially since the *rationale* behind the freedoms enjoyed by imparters and receivers is the same and it is the *marketplace of ideas*.[20] It should not be the government's job to decide for the people which expression

[15] As for exceptions to the rule, see, e.g. R.E. Herr, *The Right to Receive Information Under Article 10 of the ECHR: An Investigation from a Copyright Perspective*, "Juridiska Föreningen i Finland, JFT" 2011, no. 2, pp. 193–211, http://ssrn.com/abstract=1787085 (access: 20.04.2020); M. McDonagh, *The Right to Information in International Human Rights Law*, "Human Rights Law Review" 2013, vol. 13(1), pp. 25–55; J. Kulesza, *Prawo do anonimowej wypowiedzi a prywatna cenzura Internetu w Polsce*, „Państwo i Prawo" 2012, nr 6, pp. 35–48.

[16] Judgment of ECtHR of 26 March 1987, *Leander v. Sweden*, appl. no. 9248/81, at § 74. Similarly in: judgment of ECtHR (Plenary), *Gaskin v. The United Kingdom*, appl. no. 10454/83, at § 52.

[17] Judgment of ECtHR of 16 July 2013, *Węgrzynowski and Smolczewski v. Poland*, appl. no. 33846/07, at § 57.

[18] See examples provided in Chapter 1 of this paper.

[19] With limited exceptions – see, e.g. J. Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, "Seton Hall Law Review" 2005, vol. 35, pp. 789–821 and the legal writings invoked therein.

[20] See, e.g. I. Stanley, *The Marketplace of Ideas: A Legitimizing Myth*, "Duke Law Journal" 1984, vol. 1(2–6).

is illicit enough to be banned.[21] In the American Libraries Association dissenting Justices Souter and Ginsberg rightly pointed out that strict scrutiny should be applied to restrictions on the Internet content available in public libraries as they violate the receivers' rights under the First Amendment.[22]

One may propose the following interpretative paths in relation to the right of the passive enjoyers of the freedom safeguarded by Art. 10 ECHR:

a) if one assumes that there should be no militant democracy regime (and indeed this seems to be the approach in some European states like Italy, Spain, Scandinavian states and the UK[23]), one should not tolerate any restrictions as regards statements of *facts*, even if they are false – in accordance with the doctrine of the marketplace of ideas,
b) if one, somewhat paternalistically, believes in the militant duties of a state, one should interpret Article 10 ECHR as allowing for interferences in case of negationist speech constituting false statements of *facts*,
c) finally, regardless of the application of the militant democracy regime, one must always accept negationist *opinions* (unless obviously they compromise somebody's reputation or other personal interests).

Only states applying the militant democracy regime can guarantee the right to truth (i.e. freedom of receivers from false statements of historical facts). Purely "freedomist" (in terms of freedom of expression) states cannot legitimately provide for the right to truth (awarded to the audience members as its beneficiaries).

The third element of the paper is devoted to addressing the question on whether negationist speech can – at all – be treated as artistic expression? If so, what is the influence of characteristic features of artistic expression (such as the interpretative autonomy of the audience, etc.) on legal assessment of negationist speech which allegedly constitutes artistic expression?

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[21] See the US Supreme Court, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), in concurrence of Justice Brennan, p. 308.

[22] US Supreme Court, *United States v. American Library Association*, 539 U.S. 194 (2003), at 242–243.

[23] Exemplification provided for in: ECtHR (GC), *Perinçek*, at § 99.

This question refers to a more profound issue, namely what actually "artistic expression" is. Without recapitulating certain more in-depth analysis[24] one may shortly say that the latter is an extra-intelligent expression of the author's individual sphere of sensitivity which affects the same sphere of the audience's members. It may incidentally present facts but such presentation is in no way the predominant function or intention of artistic expression.

Therefore, artistic expression may result in transmitting negationist speech, yet solely somewhat "by the way". Even if it does so, the interpretative autonomy of the audience of art virtually excludes the possibility of imposing sanctions for violations of anti-negationist laws. Laconically speaking: why should an artist be blamed for the way that his audience member understood the work of art if the way of understanding it is determined by numerous factors laying exclusively outside of an artist's sphere of control, e.g. education, cultural background, prejudices, life experience, religion and beliefs, etc.? In a very narrow margin of cases it appears possible to interfere with the freedom of artistic expression, namely where the clear intention of an artist to actually promote negationist statements of facts was traceable beyond any reasonable doubt. But what is then interfered is not art as such, but the contaminating elements of expression, other than art (e.g. political expression and intentions laying behind it).

To exemplify this proposition, let us quote the *M'Bala M'Bala*[25] case where the ECtHR dealt with "negationism disguised as art," namely the comedy show involving anti-Semitic speech and denial of Holocaust. The applicant, a comedian, invited a certain revisionist scientist[26] to award him with a special

[24] See, e.g. separate opinion of Judge de Meyer in the ECthR judgment of 24 May 1988, *Müller and others v. Switzerland*, appl. no. 10737/84 (holding that "whilst the right to freedom of expression *shall include* or *includes* freedom to *seek*, to *receive* and to *impart information* and *ideas*, it may also include other things. The external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned above"); judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 24 February 1971, *Mephisto*, 1 BvR 435/68; judgment of the Supreme Court of Canada of 26 January 2001, *R. v. Sharpe*, [2001] 1 SCR 45; judgment of the Italian Supreme Court of Cassation of 1 October 2009, case 10495/2009, or the judgment of the Constitutional Court of Colombia of 27 March 1996, case T-104/96 *Castro Daza*, see also: M. Górski, *Swoboda wypowiedzi artystycznej. Standardy międzynarodowe i krajowe*, Warszawa 2019.

[25] Decision of ECtHR of 20 October 2015, *M'Bala M'Bala v. France*, appl. no. 25239/13.

[26] The guest was Mr. Robert Faurisson known from the UN Human Rights Committee's decision of 8 November 1996 *Faurisson v. France*, case 550/1993. For a commentary see, e.g.

prize for "unfrequentability and insolence" in a form of a three-branched candelabra (a ridicule of the Jewish symbol of the menorah) handed to him by a person wearing a striped pyjama and a yellow symbol with a sign "Jew", pretending to be a Jewish inmate of the death camp. The invitee was given a chance to present his negationist views and the applicant announced at the beginning that it is his intention to "do better than in a previous show which had allegedly been described as the biggest anti-Semitic rally since the Second World War". The applicant was convicted for proffering a racial insult. The Court declared the application inadmissible under Art. 17 ECHR finding that "in the course of the offending sketch the show took on the nature of a rally and *was no longer a form of entertainment*" and "the applicant *cannot claim*, in the particular circumstances and having regard to the whole context, *that he acted as an artist*."[27]

So, what the Court actually did was not to develop an exception to the rule of a broadened scope of protection of artistic speech, but to disqualify the expression in question as art – at all. Should it had been found to constitute art, the answer given by Strasbourg could have been different.

Let us quote also the Italian Supreme Court of Cassation (*Corte Suprema di Cassazione*) which held that

> (…) first of all, it is necessary to point out the profound difference existing between the journalistic news, the essay or documentary activity, on the one hand, and the artistic expression, both theatrical, literary or cinematographic, on the other. The first are intended to offer the reader or viewer information, news, facts, events (…) for the sole purpose of making the reader or viewer aware of certain events, or of to reconstruct through them a discourse that has a political, narrative, journalistic or historical fabric. The artistic work is differentiated by the essential connotation of creation, that is to say the particular ability of the artist to manipulate materials, things, facts and people to offer them to the user in a transcendent vision, aimed at the affirmation of

A. Gliszczyńska-Grabias, G. Baranowska, *Wolność słowa i badań naukowych: ograniczenia w „słusznym celu"?*; G. Baranowska, A. Gliszczyńska-Grabias, A. Hernandez-Połczyńska, K. Sękowska-Kozłowska (red.), *O prawach człowieka. Księga jubileuszowa Profesora Romana Wieruszewskiego*, Warszawa 2017.

[27] *M'Bala M'Bala v. France, op. cit.*, at § 39, emphasis added.

> ideals and of values that can be found in the pluralism of the society. To achieve this goal, the artistic work develops through sometimes elegiac, sometimes dramatic or comic tones, and uses the tools of metaphor, paradox, hyperbole; at the same time, it is intemperate in its description of reality through expressions that amplify it, either by excess or by default. Such a peculiar characteristic of artistic work and above all the indispensable deformation of the reality involved in it, imposes on a judge (…) a different assessment with respect to that commonly carried out.[28]

It appears that freedom of artistic expression cannot compromise the right to truth even in states which apply the militant democracy approach. Basically, if art constitutes the expression of one's individual sphere of sensitivity, it can by no means be a statement on historical facts. Artistic expression is by definition irrational (extra-intelligent) since it is rooted in emotion and not in rationality, whereas negationist statements on facts are rational (but false): they have a clearly intellectual (although illicit) intention behind as their trigger. The only trigger of art is (extra-intellectual) sphere of human sensitivity and anything more which sometimes occurs in a work of art is a contaminating component, but not pure art as such.

[28] The Italian Supreme Court of Cassation, 1 October 2009, case 10495/2009: "Occorre innanzitutto rilevare la profonda diversità esistente tra la notizia giornalistica, l'attività saggistica o documentaristica, da una parte, e l'opera artistica, sia essa teatrale, letteraria o cinematografica, dall'altra. Le prime hanno lo scopo di offrire al lettore o allo spettatore informazioni, notizie, fatti, vicende, esposte nel loro nudo contenuto o ricostruite attraverso collegamenti e riferimenti vari, al solo scopo di rendere edotto il lettore o lo spettatore di determinati avvenimenti, oppure di ricostruire attraverso di essi un discorso che abbia un tessuto politico, narrativo, giornalistico o storico. L'opera artistica se ne differenzia per l'essenziale connotato della creazione, ossia di quella particolare capacità dell'artista di manipolare materiali, cose, fatti e persone per offrirli al fruitore in una visione trascendente gli stessi, tesa all'affermazione di ideali e di valori che possano trovare riscontro in una molteplicità di persone. Per raggiungere questo fine l'opera artistica si sviluppa attraverso toni a volta elegiaci, altre volte drammatici o comici, ed adopera gli strumenti della metafora, del paradosso, dell'iperbole; comunque, esagera nella descrizione della realtà tramite espressioni che l'amplificano, per eccesso o per difetto. Siffatta peculiare caratteristica dell'opera artistica e soprattutto l'imprescindibile deformazione della realtà in essa impressa, impone al giudice, chiamato a delibare la pretesa risarcitoria come conseguenza della diffamazione, un accertamento diverso rispetto a quello comunemente svolto con riguardo all'esercizio dell'attività giornalistica e documentaristica."

The fourth part of this work is dedicated to the presentation of two legal approaches in two different jurisdictions, applied to the interactions between freedom of artistic expression and protection of other constitutionally relevant legal interests, in the context of the topical issue of negationism. The first approach seems to be nuanced and to assume that there must be a greater margin of tolerance towards negationist artistic expressions and this is because of certain definitional features of art. The second approach does not draw any consequences from the artistic character of allegedly negationist speech.

The Canadian Supreme Court, serving us the example of the first approach, which can be described as "sophisticated", delivered a series of decisions concerning xenophobic hate speech[29] including *R. v. Zundel* which regarded an expression in a form of a pamphlet entitled *Did Six Million Really Die*?[30] The pamphlet, part of a genre of literature known as "revisionist history", suggested that it had not been established that six million Jews were killed before and during World War II and that the Holocaust had been a myth perpetrated by a worldwide Jewish conspiracy. The Canadian Supreme Court included, among others, the following passage:

> The first difficulty results from the premise that deliberate lies can never have value. Exaggeration – even clear falsification – may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., "cruelty to animals is increasing and must be stopped". A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. **An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie**; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet. All of this expression arguably has intrinsic value in

[29] See, e.g. the verdicts of the Supreme Court of Canada: of 13 December 1990, *R. v. Keegstra*, [1990] 3 S.C.R. 697, of 24 February 2005, *R. v. Krymkowski*, [2005] 1 SCR 101, 2005 SCC 7, 249 DLR (4th) 28, 193 CCC (3d) 129, 26 CR (6th) 207, 195 OAC 341.

[30] Supreme Court of Canada, 27 August 1992, *R. v. Zundel*, [2] SCR 731.

> fostering political participation and individual self-fulfilment [stress added by the author].

Art. 181 of the Criminal Code, prohibiting wilful publication of false statement or news that person knows is false and that is likely to cause injury or mischief to a public interest, was held unconstitutional. As held by the majority, including the then President of the Supreme Court Beverly McLachlin, it infringed the guarantee of freedom of expression. The Court held that

> Section 2 (b) of the Canadian Charter of Fundamental Rights protects the right of a minority to express its view, however unpopular it may be. All communications which convey or attempt to convey meaning are protected by the Charter, unless the physical form by which the communication is made (for example, a violent act) excludes protection. The content of the communication is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regards as wrong or false.

The Russian Constitutional Court, which may serve as an exemplification of a "simplified" approach (i.e. assuming that artistic character of a challenged expression does not impact the legal assessment of its negationist nature), took an opposite view in *Petukhov*[31] case concerning the constitutionality of the Law 114-FZ of 25.07.2002 on the combating of extremist activities. The applicant published two books entitled *The Fourth World War. The Chronicle of the Occupation of the Eastern Hemisphere*[32] and *Genocide. The Society of Extermination. The Russian Holocaust*[33] which were subsequently seized under the said Law. The applicant challenged the contested provisions alleging that

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[31] Constitutional Court of the Russian Federation, 18 December 2007, *Constitutional complaint of Mr. Yuriy Dimitiyevich Petukhov*, case 940-O-O/2007.

[32] Y. Petukhov, *The Fourth World War. The Chronicle of the Occupation of the Eastern Hemisphere*, Moscow 2004 [Ю. Петухов, *Четвертая Мировая. Вторжение. Хроника оккупации Восточного полушария*, Москва 2004].

[33] idem, *Genocide. The Society of Extermination. The Russian Holocaust*, Moscow 2004 [Ю. Петухов, *Геноцид. Общество истребления. Русский Холокост*, Москва 2004].

they are generic and sweeping and thus likely to infringe, *inter alia*, artistic freedom as guaranteed by Art. 44 of the Russian Constitution. The Constitutional Court held that the application was unfounded. It held that although the Constitution protects freedom of artistic expression, yet the latter is not unlimited and must be balanced against the constitutional ban on xenophobic propaganda inciting to hatred. The way the contested provisions were applied in the case against the applicant laid outside the jurisdiction of the Constitutional Court. No attention was paid to the consequences of the allegedly artistic "flavour" of the contested work of Yuriy Petukhov.

Conclusions

This short analysis led us to establish that:

a) in states systematically applying the militant democracy regime it does not seem plausible to legally tolerate any restrictions as regards *false* statements of *facts*,
b) in states applying the militant democracy regime it is possible to allow for interferences in relation to negationist speech constituting false statements of *facts*,
c) regardless of whether a state applies the application of the militant democracy regime or not, it must in principle accept negationist *opinions*,
d) as regards artistic expressions, their definitional features such as an extra-intellectual character and the interpretative autonomy of the audience of art virtually exclude the possibility of imposing sanctions for violations of anti-negationist laws.

One may, therefore, conclude that freedom of artistic expression is unlikely to compromise the audience's right to truth unless the expression in question contains elements other than art as such. If they exist though, it is not the freedom of art which is interfered but the (freedom of) these external elements, e.g. political speech.

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Debates over History and the European Convention on Human Rights

1. Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention")[1] provides guarantees to a set of human rights and freedoms considered fundamental to any post-war democratic society and state in Europe. Freedom of expression has been ranked as one of those freedoms. Under Art. 10 of the Convention, everyone has the right to freedom of expression and this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers (par. 1). But freedom of expression is not absolute. Public authorities may limit this freedom once three preconditions are cumulatively met. First, any limitation must be prescribed by law, which means that it must result from an existing piece of law (understood as legislation and court decisions) which is adequately accessible and formulated with sufficient precision.[2] Second, limitation is permitted only when it aims at protecting one of the interests or goods enumerated in Art. 10 (national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary). Third, restrictions can be accepted only when they are "necessary in a democratic society." Actually, in most cases when the European Court of Human Rights found

[1] The Convention was adopted on 4 November 1950 and entered into force on 3 September 1953.

[2] *Sunday Times v. United Kingdom* (no. 1), appl. no. 6538/74, judgment of 26 April 1979, Series A. 30, par. 49.

violations of Art. 10, the interference in question was deemed "unnecessary." It must also be reiterated that the relation between the two paragraphs of Art. 10 was not construed as that between two conflicting principles of equal legal standing but freedom of expression is perceived as the principle that is subject to a number of exceptions which must be narrowly interpreted.[3]

In their abundant case law on Art. 10,[4] the European Commission of Human Rights (hereafter referred to as "the Commission")[5] and the European Court of Human Rights (hereafter referred to as "the Court") have singled out several types of expressions afforded differentiated levels of protections. In other words, freedom of expression and the restrictions imposed on it are not measured by the same yardstick. The Court remains sensitive to the characteristics of particular expressions and their broader context. Some expressions are given strong protection, which is not the case with the others.

The highest protection is awarded to the kinds of expressions considered most closely related to the well-functioning of democratic society. Those are political speech and speech on matters of public interest. Although the Court has given member states "a certain margin of appreciation" in the application of the Convention,[6] in the case of political and public interest speech this margin was narrowly tailored and even actually non-existent as the Court's control was meticulous and strict. It was assumed that broadly permitted and even unimpeded freedom of public discussion is beneficial for democratic society. This perspective protective of freedom of expression is rooted in the famous statement from the judgment of *Handyside v. United Kingdom*. The Court held there that Art. 10 "is applicable not only to »information« or »ideas« that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[7]

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[3] *Sunday Times v. United Kingdom* (no. 1), par. 65.

[4] Until 31 October 2019 the Court alone delivered as many as 1,015 judgments on Art. 10.

[5] The Commission ceased to exist with the entry into force of Protocol no. 11 which profoundly reformed the Convention's controlling mechanism (since 1 November 1998).

[6] See, e.g. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp 2002; H.C. Yourov, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague 1996.

[7] Appl. no. 5493/72, judgment of 7 December 1976, Series A. 24, par. 49.

The picture of the normative framework for freedom of expression under the Convention would not be complete if it failed to take note of Art. 17. This provision reads that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The prohibition, buffer or blocking clause from Art. 17 is innovative as a legal tool. Its insertion into the Convention was a consequence of the experience preceding World War II. German Nazis came to power through democratic elections. To prevent a repetition of the situation when the democratic political and legal order is undermined by ideologies hostile to democracy, and eventually replaced by an undemocratic regime, coming to power by making use of democratic guarantees and procedures, the provisions of international human rights law treaties[8] and national constitutions[9] contain provisions depriving undemocratic political creeds and action of the legal protection.

In this contribution I am going to briefly analyse and reconstruct the case law of the Commission and the Court dealing with domestic restrictions imposed on expressions occurring in debates over history. On the one hand, debates and expressions about history should be categorised as having public interest. Therefore, they merit a high level of protection and the Court is likely to control any interference rigorously. But, on the other hand, two additional issues must also be taken into account. First, in the course of historical debates statements glorifying (usually tacitly but sometimes also expressly) authoritarian regimes and/or denying their atrocities may occur. It would trigger the application of the clause from Art. 17, being applied as a legal guillotine and leaving the expression in question beyond the ambit of the Convention protection.[10] Second, debates over national history engage local sensitivities

[8] See Art. 5 par. 1 of the International Covenant on Citizens' Rights and Political Rights as well as Art. 5 par. 1 of the International Covenant on Economic, Social, and Cultural Rights. The Charter of Fundamental Rights of the European Union also contains the "buffer clause" (Art. 54).

[9] The most telling are the provisions of the German Constitution (*Grundgesetz*) of 23 May 1949 (Art. 18 and Art. 9 par. 2).

[10] The designation of Art. 17 as a procedural guillotine comes from J.-F. Flauss, *L'abus de de droit dans le cadre de la Convention européenne des droits de l'homme*, « Revue universelle des droits de l'homme » 1992, p. 464.

and it can be rightly argued that authorities of a given state are better placed than the Court as an international body to assess all relevant facts, contexts and aspects. In such situations, the state should be afforded a significant margin of appreciation, and the Court's scrutiny should be reduced only to ascertaining if the restriction is "in principle" consistent with the Convention.

2. Denial speech cases

The most interesting issues with the most far-reaching legal consequences arise in the cases involving Nazi or negationist speech. The Commission and the Court were prone to make use of a radical, guillotine-like scenario grounded in the application of Art. 17. However, the existing Strasbourg jurisprudence is far from being clear and coherent.

The application of Art. 17 first took place during the preliminary procedural phase, where the issue was whether a given complaint was admissible. Prior to Protocol no. 11 (entered into force on 1 November 1998) the decision was made by the Commission. A review of the Commission's decisions reveals a visible evolution, although some decisions also diverged from the earlier-elaborated directions identified below.

The line of decisions sprang from the banning of the German Communist Party (GCP),[11] which was labelled as an organisation aimed at instituting a totalitarian political system in Germany based on the dictatorship of the proletariat. The Commission ruled that the complaint was not, in light of Art. 17, supported by any provisions of the Convention. This legal reasoning had radical consequences. Since it was determined that the protections of the Convention did not apply to certain activities (on account of their aims), the Strasbourg institutions did not have competence to examine the sanctions applied for their proportionality, however burdensome they might be for the complainants. Two decades later, the Commission reaffirmed this interpretation in the case of *Glimmerveen and Hagenbeck v. the Netherlands*.[12]

[11] *Kommunistische Partei Deutschlands v. Germany*, application no. 250/57, decision of 20 July 1957, Yearbook, vol. I, p. 222.

[12] Appl. no. 8348/78, decision of 11 October 1979, DR 18, p. 187.

The use of Art. 17 as a "normative and procedural guillotine" in the GCP and Glimmerveen and Hagenbeck cases was not, however, wholly determinative of the Commission's jurisprudence. What dominated – which to say the least can only be described as surprising – was a total lack of reference to Art. 17 at all. Just several months after the GCP decision, in another complaint concerning the same political party and the sanctions imposed on it, the Commission referred exclusively to the "substantive" provisions of the Convention.[13] This approach was repeated subsequently in proceedings connected with the punishment of activities characterised as neo-Nazi,[14] the distribution of brochures proclaiming that the extermination of millions of Jews was a "Zionist falsehood,"[15] and the banning of a political movement based on the ideology of the fascist party.[16]

But in 1984, the Commission "re-discovered" Art. 17, although in a new and original fashion. The reports it prepared in the cases of Glasenapp and Kosiek contained the following thesis: if a State undertakes measures to protect the rule of law and democracy, Art. 17 gives such aims supremacy over the protection of rights guaranteed in the Convention. The need for such State intervention must, however, be clearly identified and explained.[17] The words used by the Commission seem to suggest that Art. 17 should be applied in conjunction with the other provisions of the Convention. Art. 17, thus, loses its character as a "normative guillotine," becoming instead a specific argument which can be put forward in defence of restrictions deemed necessary.

The two above-mentioned reports of the Commission are consistent in their analysis of the necessity for State intervention (hence fulfilling the third element of the test contained in par. 2 of Art. 10), taking into account Art. 17. Thus, it may be said that the "buffer clause" of Art. 17 has been used

[13] *X., Z. and Y. v. Germany*, appl. no. 277/57, decision of 20 December 1957, Yearbook, vol. I, p. 219.

[14] *X. v. Austria*, appl. no. 1747/62, decision of 13 December 1963, Collection v. 13, p. 42.

[15] *X. v. Germany*, appl. no. 9235/81, decision of 16 July 1982 (plenary session), DR vol. 29, p. 194.

[16] *X. v. Italy*, appl. no. 6741/74, decision of 21 May 1976 (plenary session), DR vol. 5, p. 83.

[17] *Glasenapp v. Germany*, appl. no. 9228/80, report of 11 May 1984 (plenary session), Series B. 87, par. 110; *Kosiek v. Germany*, appl. no. 9704/82, report of 11 May 1984 (plenary session), Series B. 88, par. 106.

as an element of the interpretation of Art. 10.[18] The first decision in which the Commission applied this interpretation, rejecting a complaint, was the case of *Kühnen v. Germany*.[19] In identifying those fundamental values which underlay the entire Convention and form the rationale for Art. 17, the Commission made reference to the Preamble of the Convention and the pledge to maintain an "effective political democracy." Thereafter and until the end of its existence the Commission, without exception, repeated in a number of cases, the formula it used in the Kühnen case, always in order to reject a complaint alleging that certain restrictions violated the Convention.

Before the entry into effect of Protocol no. 11 (1 November 1998) only cases first found admissible by the Commission could be placed on the Court's docket. As was indicated above, the application of Art. 17 *in casu* acted like a sieve, allowing the Commission to accept the national restrictions as well as the proportionality of the sanctions. As a result, cases involving Art. 17 were rarely placed on the case-list of the Court, and if so, they accompanied other issues. In order for such a case to reach the Court, the Commission had to reject a State's argument that a particular restriction be looked at in light of Art. 17 and distinguish the case before it – for various reasons – from "typical" activities contrary to the fundamental values of the Convention. As a result, the "old Court" tackled issues relating to Art. 17 on only three occasions, always sitting as a Grand Chamber formation. None of the cases, however, concerned speech/expressions in praise of Nazism or negating the existence of Nazi crimes.[20]

After 1 November 1998, the (new) Court became authorised to decide itself which complaints it would accept for review on merits as admissible. As

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[18] S. van Drooghenbroeck, *L'article 17 de la Convention européenne des droits de l'homme est–il indispensable?*, « Revue trimestrielle des droits de l'homme » 2001, p. 557, refers to Art. 17 as an "interpretative aid" (*adjuvant interprétatif*). Another author has introduced the concept of "indirect usage" of Art. 17: M. Levinet, *La fermeté bienvenue de la Cour européenne des droits de l'homme face au négationnisme*, « Revue trimestrielle des droits de l'homme » 2004, p. 657.

[19] Application no. 12194/86, decision of 12 May 1988, DR v. 56, p. 210. The complainant was an activist in a group seeking to restore the NSDAP and the author of a number of publications.

[20] Judgements: *Jersild v. Denmark*, appl. no. 15890/89, judgement of 23 September 1994, Series A. 298; *Vogt v. Germany*, appl. no. 17851/91, judgement of 26 September 1995, Series A. 323; *Lehideux and Isorni v. France*, appl. no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

a result, the judges had to confront Art. 17 directly and could no longer avoid interpretation of this provision. In its early decisions, the Court appeared to accept the legal reasoning of the Commission's line of decisions beginning with the Kühnen case: Art. 17 is used to determine the necessity for State intervention (restrictions) analysed under Art. 10. Such was the Court's reasoning in the cases of *Witzsch v. Germany* (involving the negation of Nazi crimes in letters sent to Bavarian politicians)[21] and *Schimanek v. Austria* (involving the activities of neo-Nazi groups, the organisation of meetings glorifying the Third Reich and its leaders, the SS and SA, and negation of the existence of gas chambers in concentration camps).[22]

The change in the Court's reasoning, and its choice of Art. 17 as its rationale, occurred in the case of *Garaudy v. France*.[23] Following his conversion to Islam, Garaudy became a radical critic of the Jews and Israel. He did not limit himself to criticism alone – in his published works he called into question what he termed as the "Nuremberg myth," the "Holocaust myth," and the "founding myth of the State of Israel." The French courts hold that several of Garaudy's books constituted the negation of war crimes and incited to racial hatred. In reviewing the sanctions imposed, the Court relied on Art. 17. It declared that negation of the crimes committed against the Jews during the Second World War was in contradiction to the fundamental values of the Convention expressed in the Preamble (justice and peace). As a result, the complaint was held inadmissible *ratione materiae*. Thus, the Court returned to the theory of the "normative guillotine."[24] This approach was subsequently adopted to different speech considered contrary to the values underlying the Convention, but some expressions also denied the reality of Nazi crimes or their scale.[25]

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[21] Appl. no. 41448/98, decision of 20 April 1999.

[22] Appl. no. 32307/96, decision of 1 February 2000.

[23] Appl. no. 65831/01, decision of 24 June 2003, ECHR 2003-IX.

[24] A consistent supporter of this use of Art. 17 is the renowned French expert on the Convention, Gérard Cohen-Jonathan. He writes that the earlier 'weakened' interpretation of Art. 17 probably arose from the fear of the Strasbourg judges that reliance on the guillotine theory would have provoked sharp criticism by "integralists of free speech" (*Le droit de l'homme à la non – discrimination raciale*, « Revue trimestrielle des droits de l'homme » 2001, p. 680).

[25] *M'Bala M'Bala v. France*, appl. no. 25239/13, decision of 20 October 2015, ECHR 2015 ("satirical endorsement" of the negationist Robert Faurisson). But still, on some occasions, depending on the circumstances of particular cases, the Court will prefer to focus on Art. 10;

The guillotine theory is based on a "dichotomic logic." In adjudging a particular expression to be encompassed by Art. 17 (placing it outside the protections of the Convention), the Court lacks *ratione materiae* competence. Thus, the key element is the delineation of the area to which Art. 17 is applied, or in other words, its scope of application. Not only are the Court's decisions far from precise on this question, but the judges appear to consciously avoid giving a clear answer. In practice, thus, the Court is seeking to retain its competence by carefully defining the areas to which Art. 17 is unquestionably applicable. In addition, the judges are creating a certain normative blurry "grey area."[26] Although they could use the facts in the cases before the Court to create a set of concrete conditions or prerequisites which would trigger the application of Art. 17, they prefer to analyse the cases in light of Art. 10 alone.[27] It seems clear only that speech or expressions glorifying Nazism or negating Nazi war crimes will not be located in the "grey area" of Art. 17.

3. Speech regarding the events of World War II (other than denial speech)

Another area of complaints to the Strasbourg institutions have concerned restrictions placed on speech/expression concerning debates over various historical events from World War II. Very often such expressions were elements of controversial discussions concerning events which continue to stir strong emotions in various national histories, or which question conventionally accepted or "official" versions.

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see *Gollnisch v. France*, appl. no. 48135/08, decision of 7 June 2011 (suggestions that the reality of gas chambers and the number of Nazi victims should be left to discussions by scholars).

[26] Recent examples of the Court's decisions located in this area are: Šimunić *v. Croatia*, appl. no. 20373/17, decision of 22 January 2019 (using by a soccer player before a match a greeting used by the totalitarian regime of the Independent State of Croatia); *Williamson v. Germany*, appl. no. 64496/17, decision of 8 January 2019 (statements denying and downplaying of the genocide perpetrated against the Jews).

[27] As does M. Oetheimer, who writes that while the Court should not apply Article 10 to expressions which clearly fall within the purview of Art. 17, in cases of doubt Art. 10 should be applied. (*La Cour européenne des droits de l'homme face au discours de haine*, « Revue trimestrielle des droits de l'homme » 2007, vol. 69, p. 65).

As regards historical debates over national histories, one can observe an interesting tension in Strasbourg jurisprudence to which I have already hinted in the introductory remarks. On the one hand, such discussions certainly qualify as "matters of public interest."[28] In such cases – similar as with political debates – national authorities have only very limited discretionary powers, called "margin of appreciation," and the Court will exercise strict supervision and carry out a rigorous and detailed assessment of any interferences or restrictions. But on the other hand, the debate concerns the history of a concrete nation, and the national courts (judges), who know the place, circumstances, and context of historical events – surely much better than international judges – would seem best equipped to assess the need for and extent of permissible restrictions on the freedom of expression.[29]

The Strasbourg institutions grappled with the issue of European oversight of national restrictions on historical debates for the first time in the case of *Lehideux and Isorni v. France*.[30] The legal issues turned out to be so complicated that the Commission issued its decision as a plenary body, and the ECHR heard the case in Grand Chamber.

The case concerned criminal proceedings in France against two individuals for publishing a full-page advertisement in the national daily "Le Monde" on behalf of two associations which were seeking the rehabilitation of Marshal Pétain. The authors of the advertisement presented the main facts of the Marshal's life in a positive light, asking the readers rhetorically if they recalled them. About the years 1940–1945 it was written that Pétain, following the German invasion of France, was asked to take over the reins of power, and that he achieved a cease-fire, staved off German annexation of France's Mediterranean regions, saved two million prisoners of war, and protected the country from Nazi barbarism and atrocities. Thanks to his political talent, it was alleged, the Marshal managed to maintain a balance between

[28] In the case of *Monnat v. Switzerland*, the Court labelled the discussion concerning the actions of the Swiss government during World War II as an "extremely important" (*la plus sérieuse*) issue – appl. no. 73604/01, judgement of 21 September 2006, ECHR 2006-X, par. 59.

[29] So, it was found in *Vajnai v. Hungary*, appl. no. 33629/06, judgment of 8 July 2008, ECHR 2008-IV, par. 48. This case dealt with a public exposition of symbols considered "totalitarian" (five-pointed red stars), what constituted an act prohibited under national legislation enacted in face of recent Communist past.

[30] Appl. no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

fascist Germany and the allied governments. His secret agreement with the Americans was aimed at liberating France and preparing the French army in Africa for that task. According to the authors, after the war, the grey-haired, ninety-year-old man was sentenced following a short, pre-determined and fixed criminal proceeding.

Ultimately the individuals responsible for the advertisement were sentenced to pay damages in the symbolic amount of one franc to war veterans' associations, and to publish a fragment of the judgement in "Le Monde". The Cassation Court sentenced them – as it publicly explained – for their "hidden apology" which, "in an implicit but necessary fashion" white-washed war crimes. Thus, the guilt of the complainants was based more on what they did not write than the content of the advertisement itself. The French courts found that the advertisement overlooked the unsavoury side of Pétain's life, in particular his responsibility for the deportation of French Jews. The advertisement's authors instead referred cleverly to the so-called "double game theory," a theory rejected by historians.

Both the Commission (by a vote of 23-8) and the Court (by a vote of 15-6) found a violation of Art. 10 of the Convention. The French authorities stressed in their legal memoranda directed to the Strasbourg judicial institutions that in cases concerning restrictions on discussions of national history, the local authorities of the State are better placed to assess the situation for two reasons. The first may be called a "common historical argument" – that the competence of local authorities to assess historical events in their own country is greater than that of international judges. The second reason, taking the form of a "specifically developed historical argument," is that the expression concerned very sensitive and still emotional events.

Both Strasbourg institutions focused primarily on the "technique" used in the announcement and questioned by the French courts. In describing Pétain's policies as "skilful to the highest degree," the authors were clearly referring to the "double game" theory. They had to know that this theory has been rejected by most historians, both French and non-French. The Court went on, however, to state it could not issue an assessment of a matter which is still the object of research and subject to ongoing interpretation. In the Court's opinion, it was not dealing with established historical facts such as the Holocaust, the negation or revision of which is not, in light of Art. 17, protected by Art. 10.

The authors' assertions could not be classified as the denial of events which they themselves characterised as "German omnipotence and barbarianism" and "Nazi atrocities and persecutions." At the most, the authors' assertions can be interpreted as support for one of the theories proffered in assessing the role of the Chief of the Vichy government (par. 47–48 of the Court's judgement).

The reason for sentencing the complainants was, therefore, likely to be the second "technique" they used, and for which the French courts found them guilty of an "act of omission." The announcement presented Pétain wholly in a positive light and completely overlooked the charges made against him which led to him receiving a death sentence after the war. The manner of presentation was highly polemical. But the Court found that Art. 10 does not protect only the content of information or ideas expressed, but also the form in which they are expressed.

Although it was morally reprehensible, the fact that the text made no mention of Petain's alleged collaboration had to be assessed in the light of a number of other circumstances surrounding the case. These included the fact that the prosecution, whose role it was to represent all the sensibilities which make up the general interest and to assess the rights of others, first decided not to proceed with the case against the applicants in the criminal court, then refrained from appealing against the acquittal pronounced by that court (first instance). The Court further noted that the events referred to in the publication in issue had occurred more than forty years before. Even though the complainants' remarks were likely to reopen the controversy and bring back memories of past sufferings, the lapse of time made it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years after the war. However difficult and painful the debate, it should take place in an open manner, without pre-conditions or prejudices (par. 55).

Having established its awareness and taking into account the ongoing emotional nature of the discussion in France over its war past, the Court performed "Europeanisation" of the discussion, subjecting it to objective rules and principles and rigorous control. Adopting the Commission's finding that there was no "urgent social need" for interference (par. 67), the Court examined the restriction itself and not only the concrete sanctions applied (which were in fact minimal). Here the Court's verdict seems to be based on a weaker thesis. It found the use of criminal proceedings when other, civil

remedies, were available to be disproportional (par. 57). Regardless of their differences in other aspects, both Strasbourg institutions questioned the use of criminal proceedings, ignoring the fact that the sanctions applied were minimal, even just symbolic.

The case of Lehideux and Isorni is a special and particular case inasmuch as the reason for State interference into the freedom of expression was the white-washing of history by the omission of certain historical facts and reference to interpretative theories rejected by most experts. In most instances, however, the reasons for State interference into freedom of expression are not based on the omission of issues or facts, but on their being presented in a false, negative or offensive way.

Such was the case in *Monnat v. Switzerland*.[31] In a television program titled *The Lost Honour of Switzerland*, a popular view – sometimes referred to as "a carefully cultivated national myth" – was criticised and attacked. This view holds that during the Second World War, the Swiss authorities and inhabitants behaved courageously against the German fascists. The authors of the program asserted that the truth was quite different, and that it was possible even to speak of a sympathy for fascism, which grew out of the similarities in views between the fascists and the Swiss governing elite. In this regard the authors of the program mentioned Swiss anti-Semitism, the laundering of German money, and the highly developed trade relations between Switzerland and Nazi Germany.

Following the program's emission a protest was lodged by a group of viewers to an independent governmental commission handling radio and television complaints, arguing that the program lacked objectivity. The commission agreed with the accusation, finding that the program presented only one point of view and failed to separate facts from opinions. The television authorities overseeing programming were directed to take steps to prevent any further emission of the program or its distribution. The commission's decision was upheld by the Swiss Federal Court, which declared in its judgement that although the "engagement of journalists" is not forbidden, viewers should have been informed that the program was not presenting "unquestioned facts" but only one interpretation of the relations between Switzerland and Nazi

[31] Appl. no. 73604/01, judgement of 21 September 2006, ECHR 2006-X.

Germany. As a result of the Swiss Court's decision, copies of the program could not be sold within Switzerland or abroad.

The Strasbourg Court took note of the emotions involved in the discussion of Switzerland's behaviour during World War II and the divided public opinion. But that did not change the fact that the debate concerned issues of exceptional public importance, and in such cases, the State's margin of appreciation is virtually nil. While the Court acknowledged the justification for the State's action, i.e. the desire to assure that viewers obtain objective and balanced information (protection of the rights of third persons), it found that such an aim had to be confronted with the circumstances surrounding the discussion of the historical issue in question, where it is impossible to attain certainty (par. 63) and fifty years have elapsed since the events (par. 64). As a result, the Strasbourg judges unanimously declared that Switzerland had violated Art. 10 of the Convention, and that the sanctions it imposed constituted "a form of censorship" that could discourage Monnat from undertaking any such similar criticism in the future. It should be emphasised that the Court identified the national sanctions applied as a restriction on all journalists, not just on the individual complainant, frightening journalists as a whole away from presenting positions on controversial matters of public importance, thus, diminishing their role as a public watchdog (par. 70).

Thus, the Court acknowledged the fundamental significance of a free and public debate on national historical issues where attainment of factual certainty is impossible, and the need to allow for the presentation of various views and hypotheses.[32] The imposition of a rigorous objectivism can be justified, if at all, primarily in cases where the historical debate concerns living persons, whose personal rights come into play.[33] However, even in

[32] The methodology for reaching an assumption of uncertainty in discussions concerning historical events, which brings with it a tolerance of minority viewpoints, even if they are shocking or extravagant, seems to be a fundamental ingredient of the Strasbourg standard. The Court (and national courts) are not supposed to act as arbiters in such controversies. In this context see *Fatullayev v. Azerbaijan*, appl. no. 40984/07, judgment of 22 April 2010, par. 87; also *Giniewski v. France*, appl. no. 64016/00, judgment of 31 January 2006, ECHR 2006-I, par. 51–52.

[33] This distinction was emphasised by the judges in the case of *Chauvy and Others v. France*, appl. no. 64915/01, judgment of 29 June 2004, ECHR 2004-VI, par. 69. In the Monnat judgment the Court, when analysing the conflict of interests, drew attention to the fact that none of the still-living politicians (or the next-of-kin of deceased politicians) who were mentioned in the program commenced any actions relating to damage to their reputations or good name

such cases intervention by the State must be precisely justified, taking into account the conflicting interests and opinions of various parties. It would be easier to convince the Court of the need for such intervention in the case of "offensive hypotheses" directed toward specific individuals combined with the omission of known facts and available source materials.[34]

The role of the "elapse of time" needs to be noted inasmuch as this formulation was used by the Court in both the French and Swiss cases.[35] A significant time gap between the debate and the underlying events brings about a "re-orientation" of the State's margin of appreciation. Broad discretionary powers, when the debate is of an actual character, become narrow with the passage of time.

4. Concluding remarks

The Convention standards regarding discussions on history may seem to be a bit a kind of patchwork. Actually, however, there are some points well organising the relevant case law and making it, to a pretty large extent, predictable. First, historical debates concern matters of public interest, which means they are afforded a heighten degree of protection and the resulting margin of appreciation states enjoy is very narrow or even nil. Second, all courts, both domestic and the Strasbourg Court, do not ought to become arbiters settling historical controversies. All perspectives, even minoritarian and extravagant, should enter the public area where their veracity is tested. Third, some exceptions to the rule of unfettered discussion are permitted but they must be constructed and construed in a restrictive manner. Denial of historical facts constituting crimes under international law may be subject to legal restrictions, even of penal character, especially in those places and states where such crimes occurred. Interferences are also permitted when statements hurt feelings of individuals, in particular those being close

(par. 62). As regards the rights of other persons (the remaining viewers) the Court found that commencement of complaints by them following emission of the program would not be a sufficient excuse for the institution of unwarranted restrictions on freedom of expression (par. 63).

[34] *Chauvy and others v. France*, par. 73.

[35] Par. 55 of the judgement in Lehideux and Isorni, par. 64 of the judgment in Monnat.

relatives of actors of historical events. Fourth, time span separating events and expressions relating to them is a factor that needs consideration. Some restrictions may originally be justified but over time, their application, and all the more, institution of new restrictions, becomes problematic. Fifth, Art. 17 of the Convention, according to which certain expressions are deprived of the protection stemming from Art. 10, seems to be reserved for the statement which must be deemed as going contrary to "the underlying values of the Convention".

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The Jurisprudence of the European Court of Human Rights in the Area of Europe's Totalitarian Past – Selected Examples

1. Introductory remarks

When history and memory of the past enter the courtroom, it is difficult to escape the question about the attitude of judges, who are sometimes forced to take the role of historians conducting a kind of "judgment on history."[1] However, this situation is even more difficult in the case of international courts and tribunals, where judges from different countries sit, representing also different or sometimes even antagonistic perspectives of looking at specific historical events. That is why these judges often – and probably rightly so – try to avoid speaking directly on topics related to the history of individual countries. As judge Egidijus Kūris of the European Court of Human Rights (hereafter referred to as "the Court/"ECtHR") put it:

> Courts must be precise and explicit when describing and assessing a defendant's actions. Must they be equally explicit when describing a nation's history? I do not believe so. This Court is itself at times very laconic when it comes to descriptions of historical facts, for better or for worse. After all, a trial is not a university seminar in history, and a judgment is not an encyclopaedia.[2]

[1] In recent years, the presence of academic literature on the subject, and the issue of the so-called memory laws, has grown significantly. See, e.g. A. Sierp, *History, Memory and Trans-European Identity: Unifying Divisions*, New York 2014; U. Belavusau, A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge 2017; N. Koposov, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia*, Cambridge 2017.

[2] *Vasiliauskas v. Lithuania*, appl. no. 35343/05.

However, this is not always the case in the Strasbourg Court that sometimes enters or even initiates various historical deliberations. In this presentation I would like to briefly present some of the decisions and judgments of the Court where the historical heritage had been decisive in the reasoning and decision taken by the Court, as well as some of the cases where the Court, despite the existence of significant historical conditions, did not assess them as meaningful enough to influence its final dictum. As I will try to demonstrate, the dividing line here is very often situated between the fascist/Nazi vs. Stalinist/communist pasts.[3] At the same time, as the position of the Court towards the events and circumstances marked by fascism and Nazis is much better known and analysed in the literature on the subject, I will confine myself to reminding and indicating only some of the most symptomatic decisions and judgments in this regard, paying more attention to the position of the ECtHR towards various historical events (and their current repercussions) that took place behind the "Iron Curtain."

2. ECtHR on the Fascist and Nazi past

One of the most symptomatic examples of the Court's special approach to the fascist and Nazi past is its case law regarding the admissibility of restricting freedom of expression of those who publicly deny the Holocaust, by denying or trivialising the genocide committed by the German Nazis during World War II. The Court's unequivocal position, according to which denial of the Holocaust is a form of anti-Semitic hatred[4] and as such is not subject to the protection of conventional freedom of expression, is, in my opinion, correct, although it is,of course, also contested in the literature.[5] However, the real controversy and challenge within the discussion on admissibility of limitations

[3] For a comprehensive analysis of this phenomenon, see A. Gliszczyńska-Grabias, *Stalinism and Communism Equals or Versus Nazism? Central and Eastern European Unwholesome Legacy in ECtHR*, "East European Politics and Societies" 2016, vol. 30 and I.C. Kamiński, *"Historical Situations" in the Jurisprudence of the European Court of Human Rights in Strasbourg*, "Polish Yearbook of International Law" 2010, no. 30.

[4] See, among other, the reasoning of the Court in the *Garaudy v. France*, appl. no. 65831/01.

[5] See, e.g. P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, "The European Journal of International Law" 2015, vol. 26(1).

of Holocaust deniers' free speech arose first with the Court's judgment in the *Perinçek v. Switzerland* case, where, in my view, its Grand Chamber did not find sufficiently convincing arguments for introducing a specific gradation of the validity of genocides: in the Grand Chamber judgment in the *Perinçek* case, it found a violation of freedom of expression of an individualchallenging the Armenian genocide committed by the Ottoman Empire in the early 20th century.[6] To mention here only a few other examples of the Court's definitely unequivocal and coherent position[7] regarding this aspect of totalitarian past of Europe:

1. In all cases concerning the activities of an individual within the context of neo-Nazi or neo-fascist revival, the Court has never granted protection to such individuals sentenced by domestic courts, treating this kind of behaviour as an unacceptable abuse of free speech or other freedoms, undertaken in order to destroy the very values of the Convention's system, that emerged from the ashes of the Holocaust.[8]
2. The words "Holocaust on your plate" (*PETA v. Germany*[9]) referring to the protection of animal rights or "Babycaust" used to fight against abortion (*Hoffer and Annen v. Germany*[10]) were treated by the Court as an inadmissible breach of a taboo and violation of the dignity of the Holocaust victims.
3. In turn, the *Wabl* case concerned a politician who used the words "Nazi journalism" to describe press articles alleging that he was infected with AIDS. Austrian Supreme Court had issued an injunction against the politician prohibiting him from repeating the statement about "Nazi journalism", and the politician lodged a complaint in Strasbourg about

[6] For a critical comment on *Perincek* judgment, see U. Belavusau, *Perinçek v. Switzerland: Between Freedom of Speech and Collective Dignity*, "Verfassungsblog", 5 November 2015, https://verfassungsblog.de/perincek-v-switzerland-between-freedom-of-speech-and-collective-dignity/ (access: 12.02.2020).

[7] Fáber *v. Hungary*, appl. no. 40721/08 should be considered the only really meaningful exception in this line of jurisprudence.

[8] See, e.g. *Kühnen v. Germany*, appl. no. 12194/86; *F.P. v. Germany*, appl. no. 19459/92; *Schimanek v. Austria*, appl. no. 32307/96.

[9] *PETA v. Germany*, appl. no. 43481/09.

[10] *Hoffer and Annen v. Germany*, appl. no. 397/07 and 2322/07.

violation of Art. 10. The Tribunal agreed with the Austrian court, and determined that

> […] the applicant's indignation about defamatory reporting, associating him with a disease provoking fear and antipathy amongst the majority of the population could not justify the reproach of Nazi working methods (…). In coming to this conclusion, the Court had particular regard to the special stigma which attaches to activities inspired by National Socialist ideas.[11]

At the same time, in case of indicating true connections of an individual to the Nazi or neo-Nazi movement, the Court notices the importance of making the knowledge on such connection known to the broader public. In the case against Austria, the Court considered that the term "closet Nazi" was not to be regarded as a statement of fact but as a value judgment on an important subject of public interest.[12]

3. Was Stalin as Bad as Hitler? Was communism as evil as Nazism?

Accession of all post-Communist states (with the exception of Belarus) into the Council of Europe system gave the Court in Strasbourg an opportunity to establish a legal standard of dealing with matters such as public presence of Communist symbols and insignia (*Vajnai v. Hungary*[13]), (de)registration of neo-Communist parties (*Partidul Comuniştilor* [*Nepecerişti*] and *Ungureanu v. Romania*[14]), and the relevance of past membership in Communist parties for an exercise of electoral rights in newly democratized states (*Zdanoka v. Latvia* [chamber judgment][15]). All these issues had had their equivalents in the earlier case law of the same Court which arose from the Nazi past in other countries, such as Germany and Austria. And yet the contrast is striking: the past cases

[11] *Wabl v. Austria*, appl. no. 24773/94, par. 41.
[12] *Scharsach and News Verlagsgesellschaft mbH v. Austria*, appl. no. 39394/98.
[13] *Vajnaj v. Hungary*, appl. no. 33629/06.
[14] *Partidul Comuniştilor (Nepecerişti) and Ungureanu v. Romania*, appl. no. 46626/99.
[15] *Zdanoka v. Latvia*, appl. no. 46626/99.

yielded by the Nazi history had displayed none of the hesitation, doubts or straight rights-protective attitudes (resulting in findings that a state breached the relevant Convention rights) that have been more recently shown in the "post-Communist" cases. Some explanations for this situation are "internal" to the Court's methodology (such as its doctrine of the "margin of appreciation," or deference to national regulations), but other reflect a broader dualism in the European collective memory. This shows that the post-Second World War mood of unwillingness to treat Stalin's and Communist crimes as equivalent to those committed by Hitler has a troublingly persistent quality.

These "double standards" are best seen when one considers the case *Vajnai v. Hungary* which concerned a display of a Communist symbol of the red star – which was an offence under the Hungarian criminal law. The ECtHR established that the rights of Mr Vajnai were breached when he was punished in Hungary for displaying in public the red star, and one of the main reasons for the judgment was an opinion that there was no risk, in Hungary, of reinstating the Communist regime. The Court also argued that the applicant was not engaged in any active propagation of Communism.

The facts of the case indeed prove the validity of arguments about the lack of any danger of the Communist regime being restored in Hungary, and that there was no dissemination of totalitarian propaganda by the applicant. At the same time, if one considers ECtHR case law on broadly understood activities inspired by National Socialism, one realizes that, unlike in the case of Communist ideology, the same Court does *not* apply a test of whether there actually was a real risk of restoration of the criminal regime based on this ideology or whether there was any public promotion of the totalitarian regime. In all its case law regarding applications from Nazi or fascist groups claiming that their rights under the Convention had been violated, the European Court has consistently refused to accord them such protection: all such activities (whether distribution of racist or fascist pamphlets, or public Holocaust denial, or organizing neo-Nazi paramilitary training camps, or other Nazi activities) have been denied protection of the European Convention. Thus, it is difficult to imagine that a similar judgment as the one delivered in *Vajnai* would have been rendered in a (hypothetical) case concerning the public display of the swastika symbol on the jacket of a member of the far-right

National Democratic Party of Germany, speaking at a rally in Berlin. While explaining its position in Vajnai, the Court noted:

> The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears.

It is yet again striking that these fears and emotions surrounding the presence of a particular symbol in a public place, have been "judged" as not grave enough, despite all historical background to which the Hungarian courts referred. Also the analysis of the Court that dealt with the multiple symbolism attached to the red star finds almost no equivalent in Court's attitude towards Nazi symbols.[16]

To review possible reasons and look for justification for this contrast in the Court's attitude, I would advance a hypothesis that the Court adopts a differentiated approach to different transitions – from non-democratic to democratic regime – as a function of (a) its perception of the gravity of evil of the past non-democratic systems (with Nazism being clearly "beyond the pale," while Communism still being a controversial issue in the collective European memory), (b) the perceived likelihood of the resurgence of the past regime, and (c) the practical importance of "teaching" the newly democratized states about the democratic rules of game. There is also a visible in consistence in the Court's, on the one hand, perception of post-communist states as not mature enough to be accorded a broad margin of appreciation in this field, and, on the other hand, being disabled from adopting legal

[16] Again, *Fáber* being a clear exception.

measures (including memory laws) which may be needed to consolidate newly attained democracy.[17]

4. Concluding remarks

In this presentation, I used selected examples from the jurisprudence of the top European human rights court as a prism through which we can reconstruct the dominant European thinking about its unwholesome past. To be sure, the choice of this prism may be questioned: the Strasbourg Court is not a free-standing, autonomous moral and political reasoner but is a judicial body "burdened" by various jurisdictional and purely technical-legal issues, such as the question of the standing of applicants, admissibility of claims, the "margin of appreciation", etc.

