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MEMORY LAWS OR MEMORY LOSS? EUROPE IN SEARCH OF ITS HISTORICAL IDENTITY THROUGH THE NATIONAL AND INTERNATIONAL LAW

Abstract:
This article provides an overview of "memory laws" in Europe, reflecting upon what may be called the "asymmetry" of such laws. It then looks at the special case of Poland and its troubled experience with memory laws; it considers the question of whether, in the eyes of the law – genocide, and in particular the Holocaust – is so "special" that its public denials warrant legal intervention. It also looks at the case law of the European Court of Human Rights and its (not necessarily coherent) "doctrine" on memory laws and their consistency, or otherwise, with the European Convention for the Protection of Human Rights and Fundamental Freedoms (and in particular with freedom of expression as laid down in Art. 10). The article concludes by asserting that even if we take the law as an indicator of European public memory, there is no consensus on the past, except perhaps for the special case of the Holocaust. The main challenge lies in determining whether memory laws, defined by some as social engineering and the imposition of "imperative" versions of memory, are consistent with the principles inherent in open, democratic and free societies in Europe. This challenge remains unmet.

Keywords: ECHR, ECtHR, European Convention on Human Rights, European Court of Human Rights, genocide, Holocaust, memory law, Poland

> Memory is both a blessing and a curse for nations with history marked by tragedy. In a moment of catastrophe memory is the ultimate weapon for a nation, the very last bastion of national self-defence (...). Such memory creates beautiful national myths and elevates the past; it beautifies the ugly; the sins of its own community are thus doomed to be forgotten.[1]

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[1] A. Michnik, *Żydowski problem z pamięcią* (Jewish problem with the memory), Gazeta Wyborcza, 28 April 2013.

INTRODUCTION

Each nation and each state in the world has, in its history, moments of glory and pride, and also episodes which are shameful and barbaric. There is therefore a temptation, hard to resist by politicians, to design the officially endorsed educational programmes, political actions and legal rules in such a way as to establish a collective memory which presents the state in the most positive light. With these tools they emphasize the glory and minimize the shameful chapters of their nation's past. This phenomenon is not a modern invention and has served since ancient times as a tool of influencing the present through "regulating" the past.[2]

The concept of memory laws (French *lois mémorielles,* German *Erinnerungsgesetze*) first appeared prominently in the broad public discourse in France in 2001, when the statute known as Taubira's Law was enacted,[3] which defined both the Atlantic slave trade and slavery itself as a crime against humanity. Since then fierce debates have accompanied attempts to use the law to achieve justice through the recognition of past sufferings.

Legal regulations referred to as 'memory laws' assume basically two forms, taking the nature of their consequences into account as the main criterion for the distinction: (1) the legal establishment of public acts of memory and official orthodoxy with respect to certain historical facts, without however any sanctions attached to contrary assertions (e.g. recognition of some event as genocide, or regulations establishing official dates of commemoration of an important event, such as the Italian Act of 2000 setting 27 January as the Day of National Remembrance of the Holocaust);[4] and (2) laws prohibiting the denial of certain historical events or requiring their interpretation in a specified way, under the threat of the imposition of sanctions, usually of a criminal nature. As regards the latter form of "memory law", the sanctions relate mainly to negation of the fact that crimes of genocide were committed, or interpretation of these crimes in a manner contrary to the one defined by the legislator, usually prohibiting their denial, approval, or trivialization.[5] Basic legal problems emerge here, as prohibitions of this kind are inevitably related to fundamental rights and freedoms, and imposing limitations on them will not be acceptable for many persons.

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[2] Emanuela Fronza gives the example of a ban on public commemoration of crimes committed in Athens during the rule of thirty tyrants. *See* E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, 30 Vermont Law Review 610 (2006).

[3] Law no. 2005-158 of 23 February 2005, J.O. 24 February 2005.

[4] This form of memory law is not usually controversial, unlike the second type, which applies criminal sanctions.

[5] *E.g.* in Lithuania, Art. 170 of the Criminal Code prohibits the public denial, belittling or support of international crimes, crimes of the USSR or Nazi Germany against the Republic of Lithuania and her inhabitants.. In Lichtenstein, Art. 283 of the Criminal Code contains a provision stating that "Whoever publicly denies, coarsely trivialises, or tries to justify genocide or other crimes against humanity via word, writing, pictures, electronically transmitted signs, gestures, violent acts or by other means shall be punished with imprisonment for up to two years." The provisions are quoted in the country reports of the European Commission against Racism and Intolerance, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp (accessed 30 March 2015).