Subject to all caveats, it is fair to say that the ECtHR displays a great deal of sensitivity when dealing with the Holocaust, with the Nazi or fascist past, as well as with the neo-Nazi activities. It is to a large extent because the historical pedigree of the Council of Europe, which includes also the Court, goes back to a reaction against fascism and Nazism, contrasted to the principles of democracy, the rule of law and human rights. But what about this *other* great, horrible totalitarianism in the recent European past, i.e. Stalinism and Communism in general? As the *Vajnai* case demonstrates, the ECtHR is more critical of state condemnations of Stalinism and Communism than of Nazism. Or to put it in a converse way, the Court treats more leniently state interference with freedom of expression when memory about Nazism and the Holocaust should be protected than when a post-Communist state wants to preserve a critical memory about Communism. Explanation of this difference would require another paper.

I do not wish to criticize or to approve of these "double standards" in evaluating legal means to preserve collective memory about two great versions of state totalitarianism of 20th-century Europe. But, to put it bluntly and perhaps deliberately to provoke a discussion, the fundamental reason seems to be this:

[17] For valuable analysis of all these aspects, see J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era. Universality in Transition*, New York 2013.

while there is (and certainly should be) *one* memory about the Holocaust across Europe, in contrast, the memory about the evils of Communism is strongly localized, confined as it is to the Eastern part of the Continent. So, it may well be that comparing slaughter of animals (to use the analogy with the PETA case) to "gulag" can be seen as absolutely intolerable in ex-Warsaw Pact countries, but less so in Italy or France. But there is the other side of the coin: it is objectionable, in my view, when Strasbourg judges deny Hungary a right to prohibit public displays of the red star – a symbol under which horrific crimes had been committed there – even if the same red star would carry quite different connotations in Rome or Paris.

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ALEKSANDRA MĘŻYKOWSKA

History Distortion Cases – Protection of Personal Rights of Victims of Denied Crimes in the Jurisprudence of the European Court of Human Rights

States continually affect collective memory about the past through the law and the way it is applied and understood at the domestic level. The adopted legal framework has broad consequences in many aspects of life of the society.[1] One of them, being the subject of the current article, is the impact on the realization of the rights and freedoms of individuals in often competing areas: freedom of expression and protection of personal rights. Disputes about controversial assessments of historical events initiated at the national level between the individuals or those resulting from state's prosecution have repeatedly ended before the control bodies created under the European Convention on Human Rights. But the legal situations that are the source of complaints to the ECtHR result not only from the implementation of the so-called memory laws, in the sense of legal provisions introduced by states to penalize negationist statements. They may also be the consequence of the application of a number of other provisions which, due to the way of their interpretation by the domestic authorities and the field of application, may fall into the broader category of laws affecting historical memory.[2]

[1] U. Belavusau, A. Gliszczyńska-Grabias, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, Asser Institute Research paper series, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015232 (access: 9.07.2020), p. 3.

[2] The term "memory laws" – in the sense of the provisions penalizing negationist statements and a broader category of *laws affecting historical memory* – is used in the sense given to these concepts by E. Heinze, *Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*, [in:] *Law and Memory: Addressing Historical Injustice by Law*, U. Belavusau, A. Gliszczyńska-Grabias (eds.), Cambridge 2017, and idem, *Theorizing Law and*

The European Commission of Human Rights (Commission) and the European Court of Human Rights (ECtHR, Court) dealt with a number of cases concerning statements relating to Nazi and communist crimes, as well as denial of Holocaust and other mass violations of human rights.[3] They have also been confronted with a number of cases concerning historical debates, including history distortion cases.[4] The applicants referring mainly to Art. 10 of the European Convention on Human Rights (ECHR, Convention), that guarantees the freedom of speech, alleged that public authorities while applying different kind of sanctions – civil, administrative or criminal – limited unlawfully their freedom of expression. Another basis for lodging the applications has been Art. 7 of the Convention that requires that offences be clearly defined in law. In that context the applicants mainly alleged lack of precision and predictability of the contested provisions being the basis for their persecution.[5]

Incases concerning Holocaust-, racist- or Nazi-related statements and activities, the Court invoked (in different roles) Art. 17, the so-called "abuse of rights" clause.[6] Under this clause, an applicant is not entitled to rely on the protection of the Convention because their acts are deemed to be incompatible with fundamental values which the Convention seeks to promote. Art. 17 was applied at least in two different capacities, as a principle of interpretation

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Historical Memory: Denialism and the Pre-Conditions of Human Rights, "Journal of Comparative Law" 2018, vol. 12, p. 44 et seq.

[3] *X. v. Germany*, no. 9235/81, Commission decision of 16.07.1982; *T. v. Belgium*, no. 9777/82, Commission decision of 14.07.1983; *H., W., P. and K. v. Austria*, no. 12774/87, Commission decision of 12.10.1989; *Witzsch v. Germany* (no. 1) (dec.), no. 41448/98, 20.04.1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1.02.2000; *Garaudy v. France* (dec.), no. 65831/01, 24.06.2003; *Witzsch v. Germany* (no. 2) (dec.), no. 7485/03, 13.12.2005; *Gollnisch v. France* (dec.), no. 48135/08, 7.06.2011.

[4] *Chauvy and Others*, no. 64915/01, 29.06.2004; *Monnat v. Switzerland*, no. 73604/01, 21.09.2006; *Fatullayev v. Azerbaijan*, no. 40984/07, 22.04.2010; *Giniewski v. France*, no. 64016/00, 31.01.2006.

[5] In some cases, despite the applicants allegations that their conviction had breached Art. 7 and 10 of the Convention, the Court has been more inclined to examine the cases solely under Art. 10. See, *M'Bala M'Bala v. France*, 25239/13, dec. 10.04.2013, par. 25.

[6] For further details concerning the developments in the application of Art. 17 of the Convention, see P. Lobba, *Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime*, "European Journal of International Law" 2015, vol. 26, p. 243 et seq. See also, I. Kamiński, *Ograniczenie swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa 2010, p. 558 et seq.

and as a provision causing a "guillotine effect." In the latter capacity, in cases rejected under Art. 17 of the Convention, concerning mainly Holocaust denial, the Court examined in depth not only the content of the challenged decisions of the domestic authorities demonstrating "an unusual deference to the assessment undertaken at the domestic level,"[7] but also the overall circumstances of the case, including the motivation behind the applicant's actions. Therefore, one can consider that decisions about the lack of jurisdiction of the Court *ratione materiae* are, contrary to some views expressed in the literature, of a substantive and not only procedural character.[8] In turn, in cases concerning historical statements covered by the material scope of Art. 10, the Court's role has been mainly to assess the compatibility of the states' interference with the requirements of pursuing legitimate aims and of "necessity"of the measures taken for the achievement of proclaimed goals.

Government interventions into historical memory are multi-threaded and multi-leveled. Law affecting historical memories concentrate, for example, on: condemnation of past atrocities, prosecution of persons directly guilty of crimes, drawing various consequences in relation to persons cooperating with the past regime or commemoration of heroic individuals or events emblematic of national and social movements. However, states claiming the exclusive right to protect collective historical memory generally do not equip individuals who could feel affected by various statements with the right to individually assert their infringed rights.[9] On the contrary, in the ongoing discussions, little space is devoted to the protection of rights of persons who may personally be affected by negationist statements or other types of statements in which

[7] P. Lobba, *op. cit*., p. 241.

[8] More about the argument of superficial nature of the Court's reasoning in cases rejected under Art. 17, see P. Lobba, *op. cit*., p. 242.

[9] An example of a new legislation concentrated on the protection of rights of a nation and entirely omitting the individual perspective are the amendments introduced in 2918 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish. For a detailed analysis see, K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, "Polish Yearbook of International Law" 2017, vol. 37; P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish, Nation in Light of International Law*, "Polish Yearbook of International Law" 2017, vol. 37, p. 289.

references or comparisons to the Holocaust and other mass violations of human rights are used. The victims of denied crimes often treat the opinions expressed in public about those crimes as prejudicial to their own personal rights identified as dignity, good name, reputation, national identity and freedom from humiliating statements and insults because of nationality or membership of an ethnic group. Although there is no consensus among law theorists and in the jurisprudence of courts as to whether the attribution of a negative characteristic to the whole community or a group can be seen as violating the interests of an individual, in order to protect their reputation in such situations, individuals use the possibilities offered by civil law in the field of protection personal rights.[10] In general, provisions designed to protect personal rights are not dedicated to safeguard and preserve historical memory of the society and the nation. However, the universality of the goods protected by them and the interpretation possibilities, as well as the margin of decision assigned to national courts allow to qualify them to the broad category of laws affecting historical memory. Depending on the outcome of the national proceedings, cases concerning protection of personal rights of victims of denied crimes and other individuals or communities who claim that their personal rights were infringed by untrue or misleading historical statements might also find their way to the European Court of Human Rights. Be it on the initiative of the individual that was found to be responsible for the words spoken, or at the request of an individual that believes that the non-recognition of responsibility of a third party for the words, is equivalent to the lack of appropriate legal protection at the domestic level. Depending on the legal position of person lodging the application, different provisions of the Convention would be applied. In general, such complaints would require the Court to make a balancing test between the right to respect for private life guaranteed under Art. 8 of the Convention and the right to freedom of expression as protected by Art. 10. There are two areas in which rights of the victims of denied crimes can be considered by the Court.

[10] For further comments on recent developments in Polish courts concerning protection of personal rights against historical narratives, see A. Gliszczyńska-Grabias, M. Jabłoński, *Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?*, "Verfassungsblog", https://verfassungsblog.de/is-one-offended-pole-enough-to-take-critics-of-official-historical-narratives-to-court/ (access: 9.07.2020).

First, it is necessary to analyse whether people who claim that their personal rights have been violated by public statements denying the Holocaust or other mass crimes turn to the ECtHR at all, and if so, which provisions of the Convention do they rely on. With some surprise it should be stated that victims do not submit applications to the ECtHR. A new development in this regard might be the Court's finding in a case that was communicated in 2018 to the Austrian Government and decided in 2019 – *Aba Lewit v. Austria*.[11] The case was brought by a Holocaust survivor. In 2015, he had initiated civil injunction proceedings against one of the periodicals, which had published an article entitled "Mauthausen – the Liberated as Mass Murderers," calling those liberated from that concentration camp a "rural plague." The article further stated that "(…) robbing and plundering, murdering and defiling, the criminals plagued the country as it suffered from the »liberation« [from the Nazi regime]". After the domestic courts had granted an interim injunction, finding that the applicant's reputation had been damaged by the periodical's statements, the main proceedings were terminated by a court settlement, by which the periodical committed to revoke the impugned statements in its next issue. In February 2016, the periodical published another article by the same author, in which it cited the impugned statements in connection with reporting about the fact that respective criminal investigations against it had been discontinued. The applicant again turned to the court, however, his claim was dismissed as the court decided that the applicant could not possibly be personally affected by a publication which reiterated the course of criminal proceedings, or by statements repeated therein which did not have a separate meaning from their first publication in 2015.

The applicant lodged his complaint with the ECtHR under Art. 8 of the Convention claiming that the domestic courts have incorrectly weighed his right to respect for his private life against the periodical's rights under Art. 10 of the Convention. In his words, the article of February 2016 did not merely report about the criminal investigations in a distanced manner, but rather was a repetition of the impugned statements.

[11] At the time of the presentation of the thesis of the present article, the complaint remained unresolved by the ECtHR. The judgment was issued on 10 October 2019 (appl. no. 4782/18).

The first problematic issue the Court had to deal with while examining the case was the applicability of Art. 8 of the Convention. It considered the former Mauthausen prisoners being in fact the survivors of the Holocaust, as a heterogeneous social group. Referring to its previous case law, the Court held that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group."[12] In this sense the negative public statements about the prisoners could be seen as affecting the private life of individual members of that group, including the applicant, even though he was not named personally in the article in question.[13] Therefore, the Court's conclusion was the applicability of Art. 8 to the case at hand.

Secondly, the Court rejected the Government's arguments as to the non-exhaustion of effective domestic remedies. It confirmed that the notion "effective" should be understood as comprising two elements: as a measure capable of remedying directly the impugned state of affairs – in the case at issue to have the statements retracted and retraction published, and if it was the applicant's declared goal – to obtain compensation for the non-pecuniary damage. Given these requirements the Government's objections in this regard were dismissed.[14]

Examining the applicant's allegations that the courts had failed to protect his reputation and his personal integrity against untrue, defamatory statements, the Court decided to consider the case from the perspective of complying by the Austrian authorities with their positive obligations under Art. 8 of the Convention. Therefore, it concentrated on the content of the decisions of the domestic organs. Here, it stressed the deficiencies in the proceedings, observing that the courts reached the conclusion that the applicant could not be personally affected by the publication at issue and, therefore, he did not have legal standing in the proceedings.[15] The Court explicitly stated that Austrian authorities have not yet – also in the particular case at issue – dealt with the broader problem, whether members of a group determined on the basis of special features can be personally affected by a general statement

[12] *Lewit v. Austria*, 4782/18, 10.10.2019, par. 46.
[13] Par. 47.
[14] Par. 77.
[15] Par. 82.

concerning a historical event. In this regard, it paid special attention to the fact that the problem might concern a group that was large at the time of events, but due to the passage of time and dying of witnesses of events was significantly reduced.

Two elements were pointed out by the ECtHR as shortcomings in the argumentation of the domestic courts regarding the allegations raised by the applicant: firstly the failure to take a position on the above indicated issue whether a member of a group could be personally affected by statements in regard to that group and secondly, the courts' assumption that the 2016 article, in that it was only a report on criminal investigations in respect of the author of the articles, did not have a separate impact on the protection of the applicant's reputation. The Court's conclusion was that the domestic courts did not examine "the core of the applicant's claim of defamation."[16] Thus, the Austrian authorities – as a whole – failed to comply with their positive obligations under Art. 8 of the Convention, in the framework of which they are obliged to conduct a thorough and comprehensive "assessment of a matter affecting the applicant's privacy."[17]

The ruling in the *Aba Lewit* case is the first, in which the Court had to address the issue of violating personal rights of a person belonging to a broader group slandered in the course of a historical debate. Certainly, therefore, one should assess as relevant the Court's statements on Mauthausen prisoners as a heterogeneous social group, whose individual members could feel themselves affected by negative stereotyping, even though they were not named personally in the article in question. At the same time, however, the use of interpretative measures to assess the case through the prism of fulfilling the positive obligations meant that the Court could abstain from making a direct assessment of the issue of the violation of the applicant's personal rights by the said publication. The assessment of the case from this perspective is focused on the reliability, depth and adequacy of the explanations contained in the justifications of the courts dismissing the applicant's claim, and not on whether the statements were defamatory to the applicant – a Holocaust survivor. However, the judgment contains a statement which can be considered

[16] Par. 87.
[17] *Ibidem*.

as indirectly expressing the Court's position regarding the negative impact that the publication had on the applicant's rights. The Court said: "The Court is not persuaded by the domestic courts' view that the claimants could not have been personally affected by them [statements in question]."[18]

Undoubtedly, even such a cautiously expressed position and redirecting the assessment of the case to indicating the insufficient nature of the justifications provided by the domestic courts for dismissing the applicant's claims may constitute a starting point for further, more in-depth decisions of the Court. There is no doubt that general statements regarding historical events may interfere with the right to respect for the private life of the affected individuals and as such fall within the material scope of Art. 8 of the Convention. Having said that, the Court reflected a trend emerging just recently, e.g. in the jurisprudence of the Polish courts, that protection of personal rights encompasses also one's freedom from humiliating and offensive remarks made against the community in general.

Whereas the victims of denied crimes only occasionally turn to the ECtHR and, therefore, the case law in regard to their rights has been not settled yet, it seems useful to discuss the second area where the Court can consider victims' rights. The question whether the Court takes into account the need to protect personal rights of victims of denied crimes while examining cases brought by persons who were sanctioned as a result of their statements relating to historical events. Imposing of administrative, civil or criminal sanctions causes the applicants to lodge claims raising allegations under Art. 10 and also under Art. 7 of the Convention in which they argue that a given historical statement falls within the scope of public debate permitted by law and, therefore, should not entail any sanctions. The Court referred to the fate and rights of victims in variety of decisions and judgments, both in cases rejected under Art. 17 of the Convention and in cases in which it presented more detailed examination of the circumstances.

In the case of *Witzsch v. Germany*, the Court concluded that the applicant's statements showed his "disdain towards the victims of the Holocaust." Having said that the Court found generally that the views expressed by the applicant ran counter to the text and the spirit of the Convention, and consequently, he

[18] Par. 86.

cannot, in accordance with Art. 17 of the Convention, rely on the provisions of Art. 10 as regards his statements at issue.[19] In the case *Geraudy v. France*, in which the Court identified the revisionist character of the applicant's statements, it simoultaneulsy stated that "[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others."[20] In another case, *M'Bala M'Bala v. France*, the Court assessed the elements of the impugned performance as showing the applicant's contempt for Holocaust victims. It decided that the support for Holocaust denial is an expression of an ideology being at odds with the basic values of the Convention, namely justice and peace. Therefore, the applicant's performance could not be afforded protection by Art. 10 of the Convention.[21]

The same line of argumentation was applied by the Commission and the Court in cases covered by material scope of Art. 10 of the Convention, in which their task was to examine the existence of a rational connection between the measures taken by the authorities and the aim that they sought to realize through these measures. In the *Walendy v. Germany* case, the Commission concluded that the publication in question constituted an offense against the Jewish people and a continuation of the discrimination of this people.[22] In the *Lehideux and Isorni v. France* case, the applicants were convicted for making a public defence of the crimes of collaboration.[23] During the proceedings before the Court, it was the French government that considered that the publication in issue infringed the very spirit of the Convention and the essential values of democracy. The Court, while stating violation of the applicants' rights, did not make any reference to rights of victims of the Vichy regime. What is more, the Court underlined that the events referred to in the publication in question had occurred more than forty years before. Having

19 *Witzsch v. Germany*, 7485/03, 4.2.2003.
20 *Geraudy v. France*, app. 65831/01, dec. 24.6.2003.
21 *M'Bala M'Bala v. France*, appl. 25239/13, dec. 10.04.2013.
22 *Walendy v. Germany*, appl. 21128/92, dec. 11.01.1995.
23 *Lehideux and Isorni v. France* [GC], appl. no. 24662/94, judgment of 23.09.1998.

said that it concluded that although remarks like those made by the applicants are always likely to bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. Only, three dissenting judges made explicit, however very general reference, to rights of victims. They stated that "in circumstances such as those of the present case full and sympathetic account should be taken of the extent of offensiveness of the publication to the sensitivities of groups of victims affected by it."

In turn, in the *Perinçek v. Switzerland* case, that concerned the applicant's criminal conviction and sentence on account of public statements denying the Armenian genocide of 1915, it was the Swiss government who referred, in the first place, to the need to protect the victims' rights. It argued that "it is also laudable, and consonant with the spirit of universal protection of human rights, for Switzerland to seek to vindicate the rights of victims of mass atrocities regardless of the place where they took place."[24] The Swiss authorities referring to their initial report under the CERD published already in 1997, provided an in-depth explanation of the reasons behind the adoption of criminal for exceeding the limits of freedom of speach. They explained that "the public interest in the exercise of freedom of expression had to give way before the greater interest of victims of discrimination, who had a right to the protection of their personality. (…) The same applied to the prohibition of the denial of or attempts to justify the crimes committed by the Nazi regime, and to the denial or minimisation of genocide more generally." In the Swiss argumentation there was also a reference to the jurisprudence of the Swiss Federal Court that held that "this provision protected not only public order but also the dignity of the individual. It was, however, essential that public order was protected only indirectly, as a consequence of the protection accorded to human dignity." For its part, the Court, in the course of examining the proportionality of imposed measures, made a balancing exercise between the applicant's right to freedom of expression and the right of the Armenians to respect for their private life. While doing so, it concluded, among other factors, that the applicant's statements could not be regarded as affecting the

[24] *Perinçek v. Switzerland* [GC], appl. 27510/08, judgment 15.10.2015, par. 64–65.

dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland.

The above examples of applications examined under Art. 17 and 10 of the Convention show similarity to each other. In the decisions rejecting the applications under Art. 17 concerning negationist statements, the Court used the concept of "underlying values" which is not directly referred to in the Convention. It is a notion that has emerged from the case law of the Convention organs and was first applied by the Court in the *Soering v. the United Kingdom* case.[25] Subsequently, the Court invoked this concept in cases concerning a link between political democracy and the Convention, in cases involving discrimination and sexual orientation. The Court has also spoken of Holocaust denial being contrary to the "Convention's underlying values" and in the *Janowiec and Other v. Russia* judgment, it extended the meaning of the clause to encompass Russian behavior denying the fate of the Katyń crime victims.[26] In the discussed history distortion cases, the Court referred to the concept of underlying values pointing in this regard to peace and justice. Denying of crimes was qualified as act of defamation constituting serious threat to public order, democracy and, generally, to human rights identified as rights of other people. The only direct way in which the Court addressed the victims' rights was the reference to the need to protect their dignity. However, general referring to the protection of the rights of other persons concerned by the impugned statement, or to the dignity of victims, was associated with the requirement for the state to have an efficient and well-functioning democratic system being a framework for the protection of rights and freedoms guaranteed by the Convention.[27]

Thus, both Art. (17 and 10) of the Convention are interpreted by the Court from the perspective of collective rights and general values belonging rather to whole communities and not to individuals. In none of the resolved cases did

[25] W. Schabas, *Do the 'Underlying Values' of the European Convention on Human Rights Begin in 1950?*, "Polish Yearbook of International Law" 2013, vol. 33, p. 251.

[26] *Ibidem*, p. 253. This conclusion, which supported a finding that Art. 3 had been violated, was not supported by the Grand Chamber, *Janowiec and Others*, appl. 55508/07 29520/09, judgment of 16.02.2012, par. 139, *Janowiec and Others*, appl. 55508/07 29520/09, judgment of 21.10.2013.

[27] The same conclusions are drawn as far as the general application of Art. 17 is concerned, see. I. Kamiński, *op. cit*., p. 559.

the Court specifically address the need to protect personal rights of individuals, such as dignity, good name, reputation or a right – that understandably raises more objection in the legal doctrine – to national identity. The Court did not consider, as an important element of the balancing test conducted under Art. 10, the need to assure the freedom of victims of denied crimes from humiliating statements and insults concerning nationality or membership of a distinctive group. What is bothering is the fact that the Court, referring to the need to protect values of a general nature, did not basically point to the prerequisite of protecting *rights of others*, which would seem like a natural way of argumentation. However, this would involve the need to determine whether the justification offered by the state of its interference concerned the rights of a particular defined group.[28]

The above considerations based on the jurisprudence of the ECtHR lead to several conclusions. Whereas the Court had only limited occasions to speak out directly about the infringement of rights of individual victims of denied crimes, it did not take their rights into account in cases concerning freedom of speech in historical debates. Moreover, in the assessment of negationist statements it passed over references to national specificity of debates surrounding the past historical events from the victims' perspective. It did so, regardless of whether it considered that a given statement concerning historical events was inadmissible under Art. 17 of the Convention or whether it conducted an assessment of the proportionality of sanctions imposed in connection with a given statement under Art. 10 of the Convention. The Court used the concept of "underlying values" referring to the notions of "peace" and "justice" and in a very limited manner generally to dignity of the victims of Holocaust, interpreting the provisions of the Convention from the perspective of collective rights and general values belonging to whole communities and not to individuals.

Although the above considerations may lead to the conclusion that the rights of victims of denied crimes are not sufficiently protected under the European Convention on Human Rights, it should be borne in mind that the

[28] T.T. Koncewicz, *On the Politics of Resentment, Mis-memory and Constitutional Fidelity*, [in:] *Law and Memory: Towards Legal Governance of History*, U. Belavusau, A. Gliszczyńska-Grabias (eds.), Cambridge 2017, p. 285.

scope of that protection is largely dependent on the domestic legal systems. Many national legal systems are based on the assumption that the laws dedicated to preserve and influence historical memory, providing for criminal sanctions for negationism, protect only public, not individual legal interests. By interpreting the domestic rules, the courts usually conclude that the denial of mass human rights violations could not in itself harm an individual, regardless of his or her personal history. Additionally, the circumstance that the rights of individuals are only indirectly protected under these provisions is also reflected in the fact that in many legislations individual victims could not take part in the proceedings against the alleged perpetrator.[29] Thus, the current shape of domestic legislations and their interpretation leave little space for providing protection for individuals being the victims of denialism. As long as public authorities, while adopting and interpreting laws affecting historical memory, will focus on pursuing (by law) the interests of historical policy, which are assumed to refer to the concept of "state" or "nation," the interests of individuals may not be properly protected at the international level.

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[29] *Perinçek v. Switzerland* [GC], par. 45–46.

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ALEXANDER TSESIS

Genocide Censorship and Genocide Denial

Contrasting genocide censorship and genocide denial laws

Poland's controversial February 2018 Law on Institute of National Remembrance contained criminal provisions, Art. 55a and 55b, that drew immediate international criticism for repressing speech.[1] The law punished anyone who asserted that the Polish nation or the Republic of Poland were responsible for perpetrating any portion of the Holocaust against the Jewish people during the Second World War. The statute was based on nationalistic notions of honor and tends to stifle historical and legal studies into the perpetration of human rights violations. The criminal provision was later repealed on 6 June 2019. The Act nevertheless retains a civil causes of action under Art. 53o and 53p that force speakers to adopt the claim that Poles are blameless for genocidal violence.[2] Censorship law creates a state orthodoxy that threatens to stifle discussions about the extent to which Poles advanced plans of the Holocaust by engaging in various antisemitic actions during the Second World War.

The Polish government-in-exile did not cooperate with the Nazis. Yet, eyewitnesses and documentary records testify to how often ordinary Poles

[1] P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law*, "Polish Yearbook of International Law" 2017, vol. 37, p. 287; K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, "Polish Yearbook of International Law" 2017, vol. 37, p. 275, 286, footnote 1; *Poland Holocaust Law: Government U-turn on Jail Threat*, June 27, 2018, https://www.bbc.com/news/world-europe-44627129 (access: 4.07.2020).

[2] The Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, June 6, 2019, http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180002032 (access: 4.07.2020).

and Polish organizations collaborated in German antisemitic policies by committing mass atrocities, including burning, shooting, or clubbing Jewish victims; identifying, denouncing, and exposing Jews in hiding; or defending their own families from Nazi reprisals by killing with their own hands or reporting Jews to authorities.[3]

The Polish censorship law stifles critical research into how greed, antisemitism, and fear motivated local populations to reveal the whereabouts of Jews who were living in hiding. It threatens to prevent attribution of responsibility to Poles and Polish institutions who participated in Nazi efforts to murder the entire Jewish population. Even absent the revoked criminal provision, the civil remedy aims of the Polish Institute of National Remembrance Act resemble another nation's notorious silencing regulation. The Turkish statute is a similarly nationalistic example of censorship. Criminal charges can be filed there against anyone asserting that the Young Turk government were systematically and deliberately orchestrated the Armenian genocide between 1915 and 1917.[4] Thereby, Poland and Turkey suppress legitimate historical investigations and debates in order to protect national and ethnic honor.

Poland's and Turkey's censorship laws are distinguishable from those memory laws that prevent the denial of history. Genocide denial laws – enforced in countries such as Germany, France, Spain, Switzerland, and Austria[5] – are, to the contrary, meant to prevent anyone from diminishing responsibility for the perpetration of crimes against humanity, including those committed by

[3] J.T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton 2001; B. Engelking, *Murdering and Denouncing Jews in the Polish Countryside, 1942–1945*, "East European Politics & Societies" 2011, vol. 25, pp. 433–456; J. Grabowski, *Hunt for the Jews*, Bloomington 2013, pp. 101–120; E. Friedberg, *The Truth about Poland's Role in the Holocaust*, "The Atlantic", Feb. 6, 2018, https://www.theatlantic.com/international/archive/2018/02/poland-holocaust-death-camps/552455/ (access: 4.07.2020).

[4] Turkish Penal Code, Art. 301 (2005); *Dink v. Turkey* 2668/07 (ECtHR 2010). Kemal Ataturk, the founder of the modern Turkish Republic said in a "Los Angeles Examiner" interview, given on 1 August 1926: "These left-overs from the former Young Turk Party, who should have been made to account for the millions of our Christian subjects who were ruthlessly driven en masse from their homes and massacred, have been restive under the Republican rule." (J.G. Heidenrich, *How to Prevent Genocide: A Guide for Policymakers, Scholars and the Concerned Citizens*, Westport 2001, pp. 5–6).

[5] A. Tsesis, *Prohibiting Incitement on the Internet*, "Virginia Journal of Law and Technology Association" 2002, vol. 7, p. 5, 46.

the codifying countries. Thus, genocide denial laws punish group defamation rather than censor truthful discussions as do Polish and Turkish laws.[6]

Unlike the Polish censorship laws, genocide denial laws are meant to preserve and accurately portray histories of intentional mass murders. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 began the international trend of codifying the recognition of genocidal acts. In addition to its censorship provision in Art. 55, the Polish Law on Institute of National Remembrance also contains a denial law: Art. 1 of the Law on Institute of National Remembrance restrains, controls, and limits historical discussions in order to prevent denial of the Nazi and communist atrocities committed in the country. That is consonant with other genocide denial statutes and international protocols. The law recognizes that knowledge of human rights violated perpetrated in Poland by Nazi and communist regimes are objective facts that have been overwhelmingly corroborated by eyewitnesses, photographs, and official records.

Genocide denial laws pursue a policy of preventing neo-Nazis, skinheads, and other racist groups from disseminating falsehoods that camouflage hatred in the guise of historical research.[7] Holocaust denial presents a unified narrative to supremacist defamation, hatred, and xenophobia.[8] The European Court of Human Rights has determined that denial laws do not violate free speech values because the Holocaust is "clearly established historical fact."[9]

Genocide denial laws prohibit the public falsifications of events recognized by international tribunals, such as the Nuremberg Court and the United Nations International Criminal Tribunal for Rwanda. Such tribunals rely on rules of evidence, procedural safeguards, and precedent to adjudicate guilt and provide objective proof of mass atrocities. Testimony given to these or other judicial institutions – such as the Turkish court-martial trials

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[6] See *R v. Töben*, BGH Urt1StR 184/00 LG, 69 (2000); *LICRA & UEJF v. Yahoo! Inc. & Yahoo! France*, no. 00/05308, Tribunal de Grande Instance [T.G.I.] [Superior Court], Paris, 22 May 2000.

[7] D. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, New York 1993, p. 4.

[8] M. Elósegui, *Denial or Justification of Genocide as a Criminal Offence in European Law*, [in:] *Racial Justice, Policies and Courts' Legal Reasoning in Europe*, M. Elósegui, C. Hermida (eds.), Cham 2017, p. 49.

[9] *Witzsch v. Germany*, appl. no. 7485/03, ECtHR.

on Armenians, or legislative findings of facts – such as the U.S. Congress's resolution condemning the genocide in Darfur – provide verifiable findings. Moreover, laws against genocide denial prohibit group defamation while laws censoring genocide studies are nationalistic efforts to quell debate and heterodox views, inconsistent with government statements.[10]

The Polish censorship law is a caricature of laws prohibiting genocide denial. The former stifles discussion about controversial subjects, while the latter prohibit the expression of views that defame victims and encroach on their interests to be treated with dignity. Censorship law repudiates researchers' abilities to investigate and report Polish involvement with Nazi oppressors, while denial laws protect vulnerable groups. The denial of the Holocaust fosters antisemitism.[11] Holocaust denial infects public discourse through misinformation that envenoms public discourse with lies that threaten collective memory and glorify racialist murderers.[12]

Dissemination of falsehoods about the perpetration of a genocide and the group identity of its victims or perpetrators also does not advance historical truths in the marketplace of ideas. The spread of false facts through the Internet, traditional media, and at public gatherings tends to increase the number of people holding false beliefs that perpetuate cultural prejudices.[13] There is cause for concern about genocide denial's effect on society because so many supremacist organizations from the Nazis to the Khmer Rouge have

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[10] See B.F. Smith, *Reaching Judgment at Nuremberg*, New York 1977; *The Elgar Companion to the International Criminal Tribunal for Rwanda*, eds. A.-M. de Brouwer, A. Smeulers, Northampton 2016; T. Akçam, *The Young Turks' Crime against Humanity*, Princeton 2012; N. H.B. Jorgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia*, Northampton 2018; International Criminal Court, Darfur (Sudan), https://www.icc-cpi.int/darfur (access: 4.07.2020).

[11] G.J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, "Dickinson Law Review" 1996, vol. 101, pp. 77–78.

[12] L.B. Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, "Washington & Lee Law Review" 2008, vol. 65, pp. 1093–1094.

[13] D.C. Nunziato, *The Marketplace of Ideas Online*, "Notre Dame Law Review" 2019, vol. 94, pp. 1520–1521 ("In addition to the widespread dissemination of false political content from both foreign and domestic sources, today's online marketplace of ideas is besieged by the increased polarization and siloing of thought and opinion, which renders Holmes's prescribed remedy for harmful speech – counterspeech – increasingly ineffective.").

relied on stereotypes and prejudices to galvanize disaffected people to commit crimes against humanity.[14]

Polish victimhood, perpetration, & negation

The Institute of National Remembrance Law, thereby, downplays the role Poles played in the *judenjagd* ("hunt for the Jews") and stifles research into an entire field of inquiry. Poland presents a unique set of complexities. On the one hand, it had no native government, with the German's administering the *Generalgouvernement*. Poles in the thousands heroically risked their lives to save Jews as they hid them in barns, fields, and forests. Supplies to families living in the woods came sometimes from whole villages with inhabitants helping Jews survive. The Warsaw Home Army played a crucial role in helping the Jewish Combat Organization within the ghetto walls engaged in the 1943 Warsaw Ghetto Uprising; some individual acts of heroism, such as Witold Pilecki's fact-gathering internment, escape, and report from Auschwitz, were second to none to inform the world of the mass murder of Jews; and Prime Minister Władysław Sikorski issued an appeal for Poles to "give all help and shelter to those being murdered, and at the same time, before all humanity, which has for too long been silent, I condemn these crimes."

Poles themselves suffered enormously under the dual yokes of German and Soviet powers, but the region's antisemitic history and economic causes provided the ideological background for those who opportunistically engaged in pogroms, property confiscations, intimidations, and murders of Jewish victims. Only ten percent of the country's pre-war Jewish population of 3 million survived, most of them only because they had taken shelter in the Soviet Union during the war. Only a fraction of those who hid on the "Aryan side" survived until liberation.[15] Many died because of aid Poles provided Nazis in carrying out genocidal designs. Even the goals of those who helped Jews hide were mixed. Some of them acted philanthropically, but, more commonly,

[14] J. Herf, *The Jewish Enemy Nazi Propaganda during World War II and the Holocaust*, Cambridge 2006, p. 1; D.L. Dlano, J.D. Knottnerus, *The Khmer Rogue, Ritual and Control*, "Asian Journal of Social Science" 2017, vol. 46, pp. 80–81.

[15] J. Grabowski, *op. cit.*, p. 138.

Poles turned Jews over to the Polish blue police for fear of reprisals. There were even Poles who initially rescued but then reported Jews after hiding them for a time. In such a world of atrocities, many victims survived because of their skills, connections, smarts, financial resources, and dumb luck. It is fair to say with Prof. Mary Fulbrook, "there were probably many more cases where Jews were betrayed, even murdered, and where many Poles participated informally in the Nazi-instigated »hunt for the Jews« (*judenjagd*)."[16] For the most part, Polish partisan groups fought for the home front but often disregarded the risks Jews ran as the primary targets of the Nazi occupation forces.[17] The Polish censorship law rejects claims attributing to Poles any blame for the deliberate persecution and murder of Jews.

Polish society during the war years engaged in a monstrous variety of anti-Semitic acts of violence. Furthermore, Poland enacted antisemitic laws even before the Germans arrived on its soil, after the Molotov–Ribbentrop pact between the Soviet Union and Nazi Germany.[18] On a local level, censorship can stifle study into the blue police, to whom peasants turned over tens of thousands of Jews to be killed forthwith or upon being turned over to the Gestapo. Indeed, without the blue policemen, the Germans would have lacked adequate reconnaissance to perpetrate the mass murder with such efficiency in Poland. The problem was more widespread, however, as Prof. Jan Grabowski wrote, synthesizing primary sources, Poles were themselves subject to horrible German reprisals and brutal force. Yet, the record is filled with examples of Polish peasants, firefighters, and elders murdering Jews. The author Jan Gross, whose controversial book deals with the 1941 pogrom in Jedwabne and another one the 1946 pogrom in Kielce, wrote that Poland's genocide censorship law was "designed to falsify history."[19]

While throughout the Second World War, Nazi leadership abolished Polish national authority, lower level Polish administrators cooperated with the

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[16] M. Fulbrook, *Reckonings: Legacies of Nazi Persecution and the Quest for Justice*, New York 2018, p. 100.

[17] *Ibidem*, p. 8; A. Levine, *Fugitives of the Forest*, Toronto 1998, p. xxi, xxxviii.

[18] T. Snyder, *Bloodlands: Europe between Hitler and Stalin*, New York 2010, p. 283, 291.

[19] *What's in Poland's New Memory Law*, "Economist", Feb. 19, 2018, https://www.economist.com/the-economist-explains/2018/02/19/whats-in-polands-new-memory-law (access: 4.07.2020).

German *Generalgouvernement* in formulation and administration of social, educational and cultural policies.[20] Polish collaboration includes misappropriation of both private and communal Jewish property, violent attacks, coercion, fraud, and theft.[21] While Polish governance during the War was local, it was essential to the efficient perpetration of the Holocaust.

As Prof. Timothy Snyder wrote in *Bloodlands*, despite its tremendous losses, Poland is a country that exemplifies the politics of inflated victimhood that, ultimately, seeks to obfuscate the suffering of the Jewish people within its borders.[22] During the War, the Poles experienced cruelties at the hands of the Nazis and Stalinists. Yet, the culpability of so many Poles and Polish institutions should be studied, rather than censored, to better understand how the local population significantly contributed to exposing Jews to harm, stealing their properties, or inciting hostilities against them.[23] The Institute of National Remembrance Law's civic cause of action continues to threaten the exploration of studies meant to bring facts to light and to prevent a repetition of past evils.

Comparative analysis of genocide denial and genocide censorship laws

A common feature of memory laws, both those that prohibit denial and those that censor historical expression, is that they raise a host of complex issues about how to protect free expression while also respecting human dignity. Those who generally oppose memory laws warn that both censorship and denial statutes chill speech. Those who support genocide denial legislation

[20] K.-P. Friedrich, *Collaboration in a "Land without a Quisling": Patters of Cooperation with Nazi German Occupation Regime in Poland during World War II*, "Slavic Review" 2005, vol. 64, pp. 715–716.

[21] *Ibidem*, pp. 719–733; J.T. Gross, *Fear: Anti-Semitism in Poland after Auschwitz*, New York 2006, pp. 42–45.

[22] T. Snyder, *op. cit.*, p. 406.

[23] M.M. Drozdowski, *Refleksje o stosunkach polsko-żydowskich w czasie drugiej wojny światowej*, „Kwartalnik Historyczny" 1990, vol. 96, p. 182, quoted in K.-P. Friedrich, *op. cit.*, pp. 722–723, 724, footnote 74 ("The dark blue police, part of whose functionaries were in touch with the Home Army, in many cases behaved shamefully towards Jews by actively participating in their liquidation.").

warn about that form of expression spreading group defamation, advancing discrimination, or orchestrating violence. Laws against genocide denial go beyond the condemnation of the perpetrated acts. Lawmakers also pass them to prevent supremacist organizations from incorporating denialist defamations into rallying cries to target persons based on their ethnicities, religions, races, nationalities, or classes.

Genocide denial and censorship laws raise constitutional quandaries for liberal democracies because they restrict speech, which is a fundamental component of any representative government. Criminalizing falsehoods about genocidal acts, even when tied to the conclusions of international tribunals, raises constitutional quandaries about how to preserve the fundamental right of expression while advancing pluralistic and tolerant social orders.

In the United States, under the First Amendment of the Constitution, both genocide denial and genocide censorship laws would be judicially suspect. Both are content-based regulations and therefore American courts would subject them to the most exacting scrutiny.[24] Content-based restrictions undergo strict judicial scrutiny, requiring compelling government interest and least restrictive means to achieving speech restrictive policies.[25]

While U.S. courts are libertarian and categorical in their approaches to free speech, countries around the world tend to rely on proportional analysis in their free expression jurisprudence.[26] The European Court of Human Rights examines whether a law aims at legitimate ends; suitability achieves the

[24] *United States v. Stevens*, 559 U.S. 460, 468–469 (2010).

[25] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015).

[26] See *United States v. Alvarez*, 567 U.S. 709, 716–717 (2012) ("[T]he Constitution »demands that content-based restrictions on speech be presumed invalid (…) and that the Government bear the burden of showing their constitutionality.«") (quoting *Ashcroft v. ACLU*, 535 U.S. 564 [2002]); A. Oberdorfer Nyberg, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, "The Georgetown Law Journal" 2004, vol. 92, p. 663, 665 ("Although freedom of speech is considered a fundamental freedom in Western Europe, racism, xenophobia, incitement to hatred, and incitement to violence are excluded from constitutional protection in many Western European nations because of a general consensus that hate speech perpetuates racism and other prejudices."); J.J. Garman, *The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of The Framework Decision*, "The University of Toledo Law Review" 2008, vol. 39, pp. 843–845 (detailing the ministers Council of the European Union decision to strike a "balance between the freedom and regulation of speech through the framework of a regulation designed to combat racism by criminalizing certain forms of expression.").

government's objective; results in minimal disruption from implementation; and meets proportionality in *stricto sensu*, also known as balancing stage of net gains against reduction in speech rights.[27]

The international acceptance of norms against the dissemination of genocidal propaganda were developed after WWII in the United Nations. A contemporary psychiatrist of genocide, who wrote in the aftermath of the Holocaust, identified the danger of this and other forms of advocacy that call for the perpetration of group atrocities, "It is apparent (…) that under certain circumstances there will be stepwise progression from verbal aggression to violence, from rumor to riot, from gossip to genocide."[28] Contracting parties to the Convention on Genocide agree to punish "[d]irect and public incitement to commit genocide."[29] Countries around the world have adopted various provisions to comply with international obligations.

Canada, for example, punishes the advocacy or promotion of genocide, and provides up to five years in prison for such advocacy.[30] The difficulty is in identifying whether laws prohibiting the denial of genocide are in fact necessary for stopping the perpetration of crimes against humanity. Holocaust denial falls under § 319 of the Canadian Criminal Code.[31]

Canada's definition of human rights violations that constitute genocide is more narrow than the United Nations'. The Canadian Criminal Code limits the definition of "genocide" to the "intent to destroy in whole or in part any identifiable group" by "(a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."[32] The suitability of the law is determined by the historical

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[27] M. Klatt, M. Meister, *The Constitutional Structure of Proportionality*, Oxford 2012, pp. 8–9; B. Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study*, Groningen 2013, pp. 15–39; *Sürek v. Turkey* (no. 1), 26682/95, at 62 (ECtHR 1999).

[28] G.W. Allport, *The Nature of Prejudice*, Reading 1979, p. 57.

[29] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(c), 78 U.N.T.S. 277.

[30] Criminal Law, R.S.C., ch. C-46, § 318(1) (Can.).

[31] *Canada (Human Rights Commission) v. Taylor*, 3 Can. SCR 892, 904, 919 (1990) (Can.); *Regina v. Keegstra*, 3 SCR 697, 713–714, 744–786 (1990) (Can.); *Regina v. Keegstra*, 1 SCR 458 (1996) (Can.).

[32] *Ibidem*, § 318(2). The United Nations' definition of human rights extends further to include "imposing measures intended to prevent births within the group and forcibly

and contemporary conditions of a nation. The difficulty remains gauging how likely words are to incite actual violence. Herein lies the dilemma of legislators: how to punish inchoate, dignitary harms while preserving open, historical dialogue.

In Western Europe denial laws, such as the Austrian National Socialism Prohibition Act of 1947, which was amended in 1992, typically prohibit publicly minimizing or outright denying the perpetration of genocide. Austria specifically limits the scope of its law to denial of the Holocaust committed by National Socialists and their minions.[33] The German Criminal Code similarly announces that anyone who "publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism (…) in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine."[34] The French law, known as the Gayssot Law, is more comprehensive in its listing of events that constitute "crimes against humanity." The definition of what constitutes genocides comes not from French law but, for the sake of greater definitional objectivity, from internationally recognized bodies such as the Nuremberg Tribunal, a French Court, or international courts such as the International Criminal Tribunal for Rwanda.[35]

The Rwanda genocide in Africa against the Tutsis prompted Rwanda to criminalize public assertions that "genocide is not genocide" because they "distort the facts about genocide for the purpose of misleading the public." Offenders are subject to five to seven years in jail upon conviction. The same penalty is set aside for anyone who "affirm[s] that there was double genocide in Rwanda; [or] state[s] or indicate[s] that the genocide was not planned."[36] Some commentators argue that Rwandan and European statutes are prone

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transferring children of the group to another group" because of victims membership in a "national, ethnical, racial or religious group." U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277.

[33] National Socialism Prohibition Act 1947. Federal Law Gazette No. 13/1945 as amended by: Federal Law Gazette No. 148/1992, Art. I § 3h.

[34] Germany, Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, § 130(3).

[35] R.A. Kahn, *Does It Matter How One Opposes Memory Bans? A Commentary on Liberte Pour L'histoire*, "Washington University Global Studies Law Review" 2016, vol. 15, p. 55, 60, footnote 30, 62.

[36] Rwanda, Law no. 59/2018 of 22/8/2018 on the crime of genocide ideology and related crimes § 2, Art. 5.

to abuse by political actors seeking to silence critics. Such an accusation has been leveled against Rwanda President Kagami for abusing memory laws in order to stifle Hutu political opposition.[37]

Far more controversial than genocide denial laws, however, have been national efforts to censor evidence of complicity to commit genocide, and this is the case with civil legislation in Poland and the criminal law in Turkey. As we saw earlier, the February 2018 amendments of Polish Institute of National Remembrance law contained a criminal and civil provision against anyone publicly attributing Nazi crimes to the Polish Nation or Polish State. On 17 January 2019, the Polish Constitutional Court found parts of the original 2018 amendments to be unconstitutional. And the Polish Parliament, for its part, removed the criminal provisions of the law (Art. 55a and 55b). The newest version of the law, passed on June 6, 2019, continues to have a civil cause of action that can be brought by private citizens of the Law on Institute of National Remembrance (Art. 53o and 53p). The problem, then, has not been fully resolved, despite the 2019 changes, because defense of nationalistic honor continues to function as a censor on speech.

The Law on Institute of National Remembrance is likely to have some of the same negative impacts as the Turkish censorship statute protecting national honor. Albeit, the Polish law is less draconian without a criminal provision. As we saw earlier, Section 301 of the Turkish Penal Code prohibits publicly denigrating Turkishness, censors the expression of historical memory. If the Polish Institute of National Remembrance Law were to be reviewed by the European Court of Human Rights, it would likely be found to be, like its Turkish counterpart, contrary to core principles of democratic governance.[38]

Conclusions

The Polish censorship law restricts the acquisition, expression, and dissemination of knowledge. Its vague terms do not provide adequate notice to

[37] See N. Wadhams, *Rwanda: Anti-Genocide Law Clashes with Free Speech*, "Time", May 5, 2010, http://content.time.com/time/world/article/0,8599,1986699,00.html (access: 4.07.2020).

[38] *Dink v. Turkey*, appl. nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, ECtHR (2010).

potential defendants: Its ambiguity makes it uncertain who will be punished and for what communications. Satire, political commentary, historical analysis, and eyewitness testimony are thereby chilled. The Polish censorship law aims to prevent discussion about Polish responsibility for advancing the Nazi's murderous agenda. Poland's effort to control the public spread of information is likely to lead to misleading conclusions that downplay victims' sufferings and incite hate propaganda. The statute grew from the Law and Justice Party's (PiS's) decision to enshrine "a version of Polish history in which Poles are perpetual victims and by law exempt from culpability for historical injustice – silencing such deeds effectively denies that they happened."[39] The Polish memory law advances the claim that Poles did not collaborate with German occupants in the perpetration of atrocities against Jews.

The law mimics Polish President Duda's government's position that criticism of Poles role during the Holocaust harms Polish reputation abroad as well as national conscience.[40] Yet, genocide denial laws differ from genocide censorship laws. The former, rightly or wrongly, prevent hateful declarations, punish group defamation, and stop conduct likely to cause emotional and psychological harms. Censorship laws, on the other hand, prevent discussions, debates, and statements attributing responsibility for crimes of humanity that resulted in the death of millions of victims.

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[39] A. Walke, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia by Nikolay Koposov. New Studies in East European History. New York: Cambridge University Press, 2018. xvi, 321 pp.*, "Slavic Review" 2019, vol. 78, p. 526.

[40] President Andrzej Duda, Statement by the President of the Republic of Poland on the amendment of the Act on the Institute of National Remembrance (Feb. 6, 2018) ("(…) also [the] good name of Poland and of Polish people needs to be protected. This is a question of our sensitivity. For we also have the right to our own sensitivity. We also have the right to historic truth. And we also have the right to be judged based on facts and in truth."); T. Gardos, *Poland's Twisted Holocaust Law*, "Human Rights Watch" (Feb. 10, 2018, 12:00 a.m.), https://www.hrw.org/news/2018/02/10/polands-twisted-holocaust-law (access: 4.07.2020) ("Under the law, the Institute of National Remembrance, a state body tasked with establishing an official historical narrative and prosecuting Nazi and Communist-era crimes, will now also be able to claim compensation from anyone »damaging the reputation« of Poland.").

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Holocaust Denial and the Polish Penal Law – Legal Considerations

The issue of Holocaust denial is closely related to the current Art. 55 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws of 2018, item 2032, as amended),[1] according to which: "Who publicly and contrary to the facts denies the crimes referred to in Article 1 point 1, shall be subject to a fine or imprisonment for up to 3 years. The judgment shall be made public."[2]

In the analyzed provision, and more specifically – in the first provision of the analyzed regulation – there was a description of a sanctioned norm (and a sanctioning norm linked to it) prohibiting – in the most simple terms – public and factually incorrect denying the crimes referred to in Art. 1 point 1 of the Act on the Institute of National Remembrance. However, there is no doubt that the act punishable under the law, which is based on the aforementioned sanctioned norm, is 1) of a common type (a type with features that can be

[1] Hereafter referred to as "the Act on the Institute of National Remembrance."

[2] On the history and importance of regulation of Art. 55 of the Act on the Institute of National Remembrance, see W. Kulesza, *„Kłamstwo o Auschwitz" jako czyn zabroniony w polskim i niemieckim prawie karnym*, [in:] *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, red. Ł. Pohl, Poznań 2009, pp. 297–313. It is worth mentioning that the perpetrator of the prohibited act specified in Art. 55 of the Act on the Institute of National Remembrance may with one and the same behavior also fulfill the features of another type of act punishable under the law, more specifically the type of prohibited act specified in Art. 133 of the Polish Criminal Code, according to which: "Anyone who insults the nation or the Republic of Poland in public is liable to imprisonment for up to three years." However, due to the limited volume of work and the need to maintain consistency of argument, this issue will not be given attention here.

fulfilled by any person) – the legislator uses the personal pronoun "who", and 2) intentional (the type that can only be committed solely with the intention of committing a prohibited act) – the legislator does not use the wording "unintentionally" (there is no lack of intent clause referred to in Art. 8 of the Polish Criminal Code).[3] In the context of the latter statement, however, it has to be stated precisely that the discussed type of act punishable under the law can be committed both with the direct intention (foreseeing the possibility of committing a prohibited act and wanting to commit it), and with the eventual intention (foreseeing the possibility of committing a prohibited act and accepting its committing).

Therefore, the perpetrator of the prohibited act referred to in Art. 55 of the Act on the Institute of National Remembrance must: 1) foresee that there are circumstances indicating that the specified crimes are a fact; 2) foresee that their action (one cannot deny something by omission) will be public; 3) foresee that with his behavior (oral, written, or otherwise; the legislator does not specify how the perpetrator is to deny the facts) the perpetrator will deny crimes; 4) want to deny crimes (it is impossible to deny them, accepting only that the behavior is of such nature); 5) want or accept the denial of crimes against the circumstances indicating that these crimes are a fact; 6) want or accept public denial of crimes. Adam Janisławski and Piotr Konopka legitimately indicate that: "a conduct of research analysis, a substantive preparation, or even a level of insight in assessing collected historical materials in a person who »denies« can be helpful in assessing the intent."[4]

It should be added that the wording "deny" on the basis of the common language means: 1) questioning the authenticity of something, 2) being in contradiction to something, 3) not acknowledging something.[5] In the context of the cited (first)[6] meaning of the word "deny", it should be obvious that to

[3] The Act of 6 June 1997 – The Polish Criminal Code (Journal of Laws of 2018, item 1600, as amended).

[4] A. Janisławski, P. Konopka, *Zagadnienie penalizacji „kłamstwa oświęcimskiego"*, „Palestra" 2009, nr 1–2, p. 52.

[5] https://sjp.pwn.pl/slowniki/zaprzeczać.html [access: 22.09.2019].

[6] In the context of Art. 55 of the Act on the Institute of National Remembrance, one should choose the first of the quoted meanings of the word "deny." The second of the cited meanings should be excluded due to the context in which the word "deny" appears in the analyzed regulation. The third of the meanings should be excluded due to the fact that not

fulfill the features of the analyzed prohibited act, it would be insufficient to diminish the crimes or imprecisely describe them (and even more so – praise them). It would be necessary for the perpetrator to explicitly question those crimes.

As it was already mentioned, for the existence of the discussed type of act punishable under the law it is necessary that: 1) the denial is public; 2) the denial concerns facts, 3) the denial concerns crimes referred to in Art. 1 point 1 of the Act on the Institute of National Remembrance.

Ad. 1. The legislator does not define the term "publicly" (there is no legal definition). However, it is possible to refer in this regard to the consensus position of the doctrine, expressed at least on the basis of Art. 255 of the Polish Criminal Code, according to which:

> In all cases, the crime must be committed "publicly," and therefore against a more unspecified group of recipients, in front of a specific audience, in front of an audience. It is undoubtedly difficult to explicitly determine how many people must be present at a given time to fulfill the aforementioned feature. Certainly, it can't be just a group of close friends or a family circle. It is important that this denying (praising) reaches at least some of these people, although necessary recipients do not have to show interest in the perpetrator's words. It is not absolutely necessary for the crime to be committed in a "public place."[7]

Ad. 2. A fact is – according to the Polish Language Dictionary – "what happened or happens in reality."[8] It is about the truth, not the current position of scientists, media, government or society on a given event; the legislator does not indicate that in Art. 55 of the Act on the Institute of National Remembrance is about the specific type of facts (except that they must be facts indicating the real nature of a given crime) but – simply – facts. Of

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recognizing something is a matter of the perpetrators' internal experiences, and – as it is well known – *cogitationis poenam nemo patitur*.

[7] Z. Ćwiąkalski, *Art. 255 k.k.*, [in:] *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. art. 212–277d*. Wolters Kluwer Polska, https://sip.lex.pl/#/commentary/587746534/543974, thesis 16 (access: 22.09.2019).

[8] https://sjp.pwn.pl/szukaj/fakt.html [access: 22.09.2019].

course – it can be perceived that such understanding of the wording "facts" may make it difficult (or even – impossible) for the recipient of the (sanctioned) norm and law enforcement authorities to determine whether a given behavior fulfills the objective features of the type of act punishable under the law of Art. 55 of the Act on the Institute of National Remembrance or not. However, it is difficult to justify punishing citizens for telling the truth, even if this truth was not, in accordance with, e.g. the current position of science, a fact. Similarly, it would be difficult to punish citizens for saying what according to the current position of science is a fact, although it is not true. Naturally, in a situation where the given (objective) circumstances are unclear or misinterpreted (or they will not be assimilated at all) and the perpetrator will therefore be convinced that what they say is true (despite that this is not the truth) it would be necessary to exclude the criminal liability because the subjective features of the act punishable under the law were not fulfilled (see previous considerations about the perpetrator). Janisławski and Konopka legitimately indicate that:

> The legislator's use of a very categorical wording imposes on the court an additional obligation to examine whether the event which the accused party denies is documented to the extent that it would be possible to make an allegation of falsifying history. According to Article 5 § 2 of the Polish Code of Criminal Procedure, doubts that are impossible to eliminate are resolved in favor of the accused party. Therefore, in a situation where a specific event, which the accused party denies, is so poorly documented that it cannot be said with certainty that it has taken place, the conviction would prove impermissible.[9]

Ad. 3. The denial must relate to the crimes referred to in Art. 1 point 1 of the Act on the Institute of National Remembrance. The legislator uses the wording "crimes," therefore, it has to concern more than one crime.[10] However, the

[9] A. Janisławski, P. Konopka, *op. cit*., p. 51.

[10] Mateusz Woiński indicates that: "It is not (…) clear whether these are crimes of a, one could say, systemic nature or one historical event. Despite the use of the provision of a feature in the editorial »crimes referred to in Article 1 paragraph 1« in the plural form, it seems that according to the Supreme Court's position, which is broadly shared in the doctrine, it is punishable to negate, for example, the specific execution of civilians." (*Strona przedmiotowa*,

question arises whether it concerns 1) more than one crime in the meaning of "some" crimes (at least 2 crimes), or 2) more than one crime in the meaning of "all" crimes. Each of these possibilities is one of the potential results of the application of the linguistic directives of interpretation, and, therefore, they are equally acceptable. The interpretation according to which the wording "crimes" is equivalent to the wording "crime" is surely unacceptable (although probably in line with the intention of the real legislator).[11] Such an interpretation contradicts the fundamental principle of modern penal law, and more specifically the principle *nullum crimen sine lege stricta*, and the resulting prohibition of an extended interpretation to the detriment of the perpetrator.

It is worth adding that the catalog of crimes under Art. 1 point 1 of the Act on the Institute of National Remembrance is as follows: committed on people of Polish nationality or Polish citizens of other nationalities in the period from November 8, 1917, to July 31, 1990, a) Nazi crimes, b) communist crimes, c) crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich, d) other crimes constituting crimes against peace or humanity or war crimes. Therefore, it is a closed catalog, in which the legislator does not explicitly enumerate all individual crimes referred to in Art. 55 of the Act on the Institute of National Remembrance.[12] Perpetrator of the criminal act specified in Art. 55 of the Act

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[in:] idem, *Prawnokarne aspekty zwalczania mowy nienawiści*, Warszawa 2014, https://sip.lex.pl/#/monograph/369312599/58 [access: 24.09.2019]).

[11] However, there is no mention on the subject in the justification of the project of the Act. See http://orka.sejm.gov.pl/Rejestrd.nsf/wgdruku/252/$file/252.pdf (access: 22.09.2019).

[12] Of course, the legislator explains, for example, what communist crimes are. In Art. 2 of the Act on the Institute of National Remembrance, the legislator indicates that "Communist crimes, within the meaning of the Act, are acts committed by officers of the communist state in the period from November 8, 1917 to July 31, 1990, involving the use of repression or other forms of violation of human rights against individuals or groups of the population or in connection with their use, constituting crimes under the Polish Penal Law in force at the time of their commission. Communist crimes are also acts committed by these officers in the period referred to in the previous sentence, which contain the features of prohibited acts specified in Article 187, 193 or 194 of the Regulation of the President of the Republic of July 11, 1932 – the Polish Criminal Code or Article 265 § 1, Article 266 § 1, 2 or 4, or Article 267 of the Act of 19 April 1969 – the Polish Criminal Code, made against documents within the meaning of Article 3 paragraph 1 and 3 of the Act of 18 October 2006 on the disclosure of information about documents of the state security authorities from 1944–1990 and the content of these documents (Journal of Laws of 2017, item 2186, as amended) to the detriment of people to which these documents relate." Note, however, that it does not come from this definition which

on the Institute of National Remembrance must foresee not only the fact that they deny the crime but also for the fact that it is, e.g. a Nazi or communist crime within the meaning of the Act on the Institute of National Remembrance, and, at the same time, want or accept that they deny such a crime. This may (sometimes legitimately) be the source of judgments acquitting the perpetrators of the acts as charged – after all, it would be easy (though not necessarily effective) to refer to the perpetrator's ignorance that a given crime is one of the crimes referred to in Art. 1 point 1 of the Act on the Institute of National Remembrance.

The fact of describing the analyzed sanctioned norm in such a specific act, which is the Act on the Institute of National Remembrance (and not in the Polish Criminal Code), may constitute the basis for excluding the criminal liability of the perpetrator (or at least – for its mitigation) based on another circumstance, more specifically – based on Art. 30 of the Polish Criminal Code according to which: "No crime is committed by anyone who performs a prohibited act while being justifiably unaware of its unlawfulness; if the offender's mistake is not justified, the court may apply an extraordinary mitigation of the penalty."

Finishing the consideration on the sanctioned norm specified in Art. 55 of the Act on the Institute of National Remembrance, it should also be noted that the offense provided for in the said provision is an ineffective type of an act punishable under the law. None of the ways of expressing causality in the legal text was used in the analyzed regulation. Of course, in the case of behaviors having the character of speech acts, we can still speak of an illocutionary effect. As Ryszard Sarkowicz indicates – referring to John Langshaw Austin's views –

The act of speech can be considered in various meanings. If we consider the act of speech as the act of issuing certain sounds /writing something/, which are words of a certain language and having a specific meaning, then we are talking about a locution act. However, if we examine what function a given statement performs in a specific situational context /that is whether

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crimes are specifically concerned. What is more, the legislator uses complicated and ambiguous formulations in the definition, and, moreover, refers in the definition to the provisions of other legal acts, which for obvious reasons does not facilitate anything and does not make the analyzed definition unambiguous.

it is e.g. a warning, a request, a threat or order/, then we consider the speech act as an illocutionary act. You can also analyze the speech act because of the effects it has on the listener's psyche. For example, saying: "I will give you your money back in a week" we can convince the listener, irritate them, amuse them, etc. The act of speech considered in this aspect is a perlocutionary act.[13]

Analyzing the behavior of a potential perpetrator from the perspective of Art. 55 of the Act on the Institute of National Remembrance, we examine what function this behavior performed in a given situational context, and specifically, we examine whether it was in the nature of public denial of crimes against the facts. Therefore, we consider the aforementioned speech act as an illocutionary act. This, in turn, leads to the (illocutionary) effect that it produces; the effect – let us add – which is created on the basis of certain conventional rules, the knowledge of which is necessary to trigger it.[14]

Considering what was written above, it should be stated that for committing the prohibited act in Art. 55 of the Act on the Institute of National Remembrance it is not necessary to have a locutionary or perlocutionary effect. For committing the prohibited act in Art. 55 of the Act on the Institute of National Remembrance it is only necessary to have an illocutionary effect which – let us emphasize – still is not a decisive effect on the classification of a given prohibited act into the catalog of material types of acts punishable under the law for criminal lawyers.[15]

To sum up the above-mentioned findings, it should be stated that in Art. 55 of the Act on the Institute of National Remembrance we are dealing with a relatively difficult to interpret and, above all, a relatively narrow sanctioned norm, according to which: everyone, at all times and in any place, *having an intent*, is forbidden to *publicly and contrary to the facts to the (objective) truth deny (and not just diminish) some or all of the crimes* referred to in the (*closed and ambiguous catalog of*) [emphasis added by the authors] Art. 1 point 1 of the Act on the Institute of National Remembrance. Janisławski and Konopka legitimately indicate that:

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[13] R. Sarkowicz, *Wyrażanie przyczynowości w tekście prawnym (na przykładzie kodeksu karnego z 1969 r.)*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego" 1989, nr 37, p. 107.

[14] *Ibidem*, p. 108.

[15] Cf. K. Burdziak, *Prowokacja. Analiza prawnokarna*, Poznań 2018, pp. 87–88.

> (…) despite the fact that there is potentially a wide scope of applications of Article 55 due to the number of events to which this provision refers, *its practical application will prove to be very narrow and usually limited to events that have left the largest mark on the consciousness of the Polish Nation, and even more on the awareness of the international community* [emphasis added by the authors]. It mainly concerns Nazi and communist war crimes. Out of all the events that the above-mentioned provision "refers to," it is mainly these crimes that arouse the greatest danger and contempt for their perpetrators in the society that are still the subject of intensified research and interest among historians which contributes to constant deepening of knowledge concerning them and more and more often the circumstances related to them are called "facts."[16]

The current content of Art. 55 of the Act on the Institute of National Remembrance may also provide for a basis for abuse 1) on the part of perpetrators who, for example, will claim (contrary to the truth) that they did not foresee that their behavior could be the analyzed prohibited act, because either they did not know that the crimes they denied are the crimes referred to in Art. 1 point 1 of the Act on the Institute of National Remembrance, or they were not aware of circumstances indicating that these crimes are a fact, or were convinced that these circumstances did not indicate that these crimes were a fact, 2) or on the part of law enforcement authorities, which, for example (contrary to the principles of interpretation of provisions of the Polish Penal Law), will claim that for committing the analyzed prohibited act, it is sufficient to deny, publicly and being factually incorrect, only one crime, or will not try to determine what really happened to the perpetrator at the time of committing the prohibited act, referring, in that scope, only to the so-called model citizen[17].

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[16] A. Janisławski, P. Konopka, *op. cit.*, p. 51.

[17] Woiński rightly indicates that: "In practice it may (…) prove that the adjudicating court will not admit the possibility that in the current state of common knowledge anyone may consider as a fact thesis contrary to this knowledge. So it seems that a feature contrary to the facts in the practice of justice will not fulfill any function limiting the scope of penalization." (*Strona podmiotowa*, [in:] idem, *Prawnokarne aspekty zwalczania mowy nienawiści*, Warszawa 2014, https://sip.lex.pl/#/monograph/369312599/59 [access: 24.09.2019]).

In light of the above considerations, the analyzed regulation (Art. 55 of the Act on the Institute of National Remembrance) does not seem to be fully functional, both from the perspective of the effect it has on its addressees against violation of a value protected by the law (which in the case of the analyzed provision is the historical truth and the memory of the victims of crimes),[18] and from the perspective of the possibility of bringing them to criminal liability – after the violation of a value protected by law.

The considerations regarding the Holocaust denial from the perspective of the Polish Penal Law must not ignore the amendment to the Act of 2018 on the Institute of National Remembrance, which was criticized and finally repealed, and read as follows:

> (…) after Article 55, Articles 55a and 55b in the wording: "Article 55a. 1. Whoever publicly and contrary to the facts assigns responsibility or co-responsibility to the Polish Nation or the Polish State for Nazi crimes committed by the Third Reich, as defined in Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws of 1947, item 367), or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise, grossly diminishes the responsibility of the actual perpetrators of said crimes, shall be liable to a fine or the imprisonment for up to 3 years. The sentence shall be made public. 2. If the act specified in paragraph 1 is committed unintentionally, the perpetrator shall be liable to a fine or the restriction of liberty. 3. No offence is committed if the criminal act specified in paragraphs 1 and 2 is committed in the course of the one's artistic or scientific activity. Article 55b. Regardless of the provisions in force at the place of committing the criminal act, this Act shall apply to Polish or foreign citizens in the event of committing the crimes referred to in Articles 55 and 55a.";

the amendment, which was supposed to – according to the project promoters – create effective legal tools allowing to conduct a persistent and consistent historical policy of the Polish authorities in preventing counterfeiting Polish

[18] See A. Janisławski, P. Konopka, *op. cit.*, pp. 52–54.

history and protecting the good name of the Republic of Poland and the Polish Nation (see justification of the project).

In the context of the above-mentioned amendment, the following questions, among others, arose: 1. Does the legislator's use of the terms "contrary to the facts" and "Polish Nation" mean that it is impossible to apply this provision to people reporting real crimes committed by groups of Polish citizens or even crimes for which there are divergent historical assessments?; 2. Does Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance eliminate the possibility of conducting historical research and publishing its results?; 3. Does Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance eliminate the possibility of conducting a public debate on Nazi crimes or other crimes referred to in Art. 55a par. 1 of the Act on the Institute of National Remembrance, including the participation of the population of Polish people in these crimes?; 4. Does Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance eliminate the possibility of making public cases of the participation of people of Polish nationality and Polish citizens in Nazi crimes, in particular whether criminal liability is provided for the so-called testimonies of truth, showing the reprehensible behavior of people of Polish nationality and Polish citizens?; 5. Does the wording "assigning responsibility" include behavior involving the use of words about "Polish concentration camps"?

Without prejudging the legitimacy (or lack thereof) of the analyzed regulations, it is worth answering the aforementioned questions to clarify at least some doubts that arose within their context in the public debate.[19]

Ad. 1. We have to start with the fact that Art. 55a par. 1 of the Act on the Institute of National Remembrance was a plural provision because it contained a number of legal norms. The plurality of this provision was diverse, as it included many sanctioned norms as well as many sanctioning norms linked to them. And so, from the said provision, the following sanctioned norms

[19] Further part of the work is a brief discussion of the conclusions presented in Ł. Pohl, *On Public Attribution of Responsibility (Co-Responsibility) for Nazi Crimes Perpetrated by the German Third Reich to the Polish Nation or the Polish State. The Actual Normative Content of Now Repealed Article 55a of the Institute of National Remembrance Act*, "Prawo w Działaniu" 2019, no. 38, pp. 106–116.

could be reproduced: 1. A sanctioned norm prohibiting behavior involving public and untruthful assigning responsibility to the Polish Nation for Nazi crimes committed by the Third Reich, referred to in Art. 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the prosecution and punishment of major war criminals of the European Axis, signed in London on 8 August 1945; 2. A sanctioned norm prohibiting behavior involving public and untruthful assigning co-responsibility to the Polish nation for Nazi crimes specified in Art. 6 of the Charter of the International Military Tribunal attached to the International Agreement on the prosecution and punishment of major war criminals of the European Axis, signed in London on 8 August 1945; 3. A sanctioned norm prohibiting behavior involving public and untruthful assigning the Polish Nation the responsibility for other than the aforementioned crimes constituting crimes against peace, crimes against humanity or war crimes; 4. A sanctioned norm prohibiting behavior involving public and untruthful assigning co-responsibility to the Polish Nation for crimes listed in point 3; 5. A sanctioned norm prohibiting behavior involving public and untruthful diminishing of the responsibility of the actual perpetrators of crimes against peace, other than the behaviors mentioned in points 1–4; 6. A sanctioned norm prohibiting behavior involving public and untruthful diminishing of the responsibility of the actual perpetrators of crimes against humanity, other than the behaviors mentioned in points 1–4; 7. A sanctioned norm prohibiting behavior involving public and untruthful diminishing of the responsibility of the actual perpetrators of war crimes, other than the behaviors mentioned in points 1–4.

In the context of the answers to the above questions (in particular the first one), especially substantial are those of the aforementioned norms that concerned assigning the Polish Nation or the Polish State the responsibility or co-responsibility for specific crimes, i.e. the norms indicated in points 1–4.

The first thing is that the condition for exceeding these norms was assigning responsibility (co-responsibility) to the Polish Nation or the Polish State for the crimes mentioned in Art. 55a par. 1 of the Act on the Institute of National Remembrance, including for Nazi crimes specified in Art. 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the prosecution and punishment of major war criminals of the European Axis, signed in London on 8 August 1945. Due to the indisputable

circumstance that the perpetrator of the crimes referred to in Art. 55a par. 1 of the Act on the Institute of National Remembrance could only be a man (person), assigning responsibility (co-responsibility) referred to in this article was a construction based on an idea according to which the crime indicated in this provision and committed by man is the responsibility of the (whole) community. In the case analyzed in this work – the Polish Nation and the Polish State. This idea – as is well known – is also known to jurisprudence in which it is emphasized that in order to be considered in a particular case as legitimate and, what is the most important, fair, the individual's behavior must show a strong connection with the community. In Art. 55a par. 1 of the Act on the Institute of National Remembrance this relationship could not – of course – limit to ethnicity; it is impossible to accept the assumption that for every crime committed by a person of the Polish origin the responsibility (co-responsibility) is borne by the Polish Nation. The same is true if one has specific citizenship – the Polish State does not bear the responsibility (co-responsibility) for every crime committed by a Polish citizen. Therefore, it had to be a different criterion. Without the risk of making a mistake, it can be assumed that in the case of Art. 55a par. 1 of the Act on the Institute of National Remembrance (and, consequently, in the case of par. 2 of this Art.), this relationship involved the social (in terms of the Polish Nation) or legal (in terms of the Polish State) empowerment of the individual by the community to commit the crime indicated in this provision.

Considering the aforementioned, the public statement, in which the factually correct speaker indicated that the Polish citizen had committed the crime referred to in Art. 55a par. 1 of the Act on the Institute of National Remembrance, could not be exceeding the norms listed in points 1–4 when: 1) there were no words in that statement about the responsibility (co-responsibility) of the Polish Nation or the Polish State for this crime, 2) at the core of the words about responsibility (co-responsibility) of the Polish Nation or the Polish State for this crime there was a fact (authentic, actually taking place) that the speaker was becoming aware of, indicating the existence of the empowerment to commit this crime by a Polish citizen from the Polish Nation or the Polish State.

As for the scope of the first question, which deals with crimes for which there are divergent historical assessments, it should be argued that justified

discrepancies, as to whether there was the empowerment of a Polish citizen to commit crimes by the Polish Nation or the Polish State mentioned in Art. 55a par. 1 of the Act on the Institute of National Remembrance, should have been regarded as circumstances excluding the possibility of committing both a prohibited act described in Art. 55a par. 1 of the Act on the Institute of National Remembrance, as well as the prohibited act described in par. 2 of this Art.

Given the considerations above, it should be stated that Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance in no case were also provisions limiting the possibility of conducting a public debate on the participation of the population of Polish nationality in Nazi crimes (Ad. 3) or eliminating the possibility of – otherwise necessary – making public cases of participation of people of Polish nationality and Polish citizens in Nazi crimes (Ad. 4). It should be emphasized that the norms included in the analyzed provisions did not prohibit the so-called testimonies of truth, showing the criminal behavior of people of Polish nationality and Polish citizens. They forbade – in the context under consideration – an unfounded proclamation that the entity responsible (co-responsible) for these behaviors is the Polish Nation or the Polish State.

It should also be noted that the wording "assigning responsibility" (a feature of prohibited acts under Art. 55 1 and 2 of the Act on the Institute of National Remembrance) included behavior involving the use of words about "Polish concentration camps," but only if the speaker used the indicated word formula to signify the responsibility of the Nation Polish or the Polish State for the crimes indicated in Art. 55a par. 1 of the Act on the Institute of National Remembrance. Therefore, if it was used to specify only the location of these camps, such a statement did not fulfill the feature in question. In other words – saying words about "Polish concentration camps" does not have to imply assigning responsibility (co-responsibility) to the Polish Nation or the Polish State, as referred to in Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance (Ad. 5).

Ad. 2. According to former Art. 55a par. 3 of the Act on the Institute of National Remembrance, "[n]o offence is committed if the criminal act specified in paragraphs 1 and 2 is committed in the course of the one's artistic or

scientific activity." Therefore, the cited provision was given to one's artistic and scientific activities as a circumstance excluding unlawfulness, i.e. a status of a justified circumstance. At the same time, it was argued for such an interpretation of the function of this circumstance that does not deprive the behavior from being the act punishable under the law for a party fulfilling the features of the act prohibited under Art. 55a par. 1 or 2 of the discussed Act.

Considering this, it should be stated that the norms included in Art. 55a par. 1 and 2 of the Act on the Institute of National Remembrance forbade the behaviors described in these provisions even when these behaviors took place as part of artistic or scientific activities. However, the validity of par. 3 of this Art. meant that in such situations, the perpetrator's liability was excluded because this provision gave these behaviors the status of circumstances excluding the unlawful conduct of the perpetrator. To sum up, the perpetrator's behavior, because of the substantive consequences of justification mentioned in this provision, was legal (secondary legal).

Referring to the question of the scientific status of historical research, they are without a doubt a kind of scientific activity, regardless of whether the person conducting it has formal historical education. It should be assumed that the scientific nature of a given activity is determined only by the substantive aspect, expressed in the skillful implementation thereof, and not by the formal aspect, which – as is well known – is not fully guaranteed. In this state of affairs, it must be acknowledged that as part of carrying out historical research – due to Art. 55a par. 3 of the Act on the Institute of National Remembrance – there was no unlawful commission of an act prohibited under Art. 55 par. 1 and 2 of the Act on the Institute of National Remembrance.

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BOGUSŁAW LACKOROŃSKI

Safeguarding the Good Repute of the Polish State and Nation (Art. 53o–53q of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation)

1. Introductory notes

Articles 53o–53q were introduced into the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998 (further the IPN Act) by the Act of 26 January 2018 which amended the IPN Act along with the Act on graves and war cemeteries, the Act on museums, and the Act on collective entities' liability to penal sanctions for prohibited acts (Journal of Laws of 2018, item 369, hereafter referred to as "the Amendment Act"). This amendment to the IPN Act has come in a new chapter entitled "The Protection of the Good Repute of the Republic of Poland and the Polish Nation."[1]

Pursuant to IPN Act Art. 53o, the protection of personal interests under the Civil Code Act of 23 April 1964 (Journal of Laws of 2017, items 459, 933 and 1132) extends to the protection of the good repute of the Republic of Poland and the Polish Nation. Court action in defence of the good repute of the

[1] "Section 6c Protecting the reputation of the Republic of Poland and the Polish Nation. Art. 53o.: The provisions of the Civil Code Act of 23 April 1964 (Journal of Laws of 2018, items 1025, 1104 and 1629) on the protection of personal interests apply accordingly to the protection of the good repute of the Republic of Poland and the Polish Nation. Court action aimed at protecting this good repute may be brought by an NGO within the scope of its activities as determined by its founding act. Any compensation or damages shall be awarded to the State Treasury. Art. 53p.: A lawsuit aimed at protecting the good repute of the Republic of Poland or the Polish Nation may be brought also by the Institute of National Remembrance. In such cases, the Institute of National Remembrance shall have legal standing in court proceedings. Art. 53q.: The provisions of Art. 53o and Art. 53p shall apply regardless of the governing law."

Republic of Poland or the Polish Nation may be brought by non-governmental organisations (NGOs) within the scope of its activities as determined by its founding act, but any compensation or damages thereby arising, are awarded to the State Treasury.

Under IPN Act Art. 53p, a lawsuit aimed at protecting the good repute of the Republic of Poland or the Polish Nation may also be brought by the IPN which is thereby granted legal standing in court proceedings. Under IPN Act Art. 53q, the provisions of Art. 53o and 53p apply regardless of the governing law.

Pursuant to Art. 5 of the Amendment Act, the new provisions came into force 14 days after the day of the Act's promulgation, with the exception of its Art. 1(4) and Art. 3 which came into force three months after its publication. This means that IPN Act Art. 53o–53q came into effect on 1 March 2018, i.e. 14 days after the Amendment Act's promulgation on 14 February 2018. **IPN Act Articles 53o–53q remain unamended as of their entry into force.**

2. Scope of reference – legal regime for the protection of the good repute of the Republic of Poland and the Polish Nation

Under IPN Act Art. 53o, **Art. 24 of the Civil Code**[2] regarding the protection of personal interests, extends to the protection of the good repute of the Republic of Poland and the Polish Nation. This **provides two non-financial modes of protection**, technically speaking injunctive relief, in asserting claims. Firstly, a claim can be brought where personal interests *qua* the good repute of the Republic of Poland or the Polish Nation, are jeopardised by another person's actions. This gives an entitled party the right to issue a cease and desist demand, unless no unlawful event has taken place. Secondly, a claim can be brought to remedy an infringement of personal interest. This gives the

[2] Cf. A. Pyrzyńska, *Cywilnoprawna ochrona dobrego imienia Rzeczypospolitej Polskiej i Narodu Polskiego w świetle ustawy o Instytucie Pamięci Narodowej*, „Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu" 2019, vol. 4(64), p. 30.

entitled party the right to demand remediation of the offence, in particular by way of the offender's apology declared in appropriate form and substance.

Apart from non-financial modes of protection, Art. 24 of the Civil Code provides **financial modes of protection** of personal interests, under point 24(1) an aggrieved party may demand financial compensation or payment of an agreed amount of money to a specific public cause irrespective of whether or not non-financial modes of protection have been employed.[3] Pecuniary claims under Art. 24(1)of the Civil Code, as regulated by its Art. 448, serve as legal remedies for non-material damages stemming from physical or mental suffering caused by infringements of personal interests. On the other hand, under Art. 24 (2) of the Civil Code, if material damage is sustained in consequence of an infringement of personal interests, the claimant may demand its remediation under the general principles set out in Art. 415 of the Civil Code which holds that whoever is culpable of harming another person is obliged to remedy the consequences.

According to the prevailing interpretation of Art. 24 of the Civil Code, the **non-financial mode of protection** of personal interests can be invoked **irrespective of the fault** of the addressee of injunctive relief. A claim can be asserted provided that the infringement of personal interests and its unlawfulness can be demonstrated. However, unlawfulness is presumed which means that the aggrieved party seeking protection does not need to demonstrate the unlawful infringement of his personal interests. The presumption of unlawfulness may be overturned if the defendant proves that his conduct remained within a lawful remit that excludes unlawfulness (e.g. the aggrieved party's consent). Whereas **financial** modes of protection can only be invoked if a **premise of guilt can be** proved by the claimant,[4] **resultant pecuniary**

[3] Aliud. *Ibidem*, pp. 49–50.

[4] In Art. 415 of the Civil Code, the premise of fault is expressed directly, and, in conjunction with Art. 448 of the Civil Code, it is interpreted pursuant to this provision. For the interpretation of Art. 448 of the Civil code see: G. Bieniek (updated by: J. Gudowski), [in:] *Kodeks cywilny. Komentarz*, t. 3: *Zobowiązania. Część ogólna*, red. J. Gudowski, Warszawa 2018, commentary to Art. 448, pp. 1097–1100, Sec. no. 3–4; A. Cisek, W. Dubis, [in:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, commentary to Art. 448, pp. 952–953, Sec. no. 4; K. Mularski, [in:] *Kodeks cywilny*, t. 2: *Komentarz do art. 353–626*, red. M. Gutowski, Warszawa 2019, commentary to Art. 448, p. 905, Sec. no. 4; A. Olejniczak, [in:] *Kodeks cywilny. Komentarz LEX*, t. 3: *Zobowiązania. Część ogólna*, red. A. Kidyba, Warszawa 2014, commentary to Art. 448, pp. 587–588, Sec. no. 8; M. Safjan, [in:] *Kodeks cywilny*, t. 1:

claims can be raised for harm suffered, for awarding appropriate sums of money payable to given social causes, or as damages for financial loss. The premise of guilt, even if only to a minimal extent, has to be proved by the person seeking legal protection. In civil law, the declaration of guilt, by rule, is independent of any established deliberate intent.

Because under Polish civil law only financial claims are subject to limitation periods, claims constituting **non-financial modes** of protection **are not time-barred**. On the other hand, claims pertaining to financial modes of protection of personal interests are subject to limitations under Art. 442^1 of the Civil Code which regulates tort liability claims. Under the general rule, which is slightly modified regarding claims for remedying personal injury, damage caused by crime, offence, or personal injury caused to a minor, claims for remedying damage caused by tort have a three year time-bar starting the day after the aggrieved party learnt or, acting with all due diligence, could have learnt, of the damage and of the person obliged to remedy it. However, under Art. 442^1(1) of the Civil Code, this period cannot be longer than ten years from the day on which the damage occurred. If damage results from a crime or offence, any claim for its remedy is time-barred to twenty years after its commitment regardless of when the aggrieved party learnt of both the damage and the person liable under Art. 442^1(2) of the Civil Code.

Komentarz do art. 1–449[10], red. K. Pietrzykowski, Warszawa 2018, commentary to Art. 448, pp. 1588–1591, Sec. no. 10–13; P. Sobolewski, [in:] *Komentarze Prawa Prywatnego*, t. 3A: *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, red. K. Osajda, Warszawa 2017, commentary to Art. 448, pp. 880–882, Sec. no. 1–11; M. Wałachowska, [in:] *Kodeks cywilny. Komentarz*, t. 3: *Zobowiązania. Część ogólna (art. 353–534)*, red. M. Habdas, M. Fras, Warszawa 2018, commentary to Art. 448, pp. 715–716, Sec. no. 13. This view is shared in the jurisprudence of the Supreme Court. See: the resolution of the Supreme Court (7) of 9 September 2008, III CZP 31/08, Legalis. Cf. R. Strugała, [in:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, commentary to Art. 448, Sec. no. 10, which presents the view that liability for harm resulting from the infringement of personal interests is determined by the type of event that results in the infringement of personal interests.

3. The subject and extent of protection under Art. 53o of the IPN Act

The purpose of IPN Act Art. 53o is to protect **the good repute** of the Republic of Poland and the Polish Nation. The assertion that the provisions giving protection to personal interests only apply to the protection of the good repute of the Republic of Poland and the Polish Nation would uphold the view that the good repute of the Republic of Poland and/or the Polish Nation is not considered a personal interest in the understanding of Art. 23 of the Civil Code.[5] This is of significance to the preservation of the integrity of the internal structure of personal interests in private law. It seems that the structure of personal interests in private law does not give fully adequate protection to the values which seems justified above all by public interest. Although IPN Act Art. 53o could serve as a basis for the conclusion that the good repute of the Republic of Poland and of the Polish Nation are not personal interests in the meaning of Art. 23 of the Civil Code, the substantial body of Polish case law and legal doctrine regarding personal interests *qua* the good name (honour) of natural and legal persons, may be applicable by analogy.[6] In cases regarding the protection of reputation (honour) it is of crucial importance to distinguish between descriptive and evaluative statements infringing one's good repute (honour), and to differentiate between their significance in relation to liability for the infringement of personal interests.[7] It is particularly important in the context of the tension between the protection of

[5] If the legislator had recognised the good repute of the Republic of Poland and the Polish Nation as personal interests, the provisions of the Civil Code on the protection of personal interests would apply directly and not just accordingly. Cf. A. Pyrzyńska, *op.cit.*, p. 27.

[6] In the doctrine, the reputation of legal persons and legal entities under the civil law other than natural persons is considered a counterpart of honour as a natural person's personal interest. See M. Pazdan, [in:] *Kodeks cywilny*, t. 1: *Komentarz do art. 1–449[10]*, red. K. Pietrzykowski, Warszawa 2018, commentary to Art. 23, p. 118, Sec. no. 17; see also R. Szczepaniak, [in:] *Kodeks cywilny*, t. 1: *Komentarz do art. 1–352*, red. M. Gutowski, Warszawa 2018, commentary to Art. 43, p. 357, Sec. no. 7.

[7] P. Machnikowski, [in:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, commentary to Art. 24, pp. 64–65, Sec. no. 20–21; M. Pazdan, [in:] *Kodeks cywilny…*, commentary to Art. 23, p. 119, Sec. no. 20; P. Sobolewski, [in:] *Komentarze Prawa Prywatnego*, t. 1: *Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające Kodeks cywilny. Prawo o notariacie (art. 79–95 i 96–99)*, red. K. Osajda, Warszawa 2017, commentary to Art. 23, p. 185, Sec. no. 51–53; in particular J. Wierciński, *Niemajątkowa ochrona czci*, Warszawa

personal interests, including reputation (honour), and freedom of expression of opinions (guaranteed by Art. 54(1) of the Constitution of the Republic of Poland), freedom of artistic creativity, freedom of scientific research and dissemination of the fruits thereof, freedom to teach (guaranteed Art. 73 of the Constitution of the Republic of Poland) and in seeking to strike an optimal balance between these values.

The possibility of establishing liability for infringing a person's reputation (honour) by a descriptive statement is excluded as it is not deemed unlawful, especially if the statement is true.[8] The assessment of false descriptive statements as a premise for liability for the infringement of personal interests (the honour of a natural person or reputation of other entities under civil law) rests on the discrepancy between a great part of civil law doctrine and case law. As regards false descriptive statements (including false declarations), the Supreme Court's jurisprudence is dominated by the view that unlawfulness, and thus the possibility to determine liability for infringement of personal rights, is excluded if the author of such a statement, a journalist in particular, has collected his material with due diligence, and used it with probity.[9] This approach, however, has been criticised by many civil law doctrine experts.[10]

2002, pp. 110–119; see also judgment of the Supreme Court of 11 October 2019, I CSK 482/18, Legalis.

[8] See judgment of the Supreme Court of 9 October 2002, IV CKN 1402/00, Legalis. Also P. Sobolewski, [in:] *Komentarze Prawa Prywatnego…*, t. 1:, commentary to Art. 23, p. 185, Sec. no. 52; J. Wierciński, *op. cit*., pp. 122–123.

[9] Judgment of the Supreme Court SN of 14 May 2003, I CKN 463/01, "Orzecznictwo Sądów Polskich" 2004, no. 2, item 22; resolution of the Supreme Court SN (7) of 18 February 2005, III CZP 53/04, "Orzecznictwo Sądów Polskich" 2005, no. 9 item 110, pp. 484–493. In the resolution of the Supreme Court SN (7), which constituted grounds for the decisions made in this regard, it is asserted that "a journalist's actions would not be considered illegal if he can prove that the gathering and use of press materials were made in the public interest and the duty to act with due diligence was fulfilled. If the allegation proves false, the journalist is obliged to recall it." See also: T. Grzeszak, *Glosa do wyroku Sądu Najwyższego z dnia 14 maja 2003 r. (I CKN 463/01)*, „Przegląd Prawa Handlowego" 2004, nr 3, pp. 55–58, in particular p. 58; P. Księżak, [in:] *Kodeks cywilny. Część ogólna*, red. M. Pyziak-Szafnicka, Warszawa 2009, commentary to Art. 24, pp. 295–296, Sec. no. 46–47; with reservations regarding adherence to doctrine, this position is approved by P. Machnikowski, [in:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, commentary to Art. 24, p. 65, Sec. no. 20.

[10] S. Kalus, [in:] *Kodeks cywilny*, t. 1: *Komentarz. Część ogólna (art. 1–125)*, red. M. Habdas, M. Fras, Warszawa 2018, commentary to Art. 24, p. 130, Sec. no. 6; M. Pazdan, [in:] *Kodeks cywilny…*, commentary to Art. 23, p. 120, Sec. no. 22; Z. Radwański, *Glosa do postanowienia*

Less stringent criteria in regard of evaluative statements (which are not subject to assessment from the point of view of truth and falsehood), can be employed in establishing the probity and legitimacy of criticism as grounded in fact and in compliance with the rules of the type of debate (political, scientific or artistic) under which it was formulated.[11]

The protection afforded to the good repute of the Republic of Poland and the Polish Nation under IPN Act Art. 53o requires determination what the Republic of Poland and the Polish Nation are, as defined by particular reference to the Preamble and Chapter I of the Constitution of the Republic of Poland.[12] In light of the Preamble to the Constitution, the concept of "the Republic of Poland" primarily relates to the contemporary Polish state, whose foundations and political structures are laid down in the Constitution of 1997.[13] Thus, it cannot be ruled out that IPN Act Art. 53o could not be invoked in pursuing claims for defamation of the First and Second Republics, especially those of their traditions and legacies that remain extant and give shape to the Third Republic of today. In light of this Preamble, the Polish Nation should be understood as all citizens of the Republic of Poland. This term refers to all people who have a public and legal bond of citizenship[14] with the Republic of Poland, although in constitutional law doctrine it is emphasised that the concept of a nation is not limited to citizens only. This is supported by the Preamble's reference to the communal bond with "our

Sądu Najwyższego z dnia 18 lutego 2005 r., III CZP 53/04, „Orzecznictwo Sądów Polskich" 2005, vol. 9, item 110, pp. 493–496; J. Sieńczyło-Chlabicz, *Glosa do uchwały składu siedmiu sędziów z dnia 18 lutego 2005 r., III CZP 53/04*, „Państwo i Prawo" 2005, nr 7, pp. 113–118; P. Sobolewski, *Glosa do uchwały składu siedmiu sędziów Sądu Najwyższego z 18 lutego 2005 r., III CZP 53/04*, „Orzecznictwo Sądów Polskich" 2005, vol. 12, item 144, pp. 654–657; T. Sokołowski, [in:] *Kodeks cywilny. Komentarz LEX*, t. 1: *Część ogólna*, red. A. Kidyba, Warszawa 2012, commentary to Art. 24, pp. 134–135, Sec. no. 16–17; R. Tymiec, *Glosa do wyroku z dnia 14 maja 2003 r., I CKN 463/01*, „Państwo i Prawo" 2004, nr 4, pp. 120–124.

[11] See P. Machnikowski, *op. cit.*, commentary to Art. 24, p. 65, Sec. no. 21.

[12] Cf. A. Pyrzyńska, *op. cit*., p. 25.

[13] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483).

[14] See M. Piechowiak, *Preambuła* [in:] *Konstytucja RP*, t. 1: *Komentarz do art. 1–86*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 134, Sec. no. 48–49; W. Sokolewicz, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 5, red. L. Garlicki, Warszawa 2007, commentary to Art. 1, p. 31, Sec. no. 24.

compatriots dispersed throughout the world."[15] A broader understanding of the concept of "the Polish Nation" is fleshed out in IPN Act Art. 1(1)(a) which speaks of "persons of Polish nationality or Polish citizens of other nationality" when determining the identities of victims of crimes documented by the IPN.

Striking a balance between the protection of the good repute of the Republic of Poland and the Polish Nation and constitutionally protected freedoms which may be in conflict with the former, will evolve by way of case law. Personal interest protection cases under Polish jurisdiction are typically decided in the first instance by regional courts, which are not the lowest tier in the Polish court system (Polish common courts comprise of district courts, regional courts and courts of appeal). These courts determine the scope of protection the good repute of the Republic of Poland and the Polish Nation needed in a way that does not unduly conflict with constitutionally protected freedoms. In these cases, individuals with expertise in issues related to given disputes will probably play a particularly important role, especially expert historians whose research is based on documented facts. Without thorough historical research, courts may find it difficult to strike a balance between protecting the good repute of the Republic of Poland and the Polish Nation and the freedoms guaranteed by Art. 54(1) and 73 of the Constitution. In cases which do not come under the jurisdiction of Polish courts, this task will fall upon foreign courts.

Questions of jurisdiction and applicable law should be considered next. If full-scale protection of the good repute of the Republic of Poland or the Polish Nation established by case law results in disproportionate restrictions of freedoms guaranteed under Art. 54(1) and 73 of the Constitution, it may be necessary to decide on the constitutionality of the norms provided for in IPN Act Art. 53o–53q.

[15] See: L. Garlicki, M. Derlatka, *Wstęp*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 1, red. L. Garlicki, M. Zubik, Warszawa, 2016, p. 27; M. Piechowiak, *op. cit.*, p. 141, Sec. no. 73.

4. Active and passive standing to assert the right of protection of the good repute of the Republic of Poland and the Polish Nation

Pursuant to IPN Act Art. 53o, in basing the protection of the reputation of the Republic of Poland and the Polish Nation on a private law mechanism, the question arises who is entitled to assert claims for the infringement of this personal interest and against whom can these claims be pursued. Due to the varied degree of juridification, a separate analysis regarding the concept of the good repute of the Republic of Poland and the Polish Nation would be in order to answer the question who can assert claims in the light of IPN Act Art. 53o–53q. The State Treasury is recognised in the Polish legal system, in private law in particular, as a legal person with the capacity to perform legal acts. The Polish Nation figures sporadically in the legal system, and neither appears directly nor as a civil law entity which could be endowed with or exercise any personal rights.

The private law mechanism serving to protect the good name of the Republic of Poland, gives the State Treasury, as the civil law emanation of the Republic of Poland, priority rights in pursuing claims.[16] This is confirmed by IPN Act Art. 53o under which any compensation or damages arising from the infringement of the good repute of the Republic of Poland are awarded to the State Treasury. Pursuant to Art. 67(2) of the Code of Civil Procedure, the State Treasury is represented in court by the state organisational unit with cause to assert the claim, the unit's superior body, or – within the scope provided for in a separate act – the Attorney General of the Republic of Poland (Prokuratoria Generalna Rzeczypospolitej Polskiej). Thus, it should be noted that neither local government units nor their associated organs have direct legitimisation to bring lawsuits for the protection of the good repute of the Republic of Poland. The IPN is a state organisational unit whose activity is relevant to claims for the protection of the good repute of the Republic of Poland, which is unequivocally confirmed by IPN Act Article 53p in the

[16] L. Bosek, [in:] *Konstytucja RP*, t 2: *Komentarz do art. 87–243*, red. M. Safjan, L. Bosek, Warszawa 2016, commentary to Art. 218, p. 1505, Sec. no. 19 and p. 1508, Sec. no. 32; W. Sokolewicz, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 4, red. L. Garlicki, Warszawa 2005, commentary to Art. 218, pp. 3–4, Sec. no. 5.

formal sense, but also in a material sense. It appears that under Art. 67(2) of the Code of Civil Procedure, the power to bring actions in defence of the good repute of the Republic of Poland would be vested in the IPN regardless of whether Art. 53p was included in the IPN Act or not.

Prosecutors are also entitled to bring actions aimed at protecting Poland's reputation.[17] Art. 55 of the Code of Civil Procedure grants prosecutors the right to bring actions on behalf of designated natural or legal persons, or organizational units without legal personality which are endowed with legal capacity under Art. 33^1(1) of the Civil Code Act. Prosecutors can bring such actions on behalf of persons without their consent.[18] If a prosecutor brings an action on the strength of Art. 55 of the Code of Civil Procedure, the court is obliged to notify the person on behalf of whom action has been brought and deliver a copy of the claim to that person. This person can join the suit at any stage as a claimant. In this case, the provisions on joint participation with a prosecutor are applicable. It means that the actions of the acting co-participant (prosecutor or person on behalf of whom action is taken) are effective with regard to the non-acting co-participant (prosecutor or person on behalf of whom the action has been brought). As a consequence, bringing action on behalf of the State Treasury aimed at protecting the good repute of the Republic of Poland by a prosecutor will not result in court proceedings being held without the knowledge of the State Treasury, nor will it prevent the State Treasury from actively participating in proceedings it wishes to join. On the contrary, upon joining a case, the State Treasury is the rightful party that may, in particular, control the course of proceedings by way of settlement or release of claims which, in the light of Art. 56(2) of the Code of Civil Procedure, cannot be done by the prosecutor.

Further to the above, IPN Act Art. 53o.2 and 53p, do not represent an exhaustive list of entities with the capacity to sue for infringement of the good repute of the Republic of Poland. It means that court action aimed at protecting Poland's reputation may be brought not only by NGOs acting within the scope of their activities as determined by their founding acts and

[17] A. Pyrzyńska, *op. cit.*, pp. 52–53.

[18] M. Jędrzejewska (amended by P. Grzegorczyk), [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Postępowanie rozpoznawcze*, red. T. Ereciński, Warszawa 2016, commentary to Art. 55, p. 371, Sec. no. 2.

by the IPN, but also by any legal organisational units of the State Treasury without legal personality (*stationes fisci*) whose activities accord with such claims, and by prosecutors.

If an NGO wishes to defend Poland's good repute because there is a link with its own activities, as determined by its founding act, Art. 62 and 63 of the Code of Civil Procedure serve to establish its standing in proceedings, in particular by reference to regulations on prosecutors bringing actions on behalf of parties irrespective of their wishes and on secondary interventions, but to the exclusion of the application of the provisions on joint participation. Therefore, the above observations regarding prosecutors apply, *mutatis mutandis*, to NGOs bringing actions aimed at defending Poland's good repute. Since, under IPN Act Art. 53o, an NGO may bring action in defence of Poland's good repute, provided it has the necessary standing in light of its statutory activities, Art. 61 of the Code of Civil Procedure which grants NGOs the power to bring actions and join proceedings on the side of natural persons only, and only with their written consent, has been thereby over-ruled. The provisions of IPN Act Art. 53o appear to give grounds to assert that NGOs may bring actions in defence of Poland's good repute without the State Treasury's consent. However, due to the fact that Article 62(1) of the Code of Civil Procedure refers to the rights of prosecutors to bring actions on behalf of entities deemed to have suffered damage irrespective of their wishes, bringing an action to protect Poland's good repute does not mean that court proceedings will take place without the knowledge of the State Treasury or that the State Treasury will not be able to take active part in them. Irrespective of who brings action, pursuant to IPN Act Art. 53o, any adjudicated compensation or damages will be awarded to the State Treasury.

Pursuant to IPN Act Art. 53o.2, granting NGOs the power to bring actions in defence of their founding missions, calls for reflection as to whether the legislator has not thereby implemented *actio popularis*[19] which, as noted in civil law doctrine, lost its significance as an instrument legitimising almost every person to demand protection of personal rights in the name of public

[19] See P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law*, "Polish Yearbook of International Law" 2017, vol. 37, p. 297.

interest.[20] It seems, however, that IPN Act Art. 53o.2 does not implement *actio popularis* in the strict sense of the word. *Actio popularis* is understood as a complaint that can be brought by any citizen in order to initiate private proceedings against a person responsible for a breach of public interest and to impose a fine payable to the claimant.[21] There is a clear distinction between statutory authorisation given to citizens to collect cash penalties on behalf of the state and *actiones populares*.[22] In the first place, IPN Act Art. 53o.2 only legitimizes the actions brought by NGOs whose statutory activities are in some way contingent on the good repute of the Republic of Poland or the Polish Nation, hence not everyone has the necessary standing. Secondly, this provision does not give these organisations the right to profit financially through any adjudicated monetary awards in proceedings for the protection of the good repute of the Republic of Poland or the Polish Nation. Under IPN Act Art. 53o.3, any compensation or damages adjudicated for the infringement of the good repute of the Republic of Poland or the Polish Nation shall be awarded to the State Treasury.

Answering the question of who can seek to enforce protection of the good repute of the Polish Nation may seem *prima facie* problematic as the Polish Nation, as opposed to the Republic of Poland, does not have its emanation in civil law. Consequently, there are no general provisions that would explicitly regulate this issue and provide an answer as to who can bring an action in defence of the good repute of the Polish Nation. But it appears that IPN Act Art. 53o can give grounds to establish who has the right to bring an action in such cases. In these provisions, the legislator directly arbitrates who is eligible for compensation or damages adjudicated for the infringement of the good repute of the Republic of Poland and the Polish Nation. As mentioned above, any compensation or damages adjudicated in such cases are

[20] See J. Ignatowicz, [in:] *System prawa cywilnego*, t. 1: *Część ogólna*, W. Czachórski (editor-in-chief), S. Grzybowski (volume editor), Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 877.

[21] R. Taubenschlag, *Rzymskie prawo prywatne na tle praw antycznych*, Warszawa 1955, p. 318; see also R. Sohm, *Instytucje, historia i system rzymskiego prawa prywatnego*, red. L. Mitteis, L. Wenger (transl. by R. Taubenschlag, W. Kozubski), Warszawa 1925, p. 681, who, referring to T. Momsen, asserted that a fine collected by *actio popularis* was awarded to a claimant, society or was divided between a claimant and society.

[22] R. Taubenschlag, *op. cit.*, p. 318.

awarded to the State Treasury. That being so, it can be assumed that entities and government agencies which have the right to defend the good repute of the Polish Nation are the same as those that have the right to bring analogous action in defence of the good repute of the Republic of Poland (*stationes fisci* of the State Treasury whose activities are relevant to such claims, including the IPN, prosecutors and NGOs with the necessary standing).

Vesting the IPN with the standing to defend Poland's good repute under IPN Act Art. 53p, seems to be a special judicial capacity right.[23] Public interest underlying the protection of the good repute of the Republic of Poland and the Polish Nation and the contents of IPN Act Art. 53p, support the claim that the IPN has special judicial capacity in matters regulated by Art. 53o. The provisions of Art. 53p explicitly endow the IPN with the standing to be party to court proceedings and allow it to hold an independent position in court proceedings even after Supreme Court rulings which take a more cautious approach to the concept of special-court-of-law capacity.[24] Recognition that a given state organisational unit has special judicial capacity can be of significant importance in the context of court fees, namely exemption from the obligation to pay them pursuant to Art. 94 of the statute of 28 July 2005 on court fees in civil cases (Journal of Laws of 2019, item 785), which exempts the State Treasury from court fees. The jurisprudence of the Supreme Court recognises that State Treasury organisational units accorded special-court-of-law capacity can benefit from this exemption.[25]

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[23] See M. Dziurda, *Szczególna zdolność sądowa organów państwowych oraz państwowych jednostek organizacyjnych nieposiadających osobowości prawnej*, „Polski Proces Cywilny" 2010, nr 1, p. 50; P. Grzegorczyk, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Postępowanie rozpoznawcze*, red. T. Ereciński, Warszawa 2016, commentary to Art. 64, p. 434, Sec. no. 22, who do not write about Art. 53p of the IPN Act, but apply the title of special judicial capacity, in particular with regard to the power of bringing actions by the Central Anti-Corruption Bureau granted in the provisions of the Act of 21 June 1990 on the return of benefits wrongly obtained at the expense of the State Treasury or other state legal entities, Journal of Laws of 1990, no. 44, item 255 (hereinafter referred to as "the Act of 21 June 1990"). In civil proceedings instituted on the basis of the Act of 21 June 1990, the Central Anti-Corruption Bureau has a very similar role to that assigned to the Institute of National Remembrance under IPN Act Art. 53o–53q.

[24] See the resolution of the Supreme Court of 4 August 2006, III CZP 50/06, Legalis; M. Dziurda, *op. cit.*, p. 52.

[25] See the resolution of the Supreme Court of 8 January 2008, II PZP 8/07, Legalis.

Apart from the exemption granted to the State Treasury on the basis of Article 94 of the act on court fees in civil cases, a lawsuit aimed at protecting the good repute of the Republic of Poland and the Polish Nation based on Article 53o and 53p, is also free of fees on the basis of Article 95(1d) of the act on court fees in civil cases regardless of whether it is brought by the State Treasury or any other entity. Thus, the practical importance of the exemption of the State Treasury from the court fees for lawsuits aimed at protecting the good repute of the Republic of Poland and the Polish Nation based on Article 94 of the act on court fees in civil cases will be revealed if ever the legislator decides to eliminate the exemption based on Article 95(1d) of the act on court fees in civil cases.

Claims aimed at protecting the good repute of the Republic of Poland or the Polish Nation can be served on any civil law entity whose activity constitutes a threat to or infringes that repute. Particular note should be taken of authors of statements that may jeopardise the good repute of the Republic of Poland or the Polish Nation and entities which by law, may be liable for complicity in such matters. For example, under Art. 38(1) of the Press Law Act[26] of 26 January 1984, the author, editor, publisher or any other person that may be involved, are all liable for publishing illicit press material. However, it must be stressed that only property (financial) liability of those parties is joint and several. In the case of the other type of liability, non-financial one, each such party is liable for its own actions.