Advocates of memory laws argue that legal regulations concerning historical facts and events, and their interpretation, serve as guardians of the truth about the past and honour the victims of murky times.[6] Memory laws are also meant to arrest the process of obliteration of memory about the nature of totalitarian regimes and dictatorships, which frequently resort to massive crimes. In consequence, the democratic order of the state and the foundations of a democratic society are also deemed to be protected. Conversely, opponents treat memory laws as an inadmissible establishment of historical dogma by means of legal measures.[7] Members of the Liberty for History (*Liberté pour l'Histoire*) Association a few years ago issued the famous Appeal of Blois (*Appel de Blois*), in which they proclaimed: "History must not be a slave to contemporary politics nor can it be written on the command of competing memories. In a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions (…)."[8]

Indeed, the very fragile nature of truth concerning facts is, as Hannah Arendt described it, not only prone to forgetfulness but also to manipulation.[9] But this insight can in fact be invoked as an argument both for and against the establishment of memory laws, which can be used either as an instrument to manipulate the truth about the past, or to serve as its guardian (i.e. prevent others from engaging in manipulation).

This article contends that the complex relationship between memory, history, politics and law is a fact, and the challenges it poses must be faced by historians, politicians, sociologists and legal scholars. The importance of the legal component of this equation is described by Lawrence McNamara, who states that: "As law mediates and regulates claims to justice in the present, its grasp of how to deal with the past must be a central concern. There is too much at stake for things to be otherwise."[10]

Therefore, this article analyses first and foremost the legal, but also political and social, conflicts surrounding the contemporary European memory laws. It explores the special legal status with respect to the questioning, or challenging, of certain historical facts, as well as a certain asymmetry involved in recognizing certain past events as having a special, legally protected status for their preferred interpretation. This asymmetry will be discussed in particular with regard to the case law of the European Court of Human Rights. The Strasburg Court has had to consider on several occasions the scope of the margin of appreciation enjoyed by states in providing for legal enforcement of certain interpretations of their own past, but it has not applied this margin consistently to laws related to all the evils that plague European history.

I argue that although the memory of the horrors experienced by people in the past should be a shared endeavour for all, a dialogue about history carried out solely with

[6] R. Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, 2(1) Amsterdam Law Forum 33 (2009).

[7] *See* R. Rémond, *History and the Law*, 4046 Études (2006).

[8] Liberté pour l'histoire, *Blois Appeal*, available at: http://www.lph-asso.fr/index.php?option=com_content&view=article&id=47&Itemid=14&lang=en (accessed 30 March 2015).

[9] H. Arendt, *Human Condition*, University of Chicago Press, Chicago: 1958, p. 232.

[10] L. McNamara, *History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past*, 26 Sydney Law Review 353 (2004), p. 394.

the use of legal sanctions can significantly erode the space and opportunity for conflict resolution. A serious risk exists that the legal path of enforcement will exacerbate antagonisms and sometimes provoke outright hostility concerning inherently different perspectives of historical events. At the same time, I also try to demonstrate that in the case of some bans on genocide denial, the law serves as a necessary and justified tool for counteracting incitement to racial, ethnic and religious hatred.

1. FROM THE PROLIFERATION OF MONUMENTS TO WILFUL AMNESIA: EUROPE'S ASYMMETRIC MEMORY

As noted by Jim Hoagland, Europe is a continent colonized by its past and memory.[11] This statement seems particularly true with reference to the history of 20th century Europe, which is reflected in, *inter alia*, the continually growing number of monuments, museums, and symbols commemorating the past, and nowadays increasingly in memory laws. Memory laws are today characteristic mainly of the European states. In the United States, the First Amendment principles would almost certainly be used to strike down memory laws comparable to those existing in many European legal systems.[12] One of the primary reasons for such a discrepancy in legal attitudes is assessment of the risks and effects created by such limitations on free speech. As Wojciech Sadurski put it, in the context of penalizing negationism: "In the United States, groups which feed on literature such as 'historical revisionism' are part of the political folklore, just as are flat-Earthers and Montana separatists: probably irritating and deeply offensive to many, but very unlikely to reach a capacity to challenge the democratic system to its core."[13]

One of the most controversial memory laws in Europe is the 2007 Law of Historic Memory[14] introduced by the Spanish Congress of Deputies.[15] The provisions of the law, which include limitations on individual rights and freedoms, concern two aspects: the prohibition of political events at the Valley of the Fallen and Franco's burial place, and the removal of Francoist symbols from public buildings and spaces, with exceptions granted for artistic or architectural reasons and to religious sites. At first sight, these prohibitions do not seem oppressive and controversial, at least if one compares them to

[11] J. Hoagland, *Coming to Terms with the War: It's Now or Never*, International Herald Tribune, 9 April 1998.