5. Local jurisdiction of Polish courts and jurisdiction in cases regarding protection of the good repute of the Republic of Poland and the Polish Nation

5.1. Domestic jurisdiction in regard of entities domiciled, habitually resident or with a registered office in Poland

If legal action in defence of the good repute of the Republic of Poland or the Polish Nation is taken against an entity that is domiciled, habitually resident

[26] Journal of Laws of 2018, item 1914.

or with a registered office in Poland, legal action can be taken in a Polish court (under Art. 1103 of the Code of Civil Procedure) which has jurisdiction over the defendant's place of residence or registered office (under Art. 28 and 30 of the Code of Civil Procedure) or at the court with territorial jurisdiction over the area where the offence occurred (under Art. 35 of the Code of Civil Procedure). Due to the tortious nature of liability for infringing the good repute of the Republic of Poland and the Polish Nation, the place of jurisdiction for the court should be determined in accordance with the provisions on general jurisdiction or on alternative jurisdiction applicable to tort claims. Since 7 November 2019, actions in defence of personal interests infringed by the mass media can be brought to any court that has jurisdiction over the claimant's place of residence or registered office (as per Art. 35^1 of the Code of Civil Procedure).

If Polish court jurisdiction can be justified, but the appropriate local court for dealing with the case cannot be determined by reference to the Code of Civil Procedure, then the Supreme Court, sitting in camera, may designate the court to adjudicate in the matter as laid down in Art. 45 and Art. 148(3) of the Code of Civil Procedure.

5.2. Basis for determining jurisdiction in defending the good repute of the Republic of Poland and the Polish Nation against entities domiciled, habitually resident or with a registered office outside of Poland

If a defendant is not domiciled, habitually resident or does not have a registered office in Poland, jurisdiction depends on whether the defendant is domiciled in a European Union Member State within the meaning of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal of the European Union 351/1, hereafter referred to as "Regulation 1215/2012"). Under Art. 4 of Regulation 1215/2012, persons of whatever nationality domiciled in EU Member States may be sued in the courts of those Member States. Non-nationals of EU Member States in which they are domiciled are subject

to the rules of jurisdiction applicable to the nationals of those Member States. Pursuant to Art. 5(1) of Regulation 1215/2012, persons domiciled in EU Member States may be sued in the courts of other Member States only under the rules set out in Sections 2 to 7 of Chapter II "Jurisdiction" of this Regulation. Under Art. 6(1) of Regulation 1215/2012, if the defendant is not domiciled in an EU Member State, the jurisdiction of the courts of each Member State shall, subject to Art. 18(1), 21(2), 24 and 25 of this Regulation, be determined by the law of that Member State.

5.2.1. Domestic jurisdiction in protection of the good repute of the Republic of Poland and the Polish Nation cases in light of Regulation 1215/2012

When an entity to be sued for impugning the good repute of the Republic of Poland or the Polish Nation is domiciled (or has a registered office) in an EU Member State pursuant to Art. 63 of Regulation 1215/2012, the jurisdiction of Polish courts should be established on the basis of Art. 4(1), Art. 7(5) or Art. 7(2) of Regulation 1215/2012. Under Art. 7(2) of Regulation 1215/2012 persons domiciled in EU Member States may be sued in other Member States in matters relating to tort or similar (*delict* or *quasi-delict*) in the courts appropriate to the places where the harmful event occurred or may occur. Due to the similar wording of Art. 7(2) of Regulation 1215/2012 and Art. 5(3) of Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 012, 16/01/2001 P. 0001–0023, hereafter referred to as "Regulation 44/2001") and Art. 5(3) of the Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 27 September 1968 (Official Journal of the European Communities C 027, 26/01/1998, P. 0001–0027, hereafter referred to as "the Brussels Convention of 1968"), case law that developed before Regulation 1215/2012 had come into force remains valid, in particular, the jurisprudence of the European Court of Justice and doctrinal opinions regarding the interpretation of the jurisdictional link related to the place where the

harmful event occurred or may occur.[27] According to the interpretation of jurisdictional link adopted in CJEU jurisprudence and doctrine, it should be understood as the place where the event being the cause of the damage took place and also the place where the damage occurred.[28] If these events take place in different states, then it is for the claimants to choose the trial court.[29] This position was clarified during press cases in which the CJEU deemed that the term "place where the harmful event occurs" in press torts of a cross-border nature should be understood as the place where the publisher of the press material has its seat or where the publication was disseminated and where the personal interests of the claimant could have been infringed.[30] This means that where the defendant is domiciled in an EU Member State and the good repute of the Republic of Poland or the Polish Nation was infringed in a press publication, the courts of the state in which the publisher is seated or in which the publication was disseminated and where damage is deemed to have arisen shall have jurisdiction. It seems that when assessing whether

[27] The thesis on the validity of the case law formed on the basis of Art. 5(3) of the Brussels Convention of 1968 in relation to Art. 5(3) of Regulation 44/2001 was formulated in particular by P. Rylski, *Pojęcie „miejsce zdarzenia wywołującego szkodę" w sprawach deliktowych na podstawie art. 5 pkt 3 rozporządzenia nr 44/01*, „Studia Iuridica" 2007, nr 47, p. 223.

[28] The judgment of the CJEU from 30 November 1976, Case 21/76, *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, pp. 1747–1748, Sec. no. 19 and 24, and later jurisprudence of the CJEU, in which the interpretation of Art. 5(3) of the Brussels Convention of 1968 contained in the ruling in the Mines de Potasse d'Alsace case was sustained: the judgment of the CJEU from 5 February 2004, C–18/02, *DFDS Torline A/S v. SEKO Sjöfolk Facket för Service och Kommunikation*, par. 40 of the explanation; the judgment of the CJEU from 16 July 2009, C–189/08, *Zuid Chemie BV v. Philippo's Mineralenfabriek NV/SA*, par. 23 of the explanation, E. Skibińska, *Jurysdykcja a „miejsce, gdzie nastąpiło zdarzenie wywołujące szkodę"*, „Monitor Prawniczy" 2009, nr 17, p. 917; the judgment of the CJEU from 25 October 2011, joined cases C–509/09, *eDate Advertising GmbH v. X* and C–161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, par. 41 of the explanation, E. Skibińska, *Jurysdykcja. Naruszenie dóbr osobistych*, „Monitor Prawniczy" 2011, nr 23, p. 1243; the judgment of the CJEU from 16 May 2013, C–228/11, *Melzer v. MF Global UK Ltd*, par. 25 of the explanation, E. Skibińska, *Jurysdykcja szczególna*, „Monitor Prawniczy" 2013, nr 12, pp. 620–621; see also P. Rylski, *op. cit.*, p. 226; K. Weitz, *Europejskie prawo procesowe cywilne*, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, red. A. Wróbel, Kraków 2005, p. 512.

[29] The judgment of the ECJ from 30 November 1976, Case 21/76, *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, p. 1748, Sec. no. 25.

[30] The judgment of the ECJ from 7 March 1995, C–68/93, *Fiona Shevill et al. v. Presse Alliance S.A.*, pp. 1–462, Sec. no. 33; see P. Rylski, *op. cit.*, p. 234; M. Świerczyński, *Jurysdykcja krajowa w zakresie zobowiązań deliktowych*, „Monitor Prawniczy" 2002, nr 15, pp. 694–695.

the second jurisdictional link is applicable, it is necessary to examine whether damage has actually occurred, and in consequence, whether there has been an infringement of interests,[31] and whether the damage was real or only potential. The possibility cannot be excluded that in some cases the second of the above-mentioned jurisdictional links will justify the jurisdiction of Polish courts. In particular this could be the case where press materials are available in Poland *via* the Internet.

5.2.2. Domestic jurisdiction regarding protection of the good repute of the Republic of Poland and the Polish Nation in light of the Code of Civil Procedure

Where the defendant is not domiciled in an EU Member State within the meaning of Regulation 1215/2012, jurisdiction is determined on the basis of domestic law. The Polish provisions referred to in Art. 6(1) of Regulation 1215/2012 that are relevant to this review, are contained in Art. 1103^7(2) or (3) of the Code of Civil Procedure. Pursuant to Art. 1103^7(2) of the Code of Civil Procedure, court cases other than those mentioned in Art. 1103^1–1103^6 of the Code of Civil Procedure (concerning matrimonial matters, relations between parents and children, alimony claims, labour law relations, insurance claims and consumer contracts), fall under the domestic jurisdiction of Polish courts where they concern liability which results from an event other than a legal act that occurred in the Republic of Poland. On the other hand, under Art. 1103^7(3) of the Code of Civil Procedure, Polish courts have jurisdiction

[31] See the judgment of the CJEU from 25 October 2011, the joined cases C–509/09, *eDate Advertising GmbH v. X* and C–161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, par. 41 and par. 52 of the explanation, in which the CJEU assessed that Art. 5(3) of Regulation 44/2001 must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an Internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability in respect of all the damage caused, either before the courts of the Member State where the publisher of that content is established or before the courts of the Member State where the centre of his interests is based. Also, instead of an action for liability in respect of all the damage caused, that person may bring his action before the courts of every Member State on whose territory content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused on the territory of the Member State of the court, before which a lawsuit was brought.See E. Skibińska, *Jurysdykcja. Naruszenie…*, p. 1243.

over cases concerning the activities of defendants' firms or branches located in the Republic of Poland.

The jurisdictional link of "place of occurrence of liability not resulting from a legal act" in Art. 1103[7](2) of the Code of Civil Procedure, is understood in Polish procedural law doctrine as the jurisdictional link mentioned in Art. 7(2) of Regulation 1215/2012 and its counterparts in Regulation 44/2001 and the Brussels Convention of 1968.[32] This jurisdictional link is understood likewise in the more recent Supreme Court case law.[33] Determination of the place where liability arose should be based upon law applicable to that liability.[34] There may be doubts as to the basis for determining the law applicable to determining the place where liability arose for infringing the good repute of the Republic of Poland and the Polish Nation. The manner and scope of reference to the protection of personal interests under IPN Act Art. 53o and their related consequences as outlined above, may imply that the exclusion – under Art. 1(2)g of Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (Official Journal of the European Union L 199 of 2007, p. 40, hereafter referred to as "Rome II Regulation") – does not apply to

[32] T. Ereciński, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 6: *Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, red. T. Ereciński, Warszawa 2017, commentary to Art. 1103[7], p. 121, Sec. no. 3; D. Olczak-Dąbrowska, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz do art. 506–1217*, red. T. Szanciło, Warszawa 2019, commentary to Art. 1103[7], p. 1447, Sec. no. 3 referring directly to judgments by the CJEU; B. Trocha, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz do art. 730–1217*, red. J. Jankowski, Warszawa 2019, commentary to Art. 1103[7], p. 1553, Sec. no. 11; K. Weitz, *Czy sądem, w którego okręgu nastąpiło zdarzenie wywołujące szkodę, jest tylko sąd, w którego okręgu zlokalizowane jest działanie lub zaniechanie będące przyczyną szkody?*, „Polski Proces Cywilny" 2011, nr 1, pp. 142–143; K. Weitz, *Wpływ prawa Unii Europejskiej na krajowe prawo procesowe cywilne*, „Kwartalnik Prawa Prywatnego" 2019, nr 2, p. 325; a narrower interpretation (as a place in which the legal event giving rise to the obligation occurred, in particular the place where the tort was committed) of this connection seems to be advocated by M.P. Wójcik, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz do art. 730–1217*, red. A. Jakubecki, Warszawa 2017, commentary to Art. 1103[7], p. 623, Sec. no. 3.

[33] Resolution of the Supreme Court of 15 December 2017, III CZP 82/17, Legalis (explanation); see also resolution of the Supreme Court of 15 December 2017, III CZP 91/17, Legalis (explanation).

[34] See decision of the Supreme Court of 5 January 2001, I CKN 1180/00, Legalis; decision of the Supreme Court from 19 June 2007, III CSK 444/06, Legalis; decision of the Supreme Court of 13 March 2008, III CSK 293/07, Legalis.

liability for infringing the good repute of the Republic of Poland and the Polish Nation. If it is deemed reasonable to question the qualification of the good repute of the Republic of Poland and the Polish Nation as personal interests, as prompted by the wording of IPN Act Art. 53o, then it should be acknowledged that the exclusion under Art. 1(2)g of the Rome II Regulation is inapplicable to determining the law applicable to liability for damage to the good repute of the Republic of Poland and the Polish Nation. In consequence, the Rome II Regulation will constitute the basis for determining the law applicable to this liability. But it seems that this may be questioned in light of arguments arising from a systemic and functional interpretation. Firstly, Art. 30(2)of the Rome II Regulation makes it possible to fully reconstruct the aim and scope of the exclusion contained in its Art. 1(2)g. It clearly follows from Art. 30(2) of the Rome II Regulation that this exclusion came further to awareness that special conflict-of-law rules needed to be formulated in order to determine more adequately the law applicable to obligations arising from violations of privacy and rights relating to personality and, in particular, to recognising rules relating to freedom of the press and freedom of expression in the media to a greater extent than those of the general conflict-of-law norms contained in Art. 4 of the Rome II Regulation.[35] These rules are equally necessary, if not more so, for determining the law applicable to obligations arising out of the infringement of the good repute of the Republic of Poland and the Polish Nation. Secondly, an argument for having these obligations excluded under Article 1(2)g of the Rome II Regulation, is supported by the fact that under Art. 16 in conjunction with Art. 20 of the Polish Private International Law Act of 4 February 2011 (Journal of Laws of 2015, item 1792, hereafter referred to as "PIL of 2011"), there are conflict-of-law rules directly related to the law applicable to the protection of personal interests, especially in regard of their violation in the media. Consequently, it should be considered more justified to determine where, for the purposes of Art. 1103^{7}(2) of the Code of Civil Procedure, liability for infringing the good repute of the Republic of Poland

[35] More on the scope and reasons for the exclusion contained in letter g) of Art. 1(2) of the Rome II Regulation: M. Pilich, *Prawo właściwe dla dóbr osobistych i ich ochrony*, „KwartalnikPrawaPrywatnego" 2012, nr 3, pp. 603–608.

or the Polish Nation arose, on the basis of the applicable law as determined by Art. 16 in conjunction with Art. 20 of the PIL of 2011.

This means that if, in a case for the protection of the good repute of the Republic of Poland or the Polish Nation, the defendant is not domiciled in any EU Member State, as per Art. 1103^7(2) of the Code of Civil Procedure, the courts of the state where the cause of the damage arose and also where it actually occurred, shall have jurisdiction. It appears that where the infringement was committed by the mass media, jurisdiction can be determined by considering, *mutatis mutandis*, the position of the CJEU as expressed in *Fiona Shevill et al. v. Presse Alliance S.A., eDate Advertising GmbH v X* (C–509/09) and *Olivier Martinez and Robert Martinez v MGN Limited* (C–161/10). In light of these rulings, the jurisdiction belongs to the courts of the state where the publisher of the press material has its seat or where the publication was disseminated and the claimant's personal interests may have been infringed. Apart from that, in protecting the good repute of the Republic of Poland or the Polish Nation, if the defendant is not domiciled in an EU Member State, but has a firm or a branch in Poland, Polish courts will have jurisdiction under Art. 1103^7(3) of the Code of Civil Procedure.

6. Outline of conflict-of-law rules – Art. 53q of the IPN Act

IPN Act Art. 53q, the last of the three provisions mentioned above to be discussed, is a conflict-of-law rule. Since, in accordance with unwritten conflict of law rules of the second degree, delimiting the spheres of application of conflict-of-law rules of the first degree which define the spheres of application of substantive norms of different states, whereby their courts first apply their own conflict-of-law rules,[36] IPN Act Art. 53q will have to be taken into account when determining the applicable law in cases heard by Polish courts. Pursuant to IPN Act Art. 53q, IPN Act Art. 53o and 53p are relevant irrespective

[36] A. Mączyński, *Stosowanie norm kolizyjnych obcego prawa prywatnego międzynarodowego*, [in:] *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi*, red. A. Matlak, S. Stanisławska-Kloc, Warszawa 2013, p. 574; M. Pazdan, *Prawo prywatne międzynarodowe*, Warszawa 2009, p. 47, Sec. no. 49; K. Przybyłowski, *Prawo prywatne międzynarodowe: część ogólna*, Lwów 1935, pp. 85–86.

of which law is applicable. It means that the conflict-of-law rules resulting from this provision are of a unilateral and specific nature. Because of IPN Act Art. 53q's deliberate wording, there is no need to invoke Art. 8(1) of the PIL of 2011 to justify the application of IPN Act Art. 53o and 53p, regardless of any foreign laws whatever that may have been specified by the general conflict-of-law rules.[37] IPN Act Art. 53q does not unequivocally answer the question whether, in the light of Art. 16 in conjunction with Art. 20 of the PIL of 2011,[38] in cases where the applicable law is a foreign law, its application is excluded or whether it can be applied alongside IPN Act Art. 53o and 53p. The second consideration may be supported by the systemic interpretation of IPN Act Art. 53q that takes into account the solution adopted in Art. 8(1) of the PIL of 2011. In such cases, however, the Polish and foreign laws may conflict, and the methods of their resolution diverge in conflict of law doctrine.[39]

It seems that IPN Act Art. 53q can be applied by foreign courts in exceptional circumstances, where it is permissible for a given state's court to apply foreign conflict-of-law rules, i.e. rules different to those applicable in the state where the court is based.[40] The possibility to invoke IPN Act Art. 53q

[37] See M. Tomaszewski, [in:] *Prywatne prawo międzynarodowe. Komentarz*, red. J. Poczobut, Warszawa 2017, commentary to Art. 8, p. 239, Sec. no. 13.

[38] Article 20 of the Private International Law of 2011: "The provisions of Art. 16 shall apply *mutatis mutandis* to the protection of personal interests of legal persons." Article 16 of the PIL of 2011: "1. The personal rights of a natural person shall be governed by the law of his nationality. 2. A natural person whose rights of personality are threatened by the violation or have been adversely affected may claim protection under the law of the country in whose territory the event giving rise to the risk of infringement or to the violation took place, or under the law of the country where the effects of the infringement occurred. 3. If the breach of rights of personality of a natural person took place in the mass media, the right to reply, correct, or employ other similar safeguard measures shall be subject to the law of the country in which the broadcaster or publisher is established or has his habitual residence."

[39] See M.A. Zachariasiewicz, [in:] *Prywatne prawo międzynarodowe. Komentarz*, red. M. Pazdan, Warszawa 2018, commentary to Art. 8, p. 163, Sec. no. 32, which questions the rule that one's own country's mandatory overriding provisions prevail and argues that in each case the Polish and foreign imperative provisions should be compared in order to balance interests, rights and values. Cf. M. Tomaszewski, *op. cit.*, in whose opinion, under Art. 8(1) of the PIL of 2011, Polish imperative provisions prevail over "normally" applicable foreign law.

[40] See A. Mączyński, *op. cit.*, pp. 571–595.

by the courts of other states may depend on whether there is an equivalent to Art. 8(2)[41] of the PIL of 2011 within the conflict-of-law rules that they apply.

7. Summary

IPN Act Art. 53o stipulates that its object is to protect the good repute of the Republic of Poland and the Polish Nation, and the protection of personal interests afforded by the Civil Code is applicable accordingly. This assertion, that provisions for the protection of personal interests shall only apply to the protection of the good repute of the Republic of Poland and the Polish Nation accordingly, supports the conclusion that **this** good repute is not considered to be a personal interest in the understanding of Civil Code Art. 23. In light of the Preamble to the Constitution of the Republic of Poland, the concept of the Republic of Poland refers predominantly to the present-day Polish state, whose foundations and political structures are defined in the Constitution of 1997. It cannot be ruled out that IPN Act Art. 53o will be invoked in defence of the good repute of the First and Second Republics, especially in those instances where their traditions and legacies still remain extant and give shape to the Third Republic of today. In light of the Preamble to the current Constitution of the Republic of Poland, the Polish Nation should be understood as all citizens of the Republic of Poland. This term primarily but not exclusively refers to all individuals who have a public and legal bond of citizenship with the Republic of Poland.

The substantial body of Polish court rulings and legal doctrine regarding the protection of personal interests *qua* the honour of natural persons and repute of legal entities, may find application, *mutatis mutandis*, in defending the good repute of the Republic of Poland and the Polish Nation. In this context, in protection of reputation (honour) cases, it is of crucial importance to

[41] Article 8(2) of the PIL of 2011: "When applying the law governing the legal relationship, effect may be given to the mandatory provisions of the law of another country with which the given legal relationship has a close connection, if under the law of the latter country those provisions are applicable irrespective of the law governing the given relationship. In considering whether to give effect to those mandatory provisions, due regard must be given to their nature and purpose and to the consequences of their application or non-application."

distinguish between descriptive and evaluative statements infringing upon honour, and to differentiate between their significance as a basis for liability for the infringement of personal interests. Given the tension between the protection of personal interests, including reputation (honour), and freedom of expression of opinions (as guaranteed by Art. 54(1) of the Constitution of the Republic of Poland), freedom of artistic creativity, freedom of scientific research and dissemination of its fruits, freedom to teach (as guaranteed by Art. 73 of the Constitution of the Republic of Poland), it is of vital importance to seek striking an optimal balance between these values.

IPN Act Art. 53o.2 and 53p do not exhaustively list the entities with capacity to sue for infringement of Poland's good repute. This means that court action in defence of that repute may be taken not only by NGOs acting within the scope of their activities as determined by their founding acts, the IPN or by prosecutors, but also by any organisational State Treasury units without legal personality (*stationes fisci*) whose activities accord with such claims. Entities and government agencies have the same right to take action in defence of the good repute of the Polish Nation as those that have the right to take action in defence of the good repute of the Republic of Poland (*stationes fisci* of the State Treasury whose activities accord with such claims, including the IPN, prosecutors and NGOs acting within the limits of their statutory activities).

Where defendants are domiciled or have registered offices in other EU Member States (as per Art. 63 of the Regulation 1215/2012) in Polish state or nation good repute infringement cases, the jurisdiction of Polish courts should be established on the basis of Art. 4(1), Art. 7(5) or Art. 7(2) of Regulation 1215/2012. If this infringement came in a press publication, and the defendant is domiciled in an EU Member State, the courts of the state where the publisher has its seat, or where the publication was disseminated and damage may have arisen, shall have jurisdiction. When assessing the applicability of the second of the two jurisdictional links, it seems necessary to examine whether damage had actually occurred and, in consequence, whether the infringement of interests which could cause this damage was real and not just potential. It cannot be ruled out that in some cases the second of these jurisdictional links would justify the jurisdiction of Polish courts.

If the defendant is not domiciled in an EU Member State within the meaning of Regulation 1215/2012, court jurisdiction is determined by domestic law.

In Poland, this issue is regulated by Art. 1103^7(2) or (3) of the Code of Civil Procedure. Under Art. 1103^7(2) of the Code of Civil Procedure, the courts of the state in which the cause of the damage arose, and also the place where it occurred, have jurisdiction over the case. According to the interpretation adopted in the doctrine of international civil procedures and in more recent Supreme Court case law on infringements committed by the mass media, the applicable jurisdiction under Art. 1103^7(2) of the Code of Civil Procedure can be established by considering *mutatis mutandis* the position of the CJEU as expressed in *Fiona Shevill et al. v. Presse Alliance S.A.*, *eDate Advertising GmbH v. X* (C–509/09) and *Olivier Martinez and Robert Martinez v. MGN Limited* (C–161/10). In light of these rulings, the courts of the state where the publisher of the press material has its seat, or the place where the publication was disseminated and where damage to the personal interests of the claimant could have occurred, have jurisdiction. If, in an action brought to protect the good repute of the Republic of Poland or the Polish Nation, the defendant is not domiciled in an EU Member State, but has a company or a branch in Poland, Polish courts will have jurisdiction under Art. 1103^7(3) of the Code of Civil Procedure.

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KLAUS BACHMANN

Civil Law and the Amendment of German and Polish Memory Laws

This article compares the role of civil lawsuits for the ensuing legislation and jurisprudence concerning Holocaust denial and similar offenses in Germany and Poland, leaving aside the former German Democratic Republic (GDR). In 1990, the GDR acceded to the Federal Republic of Germany (FRG) and, therefore, took over the FRG laws, including the one legislation and jurisprudence concerning Art. 130 of the German Penal Code. (StGB), which, until then, contained almost all the relevant provisions banning Holocaust denial. The article concentrates on several core issues:

- whether amendments of legislation occurred due to a top-down policy, initiated by the government, the ruling party's or coalition's members of parliament or the president or as a bottom-up development, triggered by social pressure, media coverage or new jurisprudence;
- whether the civil law elements in memory laws aimed at the protection of minority (victim or perpetrator) groups or other legal values like sovereignty, unity, social, ethnic, political or national unity, reconciliation or other overarching values;
- how much the aforementioned regulations potentially limit other rights and freedoms, especially the freedom of science, speech and the media and eventually also fair trial safeguards.

1. Civil law and the ban on Holocaust denial in Germany

Article 130 StGB stems from the German Empire (*Kaiserreich*), but then its edge was directed first and foremost against Social Democracy and its calls for "class struggle." It was meant to punish perpetrators, "who publically incite different classes of the population to commit violence against each other in a way, which endangers public peace." It is worth noticing the undemocratic and somehow fuzzy concept of public peace, which was already at the root of the StGB 130 legislation and would later surface again in Holocaust denial cases. Violations of Art. 130 StGB could then be punished by a fee or imprisonment of up to two years.[1] The article was also convenient for the post-war West German authorities, because in the Western part of the country, anti-communism was just as prevalent as anti-fascism in the Eastern part and the old article could easily be used against West German communists. Social Democrats (*Sozialdemokratische Partei Deutschlands*, SPD) had no reason to fear as far as Art. 130 was concerned. They were in opposition, however, they constituted part of the mainstream party landscape. During the party congress in 1959 in Bad Godesberg, the SPD withdrew the notion of "class struggle" from its program and accepted market economy as a basis for post-war politics. Until then, the mere evocation of "class struggle" in the party program did not lead to prosecution, because it did not fulfil the requirement to disturb "public peace." Instead, the article could be directed against the radical left, first the Communist Party of Germany (*Kommunistische Partei Deutschlands*, KPD) and later, after the KPD's ban in 1956, against the German Communist Party (*Deutsche KommunistischePartei*, DKP) and smaller Maoist and Trockist parties. Therefore, it comes as no surprise, that Art. 130 StGB remained in force unchanged until 1960. It was a civil case, which triggered the first far-going amendment.

During the early 1950s, Hans Nieland, a businessman from Hamburg had distributed thousands of copies of a pamphlet, in which he blamed "international Jewry" for the outbreak of World War II and for "financing Hitler," denounced them as "the devils of the Earth," accused them of planning to instigate another war and of spreading "lies about six million Jews being killed

[1] Art. 130 of *Reichsstrafgesetzbuch* (Criminal Code of the German Reich) of 15 May 1871.

by Germans." Nieland had sent the pamphlet to politicians and thus provoked investigations. But in addition to the public prosecutor, a Jewish member of the Landtag also filed a private libel lawsuit against Nieland.[2]

Members of the Jewish community in Hamburg did the same, basing their claim on Art. 185 of the Criminal Code, but the court of first instance found that Jews from Hamburg were not entitled to sue, because the pamphlet had targeted "international Jewry," and the plaintiff had not proven to be one of its members. The second instance court upheld the verdict, then it was indirectly quashed by the Federal Court of Justice (*Bundesgerichtshof*, BGH).[3] In a separate procedure, the BGH had to rule about the legality of confiscating the underlying propaganda material and found the content of the material not only insulting, but undermining the fundaments of the Republic and the constitutional order.[4]

The Nieland case, as the proceedings in Hamburg were quickly labelled, became the trigger of an amendment, which the Bundestag unanimously approved in May 1960, replacing the formula criminalizing incitement to violence against "classes" by a broader clause, forbidding calls for hatred and violence against "parts of the population." The judges forbade "assaulting the human dignity of others" if such assaults were associated with incitement to hate, violence, offense, to utterances of despise or slander. Punishment could then reach from three months up to five years, the possibility of imposing a fee was abolished. The new article had become more individualistic. Opposite to the old article not only groups were protected by the law, but also everybody's "human dignity."

There were also two other relevant articles: Art. 131, which forbade the production and dissemination of publications[5] inciting racial hatred and Art. 185, which made "insult" punishable, no matter, whether true or not if the insulting statement was offensive. Whereas violations of Art. 130, 131 and 185 could be prosecuted based on a decision of the prosecution, violations of the

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[2] E. Stein, *History against Free Speech: The New German Law against the Auschwitz – and Other – Lies*, "Michigan Law Review" 1986, vol. 85(2), p. 282.

[3] E. Stein, *op. cit*., p. 283.

[4] BGH jugdment of 28 February 1959; E. Stein, *op. cit*., p. 283.

[5] The legal definition of "publication" changed (in the law and in jurisprudence) over time and later also included radio and TV broadcasts as well as dissemination via the Internet.

"insult"-article could only be punished at a request of a person, who was able to show it had been insulated personally. Before the war, the courts denied Jews the right to file insult lawsuits on behalf of their community. Catholics could instigate prosecutions when Catholicism or the Catholic church had been insulted, protestants could do the same, but Jews were not regarded as a group that enjoyed the benefit of legal protection under Art. 185. This changed after the war, when in 1979, the BGH argued the Holocaust had created such a strong bond among German Jews, that it had made them a group entitled to instigate insult lawsuits under Art. 185. This was a spectacular departure from the pre-war custom, but it left those, who wanted to invoke Art. 185 against Holocaust denial with the burden to prove their Jewishness.[6] The courts of the lower instances had dismissed requests not only because of the group-argument, but also because the plaintiffs could not prove to be Jewish. The BGH quashed this argument in a stunning decision, which replicated concepts from the Nuremberg Laws, which had legally excluded Jews from German society during the Third Reich. The BGH judges argued the plaintiff had been a case of "mixed race" (*Mischling*) and therefore was entitled to file an insult lawsuit. That replaced the existing quagmire by a new one: instead of proving their Jewishness according to current criteria of Jewishness, plaintiffs had to show, they fell or would have fallen under the Jewishness criteria of the Nuremberg Laws. Otherwise, they would not be able to instigate prosecutions for insult in cases of anti-Semitic propaganda and Holocaust denial. This weird resurrection of the Nuremberg Laws in jurisprudence was unacceptable for all sides of the denial-debate in the Bundestag and the Bundesrat, but all attempts, to find a new solution failed because of the Länders' resistance in the Bundesrat and the sudden downfall of the coalition between the Social Democrats and the Liberals, which triggered snap elections.[7] There was also opposition against a new law against Holocaust denial on the part of conservative politicians, who demanded any new bill should not only criminalize Holocaust denial, but also denial of the German

[6] BGH judgment of 18 September 1979.

[7] For all bills, which had been submitted to the Bundestag and Bundesrat, these events were fatal, because the legislation procedure was stopped by the dissolution of the parliament and had to start from scratch after the elections.

population's expulsion from Eastern Europe at the end of the war and in the immediate post-war period.[8]

The result of the 1983 elections enabled the CDU/CSU and the Liberals to form a center-right government. The SPD was in the opposition, but was suddenly confronted to a new, leftist party, the Green Party, which had entered the Bundestag for the first time and had transformed the post-war three-party system into a four-party one. The original proposal, made by the Social Democrats at a time when they still had had the majority in the Bundestag, had no chance to be adopted any more. Negotiations about a compromise, which would criminalize Holocaust denial, led to a concept which did not aim at amending Art. 130, but at making "insult" under Art. 185 a crime which could be prosecuted without any private request of an individual. Under these circumstances, a case like the one which had inclined the BGH to invoke notions from the Nuremberg Laws could then be prosecuted just like any other crime. In the polarized political climate of the 1980s, when conservatives tried to balance the Holocaust against atrocities committed against Germans and leftists saw these attempts as relativizing the atrocities committed under Nazi rule, this compromise was much too simple. Conservative MPs demanded the new version of Art. 185 also to criminalize (without the need of private petitions) denial of other crimes, "committed by other regimes of violent rule."[9] In August 1985, the amendment was adopted by the necessary majority of the Bundestag and the private request – formula disappeared from Art. 185. But contrary to the BGH, which had required a plaintiff to be a Jew but had not required him to have suffered personally, the new law introduced the need for the prosecutor to show that an incriminated statement insulted a person as a member of a group and because he or she

[8] This kind of weighing the Holocaust against the expulsion of Germans (*Vertreibung der Deutschenausdem Osten*), which by some was regarded as a genocide, too, was quite popular in post-war West German debates about history and fiercely rejected by left-wing and liberal intellectuals.

[9] This is an imprecise translation of the German notion of *Gewaltherrschaft*, which describes a government that bases its rule on violence and despotism (rather than representation and the rule of law). The term was often used as an abstract reference to the Third Reich, but conservative politicians used it also as an overarching notion for communist regimes and the proposed insertion of the phrase "other violent regimes" pointed to their intention to criminalize the denial of communist crimes, too.

belonged to a group which had been persecuted under a "regime of violent rule." This set a kind of sunset-clause on Art. 185, preventing prosecution for insult, if the insulted group had never included or did not include any longer (e.g. the affected person had died in the meantime) people who had been personally persecuted.[10]

After reunification, Art. 130 StGB underwent several amendments, among others, the inclusion of the "four protected groups" from the Genocide Convention and a ban to deny, praise or justify international crimes, as well as a new definition of "publishing," which was tailored in accordance with the development of electronic media and the Internet. It is now also possible to file a civil request for criminal prosecution of insult if a person was insulted as a member of a group persecuted by the Nazi regime. However, there is no need to file a request if the insult was public – in that case the prosecutor must proceed on his own, but not against the will of the insulted person. Art. 194(2) also facilitates such lawsuits regarding insult against deceased persons, whose relatives can file (and prevent) lawsuits.

The amendment of Art. 130 StGB (and later Art. 185) was a bottom-up development, triggered by politically and socially unwanted court jurisprudence, whose attempts to bolster civil claims by Jewish victims and victim groups led to unsatisfactory legal constructions, which were then rendered obsolete by new legislation. The protection of minority (victim) groups was at the helm of these amendments and the wish to let the state assume their protection was the lawmakers' main motive. However, as the BGH verdict in the Nieland case shows, German memory laws' edge was not only directed at the protection of minority groups, but perceived the ban on Holocaust denial and Nazi propaganda as a way to protect the constitutional order. In later years, Art. 130 and 131 StGB would also become provisions sheltering German national identity from attacks by radical right-wing authors and organizations, in so far as responsibility for the Holocaust and the ban of anti-Semitism became – in the light of public discourse, media coverage and

[10] This had been the intention of the respective Bundestag's committee (*Ausschuss*), but the wording in the law which finally was adopted was not that clear; E. Stein, *op. cit*., pp. 312–313. The new law also required the group to be part of the German population at the time of the insult, thus, preventing prosecutions in cases of groups of foreigners.

jurisprudence – elements of the German *raison d'état* and legal values, which the memory laws were expected to protect.

Civic organizations, NGOs, associations do not have any role in the punishment of Holocaust denial and insult or defamation connected to the denial of past atrocities. In Germany, they only can act in so far as they represent former victims of the Nazi regime. With the post-1960 amendments of Art. 130 StGB, the state took over the burden to protect victim groups, which initially had rested on civil proceedings, giving victims veto power, to block indictments in defamation cases.

The impact on competing rights and freedoms was minor, due to the restrictive provisions of the post-1960 amendments and the way courts applied them. Until today, mere Holocaust denial remains unpunished, if there is no likelihood that "public peace" will be disturbed (e.g. because denial was not public) and if the context and the perpetrator's intentions do not indicate a defendant's bad faith (e.g. if there is no proof he or she intended to attack the constitutional order, praise Nazi rule or inflame hate against others).

2. Civil law and the Polish IPN law amendments

Because of the scope of the novelization of the "Law on the Institute of National Remembrance" (IPN) and the complicated changes, which were triggered by international protests and its revocation, this part will only deal with the role of civil lawsuits after the most recent changes, i.e. the partial revocation of the law by parliament and the changes triggered by the Constitutional Court. In other words, this part of the article will answer the following question: Which civil aspects of the Polish IPN law are still relevant today?

There have been many comments and analyses in the press according to which the whole law was repelled because of the Sejm decision and the Constitutional Court verdict, but this is not the case. Due to the specific construction of the law, there are still left-overs, which the public prosecutor and civic organizations can use. In other words: after the law was repelled and the Constitutional Court declared its "Ukrainian" part unconstitutional, the law did not return to the *status quo ante* of 1998. Regarding the IPN law's

Ukrainian issues, the law is now more punitive and less clear and transparent than ever.[11]

The legal construct, which survived the partial retraction of the IPN law and the Constitutional Court verdict rests on a definition of crimes, whose denial the law bans. These are:

- Nazi crimes (as defined in previously enacted Polish laws),
- communist crimes (which Polish legislation had defined before, including the IPN law's 1998 version),
- crimes of "members of Ukrainian organisations collaborating with the Third Reich." And here, the law does neither enumerate these organizations, nor does it provide a definition of "collaboration with the Third Reich." The Constitutional Court abolished the crimes of "Ukrainian nationalists," which the President had found to be misleading,
- other crimes constituting crimes against peace, crimes against humanity and war crimes. These refer to international crimes as enshrined in the statutes of International Criminal Tribunals and the Convention on the Prevention and Punishment of the Crime of Genocide, though this link also triggered many doubts among lawyers,[12]
- other repressions (from communist times, as defined by previous Polish laws).

After fierce criticism from media, civic organisations, and the US and Israeli governments, Polish lawmakers abolished the punitive provisions which criminalized "accusations of the Polish Nation and the State" which were "contrary to the facts" and "falsely ascribed guilt to the Polish Nation and the State" for crimes committed by others and for "otherwise diminishing

[11] This is despite the President's and the Constitutional Court's stated intent to erase the unclear provisions of the law. Both argued (the President while sending the law to the Constitutional Court and the latter in his verdict) many of the notions invoked in the law to be imprecise and misleading. The Constitutional Court actually erased some of them ("Ukrainian nationalists" and "Easter Lesser Poland") but failed to either erase some others ("Wolhynia," "Ukrainian organizations collaborating with the Third Reich") and failed to render the entire legal construction more precise (and in line with International Criminal Law definitions of concepts invoked in the law).

[12] K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, "Polish Yearbook of International Law" 2017, vol. 37, pp. 275–286.

the guilt of the real perpetrators." The hasty amendment satisfied the US and Israeli governments, but it left the "Ukrainian provisions" in the law, which is now in force. And because the exception clause, which excluded punishment for deeds undertaken in the framework of "science and art," had been part of the revoked law provisions, the "Ukrainian provisions" can now also be applied against deniers of crimes committed by "Ukrainian nationalists" if they act in the framework of "art and science."

For this article's purpose, it is more important to look at the civil law elements of the new provisions. According to Art. 53o, "lawsuits concerning the protection of the good name of the Republic or the Polish Nation can be filed by a civic organisation in the framework of its statute. The compensation shall be paid to the state budget." This provision somehow entrusts the state's and the nation's (!) protection to civic organisations. While German lawmakers relieved civil plaintiffs from the burden of Art. 185 proceedings in Holocaust denial cases, the Polish state allows civic organisations to step into proceedings whose aim is to protect the state and nation's reputation. Art. 53p also mentions the Institute of National Remembrance as a possible plaintiff, entitled to take over such cases, but only after pointing to civic organisations. The compensation, which civic organisations obtain due to this privatized protection of state and nation must be paid into the state treasury. The third pillar of the new legislation are the penal provisions, which anticipate fines and prison sentences of up to three years for "public and against the facts" denial of the crimes enumerated in the crime definitions. Because the exception clause for "science and art" vanished together with the provisions rejected by the US and Israel, denial of "crimes committed by Ukrainian organizations collaborating with the Third Reich" is now punishable even if it occurs in artwork or science.[13]

[13] The timely and territorial scope of the IPN law's "Ukrainian provisions" also constitutes a reason for lawyers' headaches. The crimes of Ukrainian collaborationist organizations, which cannot be denied under the new law, stretch from 1925 to 1950 and include something the lawmakers called "the extermination of the Jewish population" and "the genocide against citizens of the II Republic on the territory of Wolhynia" (sic). The wording reserves the notion of "genocide" to "Polish citizens" (a definition which slightly deviates from the Convention on the Prevention and Punishment of the Crime of Genocide, which explicitly protects only racial, national, ethnic and religious groups). After the Constitutional Verdict quashed the words "Ukrainian nationalists" and "Easter Lesser Poland" (*Małopolska Wschodnia*, a term

Conclusions

A comparison with the punitive part of the German memory laws reveals two tendencies, which run contrary to each other. In Germany, the inclusion of Holocaust denial was the result of grass root pressure from court verdicts, which resulted in relieving civic parties from the need to prosecute deniers and file civil lawsuits and indictments. It turned the protection of victim groups into a task for the public prosecutor. In Poland, the state entrusted its own protection to civic organizations in a top-down approach, triggered by members of parliament of the ruling party (which were supported by many members of the opposition and enjoyed considerable public support). However, one may doubt, whether it was necessary to amend the IPN law in the way described above, because courts had already accepted (after years of reluctance) lawsuits from survivors supported by civic organizations.[14]

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from the political geography of interwar Poland which overlaps with what outside Poland is better known as Eastern Galicia), denial of collaborationists' crimes is only punishable regarding crimes committed in Wolhynia. Ukrainian collaborationists' crimes in "Eastern Lesser Poland" can be denied freely. In addition, while the law in general refers to denial as denial of facts, it expands the concept of denial in the notion of "the genocide of the Polish population" to denial of the legal characterization of the crime. In other words, a person may deny a massacre to be a communist crime, but as long as this person does not deny the very existence of this massacre (or "otherwise diminish the responsibility of the »real perpetrator«") the person will not be eligible for punishment. But in the case of the Ukrainian provisions in the IPN law, questioning the genocide-label of the atrocities committed against Poles, exposes a person to the sanctions of the law regardless of whether he/she denies the atrocities' existence or not.

[14] For a long time, courts had argued that single survivors of German Nazi camps could not file lawsuits against media which had used the notion of "Polish camps" (rather than German or Nazi camps), because they were not insulted personally by that notion. This changed in the case of *Karol Tendera vs. Zweites Deutsches Fernsehen (ZDF)*, when a court in Cracow accepted Tendera's lawsuit and ordered the German TV station to apologize. ZDF appealed in Poland but lost in all instances, then appealed in German courts against the implementation of the Polish verdicts in Germany (where it has its legal residence) and won before the BGH, which found the Polish verdicts violated Germany's legal order (because the Polish verdicts had obliged the ZDF to apologize not only for the erroneous use of the "Polish camp" notion, but also to admit it had wanted to "impose the historical truth." While the ZDF had had no problem apologizing for the former, it refused to admit to the latter, arguing that the use of the incriminated notion had been due to an error and had not been caused by any wish to "forge history.").

The inclusion of denial of the legal characterization has a high potential to stifle academic legal debate and curb scientific freedom, especially in cases, where bringing lawsuits rests with civic organizations. This can easily trigger another kind of entrusting rights and competences to NGOs: the government escapes scrutiny and criticism from abroad by empowering civic organizations to legally harass people and institutions that oppose the government's policies regarding history. Paradoxically, the inclusion of "denial of the legal characterization" rather than mere "denial of fact" is more likely to stifle legal scholars' academic debates than historians'. The latter can always declare an event a crime (and hence avoid prosecution and legal harassment) and then deny the criminal character of these events' specific aspects, while legal scholars will not avoid punishment, if they dispute the criminality of deeds, which the law enumerates as crimes, which cannot be denied.[15] In other words, with the new legislation, the discussion whether Ukrainian collaborationists committed genocide, war crimes or crimes against humanity during the last years of the war in Wolhynia, which has been ongoing for several decades, can now be interrupted by a prosecutor at any time. And it will not help a lawyer to argue that his doubts about the genocidal character of these crimes are rooted in the Convention on the Prevention and Punishment of the Crime of Genocide and hence in his scientific rather than public activities. The new law also poses a heavy burden on judges, who now must find out, whether denial is contrary to the facts. This is usually the task of historians who resort to historical rather than legal methods and tools. It creates a situation, in which – because of new jurisprudence – a body of knowledge emerges, which contains legally enforceable "truths" about the past, which can no longer be changed by historical research, but instead only by new judgments and, therefore, based on the methods and tools of lawyers.

[15] This evokes reminiscences about Polish historians' strategies to avoid censorship under communism, when they would reiterate all the necessary elements of state propaganda in the book's introductions (to satisfy the censorship office) and then contradict some or all of these elements in the chapter content, supporting their claims with references to primary sources (relying on the censors' negligence or laziness).

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MATTHIAS FAHRNER

Back to the Roots – the Obligation(s) to Punish Negationism in Germany

> And if all others accepted the lie which the Party imposed – if all records told the same tale – then the lie passed into history and became truth. "Who controls the past," ran the Party slogan, "controls the future: who controls the present controls the past."
>
> George Orwell, *Nineteen Eighty-Four*

A. Introduction

The failure of the Weimar Republic (1919–1933) was closely linked to groups manipulating collective memory, as aptly captured by the above quote by George Orwell from 1949. The "stab-in-the-back" myth referring to the idea that Republicans, Jews and Marxists had "ambushed" the otherwise victorious German army causing its defeat, poisoned the political culture of the Republic. The democratic parties reacted, *cum grano salis*,[1] with trust in the superiority of democratic ideas and processes. Meanwhile, spurred on by these lies, the leading representatives of the Republic were assassinated. For the NSDAP, placing any "defamation of national honor and military" as "treason against the people" under the most severe punishment was a central plank of the policy.[2] Atrocities, mass killings, civil and war crimes committed by NSDAP members were strategically concealed with all possible means from the public

[1] The special laws and institutions established to protect the Republic cannot be discussed here, see M. Fahrner, *Staatsschutzstrafrecht*, Stuttgart 2019 (in print), § 2 (19 et seq.); C. Gusy, *Weimar – die wehrlose Republik?*, Tübingen 1991; J. Hueck, *Der Staatsgerichtshof zum Schutze der Republik*, Tübingen 1996; F.-C. Schroeder, *Der Schutz von Staat und Verfassung im Strafrecht*, München 1970, p. 109.

[2] Amendment to the Law on the Protection of the Republic proposed by the NSDAP, RT Drs. IV/1741 1930, sec. 3: "Anyone who (…) asserts Germany's sole guilt or complicity in the world war or (…) undertakes to harm the vital interests of the German people, or to paralyze

and posterity. These actions link the original perpetrators with negationism after 1945, initially as far as the actors were concerned and later, ideologically.[3] While the students' movement of 1968 aimed at reappraising the deeds of the previous generation, new negationism has appeared strongly and continues to this day in waves –despite all attempts to combat it.

At the same time, there are on-going discussions in German legal circles whether the criminalization of negationism, defined as a statement by which, contrary to better knowledge, the existence of a historical event is denied or argued,[4] can be legally established. Questions about legal obligation(s) to punish negationism in Germany seem quite unorthodox and are at best raised indirectly. After briefly outlining the existing penal provisions (B), I will address both the straightforward and formal duties with regard to international (C) and EU law (D), as well as the more complex constitutional obligations (E).

B. Criminal Offences of Negationism in Germany

Firstly, if the denial of a historical crime is "legally qualified," i.e. it can be regarded as an attack on other legal interests, then it may be subject to criminal sanction for such violation. In particular, it can be prosecuted as incitement to aggression according to sec. 80a of German Criminal Code (StGB), the downplaying of violent acts (sec. 131), the defamation of religions, etc. (sec. 166), but, above all, the general offence of insult, defamation and violating the memory of the dead (sec. 185 et seq., 189), linked to the violation of the honor of **concrete** persons. If the insult is connected to the persecution of a group of

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or destroy the will of the German people, is punished for treason against the people by death," later resulted in sec. 90f RStGB (Imperial Criminal Code 1933).

[3] For some first details for the well-established historical facts, see L. Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust*, London 2001; R.J. Evans, *The Third Reich in Power*, London 2005, p. 355; idem, *In Hitler's Shadow*, London 1989; idem, *The Third Reich in History and Memory*, New York 2015; M. Matuschek, *Erinnerungsstrafrecht, Eine Neubegründung des Verbots der Holocaustleugnung auf rechtsvergleichender und sozialphilosophischer Grundlage*, Berlin 2011, p. 35.

[4] Ch. Willmann, *Contribution judiciaire au débat sur la Mémoire*, « Archives de philosophie du Droit » 2006, p. 189 (203); M. Matuschek, *op. cit*., p. 35.

the German population under the National Socialist or another authoritarian regime, the prosecution will not depend on the personal involvement of the victim or his or her relatives in the process (sec. 194).

Secondly, since 1950, the need of punishing negationism, in particular with regard to the Shoah, irrespective of its intentional injuring of concrete individuals was discussed.[5] This was provided in sec. 130 (1, 2) StGB within the crime of incitement to hatred in 1960.[6] The current convoluted wording can be condensed as follows: a) a direct or embodied statement b) against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals due to their belonging to it c) incites hatred, assaults the human dignity, or calls for violent or arbitrary measures against them, d) in a manner capable of disturbing the public peace.[7] Such a statement may meet the features of negationism. On the other hand, sec. 140 StGB punishes approval of a committed or attempted crime under International Criminal Law. Mostly and rightly rejected is the view that acts that are only of historical interest might generally be exempt from its scope.[8] However, an explicit or implicit approval of the recognizable, concretely committed offense is required.[9]

Thirdly, to avoid problems of proof and legal loopholes that where widely used by neo-Nazi activists after a much criticized court decision in 1994,[10] so as to prohibit specific glorifying right-wing demonstrations, a new approach was added to sec. 130 StGB in subs. 3 and 4, which punishes "whoever publicly or in a meeting approves of, denies or belittles an act committed under the rule of National Socialism of the kind indicated in section 6(1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace" or "by approving of, glorifying, or justifying National Socialist rule of arbitrary force violates the dignity of the victims." It is worth recognizing that on the one hand, the German debates over the legitimacy to criminalize

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5 BT Drs. I/1307 p. 13; B. Weiler, *Der Tatbestand „Volksverhetzung" im europäischen Vergleich*, Hamburg 2012, p. 12.

6 6. StrÄndG (BGBl. 1960 I S. 478); BT Drs. 3/918, 3/1551, 3/1746, p. 1.

7 M. Fahrner, *op. cit.*, § 19.

8 M. Fahrner, *op. cit.*, § 17 (4); Th. Fischer, *Strafgesetzbuch*, 66. Ed. München 2019 §140 Mn. 4, 8a.

9 BGHSt 28, 313; NJW 1978, 58; Th. Fischer, *op. cit.*, § 140 Mn. 5.

10 BGH NStZ 1994, 140; B. Weiler, *op. cit.*, p. 12.

negationism are usually referred to,[11]e.g. as to the question of how the disturbance of public peace has to be judged.[12] It is sufficient if, for example, the grave offenses characterizing the Nazi regime of violence and despotism are presented as regrettable but unavoidable,[13] and the positive assessment of the human rights violations committed does not need to refer to a concrete act.[14] On the other hand, it is most noticeable, that this third approach only covers the rule and deeds of national socialism, and not of other regimes.

C. International Legal Obligation(s)

Pursuant to the occupation law (until 1955) those who "endangered the peace of the German people or of the world after 8 May 1945 by propaganda for National Socialism or militarism or by the invention and spread of tendentious rumors" were subject to punishment.[15] The starting point for the obligation to punish incitement to hatred under international law that still applies today, is Art. 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.[16] Art. 20(2) of the International Covenant on Civil and Political Rights (ICCPR) extends this obligation to national and religious hatred.[17] The vague formulation that the then socialist states pushed through (contrary to Western concerns) was only acceptable to the Federal Republic of Germany (FRG), as it was assumed that the acts

[11] M. Fahrner, *op. cit.*, § 18 (6 et seq.); M. Matuschek, *op. cit.*, p. 46; among the abundant literature see, e.g. M. Ulbricht, *Volksverhetzung und das Prinzip der Meinungsfreiheit*, Heidelberg 2017; see also T. Fohrbeck, *Wunsiedel*, Berlin 2015; T. Hörnle, *Grob anstößiges Verhalten*, Frankfurt a. M. 2005, p. 282; B. Weiler, *op. cit.*

[12] BT Drs. 15 /5051 p. 6.

[13] *Ibidem*, p. 5; M. Fahrner, *op. cit.*, §18 (56).

[14] *Ibidem*; Th. Fischer, *op. cit.*, § 130 Mn. 30.

[15] Part II Art. 3 A. III of Control Council Directive no. 38 (October 12, 1946) on the Arrest and Punishment of War Criminals, Nazis, and Militarists and the Internment, Control, and Surveillance of Potentially Dangerous Germans, Repealed by the Allied High Commission Law No. A-37, Art. 2.

[16] Adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969; ratified by the FRG the same year (BGBl. 1969 II 961).

[17] "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.", Resolution GA 2200A (XXI) on 16 December 1966, and in force from 23 March 1976.

involved must be capable of disturbing public peace or attacking the human dignity of others, and, therefore, were already covered by existing criminal law (in sec. 130 StGB).[18]

However, the first international legal commitment for Germany to specifically criminalize negationism is established in Art. 6 of the Additional Protocol to the Convention on Cybercrime. It refers to any statement (which is made available to the public through computer systems) which denies, grossly minimizes, approves of or justifies acts constituting genocide or crimes against humanity.[19] Its ratification triggered some legislative deliberations whether to create a new offence within sec. 130 StGB without the necessity to provide any proven incitement to hatred comprising all crimes of genocide under the rule of arbitrary force while not being restricted to the historic National Socialist regime.[20] Leaving the decision on such crimes to an international court, whose jurisdiction has been recognized by the Federal Republic of Germany (including the Nuremberg Tribunal), was to ensure that the facts are historically recognized[21] as well as to provide some control. Yet, with regard to the ongoing discussions on a European Union act, "pure" negationism was at first limited to "local" atrocities.[22] In case of other denial acts, Art. 6 sec. 2(a) introduced reservation regarding the "intent to incite hatred, discrimination or violence."[23]

D. The European Union

In addition to the German developments in the 1990s, the initiatives on the European level intensified. Starting from first declarations within the

[18] Memorandum on the ICCPR of the German Government for the Federal Parliament, BT Drs. 7/660 S. 37.

[19] Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, Strasbourg, 28.I.2003, ETS 189.

[20] Art. 2 Entwurf eines Gesetzes zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches, BT Drs. 15/4832, p. 2; B. Weiler, *op. cit.*, p. 19.

[21] BT Drs. 15/4832, p. 4.

[22] BT Drs. 15 /5051, p. 5.

[23] BT Drs. 17/3124, p. 7.

European Communities in 1986,[24] through the Vienna Declaration of 1993,[25] until the very first Joint Action 96/443/JI which aimed at punishing "public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945" – or derogating from the principle of double criminality in judicial assistance.[26] Given the "qualification" of the necessary degrading effect, i.e. incitement to hatred, it seemed that sec. 130(1, 2) StGB already includes this provision.[27] So neither the question of whether this criminalization really falls under the competence of the Art. K.1 No. 7, K.3 (2)(b) TEU nor whether it covered only the historic scope of the Nuremberg Tribunal was of interest.

The succeeding EU Council Framework Decision 2008/913/JHA[28] did not change this fundamentally. In Art. 1(1)(c)(d) each member state shall take the measures to criminalize such conducts as: publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined by the Rome Statute or the London Agreement. However, it leaves the option to restrict this to such a conduct "which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting" – i.e. the qualification in sec. 130(1, 2) StGB.[29] The Decision prepared with resistance of some parties worried about liberal freedoms in 2001–2008 and in line with German pro-activism,[30] aimed at approximating regulations, preventing and combating racism and xenophobia, was based on Art. 29(1) and 34(2) TEU. The Decision is not self-executing,[31] cannot establish an offence itself,[32] but still obliges the Member States to respect its

[24] OJ C 158 25/06/1986, p. 1

[25] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN GA A/CONF.157/23.

[26] Title I.A.c) 96/443/JHA: Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, OJ L 185 , 24/07/1996, p. 5.

[27] BT Drs. 17/3124, p. 7; on the contrary opinions, see, e.g. S. Bock, *Die (unterlassene) Reform des Volksverhetzungstatbestands*, „ZRP" 2011, p. 46 (47 et seq.).

[28] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55.

[29] Art. 1(2) of the Framework Decision.

[30] B. Weiler, *op. cit.*, p. 129.

[31] ECJ, C-573/17, 24/06/2019.

[32] ECJ, C-387/02, C-391/02 und C-403/02, 03/05/2005.

provisions with each other and towards the Union,[33] even if the type of legal instrument is no longer founded in the primary law.[34]

E. Constitutional obligations

These international and European commitments of the German state might be put into question because the German Constitution prohibits the transfer of power beyond its inherent limits. In general, the right to punish crimes lies with the state, yet harmonizing penal law is not prohibited.[35] However, basic principles like the freedom of expression, science, art, and freedom of assembly are recognized as the basic liberal foundation of the constitution, and the essence of fundamental rights cannot be changed by international or EU law but only directly by national law in accordance with Art. 19(2), 23(1) clause 3; 79(3) of the German basic law (GG), which is also recognized as national identity in the light of Art. 4 TEU.

If the requirements concerning truth are too strict, it may affect the freedom of opinion, and particular expressions may be subject to self-censorship for fear of serious consequences.[36] In general, all restrictions must be proportionate to an aim legitimized by the constitution. Yet, factual statements "are protected by freedom of expression only insofar as they are prerequisites for the formation of opinions, which is not the case with conscious or proven false assertion, especially untrue historical facts."[37] Especially, the Shoah of the Jews is an evident historical fact; it is superfluous to take evidence.[38] However, it might not always be possible to separate the untrue and personal evaluative components without distorting the meaning of the statement. In this case, the freedom of expression applies, yet it regularly yields to another right, e.g. the right to protection of personal dignity and there is no presumption in

[33] Art. 34 (2)(b) TEU.

[34] Art. 9 Protocol No. 36 Treaty of Lisbon.

[35] Z.B. ECJ C-176/03; C-440/05; BVerfG NJW 2009, 2267, 2288; M. Mansdörfer, *Das europäische Strafrecht nach dem Vertrag von Lissabon – oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung*, „HRRS" 2010, vol. 11, p. 11.

[36] BVerfGE 54, 208 (219 et seq.); 61, 1 (8); 85, 1 (22).

[37] E.g. BVerfGE 90, 241 (247).

[38] BVerfG NJW 1993, 916 (917); BGHSt 31, 226 (231 seq.); 40, 97; BGHZ 75, 160 (162).

favor of free speech.[39] What is more, freedom of science is only granted to serious endeavors to find truth.[40]

I. Constitutional starting points

There is a variety of constitutional starting points which provide one not only with the possibility, but also with the obligation to prohibit negationism.

1. Article 26(1) GG explicitly obligates legislation to criminalize all appropriate actions intended to **disturb the peaceful coexistence of peoples**. According to the prevailing opinion in Germany, which seems systematically correct, this refers only to an intentional threat to international peace in the meaning of the UN Charter, and not to the purely domestic peace between different ethnic groups.[41] However, certain kinds of negationism might fall under this condition:[42] In connection with Art. 20(2) ICCPR[43] and the extended definition of threats to peace within the scope of Art. 2(4), 24, 39 of the UN Charter,[44] a violation of international law might involve supporting national, racial or religious hatred, as well as serious and systematic human rights abuse.[45] The degree of intent required towards these aims remains very controversial.[46]

2. Any claim requesting a general, fundamental **right to get security by the state** against non-state violators must be strictly rejected; there are only concrete fundamental rights as well as a well-founded claim to receive protection **from** the state.[47]

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[39] BVerfGE 7, 198 (212); 61, 1 (8 seq.); 85, 1 (17); BVerfGE 90, 241 (247 et seq.).

[40] BVerfGE 35, 79 (113); 47, 327 (367); 90, 1 (12 et seq.).

[41] E.g. F. Wollenschläger, [in:] *Grundgesetz*, 3 Ed. Hrsg. H. Dreier, Heidelberg 2015, Art. 26 Mn. 21; for the minority, U. Fink, [in:] *Grundgesetz*, 7 Ed. Hrsg. H. v. Mangoldt, F. Klein, Ch. Stark, München 2018, Art. 26 Mn. 18.

[42] M. Herdegen, [in:] *Grundgesetz*, 87 Ed. Hrsg. Th. Maunz, G. Dürig, München 2019, Art. 26 Mn. 59.

[43] K.-A. Hernekamp, [in:] *Grundgesetz*, 6 Ed. Hrsg. I. v. Münch, Ph. Kunig, München 2012, GG Art. 26 Mn. 17.

[44] M. Herdegen, *op. cit.*, Mn. 17.

[45] F. Wollenschläger, *op. cit.*, Mn. 29.

[46] *Ibidem*, Mn. 32.

[47] See only M. Fahrner, *op. cit.*, § 3 (11).

3. It is still questionable whether the **basic rights** give cause to positive actions of the state, with reference to Art. 1, 2 GG to protect personality or honor, or if they only contain claims preventing the state from interfering, and objective legal principles.[48] Nevertheless, Art. 1(1) GG explicitly states that to respect **and protect human dignity** shall be the duty of all state authorities. Human dignity, as the most fundamental constitutional principle, encompasses the social value and the right to be treated as a human being, and forbids treatment that fundamentally calls his or her quality as subject into question.[49] It includes the notion of the availability of humans as a mere objects that can be dealt with at will. However, this core of human dignity must really be violated and not only personal honor.[50]

It is well established that

> (…) calling the genocide of national socialism "an invention," denies the Jews (…) the right to dignity, in particular on the part of the citizens of the state who bear the burden of this act (…). The significance of that event for the person goes beyond the personal experience of discrimination. Part of their self-understanding is belonging to a group of people, which is distinguished by fate, and to whom all others have a special moral responsibility which is part of their dignity.[51]

Thus, questioning the fact of genocide violates personal dignity not only of the original victims of the crime but of all living and descending members of the group.[52] This reasoning is not restricted to the Shoah, but extends to all forms of genocides.[53]Therefore, also denying the genocide of Armenians is a crime of violating the memory of the dead.[54] While it is believed that

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[48] BVerfGE 7, 198 (205); 49, 89; 53, 30; 56, 54; 76, 1, 77, 170; e.g. Th. Kingreen, R. Poscher, *Grundrechte*, 35 Ed., Heidelberg 2019 § 4 (106 et seq.) against the critics mostly from E.-W. Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, München 1974, p. 1529; idem, *Grundrechte als Grundsatznormen*, „Der Staat" 1990, vol. 29, p. 33.

[49] BVerfGE 5, 85 (204); 109, 279 (312); 115, 118 (153).

[50] BVerfGE NJW 2001, 61; BGHSt 40, 97 (100).

[51] BGHZ 75, 160 (162 et seq.); then, e.g. BGHSt 40, 97 (100); NStZ 1981, 258.

[52] BVerfGE 90, 241 (252).

[53] BT Drs. 17/3124, p. 7.

[54] Oberverwaltungsgericht Berlin-Brandenburg, Decision of 17.03.2006 – OVG 1 S 26.06.

basic human rights (e.g. the right to honor) end with his/her death, human dignity as the core of personality is constitutionally protected.[55]

4. In addition, any state's duty is to guarantee **public peace** by the effectiveness of its laws and legal protection. The modern concept of militant democracy as an obligatory form of the protection of democratic order against anti-democratic forces, lies also in the German Constitution, in the European Convention on Human Rights[56] or, to a lesser extent, in Art. 2, and 7, etc. TEU. Art. 7 TEU commits the member states, taking into account their close and thus confident cooperation as regards judicial matters as well as their constitutional obligations as democracies guaranteeing the right to human dignity and the rule of law.

The so-called **Liberal Democratic Basic Order**, the nucleus and "proto-/trans-constitutional" foundation of the German post-war state,[57] is defined by the BVerfG in a twofold conception: In addition to the positive dimensions of specific rules and principles as well as of the three pillars of human dignity, democracy and rule of law, the "negative" definition acts like a "founding myth," going back to its roots: as "the antithesis of a regime of violence and arbitrariness, that took place as especially under the rule of Hitler-led NSDAP in 1933–1945." It is "the opposite of the totalitarian state, which rejects human dignity, freedom and equality in favour of the exclusive right to power," therefore, the "exclusion of any rule of violence and arbitrariness."[58] So, safeguarding of the foundation of this construction, the recognition of the past evil in all its most disgusting, appalling aspects should be provided. This ensures a strong political structure of the state and the common-sense confidence of a pluralist society in the midst of violent struggles for democracy.[59]

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55 BVerfGE 30, 173 (196).

56 E.g. Art. 17 as well as the concept of any means "necessary in a democratic society."

57 Art. 18, 21, etc. GG; see M. Fahrner, *op. cit.*, § 4.

58 BVerfGE 2, 1 (12 et seq.); BVerfGE 5, 85 et seq.; BVerfGE 144, 20.

59 This is also the reason why the BVerfG held sec. 130 (4) StGB (notwithstanding the existence of a special law against a specific opinion) constitutional in its famous "Wunsiedel" decision, BVerfGE 124, 300 (327 et seq.).

II. Violation by negationism

The protection against the distortion of some subjective "general sense of peace," the "poisoning of the mental climate," the fact, that some members of society are upset about the totalitarian opinions of others, and false facts alone cannot justify, in the name of public peace, a taboo on radical and extreme opinions.[60] Instead, "public peace" in this context is meant to protect against statements that can clearly aim at jeopardizing recognized legal interests, e.g. they may cause aggression or violate the law by, e.g. organization of meetings aimed at intimidating third parties directly. Since even simple negationism is often used to "gain territory" in debates and communities, this is not too far-fetched in many cases, however, it must be substantiated.

Besides that, "qualified negationism," i.e. not only stating or accusing the historiography of a falsehood, is always a violation, e.g. by showing any fraternization with original perpetrators or crimes, or by inciting violence or implying accusations.[61] Especially the latter one has, in regard to any negationism, to be taken into account due to its mechanisms of framing, i.e. shifting the burden of truth and proof to victims and the democratic state, and stripping the very concept of truth of its objectivity. In addition, criminalization, in general, requires not a violation but a reasonably justifiable risk and, of course, proportionality.

III. Obligation to punish

The most important questions are whether and when the legislature is constitutionally obliged to use criminal law to prohibit those risks and violations. The BVerfG ruled repeatedly[62] that criminal law is needed to protect the "fundamental values of the community" and legislation is bound to use it in exceptional situations, namely when the constitutional protection of an

[60] BVerfGE 124, 300 (333 et seq.); BVerfG NJW 2018, p. 2858 and *op.cit*., p. 2861.

[61] BGH NStZ 1994, 140; NStZ 1981, 258; there is also no justification if dignity is violated, BVerfGE 75, 369 (380); BVerfGE 93, 266.

[62] BVerfGE 39, 1 (46); BVerfGE 88, 203 (257 et seq.) in cases about the duty to protect unborn life.

outstanding legal good cannot be adequately and effectively achieved in any other way. Human dignity and public peace are the most elementary constitutional values. Hence, the real question seems to be this one: is it necessary and adequate for their effective protection to use criminal law, especially when the relation to both seems not so immediate and manifests in the case of simple negation. This depends on the actual state of the political community:[63] Some academic scholars – far away from the dark corners of streets and the Internet – argue that punishing for violating "the taboo" or "the feelings" is an unnecessary and unequal treatment of deeds committed by national socialists when compared to the crimes of others and, that "evidently stupid opinions" should only be fought by political means.[64] Of course, prosecuting murder is not superfluous because its wrongness is evident. Furthermore, and as pointed out, there is a good reason for Germany, especially with the constitutional obligation, "to promote world peace as an equal partner in united Europe,"[65] to protect the memory of the previous German atrocities. In addition, there are good reasons why regular legal protection of individuals as well as political and social means like arguing with real facts are not sufficient. In recent years, we have seen many examples of a hydra which strategically poisons minds through negationism (especially in a first step) with the aim to control "the streets, the parliaments and the heads."[66] Therefore, the "new intellectual right" follows the theory of "cultural hegemony," developed by Antonio Gramsci and adopted by historical as well as current dangerous totalitarian movements.[67]

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[63] In general, G. Jakobs, *Strafrecht Allgemeiner Teil*, 2 Ed. Berlin 1991, p. 5; e.g. BGHSt 32, 165.

[64] See footnote 11.

[65] German Basic Law, Preamble.

[66] Program and strategy of the extremist right-wing National Democratic Party 1996/97, cited after U. Voigt, *Mit der NAPO auf dem Weg in das neue Jahrtausend*, [in:] *AllesGroße steht im Sturm. Tradition und Zukunfteiner nationalen Partei*, Hrsg. H. Apfel, Stuttgart 1999, p. 469.

[67] C. Leggewie, *Kulturelle Hegemonie – Gramsci und die Folgen*, „Leviathan" 1987, vol. 15(2), p. 285; S. Salzborn, *Renaissance of the New Right in Germany?*, "German Politics and Society" 2016, vol. 34(2), pp. 36–63.

F. Conclusions

The German criminal law fulfills its various obligations to punish "qualified" negationism. With "simple negationism," the impact on the Free Democratic Basic Order, with its necessity to protect basic liberties and the importance for discussion to achieve progress, has to be taken into account. Yet, our fragmented societies in their virtual and real-life social networks create "bubbles of beliefs" immunizing against cross-group influence, manifesting ideology and spirals of radicalization. For "ordinary" individuals who participate in debates, pseudo-convincing, fake arguments are often not immediately refutable.[68] This separates the denial of national socialist crimes from debates on other forms of genocide in Germany, including, e.g. the German mass murder of the Herero in 1905 which can – within the legislative discretion – be sufficiently fought with milder means if there is no specific qualification. Some parts of population staying within the confines of "intellectual walls" against a perhaps too complex world should remind us of the effects of old class structures in the inter-war period. To effectively combat falsification of history or negationism, criminal law should hence combine, among other things, an educational function and, in this specific context, clearly define what is right, and what is wrong.[69] If there is to be a society without cultural hegemony, it should be based on a basic democratic order that protects human dignity, an open, free and pluralist society and the rule of law. To us – post-war Germans, Europeans and citizens of the world – these lessons on our roots are nowhere else more true than in the area where our history of the rise of National Socialism itself tells us what could happen again if *repetitio, nec historia magistra vitae est*.

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[68] Cf. M. Matuschek, *Erinnerungsstrafrecht. Eine Neubegründung des Verbots der Holocaustleugnung auf rechtsvergleichender und sozialphilosophischer Grundlage*, Berlin 2011, p. 82 et seq.

[69] BVerfGE 39, 1 (57 et seq.); 45, 187 (254 et seq.); 88, 203 (253).

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VERONIKA BÍLKOVÁ

The Punishment of Negationism – the Czech Experience

The Czech Republic is one of the countries which seek to actively regulate the historical memory of its inhabitants through legal means. It does so, *inter alia*, by providing a legislative assessment of the nature of the previous non-democratic regimes,[1] by establishing a special public research institute tasked to carry out research with respect to the past totalitarian regimes,[2] and by criminalizing the denial of certain historical facts.[3] In view of the overall topic of the conference, this paper only deals with the third area. More specifically, it focuses on par. 405 of the Criminal Code which makes it a criminal offence to deny, question, approve of or justify genocide. The paper explains how this provision was incorporated into the Czech legal order, gives an overview of the case-law related to its application (or non-application) and provides a critical analysis of the provision's compatibility with the right to freedom of expression and with the principle of legality.

[1] Act no. 198/1993 Coll., on the Unlawfulness of the Communist Regime and on the Resistance against it, 9 July 1993.

[2] Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, 8 June 2007.

[3] See Act no. 40/2009 Coll., Criminal Code, 8 January 2009, par. 405.

1. Legislative history of par. 405 of the Czech Criminal Code

The criminal offence of denying, questioning, approving of or justifying genocide, was added to the 1961 Criminal Code of the Czech Republic in 2000.[4] The Explanatory Report attached to the amendment explains the inclusion of the new provision by the experience of certain Western European countries which, when faced with historical revisionism and the so called Auschwitz lie, decided to deal with this problem through criminal repression. Unlike most of these countries, however, the Czech Republic did not limit the criminalization to the denial of Holocaust or other crimes committed by Nazi Germany but opted for a broader approach.Under the new par. 261a, anyone who "publicly denies, questions, approves of or seeks to justify Nazi or Communist genocide or other crimes against humanity committed by the Nazis and Communists" was to be punished by a sentence of imprisonment ranging from 6 months to 3 years. The offence fell, together with two other offences,[5] under the title of Support and Promotion of a Movement Aimed at Suppressing Rights and Freedoms of a Person.

In 2009, when the new Criminal Code was adopted in the Czech Republic, par. 261a was taken over, becoming a new par. 405. Although still closely connected to other offences,[6] it now got its own title – Denial, Questioning, Approval and Justification of Genocide. The definition of the offence was original left unaltered. In 2014, however, it was extended to apply to the public denial, questioning, approval and justification of "Nazi, communist and other genocide or Nazi, communist and other crimes against humanity or war crimes or crimes against peace."[7] The alteration was explained by the

[4] Act no. 405/2000 Coll., Amending the Act no. 140/1961 Coll., Criminal Code, as Amended by Subsequent Acts, 25 October 2000.

[5] The other two offences were the Support and Promotion of a Movement which Demonstrably Aims at Suppressing Rights and Freedoms of a Person or Propagates Hatred (par. 260) and the Public Manifestation of Sympathies for such a Movement (par. 261). Prior to the introduction of par. 261a to the Criminal Code, these provisions, and especially par. 260, were used to prosecute those engaging in the denial of certain historical crimes.

[6] These are the offences of Establishing, Supporting and Promoting a Movement Aimed at Suppressing Rights and Freedoms of a Person (par. 403) and Manifesting Sympathies for such a Movement (par. 404).

[7] Act no. 141/2014 Coll., Amending the Act no. 40/2009 Coll. and Certain Other Statutes, 16 June 2014.

need to implement the EU Council Framework Decision 2008/913/JHA,[8] which requested States to make punishable publicly condoning, denying or grossly trivialising crimes falling under the jurisdiction of the Nuremberg International Military Tribunal (IMT) and the International Criminal Court (ICC).

The Czech Republic was also among six Central and Eastern European States[9] which, in 2010, submitted to the European Commission a proposal aimed at criminalizing the denial of communist crimes at the European level.[10] The proposal wanted the EU to explicitly extend to communist crimes the regulation under the above-mentioned EU Council Framework Decision 2008/913/JHA, which is primarily directed against the denial of Holocaust.[11] The initiative was rejected on the account that there was no consensus on the issue and that "the different member states ha[d] wildly differing approaches."[12]

2. Case-law related to par. 405 of the Czech Criminal Code

There is no comprehensive database of case-law related to the application of par. 405 of the Criminal Code publicly available in the Czech Republic. The statistics indicating the number of criminal acts committed on the territory of the Czech Republic do not indicate the denial of crimes as an autonomous category and, hence, do not give figures for this offence.[13] Yet, cases involving suspicion of the denial of crimes or, even, prosecution for such an offence, often attract public attention and give rise to public debate. Some of these cases, moreover, have been considered by higher judicial instances, i.e. the Supreme Court and the Constitutional Court. The decisions in these cases can

[8] EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[9] The other States were Bulgaria, Hungary, Latvia, Lithuania and Romania.

[10] L. Phillips, *EU Rejects Eastern States' Call to Outlaw Denial of Crimes by Communist Regimes*, "The Guardian", 21 December 2010.

[11] See also L. Cajani, *Legislating History: The European Union and Denial of International Crimes*, [in:] *Law and Memory. Towards Legal Governance of History*, U. Belavusau, A. Gliszczyńska-Grabias (eds.), Cambridge 2018, pp. 129–147.

[12] L. Phillips, *op. cit.*

[13] The statistics are available at https://www.policie.cz/statistiky-kriminalita.aspx (access: 20.09.2019).

thus be easily accessed through the database of case-law of the main judicial bodies.[14] This paper will introduce two such cases and one case which has not been considered by Czech courts yet.

The first case concerns the *Zvědavec* webzine, founded by the Czechoslovak immigrant to Canada Vladimír Stwora in 1999. The webzine publishes texts concerning various aspects of freedom of expression and has always shown particular interest in the deniers of Holocaust, such as Ernst Zündel and David Irving. In 2007, it published the Czech translation of an article by D. Cassidy entitled *Holocaust and Its 4-Million Option*, contesting the Holocaust. Stwora himself introduced the translation by a short text describing the Holocaust as a historical fraud. The Czech organs did not show much enthusiasm in prosecuting Stwora. The police investigation was dropped twice and the courts repeatedly came to conflicting decisions. In the end, however, Stwora was found guilty under par. 261a of the Old Criminal Code and sentenced to 6 months with suspension in 2011. He filed an appeal to the Supreme Court and a complaint to the Constitutional Court but both were rejected.[15] Yet, in the meantime, he benefited from the presidential amnesty declared in 2013. The webzine remains operational and continues to publish controversial materials.

The second case pertains to the approval of the Holocaust rather than its explicit denial. In 2012, a Czech publishing house Guidemedia published the book *Adolf Hitler: Statements*, which contains statements made by Hitler in 1939–1942. The statements propagate the main ideas of national socialism, such as racial inferiority of Jews and other nations or the idea of *Lebensraum*. The book also contains comments by the publishers which seem to largely condone Hitler's statements. Based on these comments, and the publication of the book, the publishers were charged under par. 405 of the New Criminal Code but the courts repeatedly acquitted them. By means of an appeal by the public prosecutor, the case got to the Supreme Court which at first returned it for further investigation on account of procedural shortcomings.[16]

[14] The database is available at https://www.justice.cz/web/msp/rozhodnuti-soudu-judikatura- (access: 20.09.2019).

[15] Supreme Court, Case 3 Tdo 475/2012, 16 May 2012; Constitutional Court, ÚS 3266/12, 19 December 2013.

[16] Supreme Court, 8 Tdo 819/2015, 25 April 2018.

Later, when its own decision was annulled on the procedural grounds by the Constitutional Court,[17] the Supreme Court rejected the appeal, confirming the acquitting decisions.[18] The publishers continue to produce books on Nazi Germany. In 2019, they announced their intention to test the degree of freedom of expression in the Czech Republic by introducing "a new independent edition devoted to the disproval of the »holocaust« myth."[19]

The third case is different from the previous two, because it has not been so far considered by courts. Despite that, it has attracted quite a lot of public attention. It is so because the main protagonists are leading politicians of the Czech right-wing political party SPD (Party of Direct Democracy), Tomio Okamura and Miloslav Rozner. In 2018, Okamura and Rozner, both members of the Parliament at the time, questioned whether the Lety camp, where during World War II the Roma people were imprisoned, had been a concentration camp or a "mere" labour camp.[20] Several NGOs filed a criminal complaint based on these statements. In case of Okamura, the complaint was soon dropped because he publicly apologized for his words. In case of Rozner, the Parliament decided not to strip him of parliamentary immunity and he thus so far could not be subject to prosecution.[21] The case might be reopened once Rozner is no longer member of the Parliament.

3. Analysis of par. 405 of the Czech Criminal Code

The previous section has shown that par. 405 of the Criminal Code (originally par. 261a of the Old Criminal Code) has already been applied in practice. Yet, the case-law seems to be rather limited and, moreover, especially as far

[17] Constitutional Court, ÚS 2832/18, 19 February 2019.

[18] Supreme Court, 8 Tdo 314/2019, 5 June 2019.

[19] *Vydávání Hitlerových projevů není trestné, ideologii nejde přímo aplikovat, rozhodl Nejvyšší soud*, 25 June 2019, http://hitlerovyprojevy.cz/vydavani-hitlerovych-projevu-neni-trestne-ideologii-nejde-primo-aplikovat-rozhodl-nejvyssi-soud/ (access: 21.09.2019).

[20] Previously, the then minister of finances of the Czech Republic, Andrej Babiš, also made statements questioning the nature of the Lety camp. When criticized for these statements, he publicly apologized. See *Czech Finance Minister Apologizes for Questioning War-Time Oppression of Roma*, "Reuters", 2 September 2016.

[21] *Czech Lower House Decides Not to Strip MP of Immunity over His Remarks Denying the Holocaust of the Roma*, "Romea.cz", 14 March 2019.

as the decisions of higher courts are concerned, it is mostly concerned with procedural matters.[22] The Czech legal scholars, on the contrary, have paid attention to the provision.[23] Two of them have even labelled par. 405 "one of the most controversial legal norms of our Criminal Code."[24] The provision has been primarily questioned from two perspectives – its compatibility with the right to freedom of expression and the fulfilment of the criteria of legality (*nullum crimen sine lege*).

3.1. The right to freedom of expression

The right to freedom of expression is enshrined in Art. 17 of the Charter of Fundamental Rights and Freedoms, which makes part of the Czech Republic's constitutional order, as well as in various international instruments binding on the Czech Republic (Art. 19 of the ICCPR and Art. 10 of the European Convention on Human Rights [ECHR]).[25] There is no doubt that the criminalization of the denial of historical crimes constitutes an interference with this right. Such interference, however, does not automatically amount to a violation of the right. Freedom of expression, as most other political rights, is not absolute. It can be restricted by law when such restrictions are necessary to achieve certain legitimate aims and proportionate to these aims. In case of negationism, the legitimate aims are mostly those of public safety and the protection of rights of other persons.

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[22] See also Constitutional Court, ÚS 3108/08, 26 March 2009; ÚS 3645/13, 21 May 2014; ÚS 1718/16, 14 June 2016; ÚS 1472/16, 10 April 2018; ÚS 1226/18, 20 June 2018; ÚS 3683/18, 26 March 2019.

[23] See J. Herczeg, *K trestnímu postihu osvětimské lži*, „Trestní právo" 2002, no. 7–8, pp. 2–12; P. Černý, *Právní ochrana před extremismem*, Praha 2008, pp. 180–195; Š. Výborný, M. Mareš, *Popírání zločinů proti lidskosti, válečných zločinů a zločinů proti míru po aktuální novelizacitrestního* zákoníku, „Trestní právo" 2015, Vol. 19(1), pp. 4–11; E. Ševčíková, *Problematika popírání holocaustu v České republice*, „AUCI" 2013, pp. 179–192; H.Ch. Scheu, *Zákaz popírání genocidy a svoboda projevu*, „Jurisprudence" 2016, no. 1, pp. 3–12.

[24] Š.Výborný, M. Mareš, *op. cit.*, p. 195.

[25] The right to freedom of expression also encompasses the right to freedom of academic research, though in some instruments, this right stands on its own (see Art. 15(2) of the Czech Charter of Fundamental Rights and Freedoms). The right to freedom of academic research is a relative human right which may be subject to restrictions under the same conditions as the right to freedom of expression.

Although the right to freedom of expression "is applicable not only to »information« or »ideas« that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population,"[26] it does not apply to those "information" or "ideas" that might undermine the basis of a democratic society. In fact, the European Court of Human Rights (ECtHR) has repeatedly excluded the denial of the Holocaust from the scope of application of Art. 10 (freedom of expression) on the account that it runs counter to the text and spirit of the Convention.[27] Yet, this conclusion cannot be mechanically applied to all instances of the denial of historical crimes.[28] The assessment is always context-specific. It has to take account of a variety of factors including the severity of the interference, its impacts and effects, the presence or absence of international consensus on the need to criminalize the denial of a certain historical fact (and on the fact itself) as well as the historical, geographical and temporal factors. This leaves space for the national legislator to decide how far it wants to go when criminalizing the denial of historical crimes and for national courts to consider how they interpret the relevant provisions.

The Czech legislator, as will be further discussed in the next subchapter, has opted for a rather extensive approach. The Czech courts have generally endorsed this approach, though they have had, especially as higher judicial instances are concerned, limited opportunities to elaborate on it in any details. It is nonetheless clear from the case-law that the criminalization of the denial of historical crimes is considered as one of the manifestations of the concept of militant democracy. The courts have clearly stated that "if enemies of democracy and of values on which democracy is based, are ready to attack it, the democratic regime must be ready to defend itself against such attacks

[26] ECtHR, *Handyside v. United Kingdom*, appl. no. 5493/72, 7 December 1976, par. 49.

[27] See ECtHR, *Garaudy v. France*, appl. no. 65831/01, 24 June 2003; or *Witzsch v. Germany*, appl. no. 7485/03, 13 December 2005. In these cases, the Court invoked Art. 17 of the European Convention which stipulates that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[28] See ECtHR, *Perinçek v. Switzerland*, appl. no. 27510/08, 15 October 2015 (Grand Chamber) – the case concerned the denial of the Armenian genocide in Switzerland.

resorting, if necessary, to restrictions of fundamental rights."[29] They have also confirmed that the denial, questioning, approval or justification of serious crimes committed in the past fall among the acts for which restrictions may be legitimately put in place.[30] So far, according to the available data, they seem to have only applied this conclusion with respect to the denial of the Holocaust.

3.2. The principle of legality (*nullum crimen sine lege*)

The principle of legality is enshrined in Art. 39 of the Charter of Fundamental Rights and Freedoms, Art. 15 of the ICCPR or Art. 7 of the ECHR. By virtue of this principle, "no one shall be held guilty for any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."[31] In addition of being included in criminal law (typically the Criminal Code) in the given country or being criminalized at the international level, the act also has to be defined in such a way as to make it possible for individuals to understand what behaviour is required from them (or, rather, what behaviour is prohibited to them).[32] Par. 405 of the Czech Criminal Code has been occasionally challenged on these grounds, mostly on account of its alleged vagueness.[33] The Czech courts have not so far dealt with the objection in any detail, mostly just referring to the general analysis of the principle of legality provided by the Constitutional Court in 2011. In this analysis, the Court confirmed that norms need to be formulated with sufficient precision to enable citizens to regulate their conduct and foresee the consequences of their acts but that the foreseeability does not need to be absolute and simple; legal terms might require non-trivial interpretation.[34]

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[29] Constitutional Court, ÚS 2011/10, 28 November 2011, par. 25.

[30] Constitutional Court, ÚS 2011/10, 28 November 2011, par. 29.

[31] Art. 7(1) of the ECHR.

[32] See also ECtHR, *Sunday Times v. the United Kingdom*, appl. no. 6538/74, 26 April 1979, par. 49.

[33] See Supreme Court, 7 Tdo 1014/2017, 13 December 2017; Constitutional Court, ÚS 1226/18, 20 June 2018.

[34] Constitutional Court, ÚS 2011/10, 28 November 2011, par. 32–33.

The terms contained in par. 405 of the Criminal Court might indeed, at instances, require non-trivial interpretation. The offence features several elements that need to be present at the same time. First, the offence has to be committed *publicly*, which means that it takes place in front of at least three persons. More frequently, however, its content will be accessible to the general public (through a publication, a statement, an online post, etc.). Second, the offence has to involve the *denial, questioning, approval or justification* of certain historical crimes. *Denial* means the negation of the crime ("the Holocaust did not happen"), *questioning* means the relativization of the crime ("only very few Jews were killed during the Holocaust"), *approval* means taking a positive approach to the crime ("the Holocaust was a very good idea") and *justifications* means seeking to find excuses for the crime ("the Holocaust was provoked by the Jews themselves"). There might be some doubts as to whether the denial and the other acts have to relate to the facts (occurrence of the crime) or to law (legal qualification of the crime). So far, the Czech courts have not explicitly addressed this issue, though it seems that they mostly adopt the former approach. The first and the second elements are, therefore, relative clear. The situation is more complicated with respect to the third element which pertains to the nature, and identification, of relevant historical crimes.

Par. 405, in its current wording, refers to *Nazi, communist and other genocide and Nazi, communist or other crimes against humanity, war crimes and crimes against peace.* Two questions arise here, one related to the definition of the crimes, the other to the conditions under which their denial is an offence. The four crimes (genocide, crimes against humanity, war crimes, crimes against peace) all constitute crimes under international law and, as such, are defined in the Statute of the IMT and/or in the Rome Statute of the ICC. The Czech Criminal Code, however, contains its own definitions of some of these crimes which are not necessarily identical with the definitions provided at the international level. This is so for the crime of genocide which, under the Czech law, is not limited to the violent acts directed against national, ethnical, racial or religious groups but includes violent acts against class or other similar groups as well.[35] The other crimes appear in the Criminal Code

[35] See par. 400 of the Criminal Code (Genocide).

under somewhat different titles and with somewhat different definitions than in international law.[36] The Czech courts have not so far felt the need to discuss the legal qualification of certain historical crimes and it is, thus, unclear how they would deal with the difference between the national and international definitions and whether they would find this difference problematic from the perspective of the principle of legality.

This might, however, be linked to the conditions under which the denial of a historical crime is to be considered an offence. The main aim of par. 405 is not to test the capacity of the inhabitants to rightly assess the legal nature of certain acts but to prevent them from denying the very occurrence of those acts which constitute the most serious crimes under international law and which, at the same time, are historically well-established and well-known. These acts, moreover, should have some link to the situation in the country, because that is what makes their denial dangerous. From that perspective, the legal qualification may be less important than the general knowledge and acceptance of a certain historical crime. That might explain why the only crime whose denial has so far resulted in criminal prosecution in the Czech Republic is the Holocaust. Were the prosecution to be related to other acts, including some of those declared as serious crimes by the IMT or the ICC (let alone acts which have never been considered by any judicial bodies), the Czech courts would be faced with more difficulties.

The last element of the offence, the *subjective one* (*mens rea*), would deserve more attention than it has so far received. It is clear that the denial, questioning, approval and justification of genocide is an intentional offence.[37] The perpetrator moreover must know that the statements s/he is making about a certain historical facts are incorrect and, in fact, must intend to make such incorrect statements in order to cast doubts on, trivialize or justify serious crimes carried out in the past by a political or ideological strand that the person usually supports at present. The mere ignorance of historical facts ("I do not know whether the Holocaust happened") is not sufficient to constitute an offence, though especially with respect to very well-known facts, the line between ignorance and intention to deny might be somewhat blurred. The

[36] See par. 401 of the Criminal Code (Attack against humanity).

[37] See also P. Šámal, *Trestní zákoník: komentář*, 2. vydání, Praha 2012, pp. 3507–3509.

presence of the subjective element – the person knows that a certain historical act constituted a serious crime but knowingly and intentionally denies that – would be crucial in the prosecution related to crimes other than the Holocaust and could overcome some of the difficulties involved in the interpretation of the objective element of the offence (*actus reus*).

The analysis of the wording of par. 405 shows that although the provision might seem rather vague and imprecise in some of its parts, when read as a whole and when given a narrow interpretation, it is not incompatible with the principle of legality. So far, the Czech organs have embraced such a reading and such an interpretation. In view of that, the Czech courts have been right to reject the claim of the alleged violation of the principle of legality in the concrete cases they have been asked to assess.[38] Were the Czech organs to opt for a broader interpretation, however, the question of the potential vagueness of par. 405 might arise again.

4. Concluding remarks

From 2000, the Czech Republic has resorted to the criminalization of the denial, questioning, approval and justification of, at first "Nazi or Communist genocide or other crimes against humanity committed by the Nazis and Communists" (par. 261a of the Old Criminal Code) and, later on, of "Nazi, communist and other genocide or Nazi, communist and other crimes against humanity or war crimes or crimes against peace" (par. 405 of the New Criminal Code, as amended in 2014). When doing so, it has primarily followed the trend set in Western Europe, although the domestic political context has had a major impact on the extensive scope of the provision and on the fact that in addition to the Holocaust, it also relates to other crimes, especially those committed by communist regimes. It is this extensive scope, together with the vague and imprecise nature of some of the concepts invoked in the provision, that have produced doubts about the compatibility of the provision with the right to freedom of expression and the principle of legality (*nullum*

[38] See Supreme Court, 7 Tdo 1014/2017, 13 December 2017; Constitutional Court, ÚS 1226/18, 20 June 2018.

crimen sine lege). A rather narrow interpretation that the Czech organs have embraced in the application of par. 261a/par. 405 has so far rendered these doubts unsubstantiated. Any attempts at broadening this interpretation would, however, highly likely bring them back, reopening the public debate on whether, or rather to what extent and in which instances, the State should legislate on historical facts.

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TAMÁS HOFFMANN

The Punishment of Negationism in Hungarian Criminal Law – Theory and Practice

I. Introduction

The punishment of denial of authoritarian crimes in Hungary is closely intertwined with widely differing political visions over the past and the present. Originally introduced as an obviously symbolic piece of legislation only criminalizing the denial of the Holocaust as one of the last legislative acts of the outgoing socialist government in 2010, it was immediately expanded to cover the negation of the crimes of communist regimes. This brief article will first give an overview of the legislative history of the legal regulation, then address some of the arguable theoretical and practical difficulties in its application. Finally, it will examine how the criminal provision prohibiting the denial of authoritarian crimes is actually implemented in practice.

II. The legislative history of the legal regulation of denial of authoritarian crimes in Hungarian criminal law

The legal regulation of the denial of authoritarian crimes in Hungarian criminal law can be divided into two periods, both of which were significantly influenced by political considerations. In the first, very brief period, the outgoing socialist government created the crime of the public denial of the Holocaust, while since the current Fidesz-government took helm since 2010, Hungarian criminal law penalizes the public denial of crimes committed during national socialist and communist regimes.

II.1. The criminalization of the public denial of the Holocaust

Between 2006 and 2010, the governing left-wing coalition government has rapidly lost its political support, which coincided with the rise of the far-right nationalist Jobbik party. Jobbik politicians have repeatedly attacked the government for not fighting against "Gypsy criminality," often denied, mocked or trivialized the Holocaust and the party has established a para-military organization, the Hungarian Guard, that often acted menacingly towards Roma people and the perceived enemies of Jobbik – though did not use physical violence.

The hitherto prevailing constitutional doctrine had been mostly opposed to the criminalization of the denial of the Holocaust adhering to a robust conception of free speech relying on Constitutional Court Decision no. 30/1992, which stated that "the right to free expression of opinion protects opinions regardless of their value and truth content"[1] and maintained that the criminalization of Holocaust denial was an unnecessary limitation of the right of freedom of expression in the absence of the breach of other fundamental rights.[2] The activity of Jobbik and other incidents, such as a neo-Nazi gathering in the Buda Castle on 18 April 2009, however, have finally spurred the government to introduce a bill to the legislation criminalizing the public denial of the Holocaust.[3] Still, this bill was eventually withdrawn over fierce debates concerning its methodology, especially the determination of the magnitude of the number of victims.[4]

On 27 January 2010, Attila Mesterházy, the leader of the parliamentary faction of the Socialist Party and its prime ministerial candidate during the 2010 parliamentary elections, submitted a new bill to the parliament.[5] This new version significantly changed its regulatory approach by focusing not merely on the denial or questioning of the historical fact of the Holocaust

[1] The Constitutional Court of Hungary, Decision no. 30/1992 (26 May).

[2] See A. Koltay, *A holokausztagadás büntethetősége* és a véleménynyilvánítás *szabadsága*, „Magyar Jog" 2004, vol. 51, pp. 220–231.

[3] Bill no. T/9861.

[4] See G. Bárándy, *A nemzeti szocialista* és *kommunista rendszerek bűneinek nyilvános tagadása, avagy a Holokauszt tagadása?*, [in:] Örökség és *büntetőjog – Emlékkönyv Békés Imre tiszteletére*, szerk. E. Belovics, E. Tamási, Z. Varga, Budapest 2011, pp. 89–103, p. 92.

[5] Bill No. T/11705 (2010).

but on the consequent breach of human dignity of the victims. The bill was adopted on 22 February 2010, the very last day of the parliamentary session before the general elections as Act XXXVI of 2010 on the amendment of Act IV of 1978 on the Criminal Code. It created the new criminal offence of "Public Denial of the Holocaust" in the section of "Crimes against Public Peace" in Art. 269.quater of the Hungarian Criminal Code declaring that: "Any person who before a large public violates the dignity of the victims of the Holocaust by denying, doubting or trivializing the fact of the Holocaust, commits a felony punishable by imprisonment not exceeding three years."[6]

The Justice Minister's official explanatory note accompanying the bill justified the new crime as satisfying a need to fight hate crimes more efficiently. It explicitly invoked Art. 1(d) of a 2008 Council of the European Union Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[7] The cited provision established an obligation of all Member States to criminalize intentional conduct:

> (…) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.[8]

Interestingly, the explanatory note failed to refer to Art. 1(c) of the Framework Decision which prescribed measures for "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Art. 6, 7 and 8 of the Statute of the International Criminal Court." This would have compelled the legislator to substantially broaden

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[6] Art. 1 of Act XXXVI. of 2010.

[7] Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.

[8] Art. 1(d) of Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.

the scope of application of the new crime, not restricting it to the denial of the Holocaust but expanding it to cover a much wider range of situations. It can be presumed that this would have been less politically opportune for the socialist government before the new parliamentary elections, but perhaps the fact that in spite of ratifying the Rome Statute of the International Criminal Court, Hungary had failed to implement it also played a role in this curious omission.

Still, even the adopted text was far somewhat obscure as it never defined who "the victims of the Holocaust" were whose human dignity the law sought to protect.[9] Obviously, in a narrow reading, such victims were only the persons directly affected by the Holocaust and in that case the criminal offence would have ceased to be applied after the death of the last Holocaust survivor. However, the descendants of Holocaust survivors could also be regarded as victims as trauma among the second and third generation of Holocaust survivors is well documented in psychological literature.[10] Moreover, the provision only applied to denial, doubting and trivializing, i.e. the public approval of Holocaust was still not punishable.

II.2. The criminalization of the public denial of the crimes of national socialist and communist regimes

As a result of the April 2010 parliamentary elections, the right-wing Fidesz party won a two-thirds majority in the national assembly. Fidesz regarded the sweeping electoral victory as the dawn of a new era of the "Regime of National Cooperation" since "Hungary has regained the right and ability of self-determination" through a "successful revolution in the polling booths."[11]

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[9] See the Hungarian Civil Liberties Union's analysis of the bill. *A Társaság a Szabadságjogokért jogvédő szervezet véleménye. A büntető törvénykönyv módosítására vonatkozó T/11705 számú törvényjavaslatról*, Budapest 2010, https://tasz.hu/files/tasz/imce/TASZ_allaspont_btk_T11705.pdf (access: 10.10.2019).

[10] See, e.g. M. Scharf, *Long-term Effects of Trauma: Psychosocial Functioning of the Second and Third Generation of Holocaust Survivors*, "Development and Psychopatology" 2007, vol. 19, pp. 603–622.

[11] Political Declaration of 16 June of 2010 of the Hungarian National Assembly on National Cooperation https://www.parlament.hu/irom39/00047/00047_e.pdf (access: 1.10.2019).

One of the central tenets of this new age was the condemnation of communism as enshrined in the new constitution adopted in 2011, which dedicated an entire article to proclaiming the illegality and criminal nature of the communist regime. Art. U emphasized that:

> The Hungarian Socialist Workers' Party and its legal predecessors and the other political organisations established to serve them in the spirit of communist ideology were criminal organisations, and their leaders shall have responsibility without statute of limitations for: f) systematically devastating the traditional values of European civilisation.[12]

Unsurprisingly, the new government wasted no time to translate this determination into criminal law by expanding the scope of application of crime of the public denial of the Holocaust. On 17 May 2010, just 3 days after the first session of the new parliament, a bill was introduced to amend the law by criminalizing the public denial of the crimes of the national socialist and communist regimes and the amendment was adopted on 8 June 2010.[13] Art. 269.quater of the Hungarian Criminal Code became "The Public Denial of the Crimes of National Socialist and Communist Regimes." The new law provided that: "Any person who before the large public denies, trivializes or seeks to justify the crime of genocide and other acts committed against humanity by national socialist and communist regimes commits a felony punishable by imprisonment not exceeding three years."[14]

The official explanatory note of the Justice Minister stated that the amendment was necessary "to measure the crimes and victims of totalitarian regimes with an equal measure" and referred to the established practice of the Hungarian Constitutional Court that did not differentiate between criminal measures protecting the human dignity of the victims of national socialism and communism.

While this new regulation, which has remained unchanged even after the adoption of the new Hungarian Criminal Code under Art. 333 in 2012,[15] has

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12 Art. U of The Fundamental Law of Hungary (25 April 2011).

13 Act LVI. of 2010.

14 Art. 7 of Act LVI. of 2010.

15 Act C. of 2012 on the Hungarian Criminal Code (entered into force on 1 July 2013).

indeed remedied certain aspects of the previous norm, such as its narrow scope and the failure to criminalize public conducts approving or extolling authoritarian crimes, it still had problematic aspects.

It is unclear why the scope of application is limited to the crimes of national socialist and communist regimes. Such restriction allows for denying or even extolling crimes committed by authoritarian regimes in Hungary – such as crimes committed between 1919 and 1944 under the Horthy regime – or in other corners of the world if they were not committed by a national socialist or communist regime, for instance, during the Bosnian civil war. Moreover, the expression "other acts committed against humanity" did not conform completely to "crimes against humanity" and, thus, created uncertainty concerning its application.[16]

III. Constitutional Court Decision no. 16/2013

On 20 June 2013, the Hungarian Constitutional Court attempted to clarify the meaning and scope of application of the crime of the public denial of the crimes of national socialist and communist regimes. Relying on a textual interpretation, it concluded that

> (…) the object of the crime of the denial of the crimes of national socialist and communist regimes is not solely acts that constitute under international and domestic law genocide and crimes against humanity but – taking into account the title and that the provision mentions acts against humanity instead of crimes – every horrific acts of a similar gravity to genocide and crimes against humanity that are generally accepted as historic facts and were committed during national socialist and communist dictatorships.[17]

[16] The majority of Hungarian literature presumed that this expression was just a codification error and the legislator clearly referred to crimes against humanity. See, e.g. E. Mezőlaki, *A köznyugalom elleni bűncselekmények*, [in:] *Kommentár a Büntető Törvénykönyvhöz*, szerk. K. Karsai, Budapest 2013, pp. 691–711, p. 695. Some scholars, however, pointed out the lack of normative clarity. See F. Sántha, *A köznyugalom elleni bűncselekmények*, [in:] *Magyar büntetőjog különös rész*, szerk. I. Görgényi és mások, Budapest 2013, pp. 447–476, p. 463.

[17] The Constitutional Court of Hungary, Decision no. 16/2013 (20 June), par. 20.

According to the Court, the terms "genocide" and "other acts against humanity" referred to the gravity of the crimes instead of their exact categorization under international and domestic criminal law since

> During the tense world political situation of the Cold War the Western powers – understandably – were much more "cautious" to judge and "criminally define" events taking place during communist regimes than concerning national socialist crimes in the Post-Second World War era. Therefore, some of the crimes committed during communist regime are "difficult" or even impossible to interpret – legally – using the terminology of international law or domestic criminal law. Consequently the legislator besides that category of genocide as a crime under international and domestic criminal law defined the prohibited act as other acts against humanity in order to "cover" every situations of communist crimes."[18]

The Constitutional Court therefore concluded that "other acts against humanity" are "crimes that are – based on their gravity – similar to genocide and therefore demand similar treatment."[19] The Decision further pronounces that whether such crimes "according to the view of the civilized world" are "historic crimes" that have similar gravity to genocide have to be determined by the criminal judge in the given legal proceeding.[20]

Such determination does not seem to be difficult in the opinion of the constitutional judges since they claim that such historic events constitute "absolute truths", the protection of which is in the interest of "European and universal culture that influences European legal and social development."[21] In other words, such events are beyond the pale of any discussions. The Constitutional Court, however, still limits the scope of application of the crime when it emphasizes that the prohibited conduct, while immaterial, still has to be capable of disturbing the public peace. "Therefore, only those acts fall within the scope of prohibited acts that are – regardless of any actual effect or other consequences – objectively capable of angering or causing outrage

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18 *Ibidem*, par. 21.
19 *Ibidem*.
20 *Ibidem*, par. 22.
21 *Ibidem*, par. 23.

to those who are committed to the values recognized and protected by the Fundamental Law, i.e. reach the level of danger for the society where the intervention of the state is inevitable."[22]

IV. The crime of the public denial of the crimes of national socialist and communist regimes in judicial practice

The crime of the public denial of the crimes of national socialist and communist regimes is almost exclusively prosecuted in cases of Holocaust denial. The first conviction was in January 2013, when a man was given an 18-month suspended sentence and was compelled to visit the Holocaust Memorial Centre in Budapest. The convicted person carried a sign on 23 October 2011 during an opposition demonstration that read "The Shoah never took place" in Hebrew.[23] In March 2016, a Jobbik politician received a fine for using different slurs concerning the Holocaust during a political event commemorating Hungarian war victims of World War II in January 2014.[24] Most of the cases, however, ever since concerned people who made comments on the social media denying or even extolling the Holocaust. On the average, there are less than 30 such cases every year.[25] These cases obviously do not present a very difficult task to the judges since the Holocaust is a universally recognized historical fact and the statements in question do not fall within a possibly controversial field of scientific debate or artistic freedom of expression.

On the other hand, determining whether statements regarding communist dictatorships satisfy the extremely high threshold of denying, trivializing or justifying acts that have a gravity "similar to genocide" is obviously much more problematic. Unsurprisingly, in the past 6 years since the adoption of the law, there has been only one instance of such proceeding concerning the

[22] *Ibidem*, par. 26.

[23] https://index.hu/belfold/2013/01/31/auschwitzi_latogatasra_koteleztek/ (access: 20.09.2019).

[24] http://zsido.com/agoston-tibort-jogerosen-eliteltek-holokauszttagadas-miatt/ (access: 22.09.2019).

[25] G. Skoda, *A szimbolikus jogalkotás a büntetőjogban*, „Pro Futuro" 2018, vol. 7, pp. 173–189, p. 184.

public statements of Béla Biszku. Biszku was the Minister of Interior between 1957 and 1961, during the period of (show) trials and subsequent executions of participants of the 1956 Revolution. On a show of Hungarian state channel Duna TV aired on 4 August 2010, he claimed that the 1956 events were not a revolution but counterrevolution, the legal proceedings against revolutionaries had a legal ground since "they had committed something," "the fight for the regime was just" and then called the events a "national tragedy." His case became a *cause célèbre* and the Fidesz government even adopted Act CCX. of 2011 – informally known as Lex Biszku – which sought to solve the confusion surrounding the application of crimes against humanity in the Hungarian legal system and also punish common crimes committed during the communist era.[26]

The first instance judgment of the Budapest Metropolitan Court relied on the approach of the Hungarian Constitutional Court and concluded that Biszku's statements were

> (…) closely related to the communist ideology and period and reach the "threshold" that in its scale and gravity can be assimilated to genocide and based on a historic crime that according to the view of the civilized world has a similar weight and is therefore similarly assessed. The fact of the public denial of show trials in itself, the repeated allusions that independent, "sovereign" courts tried cases solely complying with laws realizes the legal facts of the crime. It is public knowledge – and since the accused was one of the main operators, he is aware of it – that several thousand people were condemned innocently, thus crippling them and their families and several hundred people were condemned to death and executed. Moreover, also during this period, due to event of 1956, several thousand people left their homeland to find refuge abroad and rebuild their lives. The trivialization of these facts and the accused's attempt to justify them also contravenes the legal facts of the

[26] Hungary, Act CCX of 2011 on the Criminalization of Crimes against Humanity and Exclusion of Statute of Limitations, along with the Prosecution of Certain Crimes Committed During the Communist Dictatorship. For the Hungarian legal regulation see more in detail, T. Hoffmann, *Crimes against the People – a Sui Generis Socialist International Crime?*, "Journal of the History of International Law" 2019, vol. 21, pp. 299–329.

crime (even if it would have been strange to expect the contrary from him as a former minister of interior).[27]

One might wonder to what extent the 1956 Hungarian Revolution could be seen as having a similar gravity to genocide but this question was never conclusively answered by the Hungarian courts as Biszku passed away in 2016, before the conclusion of his trial.

V. Conclusions

The issue of the criminalization of the public denial of authoritarian crimes is a question that is very much impacted by politics, differing conceptions of history, and the lack of decisive stocktaking of the authoritarian past of 20th-century Hungary. Until these questions are resolved, this regulation can hardly be anything more than a symbolic gesture to demonstrate a public commitment to "measure all dictatorships equally." Given, however, lingering doubts whether communist dictatorship was truly as evil as National Socialism and the inapplicability of the provision to crimes committed by other authoritarian regimes, it is difficult to imagine that the law will ever achieve its goal.

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[27] Budapest Metropolitan Court, 25.B.766/2015/117, Judgment of 17 December 2015, p. 167.

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ANDRII NEKOLIAK

Regulating Memory through Responsibility for Historical Denialism: The Case of Unempowered Norms in Ukraine

Law and memory is a field of research that has grown considerably in the last few years. The practices of regulating historical memory by means of legislation, administrative and judicial procedure have provided a fertile ground for analysis across social sciences and law.[1] Moreover, bans on public expressions of historical views have reinvigorated important normative discussions about permissibility of legislative engagement with the past and the punishment of speech in a liberal democracy[2]. Legal scholars pay particular attention to

[1] See Nikolay Koposov's seminal work and his distinction between "hardcore" and "periphery" memory laws in N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge 2018. For a broad overview of "legal governance of history", see contributions to the edited volume in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge 2017; Eric Heinze's conceptual essay and his distinction between punitive and regulatory memory laws is worth of particular attention (*Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*, [in:] *Law and Memory: Towards Legal Governance of History*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2017, pp. 413–434.

[2] See, e.g. C. Douzinas, *History Trials: Can Law decide History?*, "Annual Review of Law and Social Sciences" 2012, vol. 8, pp. 273–289. For an insightful discussion on memory laws and liberal democracy, see G. Soroka, F. Krawatzek, *Nationalism, Democracy, and Memory Laws*, "Journal of Democracy" 2019, vol. 30(2), pp. 157–171. On the issue of freedom of speech and historical denialism, see E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, "Vermont Law Review" 2006, vol. 30, pp. 609–626. See also recent book by the same author: idem, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, Berlin 2018. On the issue of memory laws and "militant democracy", see M. Mälksoo, *Decommunization in Times of War: Ukraine's Militant Democracy Problem*, "Verfassungsblog", 9 January 2018, https://verfassungsblog.de/decommunization-in-times-of-war-ukraines-militant-democracy-problem/ (access: 6 July 2020).

the bans on historical speech by providing case studies on this phenomenon[3]. Arguably, regulatory intervention of governments into historical memory construction is the highest when they use criminal law. Punitive laws entail the harshest expression of official (state-sponsored) obstruction of individual conduct. Thus, according to Nikolay Koposov, criminalization of statements about the past forms a "backbone" of memory law conceptualization.[4] In comparison to "softer" and in-direct memory regulation through instituting commemorative dates or endorsing history curriculum in public schools, bans on historical speech are meant to have direct and restrictive effect on actual behavior of individuals.

This paper takes a stock of Ukrainian memory legislation dealing with the punishment of historical speech in this country. In order to illustrate the paper's argument, it first reviews punitive norms of Ukrainian legislation dealing with the symbols of the past. This strand of legislation pertains to punishment of dissemination or usage of the symbols of the Nazi and Soviet totalitarian regimes in Ukraine. The norms of the law pertaining to the symbols of the past form a part of the national criminal and administrative law. Importantly, this means that they can be enforced through criminal justice system or administrative fines. The paper then proceeds with reviewing Ukraine's punitive memory laws: the Holodomor Law (2006) and the Freedom Fighters Law (2015). I argue that the construction of the norms punishing denial of the Holodomor or legitimacy of Ukraine's independence struggle does not allow for bringing legal action against potential deniers. In contrast to legislation on the symbols of the past, these two memory laws remain rather symbolic measures to consolidate Ukraine's national memory.

There are two punitive provisions of Ukrainian law dealing with the symbols of the past. Both measures were introduced in the aftermath of

[3] See P. Teachout, *Making 'Holocaust Denial' a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, "Vermont Law Review" 2006, vol. 30, pp. 655–692; L. Cajani, *Criminal Laws on History: The Case of the European Union*, "Historein" 2011 vol. 11, pp. 19–48; M. van Noorloos, *Memory Law: Regulating Memory and the Policing of Acknowledgment and Denial*, [in:] *Transitional Justice and the Public Sphere*, eds. Ch. Brants, S. Karstedt, Oxford–Portland 2017, pp. 263–284; L. Pech, *The Law of Holocaust Denial in Europe: Towards a Qualified EU-Wide Criminal Prohibition*, "Jean Monnet Working Paper NYU School of Law" 2009, vol. 10(9), pp. 1–51.

[4] N. Koposov, *op. cit.*, pp. 1–22.

the Euromaidan protest by the new government. Firstly, in 2015, in a move to equate Nazi and Stalinist regimes in Ukraine and forbid propaganda of the regimes, Art. 436(1) of the Criminal Code was introduced to ban production, dissemination and public usage of the symbols of two totalitarian regimes.[5] The list of what counts as a totalitarian symbol as well as exemptions from the general rule were additionally defined by the law[6]. The provision of the Criminal Code was enforced against transgressors several times up to date.[7] Furthermore, in 2017, Ukraine's parliament outlawed the so-called St. George ribbon in the country.[8] The amendment to the Code of Administrative Offences of Ukraine has established fines for public usage and demonstration of the yellow-black ribbon that many Ukrainians associate with both Soviet past and contemporary Russian aggression in Ukraine.

Yet, the Ukrainian "memory laws" present different strand of legislation – the one dealing with prohibiting historical denialism. In 2006, the Holodomor Law proclaimed state-made famine organized by the Stalinist regime in Ukraine an act of genocide against Ukrainian people. In addition, Art. 2 of the Holodomor Law has stipulated explicit provision on historical denialism by stating that "public denial of the 1932–1933 Holodomor in Ukraine shall be recognized as desecration of the memory of millions of victims of

[5] Art. 436(1) of the Criminal Code of Ukraine proclaims that: "Production, dissemination and public use of symbols of communist and national socialist (Nazi) totalitarian regimes including in the form of souvenirs, public performance of the anthems of USSR, Ukrainian SSR (USRR), other union or autonomous Soviet republics or their fragments are forbidden all over the territory of Ukraine, except the cases where otherwise provided in parts 2 and 3 of Article 4 of the Law of Ukraine »On the condemnation of the communist and national socialist (Nazi) regimes, and prohibition of propaganda of their symbols« – shall be punishable by restraint of liberty for a term up to five years or imprisonment for the same term, with/without the confiscation of property." See Criminal Code of Ukraine, 2001, https://zakon.rada.gov.ua/laws/show/2341-14 (access: 6.07.2020).

[6] Law of Ukraine On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols, 2015, https://zakon2.rada.gov.ua/laws/show/317-19 (access: 6.07.2020).

[7] There were few verdicts of Ukrainian courts punishing the usage of Soviet symbols in the country. All verdicts in criminal cases applying Art. 436(1) of the Criminal Code of Ukraine are available online and can be retrieved from the official register of judicial decisions (reyestr.court.gov.ua).

[8] Law of Ukraine, On Amending the Code of Administrative Offences, 2017, https://zakon.rada.gov.ua/laws/show/2031-19#n5 (access: 6.07.2020).

the Holodomor as well as disparagement of the Ukrainian people and shall be unlawful."[9]

The Holodomor Law has appeared as a result of President Viktor Yushchenko's efforts to deal with the legacies of Soviet-times political repressions in the country and to consolidate national memory for Ukraine.[10] However, the way the provision on Holodomor denial was constructed did not allow for summoning potential deniers in court or punishing instances of denialist speech. There were efforts to introduce responsibility for Holodomor denialism after 2006. But none of the initiative reached the stage of actual criminalization. In 2006–2019, there were 10 legislative initiatives to amend the Ukraine's criminal code by introducing criminal liability for public denial of Holodomor.[11] Usually, the legal-expert service of the parliament issued negative legal opinions on the initiatives to criminalize historical denialism. Therefore, none of the initiatives did make it to the stage of actual voting in the parliament. Up to date, the provision on Holodomor denialism does not have a proper sanction in its formulation and cannot warrant legal action against potential deniers.

The introduction of "de-communization" laws into national legislation in 2015 by the new post-Euromaidan government became even more emblematic of the phenomenon to regulate memory by means of instituting bans on historical speech. In particular, one of the mentioned laws aimed at protecting the memory of Ukrainian WW2 nationalists. The Law on Freedom Fighters proclaimed that "public denial of the legitimacy of the struggle for independence of Ukraine in the twentieth century is recognized as insult to the memory of fighters for independence of Ukraine in the 20th century,

[9] Law of Ukraine, On the Holodomor of 1932–1933 in Ukraine, 2006, http://zakon.rada.gov.ua/go/376-16 (access: 6.07.2020).

[10] On the politics of memory around the issue of Holodomor in Ukraine, see L. Klymenko, *The Holodomor Law and National Trauma Construction in Ukraine*, "Canadian Slavonic Papers" 2016, vol. 58(4), pp. 341–361; G. Kas'ianov, *The Holodomor and the Building of a Nation*, "Russian Politics and Law" 2010, vol. 48(5), pp. 25–47.

[11] For example, one of the recent legislative initiatives was concerned with criminalizing both the denial of Holodomor and the denial of the legitimacy of OUN-UPA struggle for independence. It offered to punish such public denial with fines or imprisonment depending on severity of a speech act (up to 5 years in prison). See Y. Shuhevych, *The Project of the Law to Amend Some Legislative Acts in Ukraine*, no. 5692, 20 January 2017, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60975 (access: 6.07.2020).

disparagement of the Ukrainian people and is unlawful."[12] Again, the law did not amend the national criminal legislation or legislation on administrative offences to introduce actual sanction for public denial of the independence cause. Thus, the norm on historical denialism stipulated by the law remains unenforceable by means of official, criminal or administrative action.

Nevertheless, the same law contains a different provision that may yield legal action against deniers of the independence cause in longer run. Art. 6 of the Freedom Fighters Law establishes that "citizens of Ukraine, foreigners and persons without citizenship who publicly show contempt for persons referred to in Art. 1 of this Law and prevent the exercise of rights by the fighters for independence of Ukraine in the twentieth century are responsible under the law."[13] Quite obviously, this norm cannot warrant criminal punishment of deniers expressing critical views about historical Ukrainian nationalists. But, potentially, this norm can serve as a legal basis for persons defined as "freedom fighters" to instigate defamation suits against disparagement of the nationalist movement in present-day Ukraine.

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[13] *Ibidem*, par. 1, Art. 6.

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NEDŽAD SMAILAGIĆ

Negationism and Atrocity Crimes Committed in the Former Yugoslavia: Criminal Law and Transitional Justice Considerations

1. Introduction

Dealing with atrocity crimes and other mass abuses of human rights committed during the Yugoslav crisis in the last decade of the 20th century represents one of defining topics in the Western Balkan reality. Generally, atrocity crimes[1] are a complex social problem. Going beyond the two great wars, 20th-century history is rich in examples of atrocity crimes committed resulting in extensive and unnecessary loss of human lives and in violation of settled international law.[2] However, the Yugoslav crisis represents the most concentrated conflict-related abuses of human rights after World War II in Europe.[3] In retrospect, modern social and political life in the Western Balkan countries is still affected by these events and, with different degrees, struggle to cope with such legacy in a future-oriented and peaceful coexistence. Dealing with atrocity crimes committed in this period does have important share in that context, and acceptance of historical facts, often determined in relevant court decisions, is put into question.

[1] Throughout this paper the term "atrocity crimes", as coined by David Scheffer, is used to denote the so-called core international crimes, namely the crime of genocide, crimes against humanity, and war crimes. See, D. Scheffer, *Genocide and Atrocity Crimes*, "Genocide Studies and Prevention: An International Journal" 2006, vol. 1(3), p. 229 et seq.

[2] See, e.g. Bassiouni's study which shows increase of conflicts after World War II with estimated 86 millions of human casualties (*Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, [in:] *Post-Conflict Justice*, ed. idem, Ardsley 2002, p. 6 et seq.).

[3] See, e.g. J. Drnovsek, *Riding the Tiger: The Dissolution of Yugoslavia*, "World Policy Journal" 2000, vol. 17(1), p. 57 et seq.

Denial, public condoning or gross trivialization of crimes committed in the region's recent past, as various forms of historical denialism and revisionism,[4] takes an important part in the public discourse. Major portion of such discourse involves public glorification of perpetrators, both through public statements or through memorials built in their honor.[5] Numerous examples show that the facts and legal qualifications of past events are put into question through various acts qualified as negationism. Such occurrence is illustrated by a number of international reports calling upon improvement of domestic legal framework or taking more direct measures such as changing names of public places honoring convicted war criminals, memorial sites or streets named after war criminals or Nazi collaborators.[6] Scholarly works consider negationism or historical denialism as a term associated with either denial of certain past large-scale crimes such as the Holocaust or atrocity crimes,[7] or their gross trivialization or condoning.[8] More generally, according to Stanley Cohen, denial denotes various processes by which concerned actors evade

[4] E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague 2018, p. 4 et seq.

[5] One of most recent examples includes building a monument honoring Ratko Mladić, former military commander and an indictee for genocide and crimes against humanity before the ICTY, in Kalinovik, his hometown in eastern Bosnia and Herzegovina. See, E. Mačkić, *Ratko Mladic Monument Erected in His Bosnian Hometown*, "Detektor.ba", 3 September 2018, http://detektor.ba/en/ratko-mladic-monument-erected-in-his-bosnian-hometown/ (access: 1.10.2019). Another example includes a student house in East Sarajevo named after Radovan Karadžić, former President of Republika Srpska who was convicted by the ICTY for genocide and crimes against humanity to life imprisonment. See, Z. Ćosić-Vrabac, *Studentski dom na Palama na današnji dan nazvan "Dr. Radovan Karadžić"*, „Oslobođenje", 20 March 2019, https://www.oslobodjenje.ba/vijesti/bih/studentski-dom-na-palama-na-danasnji-dan-nazvan-dr-radovan-karadzic-442780 (access: 1.10.2019).

[6] See, e.g. *ECRI Report on Bosnia and Herzegovina* (fifth monitoring cycle), CRI(2017)2 (European Commission against Racism and Intolerance, 28 February 2017), p. 11, 14 et seq; *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2018 to 15 May 2019*, UN S.C. Doc. S/2019/417 Annex 2 (20 May 2019), p. 46 et seq.; *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 May to 15 November 2018*, UN S.C. Doc. S/2018/1033 Annex 2 (19 November 2018), p. 38 et seq.

[7] See in this vein, E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, "Vermont Law Review" 2006, no. 30, p. 614.

[8] See, 2008 Framework Decision, section 2 of this article.

by various means disturbing information and its consequences.[9] Futrther, he distinguishes conscious and uncouncious denial, whereby conscious denial involves various rhetorical forms such as denial of facts, denial through interpretation, and denial of implications or consequences of the act.[10] Unconcious denial relate to "expressions of the pshychological processes" of persons to evade facts.[11] Genocide scholar Gregory Stanton considers denial as the ultimate, final stage of genocide, as it "(…) lasts throughout and always follows genocide. It is among the surest indicators of further genocidal massacres."[12] As a negative social phenomenon, negationism may have particularly destructive effect in post-conflict societies aiming to come to terms with past abuses in a meaningful and effective manner. Thus, the Western Balkan region is a clear example of such society.

Additionally, negationism is a criminal justice policy issue *par excellence* as different values clash: individual rights and freedoms on the one hand, and defending the society from harmful phenomenon, on the other. As Ruti Teitel suggested, resorting to legal protection of a "particular historical account" raises various dilemmas and opens debates.[13] Prohibition and punishment of negationism through criminal law means is a clear example supporting such an account. Striking proper balance requires taking into consideration these values in an exact context. Main reasons for punishing negationism include prevention of committing further atrocities, dealing with the past wrongdoings and putting in place a potentially effective mechanism to deter potential future perpetrators. Reasons against punishment of negationism include the operative value of such incriminations, especially in countries without context or without recent historical experiences with atrocity crimes, as well as difficulties associated with defining negationism especially in the context of the freedom of expression, and the experience showing that judicial prosecution of negationists may be counterproductive by giving publicity to

[9] S. Cohen according to R. Jamieson, *Denial*, [in:] *The Sage Dictionary of Criminology*, eds. E. McLaughlin, J. Muncie, London 2001, pp. 86–87.

[10] *Ibidem,* p. 86.

[11] *Ibidem*.

[12] G. Stanton, *The Ten Stages of Genocide*, "Genocide Watch", 1996, https://www.genocidewatch.com/ten-stages-of-genocide (access: 1.10.2019).

[13] R. Teitel, *Transitional Justice*, Oxford 2002, p. 108.

such perpetrators.[14] Thus, resorting to the state's exercise of its *ius puniendi* in the context of criminal law as the *ultima ratio* mechanism of criminal justice policy, requires an assessment of each of these arguments and setting a proper national approach.

This article is structured into three parts and proceeds as follows. The first part addresses the arena of international law in this regard, both at universal and European regional level. While contemporary international law does not require punishment for negationism, the analysis shows the tendency in international law leading towards its prohibition and punishment, both universally and regionally. Recent developments in the European Union (EU) constitute a clear indicator of such a tendency. The second part providesa comparative overview and analysis of criminal legislation of the countries of the former Yugoslavia against international standards, in particular the EU framework. Some of those countries belong to the EU (Croatia and Slovenia), whereas other stateshave strong aspirations towards the EU membership and they are at various stages of integration processes. The analysis shows various approaches. Most notably, BiH and Serbian legislation are selected as examples of partial and selective implementation, while Kosovar and North Macedonian laws – as examples without appropriate national legal framework. Finally, the third part provides an overview of the issue from the transitional justice viewpoint. The article concludes that in the long run, states in question should explore mechanisms and options that would focus also on prevention of negationism, not just repression as the *ultima ratio* measure.

2. Towards International Law on Prohibition of Negationism

While there is no explicit international legal obligation to penalize negationism at the moment, it could be argued that international law is moving in that direction.

[14] On arguments for and against crimialization of negationism with specific reference to genocide, see F. Karčić, *Krivično-pravna zabrana poricanja genocida: komparativna perspektiva*, „Godišnjak Pravnog fakulteta u Sarajevu" 2007, no. 50, pp. 295–296.

At the *universal* level, in addition to specific conventions,[15] statutes of international courts and tribunals provide for definitions of "atrocity crimes" within their subject matter jurisdiction.[16] In addition, the 1966 International Convention on Elimination of All Forms of Racial Discrimination (CERD)[17] and the 1966 International Covenant on Civil and Political Rights (ICCPR)[18] impose certain obligation to state parties. While CERD obliges states to condemn and criminalize hatred-based propaganda and its justification,[19] the ICCPR further requires prohibition of "(…) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[20] The UN Committee on Elimination of Racial Discrimination recommended for prohibition and penalization of denial and public justification of atrocity crimes.[21]

At the *regional* level, both the Council of Europe (CoE) and the EU have gradually developed normative framework that addresses the problem of negationism. These measures can either relate to human rights or criminal law *stricto sensu*. Freedom of expression is listed in the catalogue of rights and

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[15] *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, UNTS 78 (1950), p. 277.

[16] *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis* (London Charter), London, 8 August 1945, UNTS 251 (1951), p. 279 et seq; *Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946*, Treaties and Other International Acts Series 1589; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993; *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994;*Rome Statute of the International Criminal Court* (*1998 Rome Statute*), Rome, 17 July 1998, UNTS 2817 (2004), p. 3 et seq.

[17] *International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 7 March 1966, UNTS 660 (1971), p. 195 et seq.

[18] *International Covenant on Civil and Political Rights*, New York, 16 December 1966, UNTS 999 (1983).

[19] Art. 4 CERD, *op. cit.*

[20] Art. 20(2) ICCPR, *op. cit.*

[21] "[P]ublic denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred. The Committee also underlines that »the expression of opinions about historical facts« should not be prohibited or punished.", *General recommendation No. 35 on Combating Racist Hate Speech*, UN Doc. CERD/C/GC/35, 26 September 2013.

freedoms protected by the European Convention of Human Rights (ECHR)[22] as a qualified right, meaning that the interference into the exercise of the freedom of expression is allowed if it is prescribed by national law, serves the legitimate interest and is necessary in the democratic society.[23] In addition, Art. 17 ECHR foresees that the abuse of rights and freedoms set forth in the Convention is prohibited.

The ECtHR has developed two tracked case law when it comes to negationism. Regarding the *denial or trivialization of the Holocaust*, the Court held firm stance that such statements fall outside the scope of the freedom of expression under Art. 10 and represent abuse of rights and freedoms under Art. 17 ECHR.[24] On the other side, present ECtHR case law considers the denial of atrocity crimes within the realm of the freedom of expression. In the case *Perinçek v. Switzerland* related to criminal prosecution of the applicant for denial of 1915 Armenian Genocide before Swiss courts,[25] the Court examined allegations under Art. 10, in the context of nature of applicant's statements, geographical, historical and temporal context, the extent the applicant's statement affected rights of the Armenian community and in context of international legal obligations of Switzerland, and held that Swiss authorities failed to strike the proper balance between the freedom of the applicant and the right to privacy of members of the Armenian community.[26]

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[22] Art. 10(1), *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14*, Rome, 4 November 1950, ETS No. 5.

[23] Art. 10(2) ECHR *op. cit*.; Herceg Pakšić, B., *Tvorba novih standarda u slučajevima teških oblika govora mržnje: negiranje genocida pred Europskim sudom za ljudska prava*, „Zbornik Pravnog fakulteta u Zagrebu" 2017, vol. 67(2), p. 230 et seq.

[24] *Pastörs v. Germany*, app. no. 55225/14, Judgment (Merits and Just Satisfaction) of 3 October 2019; *Kühnen v. Germany*, app. no. 12194/86, Commission Decision of 12 May 1988; *Lehideux and Isorni v. France*, app. no. 24662/94, Grand Chamber Judgment (Merits and Just Satisfaction) of 23 September 1998; *Garaudy v. France*, app. no. 65831/01, Court Decision of 24 June 2003. See, further P. Lobba, *Holocaust Denial before the European Court of Human Rights*, "European Journal of International Law" 2015, vol. 26(1), p. 241 et seq.; A. Buyse, *Prohibition of the Abuse of Rights*, [in:] *Theory and Practice of the European Convention on Human Rights*, eds. P. van Dijk *et al*., Antwerp 2018, p. 1091 et seq; H. Cannie, D. Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, "Netherlands Quarterly of Human Rights" 2011, vol. 29(1), p. 56 et seq.

[25] *Perinçek v. Switzerland*, app. no. 27510/08, Grand Chamber Judgment (Merits and Just Satisfaction) of 15 October 2015.

[26] *Perinçek v. Switzerland*, *op. cit.*, par. 279.

In doing so, with tight majority the Court ruled that there has been violation of the freedom of expression.[27]

National legislative initiatives and practices in Europe conditioned the need for standardization of European response to negationism as a negative social phenomenon. This need stems not only from the need to strengthen the criminal law protection against racism and xenophobia,[28] but from the divergent approaches in legislation of European states.[29] While CoE instruments are more focused on strengthening the mutual co-operation between the Member States,[30] steps taken within the EU were focused to define offences and to ensure national criminalization of certain forms and expressions of racism and xenophobia in domestic law of Member States.[31] According to Art. 6 of the CoE 2003 Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems (2003 Additional Protocol),[32] state parties have obligation to criminalize in their laws intentional denial, gross minimalization, approval or justification of genocide or crimes against humanity as defined by international law and recognized as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognized by that Party.[33] In that regard, parties may not require that such acts are committed with the intent to incite hatred, discrimination or violence

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[27] *Perinçek v. Switzerland*, *op. cit.*, operative clause, al. 2, p. 115.

[28] F. Dubuisson, *L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression?*, « Revue de la Faculté de Droit, Université Libre de Bruxelles » 2007, vol. 35(1), p. 137 et seq.

[29] See, e.g. a study by the Swiss Institute of Comparative Law, *Étude comparative sur la négation des génocides et des crimes contre l›humanité*, Lausanne 2006, https://www.bj.admin.ch/dam/data/bj/sicherheit/gesetzgebung/archiv/rassismus/studie-sir-genozid-f.pdf (access: 1.10.2019).

[30] See, e.g. B. Pavišić, *Kazneno pravo Vijeća Europe*, Zagreb 2006, p. 261 et seq.

[31] *Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal Law* (*2008 Framework Decision*), Official Journal of the European Union, L 328/55, 6 December 2008.

[32] *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, Strasbourg, 28 January 2003, ETS No. 189.

[33] Art. 6(1) 2003 Additional Protocol, *op. cit.*; B. Pavišić, *op. cit.*, p. 265.

against any individual or group of individuals, based on any discriminatory ground if used as a pretext for any of these factors.[34] As of 5 October 2019, all countries of the former Yugoslavia, except of Kosovo, have signed and ratified the 2003 Additional Protocol.[35]

On 28 November 2008, the EU Council adopted the 2008 Framework Decision with the aim of strengthening the normative framework in combatting, among others, negationism as a specific offence concerning racism and xenophobia.[36] Given the legal nature of framework decisions, there is a certain degree of latitude for states as to implementation of specific measures defined on the respective decision.[37] Based on the foregoing, regarding negationism, legal obligations to Member States stemming from the 2008 Framework Decision can be divided into two groups: mandatory and facultative. Mandatory obligations include:

— *criminalization of negationism as a specific offence concerning racism and xenophobia*, i.e. public condoning, denial or gross trivialisation of crimes of genocide, crimes against humanity and war crimes as defined in Arts. 6–8 of the Statute of the International Criminal Court,[38] and crimes defined in Art. 6 of the Charter of the International Military Tribunal,[39] directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group,[40]

— *providing for criminal responsibility for ancillary forms of participation in the commission of such crimes*. States have obligation to prescribe

[34] Art. 6(2) 2003 Additional Protocol, *op. cit*.

[35] See Chart of signatures and ratifications of Treaty 189 (2003 Additional Protocol), *CoE Treaty Office*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures?p_auth=r76yrytf (access: 5.10.2019).

[36] *2008 Framework Decision*, *op. cit*.

[37] Ž. Horvatić, D. Derenčinović, L. Cvitanović, *Kazneno pravo – opći dio I: Kazneno pravo i kazneni zakon*, Zagreb 2016, p. 28.

[38] *1998 Rome Statute*, *op. cit.*, p. 3 et seq.

[39] *London Charter*, *op. cit.*, p. 279 et seq.

[40] Art. 1(1)(c–d) *2008 Framework Decision*, *op. cit*.

criminal responsibility for instigation, but also for aiding and abetting the crime,[41]

- *prescribe "effective, proportionate and dissuasive criminal penalties."* Under the 2003 Framework Decision, Member States shall provide for criminal penalties of a maximum of at least between one and three years of imprisonment,[42] and
- *liability of legal persons.* Member States shall take necessary measures to ensure possibility to hold legal persons liable for negationism committed for its benefit by any person acting on its behalf or in case of lack of supervision or control, and to prescribe appropriate penalties.[43]

Optional elements limit the *actus reus* elements of the crime by:

- limiting the scope of the offence to the conduct which is either committed in a manner likely to disturb public order or which is threatening, abusive or insulting,[44] and
- limiting the scope of courts with established the existence of the atrocity crime, to a national court of the respective state and/or an international court, or by a final decision of an international court only[45].

Since the end of World War II, one may safely conclude that the international law, both at universal, as well as at the European regional level, moves towards the introduction of the obligation to states to penalize negationism in national legal systems.

3. Criminal law prohibition of negationism in the former Yugoslavia: comparative overview and assessment

Criminal legislation in former Yugoslav countries substantially differs in terms of defining and punishing negationism. From a historical perspective, albeit once part of a single legal system, criminal legislation of these countries reflects respective criminal justice policies defined by specific principles

41 Art. 2 *2008 Framework Decision*, *op. cit.*
42 Art. 3(2) *2008 Framework Decision*, *op. cit.*
43 Art. 5–6 *2008 Framework Decision*, *op. cit.*
44 Art. 1(2) *2008 Framework Decision*, *op. cit.*
45 Art. 1(4) *2008 Framework Decision*, *op. cit.*

and national interests. Except North Macedonia, Kosovo, and BiH in part, negationism is punishable as a specific form of either incitement to hatred or racial discrimination or as an independent crime. The following analysis provides an analysis of national legislations and is based on the 2008 Framework Decision as a benchmark for comparison given that the said countries are either current (Croatia and Slovenia) or aspiring EU Member States (BiH, Montenegro, North Macedonia, Kosovo, and Serbia).

3.1. Full compliance with the 2008 Framework Decision

(a) *Slovenia.* Following the entry into force of the 2008 Framework Decision, new Criminal Code (CC) of Slovenia was adopted.[46] Negationism represents a specific form of incitement to hatred as defined in Art. 297 CC of Slovenia as crime against public order and peace. The basic form of the crime, punishable up to two years of imprisonment, consists in denial, diminishment of the significance, approval, disregard, mockery or advocacy for genocide, holocaust, crimes against humanity, war crimes or aggression, defined as such in the Slovenian legal system.[47] Specific form exists if the crime was committed through publication in the mass media, and in such cases the responsibility extends to the respective media editor, except for live broadcasts provided that the editor was not able to prevent commission of the crime.[48] CC of Slovenia provides for two aggravated forms of the crime. The first form, punishable up to three years of imprisonment, in situation the crime was committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging the movable property of another, desecration of monuments or memorial stones or graves.[49] The second form relates to the commission of the crime by an official through abuse of the official capacity of privilege and is punishable by an imprisonment term up to five years.[50] The law further foresees obligatory forfeiture of

[46] CC of Slovenia (*Uradni list RS*, no. 55/2008, as amended).
[47] Art. 297(2) CC of Slovenia, *op. cit.*
[48] Art. 297(3) CC of Slovenia, *op. cit.*
[49] Art. 297(4) CC of Slovenia, *op. cit.*
[50] Art. 297(5) CC of Slovenia, *op. cit.*

all materials and objects used in context of the commission of this crime.[51] Finally, Slovenian legislator did not use the opportunity to reference as to the court which established the atrocity crime in question, which represents a facultative element under Art. 1(4) of the 2008 Framework Decision.

(b) *Croatia.* Criminal Code of Croatia, adopted in 2011 and entered into force in 2013, includes a single incrimination regarding negationism as a form of public incitement to violence and hatred, as a specific crime against public order.[52] Negationism, punishable by imprisonment up to three years, consists of either public approval, denial or gross trivialisation of the crime of genocide, crime of aggression, crimes against humanity or war crimes directed against racial, religious, national or ethnic group or individual members of such a group in a manner likely to incite to violence or hatred against such a group or a member of such a group.[53] Neither Croatian legislator defined which court established the commission of the crime nor the violation of public order.[54] General rules on responsibility for instigation, aiding and abetting,[55] as well as on liability of legal persons meet the requirements of the 2008 Framework Decision.[56]

(c) *Montenegro.* Montenegrin legislation defines negationism as a specific form of incitement to hatred and is considered as a crime against the constitutional order and national security.[57] *Actus reus* elements of the crime's basic form reflect the 2008 Framework Decision and consist either in public condoning, denial or gross trivialization of genocide, crimes against humanity or war crimes committed against the protected group or its member(s) in a way that it could likely result in violence or incitement to hatred against that particular group, established as such by courts of Montenegro or an

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[51] Art. 297(6) CC of Slovenia, *op. cit.*

[52] CC of Croatia (*Narodnenovine*, no. 125/11, as amended).

[53] Art. 325(4) CC of Croatia, *op. cit.*

[54] K. Turković *et al.*, *Komentar Kaznenog zakona i drugi izvori novoga hrvatskog kaznenog zakonodavstva*, Zagreb 2013, p. 400.

[55] Art. 36–39 CC of Croatia, *op. cit.*

[56] Art. 3(2) Law on Liability of Legal Persons for Criminal Offences (*Narodne novine*, no. 151/03, as amended).

[57] Art. 370(2–4) CC of Montenegro (*Službeni list RCG*, no. 070/03, as amended).

international criminal court (Art. 370(2) CC). Further incriminations provide for two aggravated forms of the crime (Art. 370(2–3) CC). The first aggravated form exists in cases the crime was committed either by coercion, abuse, breach of security, by mockery of national, ethnic, or religious symbols, or by desecration memorials or graves, and is punishable by an imprisonment term from one up to eight years (Art. 370(3) CC). The second aggravated form of the crime, punishable between two and ten years, exists if it was a consequence of an abuse of office, or if it caused riots, violence or resulted in other severe consequences for peaceful coexistence of peoples, national minorities or ethnic groups living in Montenegro (Art. 370(4) CC). Further, general rules on criminal responsibility for instigation, aiding and abetting[58] and liability of legal persons conform with the Framework Decision.[59] Finally, CC allows for consideration of bias motivation as an aggravating factor in meting out of a sentence, if it is not element of the crime.[60] It follows that incriminations in the Montenegrin legislation reflect international standards, most notably the 2008 Framework Decision.

3.2. Partial compliance with the 2008 Framework Decision

(a) *Bosnia and Herzegovina.* Given the country's complex constitutional structure,[61] criminal legislation of BiH consists of four separate criminal codes: theState level,[62] one for each of the two Entities,[63] and the Brčko District of BiH.[64] At the State level, despite at least two parliamentary initiatives in the past 10 years, specific law or amendments to the Criminal Code of BiH that would criminalize the denial of genocide and other atrocity crimes was not

[58] Art. 23–26 CC, *op. cit.*

[59] Art. 3 Law on Liability of Legal Persons for Criminal Offences (*Službeni list RCG*, no. 002/07, as amended).

[60] Art. 43a CC of Montenegro, *op. cit.*

[61] *Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes* (signed 14 December 1995) "International Legal Materials"1995, no. 35, p. 75 et seq. (Art. I [Annex 4]).

[62] CC of BiH (*Službeni glasnik BiH*, no. 3/03, as amended).

[63] CC Federation of BiH (*Službene novine Federacije BiH*, no. 36/03, as amended); CC of Republika Srpska (*Službeni glasnik RS*, no. 64/17, as amended).

[64] CC Brčko District BiH (*Službeni glasnik BD BiH*, no. 33/13, as amended).

considered for adoption by the Parliamentary Assembly of BiH.[65] This problem was partially addressed in the Federation of BiH, one of two BiHEntities, as a result of 2016 Law on Amendments to the CC FBiH.[66] According to the amendment, CC Federation of BiH provides for an incrimination which criminalizes public denial or approval of the crime of genocide, crimes against humanity or war crimes established by a final decision of International Court of Justice (ICJ), ICTY or a national court as a form of the crime of incitement to national, racial or religious hatred, discord or hostility, and provides for imprisonment between tree months and three years.[67] While such an amendment was generally endorsed, relevant commentators rightfully observed that the amendment does not fully reflect international standards.[68] Elements of the crime are defined narrower in a way that the crime can be committed by constituent peoples and others living in BiH (Art. 163(1) CC Federation of BiH), while the list of underlying acts in the incrimination does not extend to public condoning, denial or gross trivialisation of these crimes directed towards the protected group when it will likely incite to violence or hatred against such group or its members.[69] It follows that criminalisation of negationismin BiH was only partial as it constitutes as a specific criminal offence in the Federation of BiH, and it does not fully comply with the definition provided in the 2008 Framework Decision. The lack of domestic legislation in this regard was noted also by relevant international supervisory bodies, most notably the European Commission against Racism and Intolerance.[70]

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[65] *Prijedlog zakona o zabrani negiranja, minimiziranja, opravdavanja ili odobravanja holokausta, zločina genocida i zločina protiv čovječnosti*, House of Representatives of the Parliamentary Assembly of BiH, 5 September 2011, https://www.parlament.ba/law/LawDetails?lawId=733 (access: 1.10.2019); *Prijedlog zakona o zabrani javnog poricanja, minimiziranja, opravdavanja ili odobravanja holokausta, zločina genocida i zločina protiv čovječnosti*, House of Representatives of the Parliamentary Assembly of BiH, 22 March 2016, http://parlament.ba/olaw/OLawDetails?lawId=52553 (access: 1.10.2019).

[66] Law on Amendments of CC FBiH (*Službene novine Federacije BiH*, no. 46/16, as amended).

[67] Art. 163(5) CC Federation of BiH, *op. cit*.

[68] Lj. Filipović, *Krivična djela iz mržnje i krivična djela izazivanja mržnje – Komentar relevantnih zakonskih odredaba*, Sarajevo 2019, p. 76 et seq.

[69] *Ibidem*, p. 77.

[70] *ECRI Report on Bosnia and Herzegovina*, *op. cit.*, p. 11.

(b) *Serbia*. According to 2016 legislative amendments,[71] negationism represents a specific form of the crime of racial and other discrimination under Art. 387 of Criminal Code of Serbia.[72] Punishable by an imprisonment term between six months and five years, the crime consists in either public condoning, denial or gross trivialisation of crimes of genocide, crimes against humanity and war crimes directed against a group of persons or a member of such a group on any discriminatory ground provided in the 2008 Framework Decision when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group, provided that those crimes were established by a final judgment of courts in Serbia or the International Criminal Court (ICC) (Art. 387(5)). The official proposal submitted to the Parliament of Serbia indicates that these amendments were introduced in order to harmonize Serbian criminal legislation with the 2008 Framework Decision.[73] The amendments were extensively debated in Serbia as the *actus reus* of the crime is limited only to the denial of crimes established by a national court or the ICC, thus, leaving outside crimes established by decisions of ICTY or ICJ.[74] In view of the Humanitarian Law Center, prominent NGO on transitional justice issues, these amendments provided "(…) legal protection to revisionists of facts which have been established before the [ICTY and the ICJ]," and thus "(…) allow[ed] for the denial and public approval of the Srebrenica genocide, the crimes at Ovčara, the mass crimes committed in Prijedor, Markale, Meja and Korenica, Izbica and many other places during the wars in the former Yugoslavia."[75] From the formal point of view, the amendments conform the 2008 Framework Decision requirements as elements of the crime correspond to the definition contained in its Art. 1(c). On the other hand, by limiting the *actus reus* of the crime to

[71] Law on Amendments of CC of Serbia (*Službeni glasnik Republike Srbije*, no. 94/2016, as amended).

[72] CC of Serbia (*Službeni glasnik Republike Srbije*, no. 85/2005, as amended).

[73] *Zakon o izmenama i dopunama Krivičnog zakonika – Predlog*, Parliament of Serbia, 15 November 2016, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2769-16%20-Lat..pdf (access: 1.10.2019).

[74] B. Baković, *Koji genocid Srbija ne sme da negira*, „Politika", 19 November 2016, http://www.politika.co.rs/sr/clanak/368081/Politika/Koji-genocid-Srbija-ne-sme-da-negira#! (access: 1.10.2019).

[75] *Legal protection for the denial of genocide in Srebrenica*, Humanitarian Law Centre, 17 November 2016, http://www.hlc-rdc.org/?p=32958&lang=de (access: 1.10.2019).

crimes established by the ICC, beside the national courts, the possibility of processing of instances consisted in denial of events that amount to atrocity crime committed during the Yugoslav crisis is extremely limited or impossible.

3.3. North Macedonia and Kosovo

The 2008 Framework Decision was not implemented in criminal legislations of North Macedonia and Kosovo, but some tendencies are noticeable.

(a) *North Macedonia*. Following the ratification of the Additional Protocol to the Convention against the Cybercrime, Criminal Code of North Macedonia was amended by criminalization of approval or justification of atrocity crimes through information systems.[76] The basic form of the crime, punishable by an imprisonment term between one and five years, extends to either public negation, rough minimalization, approval or justification of the crime of genocide, crimes against humanity and war crimes through information systems.[77] In addition, aggravated form of the crime, punishable by minimum four years of imprisonment, exists if any of the underlying acts was committed with the intent to instigate hate, discrimination or violence against a person or a group of persons due race, skin colour, national, ethnic origin, religion or conviction, mental or bodily disability, sex, gender identity, sexual orientation and political beliefs.[78] Therefore, by extending criminal liability for negationism of atrocity crimes through information systems, North Macedonian law falls outside the framework of more advanced standards defined by the 2008 Framework Decision. While EU membership represents one of strategic goals of North Macedonian foreign policy,[79] implementation of EU law, more specifically the 2008 Framework Decision in the domestic legal

[76] Art. 407-a CC of North Macedonia (*Služben vesnik na Republika Makedonija*, no. 80/99, as amended).

[77] Art. 407-a(1) CC of North Macedonia, *op. cit*.

[78] Art. 407-a(2) CC of North Macedonia, *op. cit*.

[79] See, e.g. *Ministry of Foreign Affairs of North Macedonia*, EU Membership, http://www.mfa.gov.mk/index.php?option=com_content&view=article&id=112:eu-membership&catid=79&Itemid=391&lang=en (access: 1.10.2019).

system, will inevitably take place as the membership association process reaches its peak phase.

(b) *Kosovo*. Criminal legislation of Kosovo in currently force does not recognize negationism as a specific crime.[80] While some political options do advocate for legislative amendments in that regard and in limited capacity,[81] no formal submission was made before the Parliament of Kosovo.

3.4. Comparative assessment

This lapidary overview suggests that that national systems have, except for North Macedonia and Kosovo, either fully or partially implemented the 2008 Framework Decision. At the basic level, negationism is considered as a specific form of either incitement to hatred (BiH, Croatia, Montenegro and Slovenia) or discrimination (Serbia), or is an independent crime (North Macedonia). National legislations differ also as to the classification of the offence with regard to the protected value. Thus, this crime is grouped into either crimes against the national constitutional order (BiH and Montenegro), crimes against humanity and values protected under international law (North Macedonia and Serbia), or crimes against public order and peace (Croatia and Slovenia). Such different grouping of the crime in national legislations represents specific expression of basic principles on the application of criminal repression, its principles and limits in each of these states.[82] National legislations differ as well with respect to the structure of the crime, namely whether respective legislations foresee either one basic form of the crime or some specific forms, such as one or more aggravated or specific forms. In that regard, besides the crime's basic form, Montenegrin and Slovenian laws foresee both specific and aggravated forms. With regard to elements of the

[80] Code no. 06/L-074 – CC of Republic of Kosovo (*Official Gazette of the Republic of Kosovo*, no. 2/14, as amended).

[81] D. Morina, *Kosovo to Penalise Denial of Serbian War Crimes*, "Balkan Insight", 12 April 2019, https://balkaninsight.com/2019/04/12/kosovo-to-penalise-denial-of-serbian-war-crimes/ (access: 1.10.2019).

[82] See, e.g. Z. Tomić, *Krivično pravo II – Posebni dio*, 2nd ed., Sarajevo 2007, p. 24.

basic form of the crime, national legislations that are in conformity with the 2008 Framework Decision follow obligatory elements contained in its Art. 1(c–d). On the other side, BiH law, namely the CC Federation of BiH narrows the scope of protected groups by limiting it to constituent peoples of BiH.[83] Given the region's specific recent history stemming from the 1991–2001 Yugoslav crisis and the necessary peace processes, dealing with the recent pastin a meaningful manner dictate the need for further harmonization of national legislations. Ultimately, narrowing the space for denial of atrocity crimes and other forms of negationism is an essential element of transitional justice.

4. Narrowing the space for negationism: Some transitional justice policy considerations

Transitional justice theory considers the acceptance of past wrongdoings as a necessary step in ensuring the rebuilding of the country's social, political and legal order. Acceptance is a complex process conditioned by, among others, successful application of various inter-disciplinary mechanisms in the given society, and as such may lead to narrowing the space for denial and other forms of negationism. From the victimology viewpoint, an important aspect of this process is also giving recognition to victims.[84] In the context of the former Yugoslavia, most notably BiH, criminal justice approach was dominant over the past 25 years, while other mechanisms were not utilized to the much-needed extent.[85]

[83] See, e.g. M.N. Simović, D. Jovašević, *Leksikon krivičnog prava Bosne i Hercegovine*, Sarajevo 2018, p. 121.

[84] P. de Greiff, *Theorizing Transitional Justice*, [in:] *Transitional Justice*, eds. M.S. Williams, R. Nagy, J. Elster, New York 2013, p. 42.

[85] See, e.g. L. Aucoin, E. Babbit, *Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia*, Belgrade 2006, p. 16 et seq.; D. Popović, *Vodič kroz tranzicionu pravdu u Bosni i Hercegovini*, UNDP 2007, p. 68 et seq.

(a) *Prosecution of atrocity crimes and negationism*. Following the adoption of the ICTY Completion Strategy[86] and its closure,[87] national judiciaries focus on investigation, prosecution and adjudication over the remaining cases. According to relevant authorities, in BiH only there are almost 700 cases against thousands potential suspects yet to be processed,[88] despite the BiH judiciary, led by the War Crimes Chamber of the Court of BiH, has already processed almost 500 cases.[89] Importance of judicial fact-finding, eventual attribution of individual criminal responsibility and punishment cannot be overstated in such cases. Going beyond general goals of criminal procedure,[90] such procedures establish the clear official and historical record.[91] Questioning information established in judicial proceedings through denial or gross trivialization of facts, qualified as atrocity crimes, or glorification of their perpetrators and their deeds, seriously hinders the reestablishment of social and legal order and, ultimately affects the post-conflict rebuilding of democracy and rule of law. Thus, effective national legislation in place and certainty of initiation criminal prosecution of negationists who deny, grossly trivialize such crimes or glorify their perpetrators would have, at least at the level of principle, a general preventive effect.

(b) *Complementary non-judicial fact-finding mechanisms*. In addition to fact-finding through criminal trials, potential of non-judicial fact-finding mechanism would narrow the space for negation. While criminal proceedings are limited to fact-finding in relation to attribution of individual criminal

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[86] UN SC Res. 1503 (2003), 28 August 2003; UN SC Res. 1534 (2004), 26 March 2004.

[87] UN SC Res. 1966 (2010), 22 December 2010.

[88] *War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina*, The Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina, June 2019, p. 17, https://www.osce.org/mission-to-bosnia-and-herzegovina/423209?download=true (access: 1.10.2019).

[89] *Observations on the National War Crimes Processing Strategy and Its 2018 Draft Revisions, Including Its Relation to the Rules of the Road "Category A" Cases*, The Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina, September 2018, p. 1, https://www.osce.org/mission-to-bosnia-and-herzegovina/397541?download=true (access: 1.10.2019).

[90] See, e.g. M. Damaška, *Dokazno pravo u kaznenom postupku: oris novih tendencija*, Zagreb 2001, p. 6.

[91] See, e.g. Ch. Safferling, *International Criminal Procedure*, Oxford 2012, p. 75 et seq.

responsibility, various truth commissions could serve as a complementary mechanism that would be able to provide the historical record of general past events. Important issue arises regarding the place and competence of such mechanisms in relation to the judicial proceedings. While it can depend on historical reasons, it seems appropriate in the context of the former Yugoslavia that non-judicial mechanisms have a complementary role. Such an approach seems acceptable from the legal point of view since the principle of legal certainty as an important aspect of rule of law should prevail. If utilized, such non-judicial mechanisms would not only complement the judicial ones, but also would significantly narrowdown the space for negationism at least about general past events at the level of the whole region (if regional), state, or at the level of local communities.

(c) *Institutional and legal reforms*. Properly implemented institutional and legal reforms serve as a precondition for prevention of future abuses of human rights. Apart from reforming and, where necessary, establishing the institutional apparatus, necessary measures must be taken with a view of establishing legal framework and procedure that will prevent negationism in public and official discourse. Such an approach should not be limited only to criminalization of negationism, but also to putting in place procedures that will detect and remove individuals from public offices that deny or in any other way condone, grossly trivialize atrocity crimes or glorify their perpetrators. Vetting procedures in existing institutions or establishment of new institutions, in addition to appropriate legal framework, would ultimately lead to prevention and minimization of negative effects of negationism.

(d) *Memorialization*. As evidenced above, memorialization – or the use of various memorials at sites of atrocities – can be abused and, ultimately, used for negationist purposes. Unselective and uncoordinated approach in building memorials, as well as the absence of any authority that would have any overview or role in the decision-making process leaves a wide margin for abuses. Usual practice noted in BiH includes building memorials to individuals which are, depending on the ethnic community in question, either celebrated as heroes or regarded as ones responsible for atrocities committed against the

other group.[92] Based on the foregoing, in order to avoid the misuse of memorial sites for negationist purposes, a more structured and systemic approach should be taken with a view of securing an effective decision-making process made in the public interest.

(e) *Evidence-based education*. Education is perhaps the most future-oriented tool in the peace building process. Evidence-based education system is perhaps the best tool for both prevention of future atrocities and narrowing the space for negationism. This is particularly complex in case of BiH, as the education system is particularly decentralized between the two Entities, cantons in FBiH and Brčko District. Without unified curriculums at all levels of education (primary, secondary and higher education), there is real possibility of different approaches and understandings of past events. Existing research shows absolute differences in presentation and interpretation of facts about the 1992–1995 war in BiH.[93] Such approaches do not contribute to the peace building process as it allows for wide margin for manipulation in presentation and interpretation of facts from the recent history, and ultimately in the long run will inherit a culture of denial in the future.

This brief overview highlights the potential of other transitional justice mechanisms in narrowing the space for negationism in post-conflict societies. While criminalization of negationism is necessary, national criminal justice and transitional justice polices should include a wide array of measures that would put prevention in the first place.

5. Conclusions

Addressing negationism in societies affected by mass violations of human rights and atrocity crimes in the recent past is of importance in the peace building process as the overarching goal. Denial, gross trivialization or

[92] D. Popović, *op. cit.*,p. 121.

[93] See, e.g. H. Krage, K. Batarilo, *Reforma nastave historije u Bosni i Hercegovini*, Sarajevo 2008; M. Forić Plasto, *Podijeljena prošlost za podijeljenu budućnost!? Rat 1992–1995. u aktuelnim bosanskohercegovačkim udžbenicima historije*, „Radovi: Historija, historija umjetnosti, arheologija" 2019, vol. 6(1), p. 231 et seq.

condoning of such atrocities neither contribute to such a goal nor it serves the rule of law. Tendencies in contemporary international law, both at universal and regional level, suggest development towards criminalization and, ultimately, punishment of negationism. Apart from repression by criminal law means, in striking prober balance between securing common values and individual rights and freedoms, national criminal justice policy should also include measures that would promote prevention and, thus, leaving repressive approaches as the *ultima ratio* measure. In the context of the former Yugoslav countries, national legislations show either full or partial implementation of international standards. With the exception of North Macedonia and Kosovo, national legislations of countries contain some provisions based on the 2008 Framework Decision. In case of BiH, that is only partial – both in terms of the scope of application of entity criminal legislation and the elements of crimes. On the other hand, Serbian legislation is rather selective as it does not acknowledge the context, thus, leaving the negationism incrimination *de facto* inapplicable as to denial, gross trivialization of atrocity crimes established by the ICTY during the Yugoslav crisis. Thus, such an approach does not contribute to the peacebuilding process in the region as the overarching goal. Finally, both criminal law and transitional justice approaches can complement each other by promoting prevention of negationism and future atrocity crimes being committed and strike proper balance between individual rights and freedoms and common social interests.

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GRAŻYNA BARANOWSKA

Penalizing Statements about the Past in Turkey*

1. Introduction

Amendments to the Polish Institute of National Remembrance Act (INRA) in 2018 created, *inter alia*, the possibility to criminalize statements concerning involvement of Poles in crimes committed against Jews during the Second World War.[1] This has been widely criticized, both inside and outside of Poland.[2] Critics have compared the amended INRA with a law prohibiting denigration of the Turkish nation (Art. 301 of the Turkish Criminal Code) and stated that the new Polish law is its "closest sibling."[3] The Turkish provision has been

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[1] This part of the amendments was repealed after just a couple of months. For comments on the amendments see, e.g. P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law*, "Polish Yearbook of International Law" 2017, vol. 37; A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, "Polish Yearbook of International Law" 2018, vol. 38.

[2] A. Gliszczyńska-Grabias, W. Kozłowski, *Calling Murders by Their Names as a Criminal Offence – a Risk of Statutory Negationism in Poland*, "Verfassungsblog", 1 February 2018, https://verfassungsblog.de/calling-murders-by-their-names-as-criminal-offence-a-risk-of-statutory-negationism-in-poland/ (access: 13.07.2020); N. Kebranian, *Poland's 'Holocaust Law' Redefines Hate Speech*, "Open Democracy Net", 9 April 2018, https://www.opendemocracy.net/en/can-europe-make-it/poland-s-holocaust-law-redefines-hate-speech/ (last access: 13.07.2020).

[3] U. Belavusau, A. Wójcik, *Polish Memory Law: When History Becomes a Source of Mistrust*, "New Eastern Europe", 19 February 2018, http://neweasterneurope.eu/2018/02/19/polish-memory-law-history-becomes-source-mistrust/ (access: 13.07.2020). Ireneusz Kamiński has earlier invoked Art. 301 from the Turkish criminal law when analysing a – short-lived – amendment to the Polish criminal law, which introduced the criminalization of denigrating

infamously used to prosecute persons alluding to past events, and has been considered as one of the most repressive "memory laws."[4] As such, it is often invoked when countries introduce laws that penalize certain statements about the past. For example, Art. 301 has also been compared to the provision introduced to the Russian criminal code in 2014, which criminalizes dissemination of knowingly false information on the activities of the USSR during the Second World War.[5] Under the said provisions reminding of the USSR's role in starting the war, mentioning the pogroms Poles perpetuated during this time or stating that the Armenian genocide occurred, could lead to imprisonment sentence.[6]

However, statements about the past have been prosecuted in Turkey not only under Art. 301 of the Turkish Penal Code. What is characteristic of this phenomenon in Turkey is that domestic courts have used different criminal provisions to charge persons challenging official politics. Most of those criminal provisions do not in fact indicate historical revisionism, so they are what is considered a *de facto* memory law.[7] Because of this characteristic, I argue that provisions adopted to ban statements about particular events from the past, such as the amendments to the Polish INRA, should not be compared to memory laws in Turkey. While with regard to Poland, after changing the

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the Polish nation by attributing to the Polish nation Nazi or communist crimes (2006 amendments to Art. 132 of the Polish Criminal Code). However, the analysis concerned specifically legal provisions concerning defamation of a nation and not memory laws. See I.C. Kamiński, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2010, nr 8.

[4] See, *inter alia*, N. Koposov, *Memory Laws: Historical Evidence in Support of the "Slippery Slope" Argument*, "Verfassungsblog", 8 January 2018, https://verfassungsblog.de/memory-laws-historical-evidence-in-support-of-the-slippery-slope-argument/ (access: 13.07.2020); U. Belavusau, A. Wójcik, *op. cit.*; J. Tourkochoriti, *Challenging Historical Facts and National Truths Analysis of Cases from France and Greece*, [in:] *Law and Memory*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2017, pp. 171–172; O. Bakiner, *Is Turkey Coming to Terms with Its Past? Politics of Memory and Majoritarian Conservatism*, "Nationalities Papers" 2013, no. 5, pp. 702–703.

[5] Art. 354.1 of the Russian Criminal Code. See N. Koposov, *Memory laws: Historical…*

[6] The part of the INRA amendment, which created the possibility to criminalize statements concerning involvement of Poles in crimes committed against Jews during the Second World War has been withdrawn shortly after its adoption, so it is no longer in force.

[7] Nikolay Koposov coined the term "*de facto* memory law" with regard to Art. 301 of the Turkish Criminal Code. N. Koposov, *Memory Laws, Memory Wars*, Cambridge 2018, p. 112.

provisions in question statements about the involvement of Poles in crimes committed against Jews during the Second World War are not punishable under criminal law,[8] in Turkey withdrawing one of the provisions used to ban statements about the past would not alter the danger of being prosecuted for contesting official memory politics.

This contribution first introduces Art. 301 of the Turkish Criminal Code and shows how it has been used with regard to statements about the past. As this is the best known law used in such a way, both its wording and use by domestic courts are analysed. The second section of the chapter presents how courts have prosecuted authors of similar publications and comments under other criminal law provisions.

2. Art. 301 and its role in criminalizing statements about the past

Denigrating the Turkish nation and state authorities has been prohibited in Turkey since 1926. Art. 301 has replaced the provision penalizing such acts, when major penal-law reforms were introduced prior to the opening of negotiations for Turkish membership of the European Unionin 2005.[9] Currently, the Article sounds as follows:[10]

(1) Anyone who denigrates the Turkish nation, the Republic of Turkey, the Grand National Assembly of the Republic of Turkey, the Government of the Republic of Turkey, or the judicial bodies of Turkey, shall be

[8] For an analysis of the on-going possibilities of bringing civil cases, see A. Gliszczyńska-Grabias, M. Jabłoński, *Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?*, "Verfassungsblog", 12 October 2019, https://verfassungsblog.de/is-one-offended-pole-enough-to-take-critics-of-official-historical-narratives-to-court/ (access: 13.07.2020).

[9] For more on the amendments to the provision between 1926 and 2005, see T.Y. Sancar, *Türklüğü, Cumhuriyeti, Meclisi, Hükümeti, Adliyeyi, Bakanlıkları, Devletin Askerive Emniyet Muhafaza Kuvvetlerini Alenen Tahkirve Tezyif Suçları (Eski TCK m.159/1 – Yeni TCK Md. 301/1–2)*, Ankara 2006, pp. 46–57. See also Türkan Yalçın Sancar's assessments of the 2002 changes to Art. 159 in *Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı*, "Ankara Üniversitesi Hukuk Fakültesi Dergisi" 2003, no. 52, pp. 89–96.

[10] The author's translation. For the original provision, see https://www.tbmm.gov.tr/kanunlar/k5759.html (access: 13.07.2020).

sentenced to a penalty of imprisonment for a term of six months to two years.

(2) Anyone who publicly insults State military or security organizations shall be punishable according to the first paragraph.

(3) Expressions of thought intended to criticize shall not constitute a crime.

(4) The prosecution under this Article shall be subject to the approval of the Minister of Justice.

As can be seen, the provision predominantly addresses denigrating the State and its organs.[11] However, the term "Turkish nation" (or "Turkishness,"[12] as the provision stated before the 2008 amendments[13]), have been very broadly interpreted by domestic courts. Derya Bayır's research shows how the offence of denigrating the Turkish nation/Turkishness has been used since its introduction to the criminal code tosuppress ethno-religious minorities in Turkey.[14] In the context of the issues analysed in this book, it is particularly interesting how courts have applied Art. 301 to statements about the past. While I argue that Art. 301 does not play such a significant role with regard to statements about the past as scholars have assumed,[15] it nevertheless has been used to bring charges against persons making statements about the past, in particular if they were challenging the official narrative on history.

The most well-known example of atrocities silenced in Turkey is the Armenian genocide, which took place during and after the First World War. The Turkish authorities' attitude towards the events are shifting, however,the

[11] Art. 301 has been predominantly used with regard to insults towards police and military staff.

[12] The term "Turkishness" was strongly criticized, which was one of the reasons for the amendment. However, as Sancar, the author of the only monograph on Art. 301, states the terms "Turkish nation" and "Turkishness" have been considered basically to be the same by the Turkish second instance court. For a discussion on the meaning of "Turkishness", see T.Y. Sancar, *Türklüğü…*, pp. 70–87.

[13] A. Bülent, *The Brand New Version of Article 301 of the Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*, "German Law Journal" 2008, no. 9, pp. 2237–2251.

[14] D. Bayır, *Minorities and Nationalism in Turkish Law*, New York 2016, pp. 243–249.

[15] Scholars have repeatedly named Art. 301 as the sole or most significant Turkish memory law, and in particular connected it with the denial of Armenian genocide (see footnote 4). By contrast, see Jennifer M. Dixon, who argues that what makes it dangerous to make statements about the Armenian genocide who are at odds with the Turkey's narrative, are "a series of broadly written laws" (*Dark Pasts: Changing the State's Story in Turkey and Japan*, London 2018, p. 27, see also pp. 165–166).

numbers of persons killed as well as the facts are continuously contested, and there is still no acceptance of calling them "genocide."[16] Due to such state policy, certain statements about the Armenian genocide have been criminalized. For example, in 2005, charges have been brought against Orhan Pamuk, the renown writer and recipient of the 2006 Nobel Prize in Literature, for stating in an interview to a Swiss magazine that thirty thousand Kurds and a million Armenians were killed in Turkey.[17] The charges against him have been eventually dropped, however, Pamuk became worldwide a symbol of how Art. 301 has been used to statements about the past.[18] In Turkey, the proceedings against Hrant Dink have been more prominent in this regard. The well-known journalist and chief editor of a Turkish-Armenian newspaper "Agos" was sentenced on the basis of Art. 301 because of a series of articles he published on the identity of Turkish citizens of Armenian dissent and the Armenian genocide. In particular, the Turkish court found that Art. 301 was violated by a statement on poisoned blood, which the judges interpreted as "Turkish blood" (and therefore found it to be an instance of denigrating Turkishness), while Dink argued that he used those words to speak up for defeating prejudice against Turks among Armenians.[19] The two proceedings exemplify how domestic courts have interpreted Art. 301 in a very broad way, making it risky to make statements about the Armenian genocide, or conduct research on the topic.[20]

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[16] On changing strategies of Turkish authorities with regard to the genocide, see J.M. Dixon, *Defending the Nation? Maintaining Turkey's Narrative of the Armenian Genocide*, "South European Society and Politics" 2010, no. 3; eadem, *Rhetorical Adaptation and Resistance to International Norms*, "Perspectives on Politics" 2017, no. 1.

[17] For the original interview, see P. Teuwsen, *Der meistgehasste Türke*, „Tages Anzeiger", 5 February 2005, https://web.archive.org/web/20090116123035/http://sc.tagesanzeiger.ch/dyn/news/kultur/560264.html (access: 13.07.2020).

[18] Y (G), E. 2006/12581, K. 2007/15816, 12.01.2007.

[19] Y (G), E. 2006/9-169, K. 2006/184, 11.7.2006; ECtHR judgment from 14 September 2010, *Dink v. Turkey*, Case no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, par. 24. The ECtHR ruled in 2010 that Turkey failed to protect Hrant Dink's freedom of expression, as well as life (as the journalist was killed in 2007 by an ultra-nationalist). The assassination of Dink received immense national and international attention and was one of the factors leading to the 2008 amendments of Article 301, D. Bayır, *op. cit.*, p. 246.

[20] See also ECtHR judgment from 25 October 2011, *Altuğ Taner Akçam v. Turkey*, Case no. 27520/07, concerning a history professor working on the Armenian genocide.

Art. 301 has also been used to prosecute persons making statementsabout more recent events in the history of Turkey. For example, Fatih Taş, a publisher, was convicted for denigrating the Republic of Turkey because of a book called *They Say You Disappeared* (org. *Kayıpsın diyorlar*). The book concerned a journalist, who disappeared[21] in unknown circumstances in 1994 in the South East of Turkey. The book alleged that the journalist was abducted by village guards and counter-guerrilla members, when he was conducting a journalistic investigation. This case eventually was brought to the European Court of Human Rights, which stated in a judgment in September 2018 that the provision is applied in a manner inconsistent with the criteria established by the case-law of the ECtHR.[22]

3. Statements about the past penalized under other criminal provisions

As the previous section has discussed, statements about the past have been prosecuted under Art. 301 of the Turkish Criminal Code. At the same time, criminal charges against authors of similar comments or publications have been brought also on the basis of other provisions. Among others, this has been done on the basis of a provision prohibiting openly inciting to hatred and animosity against a group, as well as anti-terror legislation. A special law, which has also been used to prosecute persons contesting official memory politics, is the law protecting the memory of Mustafa Kemal Atatürk, who was the founder and first president of the Republic of Turkey.[23]

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[21] On disappearances in Turkey, see Ö.S. Göral, A. Işık, Ö. Kaya, *Unspoken Truth: Enforced Disappearances*, Istanbul 2013.

[22] ECtHR judgment from 4 September 2018, *Fatih Taş v. Turkey (5)*, appl. no. 6810/09, par. 6–8, 45. Fatih Taş was convicted on the basis of Art. 159, which was the equivalent of Art. 301 in the former Criminal Code. See also Y. (8), E. 2017/3280, K. 2018/1581, 9.5.2018, a persons convicted for denigrating Turkishness because of sharing a Facebook post concerning the PKK.

[23] Law of Offenses Committed Against Atatürk (Law no. 5816) from 1951. On the law, see G. Baranowska, *Memory Laws in Turkey: Protecting the Memory of Mustafa Kemal Atatürk*, [in:] *Criminalizing History. Legal Restrictions on Statements and Interpretations of the Past in Germany, Poland, Rwanda, Turkey and Ukraine*, eds. K. Bachmann, C. Garuk, Berlin 2020, pp. 107–125.

İbrahim Güçlü, a lawyer and politician, was convicted under anti-terrorist legislation for a statements on the Armenian genocide. He was asked during a press conference about his opinion on recognizing the Armenian genocide by the French parliament and replied that Turkey cannot realistically solve the problem through a policy of denial and that an open debate was needed. He was accused of having made separatist propaganda, and the prosecutor in particular argued that Güçlü has alleged the existence of an Armenian genocide in 1915.[24] Another example of a person convicted under anti-terror legislation for statements about the past is a poet, who published an anthology of poems on the Dersim uprising (org. *Dersim – Bir İsyanın Türküsü*). The poems concerned the 1937/1938 rebellion in present-day Tunceli province, which was crashed brutally by Turkish military. In the judgment the court in particular stressed that he glorified an insurrection movement and referred to a specific region in Turkey as "Kurdistan."[25] Also authors of historical book tackling the Dersim massacre have been prosecuted under anti-terror legislation.[26] Even pointing out historical facts like the ban on the Kurdish language[27] has led to prosecutions: the author of such statements was convicted of openly inciting to hatred and animosity against a group.[28]

The selected examples show that various criminal provisions have been used to penalize certain statements about the past. Not only are there many different possibilities to prosecute persons making such statements, but governmental tactics and trends to suppress political speech and dissent in Turkey are shifting. As research by Yaman Akdeniz and Kerem Altıparmak reveals, Art. 301 was one of the leading reasons for freedom of expression prosecutions, which changed since the currently ruling party gained power in 2002. During the state of emergency (2016–2018), the application of anti-terrorism

[24] ECtHR judgment from 10 February 2009, *Güçlü v. Turkey*, Case no. 27690/03, par. 5–8.

[25] ECtHR judgment from 8 July 1999, *Karataş v. Turkey*, Case no. 23168/94, par. 8–12.

[26] ECtHR judgment from 2 October 2012, Önal v. Turkey, Case no. 41445/04, 41453/04, par. 18–19.

[27] The use of Kurdish language was officially prohibited both in public and private life after the military coup of 1980. The ban was lifted in 1991.

[28] Y. (8).CD, E.1996/11624, K.1996/12797, 18.10.1996; on inciting hatred and animosity in Turkish law and jurisprudence (current 216(1) Article of the Turkish criminal code) see D. Bayır, *op. cit.*, pp. 237–249.

law – also applied to statements about the past – has become pervasive.[29] The law protecting the memory of Mustafa Kemal Atatürk has been used only exceptionally for a number of years, however, since 2017, there is a sharp increase in both charges brought and judgments passed.[30] Such changes in which laws are used makes it even more complicated for journalists, writers and historians to foresee which comment will lead to criminal charges, and under which criminal provision.

4. Conclusions

Making statements about particular events from the past can lead to prosecutions in Turkey. Not every critical statement about the Armenian genocide, Dersim massacre or other atrocities committed against minorities is followed by criminal charges, however, persons mentioning those events are under particular threat. Which provisions in particular are more often used is changing over time. However what is persistent is the fact that statements about the past can, and often are, prosecuted under criminal provisions. Because of this particularity of the Turkish laws it is more appropriate to treat them as a set of provisions. Withdrawing one of the provisions in question, or changing the practice of domestic courts with regard to one of them, would not change the danger of prosecutions. This makes the Turkish *de facto* memory laws unsuitable to compare them with provisions relating to statements to particular events in a country's history, such as criminalize statements concerning involvement of Poles in crimes committed against Jews during the Second World War (2018 amendments to the INRA), or dissemination of knowingly false information on the activities of the USSR during the Second World War (354.1 of the Russian Criminal Law). However, in Russia, as in Turkey, also other laws are used to prosecute statements about the past, for

[29] Y. Akdeniz, K. Altıparmak, *Turkey: Freedom of Expression in Jeopardy. Violations of the Rights of Authors, Publishers and Academics under the State of Emergency*, English PEN, 2018, pp. 4–5.

[30] G. Baranowska, *op. cit.*

example, Art. 282 of the Penal Code.[31] The Turkish case study is, therefore, not an exception and can be used as a model to analyse the situation in other countries, where different criminal provisions are used to punish persons challenging official memory politics.

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[31] Art. 282 penalizes the incitement of hatred or enmity and abasement of human dignity. As such, it is very close to current Art. 216(1) of the Turkish Criminal Code, on the basis of which statements about the past have been prosecuted in Turkey (see, e.g. Önal v. Turkey). I would like to thank Nikolay Koposov for his insightful comments on memory laws in Russia.

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VASSILIS P. TZEVELEKOS

The Importance of State Practice in the Shaping of International Standards Pertaining to the Clash between Free Speech and the Banning of Negationism: The Contribution of the Greek Legal Order*

1. Encounters between law and history

History and law are two distinct academic disciplines. The former studies the past. The latter studies the regulation of social behaviour and inter-relationships. Often, history and law are like ships that pass in the night. Sometimes, however, their encounters may have some lasting significance. Historians, for instance, may study earlier legal materials (e.g. judicial decisions) as archival sources. Lawyers may look to the past as a means (i.e. a method) to interpret the law, such as when a court endeavours to define the meaning of a legal term or to determine its effects by identifying the intentions of the drafters of old legal acts or by tracing how the users of these acts applied them in the past. Thus, the paths of history and law may intersect.

Here is another encounter between history and law. In Greek mythology, the goddess of memory, Mnemosyne (*Μνημοσύνη*), was the mother of Clio, the muse of history.[1] Mnemosyne stems from the Greek word *mneme* (*μνήμη*), meaning "memory"/"remembrance." The opposite of memory is *lethe* (*λήθη*), which means "oblivion"/"forgetfulness." The word for truth in Greek is *aletheia* (*ἀλήθεια*). When translated literally, this term means the absence of *lethe*, i.e. un-forgetfulness. According to ancient Greeks, goddess

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[1] Hesiod, *Theogony*, https://chs.harvard.edu/CHS/article/display/5289 (access: 3.11.2019) [translated into English by Gregory Nagy and James Banks].

Lethe was the daughter of Eris (strife, discord) and the sister, *inter alia*, of Phonoi (homicides) and Dysnomia (lawlessness, disorder).[2] Thus, (historical) oblivion is associated with discord and lawlessness. By analogy, Eunomia (i.e. the opposite of Dysnomia; the goddess personifying good order and governance on the basis of good laws[3]) also depends on *mneme*, which is offered by history.

This brief reference to Greek mythology highlights the importance of historical memory for any society. Historical narration aims at revealing the/a truth. This helps societies to live harmoniously by learning from the past. However, the idea of an objective historical account, to which everyone subscribes, can be faulted for being unrealistic. Historical narratives are the outputs of interpretation, which is also central to legal analysis. This means that historical facts, as well as their significance and overall evaluation are debatable. It is not uncommon that historians produce conflicting versions of historical "truth." Historical revisionism may invite us to reconstruct our understanding of the past by challenging mainstream or "orthodox" and well-established historical accounts. Such considerations and disagreements are common in academic discourse, but they may also permeate academia and become an issue of public discourse, where it is often easy to associate a narrative with a particular ideology, group of people, national identity, etc.

Although historical contestation and conflicting views of the past may be seen as a healthy sign of academic and democratic pluralism, certain historical accounts can be perceived – by a part of the society – as provocative, polemical, inflammatory, offensive or even as ultimately aiming at expressing a prejudice against a particular social group or as hurting key elements of its identity. Thus, promoting a particular narrative or version of history and/or denying another version may amount to hate speech, i.e. propagation of hatred against specific groups. This leads to tension between (academic) freedom of expression (FoE) and the responsibility to protect human dignity and public order when these are threatened by hate speech. This dilemma is considerably

[2] *Ibidem*.

[3] On the relationship between law and memory, see also E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, "Vermont Law Review" 2006, vol. 30, pp. 609–626, and especially pp. 613–620 on negationism.

broader than historical negationism, as, when the latter is tantamount to hate speech, it is only one of the various forms that hate speech can take.

Solving this dilemma and drawing a clear line on the limits of FoE is a demanding task. This becomes even more difficult when – and this is yet another instance of intersection between law and history – a polity and its authorities have an official say on history. This may be done in many different ways and for many different reasons. For instance, national authorities may (directly or indirectly) officially recognise a version of history when they grant an amnesty, (social) benefits or an award to a (group of) person(s) for their participation in a war, when they characterise a (group of) person(s) as terrorist(s) or freedom fighter(s), when they recognise or punish an international crime (such as a genocide), when they establish the facts of an incident for the purposes of their regular function (e.g. criminal law trial of a person) and these facts have a historical significance, or even when they limit FoE as a means to ban hate speech. As law and history intersect, states and their institutions – such as courts and parliaments – may favour, endorse or even construct an "official" version of history.

Considering this broader framework, and particularly the tension between FoE and the banning/punishing of negationism as a means to fight hate speech,[4] we make the following three interconnected points in this study. *First*, we observe the existence of a number of international legal authorities calling on states to enact legislation at the domestic level to prohibit and, in particular, to prosecute denialism.[5] This movement is thinner at the global level, but more tangible within Europe. The authorities at issue acknowledge the importance of FoE, but they offer no clear guidance as to the balance that should be maintained between it and the prohibition/punishment of

[4] Thomas Hochmann has studied this question extensively. See indicatively T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression, étude de droit compare*, Paris 2012. Additionally, see L. Pech, The Law of Holocaust Denial in Europe, [in:] *Genocide Denials and the Law*, eds. L. Hennebel, T. Hochmann, Oxford 2011, pp. 185–234 and in the same collection, R.A. Kahn, *Holocaust Denial and Hate Speech*, [in:] *Genocide*…, pp. 77–108.

[5] For the purposes of this paper, we will be employing the terms "negationism" and "denialism" interchangeably. Negationism refers to the distortion of the historical record and, more specifically, "the denial of the very existence" of specific events. It "disregards settled historical norms, and distorts the relationship between [these events] and historical reality". See E. Fronza, *op. cit.*, p. 614.

denialism, or as to the limits of FoE more generally. In other words, they are silent as to how the burgeoning duty to prohibit and criminalise certain historical perspectives may co-exist with the well-established international obligations of states in the area of FoE. Moreover, these authorities contain no fully shaped and clear criteria as to how to draw a satisfying distinction between legitimate debate and disagreement, on the one hand, and negationism amounting to hate speech that shall constitute a criminal offence, on the other. Notwithstanding the absence of clear boundaries between the outlawing of denialism and FoE, however, it appears that a number of states[6] have designated the denial of certain crimes and atrocities as criminal offences or even banned symbols of the past.[7] *Second*, establishing such limits and balances involves a value judgment. It is not an objective, "dry" technical legal exercise. In this respect, we highlight certain criteria established by the European Court of Human Rights (ECtHR) in historical negationism cases arguing that, even though they may be useful, they are not adequate, in the sense that these criteria do not suffice to avoid shifting to a subjective appraisal (by means of *stricto sensu* proportionality or by declaring certain speech as abusive) based upon the personal values, ideals, preferences and the ideological predispositions of judges. *Third*, the key argument advanced in this note is that the combination of the previous two points invites us to recognise the weight of state practice in the shaping of international standards in an area (namely the balance between FoE and the prohibition/criminalisation of denialism, particularly as a form of hate speech) that is far less settled than one may think or than what the exigencies of legal certainty, particularly in areas like human rights and especially in criminal law, require. In this respect, we outline the importance of state practice and how, from a technical point of view, such practice may help to shape standards, to give the example of the Greek legal order, briefly discussing relatively recent relevant legislative and judicial practice that allows learning certain lessons regarding, *inter alia*,

[6] For an overview of the criminalisation of negationism in Europe see Part 4.

[7] In relation to banning symbols of the past, see A. Fijalkowski, *The Criminalisation of Symbols of the Past: Expression, Law and Memory*, "International Journal of Law in Context" 2014, vol. 10, pp. 295–314, where the author examines the criminalisation of fascist, communist and other totalitarian symbols in Poland, Germany, and Hungary, as well as the effect of this criminalisation to FoE.

the dangers of abusive prosecution of free speech on the basis of defective legislation criminalising denialism.

The structure of the note follows the order of these three points. The last section concludes.

2. The movement towards the prohibition and criminalisation of negationism, the absence of clearly established criteria for that purpose and the tension with freedom of expression

The proliferation of international authorities – consisting, *inter alia*, of human rights treaties, secondary EU law, international jurisprudence and, to some extent, soft law –[8] requiring states to adopt measures within their domestic orders with a view to ban the denial, glorification or trivialisation of international crimes can be treated as an "ensemble" pointing to the direction of the prohibition and criminalisation of negationism. As already mentioned, this ensemble is thinner at the global level, but more substantial within Europe. There are, however, "mixed-messages" in this body of law, which remains to a large extent abstract, general and lacking in precision. As a result, we observe that, even though a movement towards the prohibition and prosecution of denialism exists, the specific preconditions that shall apply to that end are not sufficiently clear. Additionally, in accordance with the authorities inviting states to adopt measures against negationism, any such action is permissible only insofar as it does not unduly restrict FoE. Nevertheless, these authorities do not provide states with guidance on how to carry out the necessary balancing exercise or on how to draw the line between legitimate and lawful debate on historical narration and hateful negationism. This section develops these points in some more detail but, given the limited scope and the confines of this note, the discussion that follows does not aim at being exhaustive.

[8] The most important of these authorities are discussed below.

The denial of historical crimes can be a form (i.e. a subcategory) of hate speech.[9] Art. 7 of the Universal Declaration of Human Rights,[10] the Declaration's anti-discrimination provision, requires states to protect individuals from any incitement to discrimination. A more concrete international obligation on states to criminalise all forms of hate speech appears in the International Covenant on Civil and Political Rights (ICCPR).[11] Art. 20(1) of the ICCPR requires states to domestically prohibit any propaganda for war. The second paragraph of this Article establishes an obligation to prohibit by law "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[12] Negationism is not explicitly mentioned, but may fall under said provision *if* and to the extent that it may amount to hate speech. Moreover, Art. 19 ICCPR safeguards FoE as a qualified human right. Similarly, in General Comment 34, the Human Rights Committee (HRC) noted that "laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression."[13]

Further duties to restrict hate speech were adopted in the context of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[14] Here, however, the approach differs from that of the ICCPR framework. Whilst Art. 4 – ICERD's provision requiring states to penalise

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[9] On this, see C. Pégorier, *Speech and Harm: Genocide Denial, Hate Speech and Freedom of Expression*, "International Criminal Law Review" 2018, vol. 18, pp. 97–126 and S. Stavros, *Combating Religious Hate Speech: Lessons Learned from Five Years of Country-Monitoring by the European Commission Against Racism and Intolerance (ECRI)*, "Religion & Human Rights" 2014, vol. 9, pp. 139–150.

[10] UN General Assembly, Resolution 217 A(III), Universal Declaration of Human Rights, 10 December 1948.

[11] International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Entry into force: 23 March 1976.

[12] *Ibidem*, at Art. 20(2). See also J. Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, Cambridge 2016, especially chapter 11 assessing Holocaust denial laws from the perspective of Art. 20(2) ICCPR.

[13] UN Human Rights Committee, General Comment no. 34, Art. 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, par. [49].

[14] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Entry into force: 4 January 1969.

racist speech – does not include an explicit reference to negationism, the Committee on the Elimination of Racial Discrimination (CERD) noted that attempts to deny, justify or trivialise acts of genocide should be offences punishable by law.[15] This statement is, however, qualified. The CERD emphasised that criminalisation should only be permissible where the speech in question would "clearly constitute incitement to racial violence or hatred."[16] Additionally, mirroring the approach of the HRC, CERD noted that "the expression of opinions about historical facts should not be prohibited or punished."[17]

In Europe, the relevant authorities have been more explicit in requiring states to take steps in the direction of prohibiting and, particularly, criminalising denialism. The prime example comes from EU Law. Council Framework Decision 2008/913/JHA sets out the framework that states should adopt to combat xenophobia and racism by means of criminal law. This Framework Decision (FD) requires states to punish by means of national criminal law, *inter alia*, "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes (…) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."[18]

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[15] UN Committee on the Elimination of Racial Discrimination, General Recommendation no. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35 par. [14].

[16] *Ibidem*. While CERD does not provide a definition of hatred *per se*, it guides states on the types of speech that will be considered hateful. See in particular par. [13], where CERD identifies as hate speech "[a]ll dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means"; "[i]ncitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin"; "[t]hreats or incitement to violence against persons or groups" on the grounds mentioned above, the "[e]xpression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination (…) when it clearly amounts to incitement to hatred or discrimination"; and the "[p]articipation in organizations and activities which promote and incite racial discrimination".

[17] *Ibidem*, par. [14].

[18] Council of the EU, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Art. 1(c). For a critique, see F. Dubuisson, *L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression?*, "Revue de Droit Université Libre de Bruxelles" 2007, vol. 35, pp. 135–195, pp. 185–192.

The FD is aligned with CERD's approach, which associates punishable denialism with incitement to violence and hatred. Nevertheless, the term "hatred" is not adequately defined. An attempt is made within the text of the FD to delimit it, but without duly defining it; thus, hatred "should be understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin."[19] The FD also stresses that the duty to criminalise the denial of certain crimes "shall not have the effect of modifying the obligation to respect fundamental rights (…) including freedom of expression"[20] or "requiring Member States to take measures in contradiction to fundamental principles relating to (…) freedom of expression."[21] No guidance is provided as to the balance to be maintained between the prosecution of denialism and free speech.

Moving to the Council of Europe (CoE), the Committee of Ministers in Recommendation no. 97(20) recommended that states take steps to combat hate speech. The Recommendation defined the term "hate speech" as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[22] The Preamble to the Recommendation noted the Committee's awareness "of the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it."[23]

Moving to the CoE's European Commission against Racism and Intolerance (ECRI), the institution invited states to penalise "the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes".[24] Like other instruments,

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[19] *Ibidem*, at Preamble (9).

[20] *Ibidem*, at Art. 7(1).

[21] *Ibidem*, at Art. 7(2).

[22] Council of Europe, Recommendation no. R 97(20) of the Committee of Ministers to Member States on "Hate Speech", 30 October 1997, Principle 1.

[23] *Ibidem*, at Preamble.

[24] Council of Europe, European Commission Against Racism and Intolerance (ECRI), Recommendation no. 7 on national legislation to combat racism and racial discrimination, 13 December 2002, par. [18(e)]. More recently in Council of Europe, European Commission Against Racism and Intolerance (ECRI), Recommendation no. 15 on combating hate speech, 8 December 2015, the ECRI confirmed that "hate speech may take the form of the public denial,

however, the ECRI stresses that "any such restrictions [to FoE] should be in conformity with the European Convention on Human Rights,"[25] the text of which protects FoE in Art. 10 as a qualified right.

Finally, the CoE's Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems,[26] requires states parties to criminalise the "denial, gross minimisation, approval or justification of genocide or crimes against humanity,"[27] whilst stressing "the need to ensure a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature" in its preamble.[28] Notably, the Additional Protocol provides states a significant degree of flexibility by stating that

> (…) a Party *may* either a) require that the denial or the gross minimisation (…) is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise b) reserve the right not to apply, in whole or in part, (…) article [6(1)].[29]

Combined in their diversity, what all of these authorities have in common is that, first, they point to the same direction, namely the banning of hate speech as a generic concept, and of denialism more specifically, and, second, that they acknowledge the obligation on states to respect FoE.

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trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes" p. 3. On the background to the adoption of Recommendation no. 15, see S. Stavros, *The European Commission's against Racism and Intolerance New General Policy Recommendation on Combating Hate Speech*, [in:] *On the International Community: Legal, Political and Diplomatic Issues*, eds. J.P. Jacqué et al., Athens 2017, pp. 413–420.

[25] *Ibidem*, part II at [3].

[26] Council of Europe, Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003, ETS No. 189, entry into force: 1 March 2006.

[27] *Ibidem*, at Art. 6(1).

[28] *Ibidem*, at Preamble.

[29] *Ibidem*, at Art. 6(2) [emphasis added].

Starting with the former common element, these authorities (to the extent that, and in the way that each one of them – depending on its legal nature – generates international obligations) require states to adopt measures at the domestic level to fight hate speech and/or negationism. These measures vary, spanning from a general prohibition, to concrete sanctioning by means of criminal law. States thereby assume an obligation of means (i.e. of due diligence)[30] to fight negationism at the domestic level. Seen from the perspective of human rights law, this obligation falls under the broader concept of positive obligations aiming at protection, as opposed to negative human rights obligations associated with the concept of respect.[31] By fighting negationism, states strive to offer protection from hate speech. Yet, very little guidance is offered by these authorities as to what hate speech is and when negationism may amount to hate speech. Certain authorities link negationism with racism, whilst others refer to incitement to violence as a precondition for banning negationism and/or hate speech. Yet, incitement to violence can be treated as an autonomous criterion for limiting FoE, irrespective of whether it is associated with hate speech or negationism. For these reasons, seen as an ensemble, the set of authorities discussed earlier offer neither clearly defined nor absolutely consistent and comprehensive criteria for the banning of negationism. It points to a direction but does not offer a clear and absolutely coherent "roadmap".

As far as the second common feature is concerned, namely the acknowledgment of the tension between the prohibition of negationism and FoE, this can be translated into the language of international human rights law in the following way. States' positive obligations to take steps to protect from

[30] The literature is vast. See T. Koivurov, *Due Diligence*, "Max Planck Encyclopedia of Public International Law" (last updated February 2010), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=EPIL (access: 3.11.2019) and J. Kulesza, *Due Diligence in International Law*, Oxford 2016.

[31] The point made here refers to the classification of obligations on the basis of respect--protection-fulfilment and, in particular, on the distinction between negative obligations to respect and positive obligations to protect. On this, see UN Human Rights Committee, General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, especially par. [5–8]. See also P. Alston, G. Quinn, *The Nature and Scope of State Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, "Human Rights Quarterly" 1987, vol. 9, pp. 156–229 and P, Macklem, *Human Rights in International Law: Three Generations or One?*, "London Review of International Law" 2015, vol. 3, pp. 61–92.

hate speech when such speech takes the form of negationism clash with their negative obligations with regard to FoE, namely their duty to respect FoE by abstaining from interfering with the free circulation of opinions, ideas and information. Alas, said authorities lack more specific guidance or even general indications that would assist states in conclusively determining how this clash is to be resolved and how their duties to prohibit/criminalise negationism should be discharged in a manner that would be FoE-friendly or, more generally, compatible. One could argue that this approach is not uncommon with human rights instruments. Bills of rights seek to establish general rules which are given specific effects (by courts) in light of the particular facts and circumstances of a specific case. Moreover, the "dilemma" between free and hate speech is significantly broader, thus, exceeding the question of the permissibility of the banning of negationism. This lack of some degree of specificity regarding the inter-relationship between the prohibition/criminalisation of negationism and FoE does, however, confirm the point that we are making in this note, namely that, whilst there is a movement at various levels (universal and European human rights rules, including EU law) to ban negationism associated with hate speech, the exact contours of this obligation (i.e. the exact scope of this positive duty to criminalise, the applicable preconditions, along with its inter-relationship with FoE) remain altogether ambiguous.

3. Resolving the tension between freedom of expression and the banning of negationism: a matter of law or rather a value judgment?

Occasional conflicts are very common in human rights law. Unlike absolute rights, qualified rights may be restricted for general interest purposes or when, in the light of the particular circumstances of a case, they occasionally clash with another right. Resolving such conflicts involves an act of balancing on the basis of the criterion of necessity, within the broader framework of the principle of proportionality. In the lines that follow, we use the example of the ECtHR to show that, whilst some useful guidance has been provided thus far pertaining to the necessity of restricting free speech in the context of negationism, this does not suffice to fully crystallise the applicable standards

that states should apply. Our argument in this respect is that judicial analysis inevitably shifts to a rather subjective evaluation resulting in the establishment of priorities over conflicting values/ends (i.e. FoE *v.* the banning of denialism). Prioritisation reflects to a great extent the preferences of the adjudicators. As we explain below, to establish priorities of this kind within the regime of the European Convention on Human Rights (ECHR), Judges resort to either *stricto sensu* proportionality under Art. 10 ECHR or to declaring hate speech as an abuse of rights under Art. 17 ECHR.[32] Each of these approaches will be examined in turn and then linked to our central discussion on negationism.

In relation to FoE as protected under Art. 10 ECHR, the ECtHR has stated that free speech "constitutes one of the essential foundations of (…) society, one of the basic conditions for its progress and for the development of every man."[33] The Court has established generous standards of free speech protection for journalists,[34] whistleblowers,[35] and protesters[36] amongst others, and has held that the protection provided under Art. 10 ECHR

> is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness, without which there is no "democratic society".[37]

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[32] The provision states that "[n]othing in [the ECHR] may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The *Dictionnaire de Droit International Public* links abuse of rights to illegitimacy, *dolus* and bad faith (J. Salmon (ed.), *Dictionnaire de Droit International Public*, Brussels 2001, p. 4). See also A. Kiss, *Abuse of Rights*, "Max Planck Encyclopedia of Public International Law" (last updated December 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690 (access: 3.11.2019) and R. Kolb, *La bonne foie en droit international public. Contribution à l'étude des principes généraux de droit*, Paris 2000, pp. 439–486. For an overview in English, see M. Byers, *Abuse of Rights: An Old Principle, a New Age*, "McGill Law Journal" 2002, vol. 47, pp. 389–431. In the context of negationism and FoE, see C. Pégorier, *op. cit.*, p. 122 et seq.

[33] *Handyside v. United Kingdom* (app. no. 5493/72, 7 December 1976) at [49].

[34] See, e.g. *Lingens v. Austria* (app. no. 9815/82, 8 July 1986).

[35] See, e.g. *Guja v. Moldova* (app. no. 14277/04, 12 February 2008).

[36] See, e.g. *Mariya Alekhina and Others v. Russia* (app. no. 38004/12, 17 July 2018).

[37] *Handyside…* (n. 33) at [49].

Whilst the Court has recognised the importance of FoE, this is not an absolute right. The ECHR provides that it can be restricted in certain circumstances, including to protect the rights of others.[38] Following this logic, the ECtHR has excluded hate speech (in general, i.e. not only negationist speech) from the protective ambit of Art. 10 ECHR.[39] The Court has provided some guidance on the type of speech that it regards as hateful. More specifically, the ECtHR has not limited its understanding of hate speech to incitement to violence. As the Court has held,

> (…) inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.[40]

Notably, the Court has not (yet) interpreted Art. 10 ECHR as imposing a positive obligation on states to criminalise or prosecute all instances of hate speech.[41]

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[38] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14, 4 November 1950, ETS 5, entry into force: 3 September 1953, Art. 10(2).

[39] See, e.g. *Féret v. Belgium* (app. no. 15615/07, 16 July 2009) and *Vejdeland and Others v. Sweden* (app. no. 1813/07, 9 February 2012).

[40] See *Vejdeland…* (n. 39) at [55]. Where incitement to hatred is concerned, the EctHR has not provided an all-encompassing definition of hate speech, but instead has made reference to "all forms of expression which spread, incite, promote or justify hatred based on intolerance." See *Erbakan v. Turkey* (app. no. 59405/00, 6 July 2006) at [56]. Additionally, in relation to the display of controversial symbols, the Court has distinguished "between shocking and offensive language which is protected by Art. 10 and that which forfeits its right to tolerance in a democratic society," see *Fáber v Hungary* (app. no. 40721/08, 24 July 2012) at [36]. The Court has elaborated on the types of speech it would not tolerate, namely speech calling "for violence, uprising or any other form of rejection of democratic principles." Such speech does not enjoy protection under Art. 10, see *Seher Karataş v Turkey* (app. no. 33179/96, 09 July 2002) [42].

[41] On this, see F. Tulkens, When to Say is to Do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights, [in:] *Freedom of Expression, Essays in Honor of Nicolas Bratza, President of the European Court of Human Rights*, eds. J. Casadevall et al., Nijmegen 2012, p. 284 and A. Nieuwenhuis, *A Positive Obligation under the ECHR to Ban Hate Speech?*, "PL" 2019, pp. 326–342, especially 326–328. In the recent judgment of *Beizaras and Levickas v. Lithuania* (app. no. 41288/15, 14 January 2020), the ECtHR noted that in some

In certain circumstances, the Court has based its findings on hateful speech by reference to Art. 17 ECHR, the Convention's abuse clause.[42] The provision has been called a "guillotine clause" on the basis that, when speech is found to fall within the ambit of Art. 17 ECHR, we have a "categorical exclusion of a given expression from the protection of the Convention."[43] This means that "when faced with a conduct of this sort, the Court need not proceed to examine the merits of the complaint, but rather declares it inadmissible on a *prima facie* assessment."[44] The Court allegedly resorts to Art. 17 ECHR only exceptionally and in extreme cases,[45] where "the impugned statements sought to deflect [Art. 10] from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention."[46] Thus, in some instances of hate speech,[47] the Court forgoes the usual proportionality analysis that is inherent in qualified rights; instead, by relying on Art. 17 ECHR, it finds cases to be inadmissible as manifestly ill-founded. There is also an intermediary category of cases, where the Court combines the two approaches

instances involving "acts that constitute serious offences" or "are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor (…)" at [111]. The Court also noted in this case "that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes" (*ibidem*).

[42] See, e.g. *Norwood v United Kingdom* (app. no. 23131/03, 16 November 2004, dec), and *Garaudy v. France* (app. no. 65831/01, 24 June 2003, dec.). On Art. 17, see P. de Morree, *Rights and Wrongs under the ECHR. The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights*, Cambridge 2016, pp. 23–66. See also Council of Europe, "Guide on Article 17 of the European Convention on Human Rights: Prohibition of Abuse of Rights", last updated 31 August 2019, https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf (access: 3.11.2019). For a critique of the Court's reliance on Art. 17 ECHR, see A. Buyse, *Dangerous Expressions: The ECHR, Violence and Free Speech*, "International & Comparative Law Quarterly" 2014, vol. 63, pp. 491–503, especially p. 494, and D. Keane, *Attacking Hate Speech under Article 17 of the European Convention on Human Rights*, "Netherlands Quarterly of Human Rights" 2007, vol. 25, pp. 641–664. Art. 18 ECHR also deals with abuse of rights but, where the source of this potential abuse is the applicant approaching the ECtHR, the Court relies on Art. 17 ECHR.

[43] See P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, "European Journal of International Law" 2015, vol. 26, pp. 237–253, 238.

[44] *Ibidem*.

[45] *Pastörs v. Germany* (app. no. 55225/14, 3 October 2019) at [37].

[46] *Ibidem*. See also *Belkacem v. Belgium* (app. no. 4367/14, 27 June 2017, dec.) at [31–32].

[47] See, e.g. *Pavel Ivanov v Russia* (app. no. 35222/04, 20 February 2007, dec.), *Roj TV A/S v. Denmark* (app. no. 24683/14, 17 April 2018, dec).

(i.e. abuse of rights and proportionality) by relying on Art. 17 ECHR as an aid to the interpretation of Art. 10,[48] namely by invoking Art. 17 ECHR in the context of the proportionality analysis regarding Art. 10 ECHR cases.

In relation to negationism, the ECtHR has over time relied on all of the approaches discussed above. Most cases relating to Holocaust denial are summarily found inadmissible through reliance on Art. 17 ECHR,[49] fewer are dealt with under a combination of Art. 10 ECHR and 17 ECHR,[50] whilst other cases (some relating to Holocaust denial and some to other types of negationism) are examined under Art. 10 ECHR.[51] In distinguishing between these approaches, the ECtHR has held in a recent case relating to Holocaust denial that "whether the Court applies Art. 17 directly, declaring a complaint incompatible *ratione materiae*, or instead finds Art. 10 applicable, invoking Art. 17 at a later stage when it examines the necessity of the alleged interference, is a decision taken on a case-by-case basis and will depend on all the circumstances of each individual case."[52]

The fact that certain negationist speech is treated as automatically incompatible with the ECHR, whilst other is subject to the usual Art. 10 ECHR proportionality scrutiny, reveals a normative understanding as to what FoE aims to/should cover. As we argue in more detail below, this may also be viewed as a subjective interpretation, reflecting to a certain extent value judgments as to what free speech should encompass and how the distinction should be drawn

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[48] *Pastörs* (n. 45) at [36]. On this point specifically, see D. Keane, *op. cit*., p. 646.

[49] *Garaudy* (n. 42) and *M'Bala M'Bala v. France* (app. no. 25239/13, 20 October 2015, dec.).

[50] *Pastörs* (n. 45).

[51] *Williamson v Germany* (app. no. 64496/17, 8 January 2019, dec.) relating to Holocaust denial was found inadmissible under Art. 10 ECHR, while in *Perinçek v. Switzerland* (app. no. 27510/08, 15 October 2015) the Court held that Switzerland was in violation of Art. 10 ECHR for fining a Turkish politician who denied the Armenian genocide in a speech in Switzerland.

[52] *Pastörs* (n. 45) at [37]. This reiterates (and elaborates further on) the Grand Chamber's findings in *Perinçek* (n. 51) at [114]. More recently in *Lilliendahl v. Iceland* (app. no. 29297/18, 12 May 2020, dec.) the Court noted at [34] that Art. 17 is reserved for the "gravest forms of hate speech," whereas Art. 10 applies to "less grave forms of hate speech" at [35]. The Court reiterated that Art. 10 does not only exclude "speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression" (at [36]).

between speech that is still subject to Art. 10 ECHR restrictions and speech that is so odious that it does not even qualify for Art. 10 ECHR consideration.

In cases where the Court has relied on Art. 10 ECHR to balance free speech against the need to protect individuals from hateful speech in the form of negationism, the ECtHR has made reference to various factors or criteria to be taken into account within the broader proportionality exercise. *Inter alia*, these criteria include the nature of the relevant statements,[53] the geographical location in which the speech took place and the broader historical context,[54] the time that has elapsed from the events in question,[55] the degree to which the impugned speech was prepared or whether it consisted of solely "off the cuff" remarks,[56] the identity of the speaker,[57] etc. Despite the attempts of the ECtHR to establish criteria pertaining to necessity in the context of FoE or to qualify certain speech as abusive, the relevant case law to date does not offer a comprehensive "roadmap" for helping states to draw a clear line that distinguishes between legitimate historical disagreement and sanctionable negationism. For instance, as discussed above, although the ECtHR's consistent stance has been to refuse extending free speech protection to Holocaust

[53] *Perinçek* (n. 51) at [229] et seq. The nature of the speech will determine the relevant margin of appreciation. As the Grand Chamber held, the Court will assess "whether the statements belonged to a type of expression entitled to heightened or reduced protection under Art. 10 of the Convention" (at [229]). If the speech relates to matters of public interest, this will attract heightened scrutiny (at [229]), while "expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection" (at [229]). The Grand Chamber also noted that the Chamber's distinction between denial and justification of genocide was irrelevant in the context of this case as the impugned statements could not be viewed as "a call for violence, hatred or intolerance." See *Perinçek* (n. 51) at [240].

[54] *Perinçek* (n. 51) at [242] et seq. For instance, in *Perinçek*, the Court made note of the fact that the speech in question took place in Switzerland and not in Turkey. As it stated, "[i]t can hardly be said that any hostility that exists towards the Armenian minority in Turkey is the product of the applicant's statements in Switzerland" (at [246]). Additionally, the location can also play a role without this transnational element. In *Pastörs* (n. 45) for instance, the fact that the speech took place within the Parliament was taken into account (although the negationist statements at issue were not found to be within the scope of protection of Art. 10 ECHR).

[55] *Perinçek* (n. 51) at [249–250].

[56] *Pastörs* (n. 45) at [46].

[57] In *Perinçek* (n. 51) the ECtHR took note of the fact that the applicant was "speaking as a politician" (at [231]).

denialists in all circumstances,[58] its findings in cases relating to the denial of other atrocities suggests an *ad hoc* approach to each case. In its Grand Chamber judgment in *Perinçek v. Switzerland*,[59] for instance, a case relating to a Turkish politician who was fined after denying the Armenian genocide in a speech in Switzerland, the ECtHR faulted the respondent state for its overbroad approach to the criminalisation of negationism.

This picture, we argue, is a consequence of the inevitable value judgments that are part and parcel of both *stricto sensu* proportionality and abuse of rights. Starting with proportionality, this principle and the test that it incorporates are quite uncontroversial when testing suitability and necessity in light of the *ad hoc* circumstances of a case, if by necessity it is merely meant whether less intrusive means would suffice to achieve a pursued goal.[60] Yet, when necessity involves assessing the legitimacy and, more generally, the value and significance of a pursued goal requiring interferences with human rights (i.e. how important is limiting free speech in a given context involving hate speech), the assessment shifts to *stricto sensu* proportionality. The latter allows establishing occasional priorities reflecting the moral weight and prevalence assigned to either free speech or to the banning of negationism/hate speech (and of the rationale behind banning). This dimension of proportionality, namely *stricto sensu* proportionality (which is also associated with the concept

[58] While, as discussed above, the Court is not always consistent on whether it relies on Art. 17 ECHR or Art. 10 ECHR, its approach is, however, consistent in that FoE does not cover Holocaust denial. See also M. Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*, Oxford 2017, chapter 6. For a critique of the ECtHR's approach to Holocaust denial, see A. Altman, *Freedom of Expression and Human Rights Law: The Case of Holocaust Denial*, [in:] *Speech and Harm: Controversies Over Free Speech*, eds. I Maitra, M.K. McGowan, Oxford 2012, pp. 24–49.

[59] See (n. 51). See also L. Daniele, *Disputing the Indisputable: Genocide Denial and Freedom of Expression in Perinçek v. Switzerland*, "Nottingham Law Journal" 2016, vol. 25, pp. 141–151; P. Lobba, *A European Halt to Laws Against Genocide Denial?*, "European Criminal Law Review" 2014, vol. 4, pp. 59–77 (the article analyses the Chamber, rather than the Grand Chamber judgment in *Perinçek*); C. Pégorier, *op. cit*., p. 99 et seq. See also *Chauvy and Others v. France* (app. no. 64915/01, 29 June 2004). Although this judgment did not relate to a clear-cut case of negationism, it was a defamation case that had some important elements linked to negationism and revisionism. The Court found no violation of Art. 10 ECHR.

[60] On the necessity/suitability stage of the proportionality test, see J. Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, "International Journal of Constitutional Law" 2013, vol. 11, pp. 466–490, especially the introductory part in pp. 466–470.

of "legitimate aims" pursued by an interference with human rights within the ECHR system), should, therefore, not be thought to be a mathematical or mechanical exercise that produces objective standards.[61] Rather, it is shaped and influenced by the normative desires and preferences of decision-makers.

Mutatis mutandis, declaring the content of certain speech as an abusive exercise of FoE, that is to say, as speech that FoE was never designed to encompass and allow, reflects a certain understanding as to what free speech should cover and as to what the predetermined and inelastic limits of FoE should be. When this understanding is not evidenced by reference to the text of the law (i.e. if the law does not exclude certain form of speech explicitly from the ambit of FoE) or by reference to other appropriate sources (e.g. European consensus discussed below or the *travaux* of an instrument, clearly showing that its drafters never envisaged extending FoE to denialists either in general or of a particular historical event, such as the Shoah), this delimitation of the scope of FoE may be seen as reflecting normative preferences, that is, what adjudicators think a society in a given time should not tolerate as free speech. In a sense, in the area of FoE, the sensitivities – or even the intolerance – of the members of a court can be disguised as abuse of rights.

Thus, irrespective of the very sincere efforts by the ECtHR to guide states as to the applicable criteria regarding the delimitation of free speech, the abusive exercise of FoE, the definition of hate speech and, more specifically, the banning of negationism, the guidance offered is neither comprehensive nor deprived of value judgments reflecting the preferences of the members of this Court in an area that, as we argue in the following section, no consensus exists between states (in Europe) as to how historical negationism shall be treated.

[61] See S. Tsakyrakis, *Proportionality: An Assault on Human Rights?*, "International Journal of Constitutional Law" 2009, vol. 7, pp. 468–493.

4. Why state practice on the banning of historical negationism matters and what can the Greek legal order teach us?

As explained in the introduction of the note, the combination of the arguments advanced in the previous two sections – namely the movement at the international and European levels towards banning/criminalising negationism, the absence of comprehensive criteria in that respect and the value judgment that is inherent when deciding whether negationism (and hate speech, more generally) should be tolerated in a (more or less militant[62]) democracy – invites us to highlight the importance of state practice in shaping the applicable criteria and standards. Thus, this section of the study focuses on state practice. This is done in two steps. First, we observe the absence of consensus stemming from state practice within Europe and we briefly explain how, from a doctrinal point of view, a more homogeneous practice by states can help to shape standards. The confines of this note are an impediment to a thorough examination of the ways in which state practice contributes to the shaping of standards; thus, discussion is inevitably limited to the identification of some of these methods. Second, we give the example of the relevant practice generated by the Greek legal order. The reason for choosing Greece is because it has important, relatively recent practice to demonstrate in the area of the criminalisation of negationism. This practice is particularly instructive and quite revelatory of the dangers associated with the criminalisation of negationism for (academic) FoE. In spite of good intentions, bad laws can backfire.

[62] On militant democracy see, amongst several other sources, the two seminal papers by K. Loewenstein, *Militant Democracy and Fundamental Rights, I*, "The American Political Science Review" 1037, vol. 31, pp. 417–432 and eadem, *Militant Democracy and Fundamental Rights, II*, "The American Political Science Review" 1937, vol. 37, pp. 638–658. See also J.-W. Müller, *Militant Democracy*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 1253–1269. Müller aptly defines militant democracy as "the idea of a democratic regime which is willing to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime" (p. 1253). Müller (p. 1263) suggests that prohibiting hate speech is an approach adopted in militant democracies.

4.1. Lack of consensus within Europe and the potential of state practice from a theoretical point of view

The lack of clarity at the international/European level, alongside the difficult normative (i.e. pertaining to how things should ideally be) questions raised by the banning of negationism, may explain the significant disparities in relation to this area at the state level. In the European context, the European Commission in its 2014 report assessing the implementation of the aforementioned EU FD made note of the extensive inconsistencies between states in their approaches to transposing the FD.[63] Similarly, the ECtHR noted that there is no clear European state practice that has emerged with regard to criminalising negationism. In *Perinçek*, when examining how European states handle the criminalisation of negationism within their domestic order, the Grand Chamber highlighted the lack of consensus between states parties to the ECHR, as there existed "a spectrum of national positions"[64] on the matter at the time. The ECtHR identified four broad approaches that European states had adopted. One group of states had no criminal sanctions in place relating to the denial of historical events.[65] For another group of states, only Holocaust denial was designated as a criminal offence.[66] A different set of states criminalised Holocaust denial, but also the negation of communist crimes.[67]A final set of states, criminalised the negation of all genocides.[68]

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[63] Report from the Commission to the European Parliament and Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM (2014) 27, 27 January 2014.

[64] *Perinçek* (n. 51) at [256].

[65] *Ibidem* (Denmark, Finland, Spain, Sweden and the United Kingdom).

[66] *Ibidem* (Austria, Belgium, France, Germany, the Netherlands and Romania). It is important to acknowledge some changes in the state of European consensus on the matter since the Grand Chamber judgment in *Perincek*. For instance, France has amended Art. 24 and 24bis of the "freedom of press act" (law of 29 July 1881) to include a broader restriction, also covering, *inter alia*, slavery and genocide (outside of the Holocaust). See Art. 173(2) of Law 2017-86 of 27 January 2017 relating to equality and citizenship (Journal Officiel de la République Française, 28/01/2017).

[67] *Ibidem* (Czech Republic and Poland).

[68] *Ibidem* (Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, North Macedonia, Malta, Slovakia, Slovenia and Switzerland).

But why did the ECtHR proceed with this comparative law analysis? Why did it focus on the practice of the states parties to the ECHR? The answer is that such practice can influence the reasoning of a court in at least three possible ways. *First*, according to Art. 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, when interpreting a treaty, together with the context, interpreters should also take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[69] *Second*, within the ECHR regime, the ECtHR has developed a contiguous method of interpretation, namely European consensus analysis. The specifics of this method, its exact *modus operandi*, and its appropriateness and desirability in a "special" area such as human rights, which excludes in principle majoritarian considerations, are debated in scholarship.[70] It is, however, generally accepted that the key dimension of the European consensus method of interpretation consists of comparative examination of the practice at the national level of the states parties to the ECHR with a view to identify (majoritarian) trends, evolution and, more broadly, movement towards a specific direction labelled then by the ECtHR as "consensus." If consensus can be diagnosed, the discretion (margin of appreciation) states enjoy regarding a particular human rights issue is limited. Alternatively, if no consensus is identified, the ECtHR grants states a wider margin of appreciation and applies a looser test of proportionality,[71] thereby leaving it to states to set the exact standards domestically.[72] Finally, the *third* and more apparent reason why an international court may investigate state

[69] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, entry into force: 27 January 1980, Art. 31(3)(b).

[70] On this, see K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge 2015 and P. Kapotas, Vassilis P. Tzevelekos (eds.), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, Cambridge 2019. In this collection, see D. Kagiaros, *When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights*, [in:] *Building…*, pp. 283–310. See also V.P Tzevelekos, K. Dzehtsiarou, *International Custom Making and the ECtHR's European Consensus Method of Interpretation*, "European Yearbook on Human Rights" 2016, vol. 16, pp. 313–344.

[71] E.g. *Dickson v. the United Kingdom* (app. no. 44362/04, 4 December 2007) at [78].

[72] The Court concluded that "the comparative-law position [namely, the state of consensus across Europe] cannot play a weighty part in [its] conclusion with regard to this issue," particularly because the Court had looked to other factors to determine the appropriate margin of appreciation that would apply in this context (*Perinçek* (n. 51) at [257]).

practice is to explore whether this may have been transformed into customary international law.[73]

These reasons, in addition to the points made in the previous two sections of this note, explain why, largely, no absolutely common standards regarding FoE and negationism exist in Europe today, and also why it is important to place emphasis on approaches adopted at the state level as a means to identify the prevailing trends and their contribution to the shaping of common standards. In the lines that follow, we give the example of the Greek legal order and we critically discuss how it treats negationism.

4.2. Lessons from the criminalisation of negationism within the Greek legal order

In the Greek legal order, Law 4285/14[74] (colloquially referred to in Greece as the "anti-racism law") was adopted in 2014 to transpose the EU FD into domestic law. The law established criminal offences for public incitement to violence or hatred[75] and for public endorsement or denial of certain crimes. The latter provision is designed in Art. 2(1) of said Law as follows:

> Anyone who intentionally, either orally, through the press, online, or by any other means or methods, condones, trivializes, or [maliciously] denies the existence or seriousness of the crimes of genocide, war crimes, crimes against

[73] This lack of consensus as expressed through the variety of state practices was also used by the ECtHR to determine that there was no customary international law rule to criminalise negationism. The ECtHR asserted that state practice was 'far from generalised and consistent'. See *Perinçek* (n. 51) at [266]. See also I. Ziemele, *Customary International Law in the Case Law of the European Court of Human Rights – the Method*, "The Law & Practice of International Courts and Tribunals" 2013, vol. 12, pp. 243–252. The literature on international customary law is vast. The International Law Commission recently produced a set of conclusions on the identification of customary international law. See International Law Commission, "Draft conclusions on identification of customary international law" adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, par. [65]).

[74] Law 4285/14, amending Law 927/1979 on combating race discrimination (Official Government Gazette Part A, No. 191/10-9-2014).

[75] *Ibidem*, Art. 1.

> humanity, the Holocaust, or Nazi crimes, when those crimes have been established by international court decisions *or the Greek Parliament*, if this conduct is directed against a group of persons or a member of such a group defined by race, color, religion, descent, national or ethnic origin, sexual orientation, (…) gender identity [or disability] and in a manner that is likely to incite (…) [violence or hatred] or is of a threatening or insulting nature against such a group or one of its members, will be punished by the punishments indicated (…) [in par. 1 of the previous Art.].[76]

When Law 4285/14 was introduced to the Greek Parliament, the justificatory report noted that any criminalisation of speech introduced in this law would be limited by Greece's obligations under international human rights law and the relevant provisions of the Greek Constitution[77] to respect FoE.[78] The text of the law, however, as presented above, did not include a reference to FoE. This omission was noted in the Report on Law 4285/14 of the Scientific Committee of the Greek Parliament.[79] The report highlighted the benefits of including an explicit reference to FoE and pointed to the principle of proportionality as a reason to bar criminality in the provision.[80] This approach was ultimately not adopted. Additionally, following the approach of the international and regional instruments that we presented in Part 2, Law 4285/14 did not provide a working definition of "hatred," even though it refers to this concept in both Art. 1 and 2.

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[76] *Ibidem*, Art. 2 [emphasis added]. Translation taken from the Law Library of Congress, https://www.loc.gov/law/foreign-news/article/greece-new-law-criminalizes-denial-of-genocide-hate-speech-and-other-acts-of-racism/ (access: 3.11.2019). The parts missing in this translation were added by the authors and are included in brackets.

[77] Constitution of Greece as revised by the Parliamentary Resolution of 27 May 2008 of the VIIIth Revisionary Parliament Art. 14–16, available in English at https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (access: 3.11.2019).

[78] Greek Parliament, "Justificatory Report" (of Law 4285/14), 18 January 2013, par. [6], https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/t-l328-eis.PDF (access: 3.11.2019).

[79] Scientific Committee of the Greek Parliament, Report (on Law 4285/14), 1 September 2014, https://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/t-xeno-epi.pdf [access: 3.11.2019].

[80] *Ibidem*, at p. 2 and 3.

Law 4285/14 did include some noteworthy innovations when compared to the FD. Firstly, it went beyond the FD by providing that the denial of international crimes will also be a criminal offence if it is likely to incite violence or hatred against disabled persons or against a specific gender identity or sexual orientation.[81] The Law thus expanded the scope of hateful speech, building on the categories of affected persons and groups mentioned in the FD.[82] This expansion, however, was accompanied by a much more controversial "innovation". This was the reference to the Greek Parliament's authority to designate those international crimes, whose denial would render an individual criminally liable, providing that the other preconditions established by said provision have been met. The FD had instead required states to define genocide, war crimes or crimes against humanity by reference to Art. 6, 7 and 8 of the Statute of the International Criminal Court and Art. 6 of the Charter of the International Military Tribunal,[83] leaving discretion to the EU member states to determine whether they would criminalise the denial of crimes only after they had been established as such by a "final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only."[84]

The first prosecution in Greece for this offence under Law 4285/14 was brought against Prof. Heinz Richter, a German historian, for, *inter alia*, allegedly denying the atrocities carried out by the Nazi occupiers during the Battle of Crete, a key moment during World War II in Greece.[85] Prof. Richter had been awarded an honorary doctorate by the University of Crete. This generated outrage by (amongst others) some members of academia on the basis that it was perceived that Prof. Richter's work had denied the atrocities perpetrated by the Nazis against the people of Crete. As a response to the outcry, Prof. Richter was prosecuted under Law 4285/14. In order to argue

[81] Law 4285/2014 (n. 74), Art. 2(1).

[82] It should be noted that the FD explicitly permitted states to expand on the "list" of affected groups mentioned in the FD. See Framework Decision (n. 18), Preamble at [10].

[83] *Ibidem*, Art. 1(1)(d).

[84] *Ibidem*, Art. 1(4).

[85] On this case, see I. Tourkochoriti, *Memory Politics and Academic Freedom: Some Recent Controversies in Greece*, "Verfassungsblog.de", 14 January 2018, ahttps://verfassungsblog.de/memory-politics-and-academic-freedom-some-recent-controversies-in-greece/ (access: 3.11.2019).

that Prof. Richter's work amounted to a denial of crimes within the meaning of Law 4285/14, the prosecution relied on an Act of Parliament that made references to the contribution of Greek cities and villages to the resistance during the Nazi occupation of Greece.[86] Additionally, the prosecution also utilised a number of Presidential Decrees that had designated certain towns and villages in Greece where various crimes took place during the Nazi occupation as martyr towns and villages.[87] The Criminal Court of First Instance (henceforth CFI) in Rethymno (Crete), found Prof. Richter innocent and also declared Art. 2 of Law 4285/14 unconstitutional.

Constitutional review of primary legislation is diffuse and incidental in Greece, thus, allowing all courts (including lower courts) to opine on the constitutionality of legislation and to set aside, i.e. render inoperative (but not invalidate[88]), a law that they find unconstitutional.[89] The *Richter* judgment ultimately identified three flaws in Art. 2 of Law 4285/14 that rendered it unconstitutional. Firstly, the Law was found to be contrary to the constitutional provision on the separation of powers.[90] The fact that the legislature, in this instance the Greek Parliament, had the capacity under Law 4285/14 to designate certain crimes as crimes the denial of which would constitute a criminal offence, overstepped the boundaries of the legislative branch.[91] For the CFI, deciding which crimes amount to genocide, war crimes or crimes against humanity was a matter that should fall exclusively within the remit of the judiciary, which has the capacity to establish facts in the context of judicial reasoning and to consequently determine whether the relevant requirements under the law have been met.[92] Secondly, the CFI concluded that the reference to the Greek Parliament in Law 4285/14 rendered Art. 2 of this law unconstitutional on the basis that it violated FoE and academic

[86] Law 2503/1997 (Official Government Gazette Part A, no. 107/30-05-1997), Art. 18(5).

[87] See, e.g. Presidential Decrees 399/1998 (Official Government Gazette Part A, no. 277/16-12-98), 40/2004 (Official Government Gazette Part A, no. 36/09-02-2004) and 99/2000 (Official Government Gazette Part A, no. 97/16-3-2000).

[88] As opposed to the unconstitutional administrative acts, which are annulled. See Constitution of Greece (n. 77) Art. 95(1)(a).

[89] *Ibidem*, Art. 87(2) and 93(4).

[90] *Ibidem*, Art. 26.

[91] Rethymno Criminal Court of First Instance, Judgment 2383/2015, 10 February 2016 at [83].

[92] *Ibidem*.

freedom. The judgment held that laws that recognise or establish historical truths cannot be used in a pluralistic and democratic society as the basis for legal sanctions, even if such laws enjoy majoritarian approval. The approach adopted by Art. 2 of Law 4285/14 would have a chilling effect on free speech and academic freedom, as it would require everyone to conform with the version of historic events endorsed by the legislature, an innately political body that seeks to implement the policies of whichever political group happens to be in power at a certain time.[93] The Court held that it would be unthinkable for historians to have to adjust their academic opinion to the whims of the majority as expressed in parliament at any given time.[94] Finally, the Greek court held that the addition of the reference to the decisions of the Greek Parliament in Law 4285/14 went beyond what was required in the FD, thus impeding the process of legislative harmonisation in EU law.[95]

Whilst we share the CFI's concerns in relation to the legislature "officially" determining historical truth, we argue that conditioning the prosecution of denialism or, more generally, associating the banning of negationism with the determination of (international) crimes by judicial decisions may also raise issues. For instance, since reference is also made in the FD to (national or international) courts having the power to establish with a final decision crimes, the denial or gross trivialisation of which could be punishable under legislation criminalising negationism, what would happen when courts disagree, either within the same legal order or between different legal orders, on the denial of which crimes may amount to hate speech? Just as it would be problematic for historians to be expected to alter their views depending on the decisions of a legislature, it would be equally undesirable for them to have to conform to judicial dictations of historical truth. This is because, any judgment identifying certain crimes as crimes that are not lawfully subject to historical debate, would not only serve as binding precedent for all lower courts as is usually the case and resolve the dispute for the parties to the litigation, but also have the side-effect of "criminalising" the expression

[93] *Ibidem*, at [90].
[94] *Ibidem*, at [91].
[95] *Ibidem*, at [93] et seq.

of dissenting historical views.[96] Thus, the chilling effect is not necessarily mitigated by removing these powers from the legislature and exclusively allocating them to the judiciary. What we are missing here again are the criteria for deciding when a particular historical narrative may amount to hate speech, irrespective of what version of history or narrative has been officially approved by whichever institution or authority within a polity or at the international level.

As a result of the legal effects developed in accordance with the Greek Constitution by the declaration by a judicial instance of a rule as unconstitutional within the Greek legal order, Art. 2 of Law 4285/14 criminalising negationism remains in force. The future will tell what effects (if any at all) it will produce, how it will be influenced by European/international standards and to what extent this law and the important and courageous CFI case law on it that we have discussed will co-shape these standards. Although its future, as well as the future of the criminalisation of negationism more generally in Europe and beyond, remains uncertain and in a state flux, however, we cannot abstain from noting that this first (mis)use of Law 4285/14 before the Greek national judicial instances did not concern hate speech and/or incitement to violence, but pure academic speech by a respected and established scholar, whose historical narration challenges the way that the majority of Greeks and their Parliament perceive the historical facts that led to the prosecution of Professor Richter. This shows how important it is that the banning of negationism is duly delimited, defined and subjected to such criteria that will prevent abusive prosecutions, whilst guaranteeing that the banning and criminalisation (supposing that they shall prevail over FoE, which is a value judgment stemming from the ideological preferences of each one of us) of negationism *only* concerns hate speech. The example of the *Richter* case also shows how, irrespective of good intentions, bad laws may backfire[97] and allow

[96] On a related note, see J. Houwink ten Cate, *Genocide in the Courtroom: On the Interaction Between Legal Experts and Historians*, "International Journal of Legal Information" 2011, vol. 39, pp. 186–193.

[97] For another very useful case study which identifies the shortcomings of genocide denial laws in Rwanda, see Y.-O. Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, "Northwestern Journal of International of Human Rights" 2014, vol. 12, pp. 191–213, especially Part IV, pp. 205–207. In relation to Poland, see P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National*

the prosecution (even if this did not lead to a condemnation) of academics whose only fault is that they read the past in a manner that contravenes how a nation understands and narrates its history, but also possibly constructs its historical "myths," and ultimately its national identity and self-perception. Prof. Richter's case is not one where a polity prosecuted negationism as a means to offer protection from hate speech; it is a case of intolerant Greek nationalism trying a disturbing academic voice under the guise of and by abusing defective legislation against hate speech.[98]

5. Conclusions

This note has introduced three key arguments to the debate surrounding the banning and criminalisation of negationism, and its concomitant impact on FoE. *Firstly*, it argued that international/European legal standards pertaining to the prohibition/criminalisation of negationism are still in a state of flux. Whilst we identify a noteworthy movement (which is thinner at the global level, but more solid within Europe) in the direction of requiring states to ban and punish negationism by means of national law, we argue that there are as of yet no fully crystallised international/European rules on negationism that would generate specific standards of conduct on states. This partially owes to the fact that states' positive obligations to bar negationism clashes

Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation in Light of International Law, "Polish Yearbook of International Law" 2017, vol. 37, pp. 287–300, especially p. 296 et seq. and K. Wierczyńska, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation as a Ground for Prosecution of Crimes Against Humanity, War Crimes and Crimes Against Peace*, "Polish Yearbook of International Law" 2017, vol. 37, 275–286.

[98] Our feeling is that Prof. Richter's prosecution may, to some extent, have also been the result of political calculation rather than a genuine concern to fight negationism and hate speech. *Inter alia*, the accusers (including witnesses) involved in this trial were high ranking (former) military personnel and MPs. In that respect, see the article by the attorneys representing Prof. Richter, A. Anagnostopoulos, K. Kalliris, *The Richter case: An Appraisal* ("Υπόθεση Ρίχτερ: Μία Αποτίμηση") (kathimerini.gr, 16 February 2016) https://www.kathimerini.gr/849649/opinion/epikairothta/politikh/ypo8esh-rixter-mia-apotimhsh (access: 3.11.2019) and V.P Tzevelekos, *The Richter Case: An Officially Approved Version of History* ("Υπόθεση Ρίχτερ: Ιστορία με τη Βούλα") (protagon.gr, 22 December 2015) https://www.protagon.gr/apopseis/editorial/gia-tin-ypothesi-rixter-istoria-me-ti-voula-44341001827 (access: 3.11.2019).

with negative obligations pertaining to FoE (including speech in academic or political contexts). Moreover, this also owes to the absence of well-shaped criteria defining hate speech, offering legal certainty and allowing to foresee (which is essential in criminal law and, more generally, for the purposes of legal certainty) when a historical narrative challenging a given historical "truth" shall amount to hateful, thus punishable, negationism. The *second* argument concerns the limits of FoE. In this respect, our argument is that, whilst courts have attempted to resolve the tension between free and hate speech (in the form of historical denialism), this cannot be achieved by means of a "mechanical" legal exercise. Whether a court such as the ECtHR employs (*stricto sensu*) proportionality or the concept of abuse of rights, it essentially proceeds with value judgments stemming from and essentially reflecting the normative/ideological preferences of decision-makers. To an extent, this is inherent to judicial function. The *third* and final argument stems from a combination of the two previous ones and identifies the importance of state practice in the shaping of international/European standards pertaining to the treatment of negationism. Thus, given the way that judicial instances inevitably perform their conflict resolution function in the field of human rights law and the absence of sufficiently crystallised, consistent and clear norms at the international and European levels pertaining to negationism, due attention must be paid to state practice. This is a key element nourishing and co-shaping international standards, either by means of judicial interpretation or as an element of customary international law (which is also heavily influenced by judicial interpretation); therefore, national authorities have the potential to influence international standards and co-shape them, particularly when these are imprecise and indeterminate, as is the case of the punishment of negationism. With this in mind, we discussed in this note the example of the criminalisation of denialism by the Greek legal order, which raises interesting questions as to who should determine those atrocities, the denial of which would be a criminal offence, whilst also showing how the dearth of clarity as to when negationism should be prosecuted as hate speech and, more generally, the semantic inflation of denialism can – irrespective of good intentions – lead to abusive prosecutions animated by and ultimately favouring officially endorsed historical narratives (or even nationalism), rather than truly fighting hate speech.

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ATHANASIOS CHOULIARAS

Criminalizing Negationism in Greece: Legislative Choices and Judicial Application

1. Introduction

The criminalization of negationism (or historical denialism) aroused for the first time on the occasion of the transposition of the European Council's Framework Decision 2008/913 on combating certain forms and expressions of racism and xenophobia by means of criminal law (FD) of 28 November 2008 into the Greek legal order.[1] This was eventually achieved through the enactment of law 4285/2014 on 10 September 2014, the Art. 2 of which bears the title "Public Condoning or Denial of Crimes." Until that moment, Greek criminal legislation included one relevant statute: the law 927/1979 entitled "On the Punishment of Acts or Conducts Aiming at Racial Discriminations," which was enacted in compliance with Art. 4 of the "International Convention on the Elimination of All Forms of Racial Discrimination." This latter law punished, among other conducts, the intentional public incitement by any means to acts or conducts capable of provoking discrimination, hatred or violence on racial or national grounds (Art. 1 par. 1) or even the creation or participation in organizations that pursuit organised propaganda or any kind of activity tending to discrimination (Art. 1 par. 2), but did not include any provision with respect to negationism, which did not constitute a criminal offence as such. Relevant was also Art. 185 of Greek Criminal Code, which punished generally the public glorification of crimes in a way that endangers

[1] See A. Chouliaras, *Transposing the Framework Decision on Combating Racism and Xenophobia into the Greek Legal Order*, "Eurocrim" 2011, vol. 1, pp. 39–44.

public order.[2] Law 4285/2014 radically amended law 927/1979 in order to align it with the obligations of Greece stemming from the above-mentioned FD.[3]

The criminalization of negationism became an endless source of dispute, as it is considered an unacceptable restriction to the freedom of speech and research.[4] In this context, two questions are raised: is the criminalization of hate speech in general and of negationism in particular legitimate in a liberal and democratic state functioning under the rule of law? In the affirmative case, under what specific terms and conditions? The former question refers to the political and legal justification of such a choice, while the latter one correlates with the degree that specific legislative choices in the stipulation of the criminal types come to terms with fundamental principles of liberal criminal law.

2. The political justification of the punishment of negationism

The political justification of the punishment of hate speech and negationism is strictly linked, on the one hand, to the wider issue of the respect of pluralism in modern multicultural democracies, and, on the other, to the demarcation of the limits within which the state is obliged to tolerate different beliefs and lifestyles.

We should not forget that liberalism is based on the assumption that freedom is the primary political value. Such a thesis introduces a positive presumption in favour of freedom placing the burden of justification for

[2] This offence has been abolished, since it is not included in the new Criminal Code enacted on 1 July 2019.

[3] The amendment was also dictated by the fact that there was not even one published judgment (condemnatory or absolvatory) applying law 927 for a period of 30 years! This situation changed only in 2010, when the first widely known application of the law by the criminal courts of first and second instance of Athens resulted in an acquittal judgment that was even appealed before the Supreme Court, which confirmed the judgment of the Appeal Court (*Areios Pagos* judgment no. 3/2010, published in "Poiniki Dikaiosini" 2010, p. 533 et seq.). In that case Kostas Plevris was charged under Art. 1 par. 1 and 2 for the publication of his book *The Jews: The Whole Truth*, where he glorifies Hitler and calls for the extermination of the Jews. Denial of the Holocaust was not raised as an issue, as negationism did not constitute an offence under the law in force at the date of publication (2006).

[4] See, e.g. the public appeal of 152 Greek historians to erase Art. 2 from the draft law, https://enthemata.wordpress.com/2014/09/03/ekklisi/ (access: 9.7.2020).

any restriction on the state, whose primary concern lies in ensuring equal freedom for its citizens. Such an acknowledgment entails a dual consequence: the principle of self-restriction of power and the demand of state neutrality towards different perceptions of the good.[5] It should be clarified, however, that it is one thing the neutrality in relation to different perceptions of the good ("good:" what we consider to be the ideal way of life) and another the formation and defence of a commonly shared basic idea of the right ("right:" how we ought to act in public life).[6] After all, the distinction between the good and the right is the way in which political philosophy has attempted to overcome a fundamental contradiction of liberalism: the state should remain neutral with respect to different perceptions of good but ought not to be neutral in relation with some fundamental principles that constitute its conceptual core, i.e. principles without which it is impossible to consider a government as liberal.[7] Accordingly, the state legitimately imposes the right even by using its monopoly on physical coercion, and it should remain neutral towards different perceptions of the good, tolerating them.

The above standpoint is not in principle inconsistent with the democratic principle, given that in liberal democracy next to the majority principle is also enshrined the respect of minority views, a position linked to the principle of "relevance of truth:" decisions taken by the majority are relative and not absolute truths.[8] The role of human rights law is crucial here, as it calls for respect of the fundamental rights and freedoms of all, regardless of position or perception.[9] But one would ask: to what extent is the restriction of one's freedom of expression legitimate for the sake of the proper functioning of democracy?

The answer here is to accept, on the one hand, that there are limits to the restriction of rights as laid down in the statutes, where rights are usually enshrined in a relative, not absolute way, and, on the other, that democracy should be neutral to different perceptions of good, but it should also not be apathetic to those perceptions that contradict the meaning of it conceptual core running against the right. In short, I am referring to a modest model of

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5 C. Larmore, *The Morals of Modernity*, Cambridge 1996, pp. 121–127.
6 *Ibidem*, pp. 19–40.
7 J. Rawls, *Political Liberalism*, New York 2005, p. 173 et seq.
8 N. Bobbio, *Liberalismo y Democracia*, Mexico 1989, p. 44 et seq.
9 L. Ferrajoli, *Derechos y garantías. La ley del más débil*, 2nd ed., Madrid 2001.

militant democracy that is committed to guarantee through its institutions and formal processes not only individual rights but also the minimum conditions for its own existence and in any eventual conflict restrict the rights of some in order to protect the rights of all.[10]

What is the legitimation basis in that case? Again, the guarantee of equality and freedom of all citizens: insofar as hate speech and negationism entail by definition discrimination on the basis of race, colour, etc., its prohibition aspires to protect vulnerable and disadvantaged groups or victimized groups from being discriminated and in this sense it becomes a means for promoting both substantive equality and diversity, as it seeks to restore historically and socially established relations of inequality. At the same time, according to the "principle of harm," the only reason for which it is legitimate to restrict one's liberty is the prevention of harm (or threat of harm) caused to another (not to himself), which according to Joel Feinberg, is defined as an obstacle to the interests of someone, which constitutes at the same time a wrong, given that it violates his rights.[11]

The intolerance and even the punishment of hate speech and negationism in a liberal and democratic state is further justified, if we take into consideration its inherent characteristics and the harm it entails. In particular, hate speech differs from a critical discourse, which may be formulated in conflictual or even virulent tones, on the basis of the following three characteristics: a) it points to a specific or identifiable individual of usually group on the basis of an arbitrary and normatively indifferent characteristic (race, colour, etc.), b) it stigmatizes the target group attributing implicitly or explicitly negative qualities, c) because of which said group is negatively stigmatized and hence it is considered undesirable or even an "enemy."[12]

Accordingly, hate speech and negationism cause specific and tangible harm, as they involve discrimination against groups identified on the basis

[10] G. Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, "Annual Review of Law and Social Science" 2013, vol. 9, pp. 207–226.

[11] J. Feinberg, *The Moral Limits of the Criminal Law*, vol. 1: *Harm to Others*, New York 1984, p. 36.

[12] B. Parekh, *Is There a Case for Banning Hate Speech?*, [in:] *The Content and Context of Hate Speech. Rethinking Regulation and Responses*, eds. M. Herz, P. Molnar, Cambridge 2012, pp. 40–41.

of certain physical and/or cultural characteristics, which offer the exclusive basis for their victimization as they could not be eliminated, even if their bearers wanted to, restricting or even depriving them of the opportunity to participate equally in public life and to have a seamless development of their personality.[13] Therefore, the provoked harm is manifested at the individual level, as an infringement on the right to an equal and free self-fulfilment, as well as at the collective one, as a violation of the principles of freedom, democracy and respect of individual rights enshrined both by the Greek and the European legal order. Under this second collective perspective, the criminalization and punishment of hate speech and negationism serves primarily an expressive and educational function, establishing that their wrongfulness run against the constitutive principles of democratic rule of law.

3. The prerequisites and limits of punishment of negationism in the European public order

In European legal order the delimitation between freedom of expression and hate speech is firstly made by examining whether the speech act in question falls within the scope of Art. 10 par. 1 and Art. 11 par. 1 of the European Convention of Human Rights (ECHR) or, on the contrary, cannot even be included in the protective field of the ECHR, because it aims at denying or destroying the rights or freedoms recognized therein, in accordance with Art. 17 of the ECHR (abuse of right). The latter article applies when the European Court considers that an opinion is articulated in such a form and has such a content rendering it incompatible with democracy and human rights and, therefore, does not contribute to the public debate, but constitutes an absolute denial of the rights of a group identified by specific characteristics.

On the other hand, the freedom of expression is subject to restrictions whose compatibility with the ECHR is checked on the basis of the criteria set out in Art. 10 par. 2 ECHR. Given that such restrictions will be prescribed as a rule by law and will be justified in the interests of public safety or for the prevention of disorder or crime, etc. the crucial question is whether they are

[13] *Ibidem*, p. 44.

considered "necessary in a democratic society." Although such an evaluation is made *in concreto*, two are the general principles set out in the case law of the Court: the restriction should serve a "pressing social need," which as a rule is not the case with respect to political expression and debates on questions of public interests.[14] What is more, the Court has repeatedly declared that statements stirring up or justifying violence, hatred or intolerance, when read as a whole and in their context, are declared inadmissible on the basis of Art. 17.[15] Statements entailing the denial of the Holocaust are dismissed as inadmissible on the same basis. It is safe to assume that the Court will adopt the same position with respect to genocides, crimes against humanity and war crimes that have been recognized by an international criminal tribunal.[16] On the contrary, the Court expressively stated that it is not its role to arbitrate historical debates.[17]

The Greek provision on "Public condoning or denial of crimes" (Art. 2 of Law 4285/2014) reads as follows:

> Anyone who intentionally, publicly, orally or through the press, the internet or by any other means or manner, condones, trivializes or maliciously denies the existence or seriousness of genocides, war crimes, crimes against humanity, the Holocaust and crimes of Nazism recognized by judgments of international courts or the Hellenic Parliament, and such behavior is directed against a group of persons or its members identified by race, color, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability and is manifested in a manner that may incite violence or hatred or it is threatening or offending towards the group or its member is punished with imprisonment ranging from 3 months to 3 years and a pecuniary penalty ranging from 5.000 to 20.000€.

Examining the above provision in the light of the above observations, one observes the following:

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[14] ECHR, *Perinçek v. Switzerland*, judgment of 15 November 2015, Grand Chamber, par. 196–197.

[15] *Ibidem*, par. 204–208.

[16] *Ibidem*, par. 209–212.

[17] *Ibidem*, par. 213–220.

1. Public order and/or the life, freedom or physical integrity of individuals designated on the basis of the above-mentioned characteristics are the protected legal interests, echoing both the collective and the individual dimension of negationism. Consequently, the speech act suffices to endanger public order, without necessarily infringing at the same time individual interests, while in the latter case, there is a concurrence of offences. The emphasis on the public nature of the offence indicates that a fundamental dimension of social coexistence, i.e. freedom and equality, is breached. In this context, public order is not an elusive idea, but it acquires a specific and clear meaning, empirically perceived and verifiable, rendering negationism as a threat to the fundamental conditions of a liberal and democratic rule of law.
2. Constituent element of the offence is the public utterance of hate speech. According to the Supreme Court, there is a public utterance when the speech act "may be heard by and affect any receiver, being irrelevant if it is pronounced in public or private space, by public or private means, such as the press."[18] The requirement of public pronouncement shows that the legislator is not primarily concerned with the persuasive power of the speech but with the dynamic created by its externalization, as a transmitter-recipient relationship is established, with the former calling the latter in acts that can at least discriminate on the basis of the above-mentioned characteristics. What is of main concern here is the activation of empirically verifiable conditions putting the protected interests at risk. Therefore, it is crucial that the racist intent is corroborated by words or actions, which are objectively suitable, given the manner and circumstances of the message, to mobilize an indefinite and unknown number of individuals in discriminations, violence or hatred against individuals or groups with specific physical and cultural characteristics (victimization). Hence, racist ideas as far as they remain in the form of inherent believes or thoughts and do not transform into speech acts are not punishable.
3. Further objective elements of the offence are: a) condoning, trivializing or maliciously denying the occurrence or seriousness of the Holocaust,

[18] *Areios Pagos* judgment 3/2010.

> Nazi crimes or core international crimes (genocide, crimes against humanity and war crimes) established by a decision of international courts or by the Greek Parliament; b) the prohibited behaviour should be directed against members of a group determined on the basis of the above-mentioned characteristics; and c) the behaviour is manifested in a manner that may incite violence or hatred or it is threatening or offending against the group or its member. The legislator has opted for the creation of a potential endangerment offence, where the risk or danger is a constitutive element of *actus reus* not in the form of a tangible result, but as a mere possibility that could be materialized in the concrete circumstances. It is therefore up to the judge to determine in each particular case whether a causal link is detected between the hate speech and the violence, hatred, threat or insult of a certain group or its members, in order to rule whether there is a violation of the protected interests. Legislator's choice to construct the offence in terms of potential instead of concrete endangerment, where it should be established that all causal factors leading to harm have been put in motion, is a clear sign of the will to offer greater protection activating penal intervention pre-emptively.

In this framework, denial can refer both to the factual circumstances of a crime as well as its legal characterisation. Nevertheless, it should be stressed that if denial is limited to questioning the occurrence of some historical facts through their re-evaluation or re-interpretation, which might be based on new evidences, without inciting to violence or hatred or without threatening or insulting a group or its members, then it is not punishable.[19] Denial may refer either to one of the crimes stipulated in Art. 6–8 of International Criminal Court's Statute[20] or crimes stipulated in Art. 6 of the Charter of International Military Tribunal at Nuremberg.[21] The commission of the said crimes should have been recognised through a final decision of the two mentioned international tribunals, excluding any other international tribunal of body.[22] What

[19] Magistrates Court of Rethymno, judgment no. 2383/2015, par. 45.

[20] Ratified by Greece by law no. 3003/2002 and transposed into Greek legal order through law no. 3948/2011.

[21] Judgment no. 2383/2015, par. 48–53.

[22] *Ibidem*, par. 54.

is more, the act of denial should be suitable to infringe the harmonious and peaceful coexistence (public order) and/or the rights of a specific individual or group through the creation of a direct and immanent danger; if such condition is not met, there is no offence.[23]

Subjectively it is required the existence of *dolus* (even eventual) for all the above objective elements, while denial should be malicious, which means that an additional *dolus malus* is required.[24] According to the Explanatory Report on the law, this additional subjective element is a clear sign that the legislator does not seek to prohibit or ideologically manipulate scientific research and that freedom of research is not in jeopardy. In other words, the simple expression of a different opinion as a form of participation in an open dialogue on history and past events is not a prohibited act, under the condition that it is articulated in such a way that does not incite to violence or hatred against groups or their members defined on the basis of their characteristics.

I have the opinion that the proper application of the criterion of suitability of the act to harm the protected interests would be sufficient in order to dismiss the possibility of initiating a criminal case against the German history Prof. Heinz Richter for the publication of his book *The Battle of Crete*[25] under the charge of "condoning, denying or grossly trivialising Nazi crimes and war crimes committed by Nazi forces during the Second World War against the people of Crete recognised as such by the Greek Parliament." Unfortunately, that was not the case. Such a development can be explained if one has in mind the sociological distinction between "law in the books" and "law in action." Nevertheless, the positive point of said case, which led to the acquittal of Richter, was that it offered the opportunity to the Court to rule on the unconstitutionality of the provision that the Greek Parliament can also decide on the establishment of core international crimes as a straightforward violation of the principle of the separation of powers and the principle of legality (*lege previa*), especially in cases where national or international tribunals have ruled that no such crimes have been committed.[26]

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[23] *Ibidem*, par. 66, 75.

[24] *Ibidem*, par. 75–76.

[25] Published in Greek in 2011 (Athens). In German: K. Richter, *Operation Merkur: Die Eroberung der Insel Kreta im Mai 1941*, Ruhpolding 2011.

[26] Judgment no. 2383/2015, par. 79–88.

4. Conclusions

All things considered, one could conclude that the criminalization of negationism is compatible with the principles of liberal and democratic rule of law and necessary for the effective protection of freedom and equality of all individuals regardless discrimination. The Greek legislator has incorporated all guiding principles arising from the relevant European's Court case law in order to guarantee freedom of expression, restricting the wrongfulness of negationism only to cases where hate speech equates to a criminal act violating the right of some groups or individuals in equal and free self-fulfilment.

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BARTŁOMIEJ KRZAN

Report on the First Day of the International Scientific Conference "The Punishment of Negationism Memory Law – International Crimes and the Problem of the Denial"

On 7–8 October 2019, in Warsaw, the Faculty of Political Science and International Studies of the University of Warsaw and the Institute of Justice held a conference on "The Punishment of Negationism. Memory Law – International Crimes and the Problem of the Denial."

The Conference was opened with short speeches by Dr. hab. Daniel Przastek, Deputy Dean of Finance and Development at the Faculty of Political Sciences and International Studies, University of Warsaw and Dr. Marcin Wielec, Head of the Institute of Justice (IWS). A more extensive introduction to the subject matter of the Conference was given by Bartłomiej Oręziak, representative of IWS, and, above all, by Dr. hab. Patrycja Grzebyk who spoke on behalf of the Faculty of Political Sciences and International Studies, University of Warsaw. The main organiser of the event drew attention to the legal issues of the denial problem.

The first substantive panel was devoted to the obligation to punish negationism. At the beginning, Dr. Agnieszka Bieńczyk-Missala (Institute of International Relations, University of Warsaw) gave a speech on the causes and effects of negationism. The panel was led by Dr. Magdalena Słok-Wódkowska from the Institute of International Law, University of Warsaw, who, due to the absence of Prof. Anna Potyrała (Adam Mickiewicz University in Poznań), introduced the audience to the main assumptions of the Framework Decision on combating certain forms and manifestations of racism and xenophobia by means of criminal law. Another speech by Prof. Sévane Garibian from the University of Geneva provoked a stormy discussion, mainly due to her comments on the *Perinçek v. Switzerland* case decided by the European Court

of Human Rights in Strasbourg.[1] Piergiuseppe Parisi from the University of Trento also referred to this case in the broader context of the obligation to penalise historical denials in a multi-level human rights system. The discussion on all papers highlighted a number of issues, in particular restrictions on freedom of expression and a belligerent approach to democracy. The areas for a clear distinction referring to Holocaust denial were considered. The issue of an evident geographical link and emerging paradoxes, such as unequal treatment (double standards) and the lack of perfect tools for a full understanding of historical truth as well as the lack of vision on how to limit freedom of expression, became the subject of a lively debate. The lack of clear definitions and the associated problems (margin of national discretion, relationship with the public policy clause) were highlighted. The speech of Armenian Ambassador, regarding the rationalisation of the punishment of negationism for educational purposes and prevention, provoked comments on possible contradictory legal steps (and justifications) taken to combat negationism.

After a lunch break, the second panel entitled "Negationism, Totalitarian Past and Freedom of Expression" started. The first speaker, Prof. Alexander Tsesis of the Loyola University of Chicago, considered different methods of the legal approach to history, focusing primarily on the distinction between the means of censoring (or even deceiving) history and punishing denial. He placed particular emphasis on the need to be careful and accurate in establishing the historical truth. In turn, in her paper, Dr. Aleksandra Gliszczyńska-Grabias (Polish Academy of Sciences) considered selected examples from Strasbourg jurisprudence that referred to the totalitarian past of Europe, focusing on the role of judges and lawyers. What she pointed out was the trivialisation of Nazi crimes and contemporary neo-fascist reflections with a completely different approach to the neo-communist movements in former socialist countries. The imbalance in the approach and the resulting controversy about the need to teach the newer European democracies a lesson, which was thus noticed, triggered a lively response during the subsequent discussion, as did the speech by Dr. Marcin Górski from the University of

[1] *Perinçek v. Switzerland*, appl. no. 27510/08, the ECHR Judgment of 15.10.2015, Grand Chamber.

Łódź, which was devoted to freedom of artistic expression. The fragility of the nature of artistic message in relation to the right to the truth was presented with a wide reference to the American Supreme Court judicature. The issue of the application of historical symbols, used by totalitarian systems, as evidenced by swastika, seemed to cause particular controversy. These considerations, in turn, prompted the participants to share the specific experiences of particular countries (Hungary, Romania, as compared to Poland). In this context, Dr. Mattias Fahrner from the University of Constance presented particularly accurate remarks in his speech, with assumptions behind the punishment of negationism in Germany. In his analysis, the reviewer used his own experience as a judge and government official, clearly presenting German solutions and practice against international and European standards. In this way, the discussion gained an additional dimension.

The reflections on the German experience were a kind of a springboard for further analysis in the last panel of the first day of the conference. First of all, the relevant Greek legislative and doctrinal *acquis* was presented – both from the perspective of its translation into international standards (which was the subject of a joint paper by Prof. Vassilis P. Tzevelekos of the University of Liverpool and Prof. Dimitrios Kagiaros of Exeter) and its judicial application, as reflected in the speech by Athanasios Chouliaras (Hellenic Open University). Similarly to the presentation by Dr. Grażyna Baranowska on the controversial solution contained in Art. 301 of the Turkish Penal Code, which became the basis for launching proceedings against Orhan Pamuk (the Nobel Laureate in Literature), it allowed the participants of the meeting to compare analogous solutions. The last speech of Prof. Charis Papacharalambous from the University of Cyprus, gave the participants an excellent insight into the doctrinal and philosophical justification (both general and from the perspective of the philosophy of law) for prosecuting negationism, which was reflected in the evening discussions, and continued successfully over dinner and on the following day.

KAROLINA WIERCZYŃSKA

The Punishment of Negationism in the Experience of Central, Eastern and Southern European States. Summary of the Second Day of the Conference

On the first day of the Conference, a number of important issues concerning negationism were raised. Also other problems related to the obligation to penalise negationism, and to set boundaries for freedom of expression or artistic freedom were discussed. On the second day, which was largely based on the conclusions of the previous day, the issue of negationism in the practice and jurisprudence of states was continued, and the problem of civil liability for negationism was addressed.

Throughout the discussion it was emphasized that negationism is connected with "falsified interpretation of history"[1] denial of facts, calling facts lies and deception,[2] denial of committing serious crimes, and that it concerns, for example, the denial of the existence of the Holocaust, the Holodomor, crimes committed against Jews and Roma in general, and the role of certain nations in committing crimes against these groups. Denial may even refer to the use of language wrongly attributing responsibility for the crimes committed, for example, by using such phrases as "Polish death camps" or "Polish concentration camps," which mistakenly indicate that the Poles were behind the Holocaust industry, while the concentration camps were not set up or used by them, but only placed by the Nazis on the territory of occupied Poland.

Negationism may also refer to the attempt to justify committing serious crimes against a certain group. The extermination during the Rwandan

[1] M. Duda, *Przestępstwa z nienawiści. Studium prawnokarne i kryminologiczne*, Olsztyn 2016, p. 202.

[2] E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, "Vermont Law Review" 2006, vol. 30(3), p. 614.

genocide was justified by the fact that it concerned killing cockroaches, as the Tutsi population was described.[3] Not only was it dehumanising for the group, as its members were reduced to the role of insects, but it also served for justifying murders on the group members. Killing a cockroach is a necessary and useful activity. Justifications for the crimes committed may be also of a different nature; committing serious crimes may be justified by revenge, but also by the need to intervene (even using the term "humanitarian intervention," i.e. something on behalf of the international community).

Finally, negationism can take the form of minimising the crimes committed, for example, by denying the existence of gas chambers in concentration camps and the mass character of crimes committed against Jews, minimising the number of Holocaust victims, or even indicating that the Auschwitz concentration camp was not a camp, but only a large industrial plant, where interned people and not prisoners worked.[4]

The denial of crimes despite historical facts, or even against the facts, often concerns cases or events which do not need to be proven in court and to which there is a social agreement that they took place. It is all the more painful for the victims to see the emergence of narratives denying the existence of the Holocaust (confirmed by the jurisprudence of the International Military Tribunal in Nuremberg[5]), the Srebrenica massacre (confirmed by the International Court of Justice[6] and the International Criminal Tribunal for the former Yugoslavia[7]) or the Rwandan genocide (confirmed by the International Criminal Tribunal for Rwanda[8]).

With respect to the protection of historical truth and collective memory, negationism should be sanctioned, taking care to include appropriate

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[3] See, e.g. *The Prosecutor against Augustin Bizimungu, Augustin Ndindiliyimana, Protais Mpiranya, Francois-Xavier Nzuwonemeye, Innocent Sagahutu*, Case no. ICTR- 2000-56-I, INDICTMENT, 25.09.2002, par. 5.38.

[4] Available at: http://auschwitz.org/historia/negacjonisci/formy-negacjonizmu (access: 16.10.2019).

[5] IMT, judgment of 1 October 1946, https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf (access: 16.10.2019).

[6] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, par. 278 et seq.

[7] ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgement, 2.08.2001, par. 599.

[8] ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 1.06.2001, par. 6–8.

regulations in the constitutions of states, their penal codes or lower-level acts. However, states must balance their regulations against their international obligations. The member states of the Council of Europe must in particular take into account the provisions of the European Convention on Human Rights (Art. 10 thereof) and the case law of the European Court of Human Rights, which set a specific standard to balance the level of protection of the freedom of expression with the principle of non-discrimination, reconciling the standard of law enforcement with the standard of respect for freedoms of others.

It was emphasized during a conference that in recent years there has been a worrying increase in negationist episodes. In addition to the "traditional" attempts to deny the Holocaust, there have been attempts to deny the genocides that have taken place recently and are still alive in the memory of the societies harmed by these crimes, namely the genocides in Srebrenica and Rwanda. The scale of the denialist episodes was a direct reason for the introduction of new normative instruments to deal with such phenomena in many countries.[9] Various solutions introduced by the states not only allow us to assess their effectiveness in comparison with those introduced by other states, but also provide an attitude for discussion on the difficult relationship between law and memory. Additionally, one may wonder what should be considered as protected good – whether the memory of societies, historical truth, human dignity, the rights of individuals or specific groups, other communities or public order.

Discussions held on the second day concerned the issue of negationism in the law and jurisprudence of the states[10] of both Central and Eastern and Southern Europe. The subjects discussed referred to the experiences of Poland, the Czech Republic, Serbia and other countries created after the break-up of the former Yugoslavia, Hungary, and the jurisprudence of the European Court of Human Rights on the victims of negationism and historical debates.

[9] It should be noted, however, that many countries that face the problem of negationist crimes have not introduced any regulations at all.

[10] Panel IV was linked with Panel III, which also dealt with negationism in the practice and jurisprudence of states, but focused mainly on the experience of Greece and Turkey (speeches: Tzevelekos, Kagiaros, Chouliaras, Baranowska) and the philosophical and legal analysis of implications of incrimination of negationism (speech: Papacharalambous).

These aspects were discussed by Prof. Ireneusz C. Kamiński in a presentation entitled "Debates over history and the European Convention" and Aleksandra Mężykowska in her presentation entitled "History Distortion Cases – Protection of Personal Rights of Victims of Denied Crimes in the Jurisprudence of the ECtHR." Prof. Kamiński drew attention, among others, to the provisions of the Convention which protect freedom of expression, even when certain statements are offensive and shocking. He also pointed to situations when the ECtHR used the buffer clause, regulated in Art. 17 of the Convention, which prohibits the abuse of the right to complain. In this regard, however, he referred to the rather strict standard established for the *Perinçek v. Switzerland*[11] case concerning the denial of the Armenian genocide committed in 1915. The Court, as Kamiński pointed out, tried to stay out of historical debates by referring to the issue of the official version of history. What was stressed during the discussion, however, was that in practice it is impossible to avoid these debates, as we are convinced not only by the case-law of the ECtHR, but also by the practice and case-law of national courts. Mężykowska addressed the problem of victims of negationist crimes, pointing out the insufficient protection of persons who have been harmed by such crimes. National proceedings (mainly stigmatising the perpetrators of crimes under criminal law) are not fully adequate and able to satisfy the victims of negationist crimes, because they simply do not relate to the victims' personal rights (e.g. reputation).

This aspect, namely the protection of personal rights, was also mentioned in papers dealing with the issue of civil liability for negationist crimes. In his presentation "Safeguarding the Good Repute of the Polish State and the Polish Nation in the Light of Art. 53o–53q of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation," Dr. Bogusław Lackoroński addressed the issue of civil claims, but only in relation to the good name, reputation of the Republic of Poland and the Polish Nation, while Klaus Bachmann, in his presentation "Civil Responsibility in the Context of Holocaust Denial and Memory Laws in Germany and Poland," made a comparative analysis of the Polish and German

[11] ECtHR, *Perinçek vs. Suisse*, appl. no. 27510/08, Judgement, 13.12.2013.

systems as regards the possibility of shaping civil claims in the context of crimes related to memory laws.

Other papers mainly concerned criminal liability for the negationist crimes.

In his presentation "Negationism and Polish Criminal Law – Dogmatic Considerations", Konrad Burdziak presented problems related to the interpretation and application of Art. 55 of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. In the legal analysis, the author gave a detailed explanation of the problems connected with the interpretation of particular elements of the regulations, pointing out his doubts concerning these regulations and the difficulties which are connected with the possible application of the provisions of the Act to the perpetrators of the offences specified in this provision.

Similar problems were indicated by the authors of studies on the Czech Republic (Veronika Bílková in her presentation entitled "The Punishment of Negationism – Czech Experience") and Hungary (Tamás Hoffmann in his presentation "The Punishment of Negationism in Hungarian Criminal Law – Theory and Practice"), who referred to the shortcomings of national regulations and limited practice of national courts in this area.

Interesting conclusions in this respect were undoubtedly made by Nedžad Smailagić. In his presentation "Negationism of Atrocity Crimes Committed in the Former Yugoslavia: Criminal Law and Transitional Justice Considerations," he referred to the experience of countries after the break-up of the former Yugoslavia, which have experienced serious crimes in recent decades, including genocide during the war. Smailagić referred to the shortcomings of national regulations, as well as to the very selective implementation of international law in this area (raising the example of Serbia or Bosnia and Herzegovina and their very selective implementation of the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law).

Similar conclusions were also presented by Andrii Nekoliak in his presentation "Regulating Historical Memory through Civil Responsibility for Negationism: The Case of (Un)empowered Norms in Ukraine?," drawing attention to the shortcomings of norms to regulate the issue of liability for

the Holodomor in Ukraine and the lack of sanctions for denying the great famine despite repeated attempts to regulate this problem.

This aspect of Nekoliak's presentation could be treated as a common element of the presented statements. Despite the introduction of regulations aimed at sanctioning negationism, it is characteristic, as the panelists have pointed out, that Polish, Czech, Hungarian, Ukrainian or regulations from the states of former Yugoslavia do not reflect international regulations or are implemented in an insufficient (not allowing for effective judgment) or very selective way. Crime definitions used in domestic law do not correspond to those used in international law. Hungarian "acts against humanity" in relation to the concept of *crimes against humanity*, used in international law, or definitions introduced in the Polish Act on the Institute of National Remembrance, are only two examples of common practice for the discussed states.

Additionally, these regulations are often implemented contrary to the principle of legalism at various levels of its application. Finally, as demonstrated in the presentations, very few episodes of a negationist nature have been assessed in accordance with the applicable national regulations, which allows forming some hypotheses concerning the quality of these regulations. It may be that, firstly, they do not meet the expectations of the criminal justice system, and secondly, that they have errors or are so illegible or impossible to interpret (because they contain so many phrases that are undefined or lack statutory definition) that they do not allow to prosecute effectively the crime of negationism on their basis.

Another issue raised in the discussion was the question of different national experiences. The problem is that some national regulations do not take into account the intention (malicious intent) of the perpetrator of a crime of a negationist nature at all: whether he/she only denies, intentionally denies and offends, or whether he/she does it by inattention, by accident, because of ignorance, yet without any intention to commit a crime. This is an important, if not elementary, issue in the context of judging individuals, and a reasonable legislator should bear it in mind.

After all, it is also possible – although this is not necessarily related to the quality of statutory regulations – that national authorities are not interested in sanctioning negationist crimes and do not prosecute those who commit such crimes because they are still not ready to discuss the Holocaust, genocide,

communist crimes, the Holodomor and accept a common version of history. It was constantly pointed out by the participants, that this history should not be written by the judges.

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Biographical Notes

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History is no longer the exclusive domain of historians, but is now often used as a tool for politics. It is not without reason that the term "state historical policy" has been coined, which must be a kind of aberration for those who believed that the role of history is to objectively determine the course of events. The fact is, however, that the distortion of historical facts, the concealment of crimes is now part of the "information war". Therefore, new acts of public international law, EU law and national law are introduced in order to combat public condonation, denial or gross trivialisation of the core international crimes which are certain forms and expressions of racism and xenophobia. States have to determine for themselves how they understand "denial" or "gross trivialization", which may lead to abuse. In many cases, when introducing criminal law provisions, States wish to decree historical truth, to establish once and for all the general facts and determine who was the victim, and who was the perpetrator. This does not have to be the result of bad will, but of a desire to exclude the possibility of nuance, which could turn into dangerous trivialisation. The aim of this publication is to specify the reasons for holding accountable for denial of international crimes, indicate legal obligations in this respect, look at the Polish case, both in terms of criminal provisions (partly repealed) and standards of a civil law nature, and compare the Polish regulation with the legal systems of other states, which were chosen because of the region (Central and Eastern Europe) or due to having current problems with denial of crimes or doubts about prosecution on this account.

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