[12] For more on the First Amendment principles, *e.g.* G. R. Stone et al., *The First Amendment*, Aspen Publishers, New York: 2012.

[13] W. Sadurski, *'It All Depends': The Universal and the Contingent in Human Rights*, EUI Working Paper, 2002/7, p. 28.

[14] Law to recognise and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship, B.O.E. 2007, 52/2007, English translation available at: http://www.derechos.org/nizkor/espana/doc/lmheng.html (accessed 30 March 2015).

[15] For a detailed analysis of the legal dimension of the transitional justice period in Spain, see *e.g.* J. M. Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain. A Case of Late Transitional Justice*, Intersentia, Cambridge – Antwerp – Portland: 2013.

Austria's Prohibition Act, which provides the legal basis for the process of denazification in Austria and aims at suppressing any potential rebirth of Nazism by providing severe penalties (up to 10 years imprisonment) for a wide range of neo-Nazi activities.[16] But although the wording of the Spanish law declares that its aim is the "recognition of the victims of political, religious and ideological violence on both sides of the Spanish Civil War and of Franco's regime", its provisions seem to indicate that it was designed as a tool for praising and aiding Franco's victims and condemning his supporters. Thus the law is deemed by many to violate the Spanish "Pact of Forgetting", legally incorporated into the 1977 Amnesty Law.[17] It was therefore bound to arouse the split memory of society and face fierce criticism from the political right. As a result, some have criticized it as being "[a]ccusatory rather than reconciliatory."[18]

Another example of memory laws are the legal prohibitions which have been introduced in some post-communist countries against the public denial of the crimes of Communism and Stalinism and the display of their symbols (such as the hammer and sickle).[19] In the context of these regulations it is worth noting the bill on amendment of the Criminal Code in Russia. Work on the amendment was commenced in 2009 by the State Duma,[20] and provided that any form of total or partial rehabilitation of Nazism and Nazi criminals, as well as the denial of Nazi crimes, would be punishable by a fine and/or up to three years imprisonment. At the same time however, the proposed law was initially also aimed at punishing the characterization as criminal of any actions undertaken by the member states of the anti-Hitler coalition, including crimes committed by Stalin in Poland, thus upholding the Russian myth of the Great Patriotic War. From

[16] Verbotsgesetz [Prohibition Act] 1947, 8 May 1945, BGBl. 25/1947, amended in 1992: BGBl. 148/1992.

[17] The Spanish Amnesty Law has itself been subject to sharp controversies and criticism, (i.e. by the UN human rights bodies), which stress that under international human rights law there must be no statute of limitations for crimes against humanity, as are contained in the 1977 law. See the UN position: http://www.trust.org/alertnet/news/spain-must-lift-amnesty-for-franco-era-crimes-un (accessed 30 March 2015).

[18] D. E. Stofleth, *Memory Politics in Spain: The Law of Historical Memory and the Politics of the Dead* (International Association of Genocide Scholars database), available at: http://www.genocidescholars.org/sites/default/files/document%09%5Bcurrent-page%3A1%5D/documents/IAGS%202011%20Daniel%20Stofleth.pdf (accessed 30 March 2015).

[19] The constitutionality of legal provisions imposing sanctions against those who publicly display such symbols has already been challenged in national constitutional courts. On 4 June 2013 the Constitutional Court of Moldova ruled on the constitutionality of Law No. 192 of 12 July 2012 as regards the prohibition of symbols of the totalitarian communist regime and of promoting the totalitarian ideologies, finding it unconstitutional as it has failed to satisfy the requirements of clarity and predictability. A similar decision has been issued by the Polish Constitutional Tribunal, while in the case of the Czech Republic and Hungary, the constitutionality of bans against Communist symbols has been upheld. See the brief submitted on 11 March 2013 by the European Commission for Democracy through Law of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights Amicus Curiae upon the request of the Constitutional Court of Moldova, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)004-e (accessed 30 March 2015).

[20] Bill on the amendment of the Penal Code of Russian Federation, General Code of Russian Federation 1996, No. 25, item 2954.

a Polish perspective such a provision would legitimise an inadmissible historical lie, giving it the authority of law.[21] Fortunately, in the face of strong criticism the final scope of the provision was limited to criminalisation of the denial or approval of Nazi crimes.[22]

Interestingly, the most numerous legal regulations concerning different types of historical assertions have been established in France, where for years the truth about the nation's colonialist past and collaboration with the Nazis was pushed into official and social oblivion.[23] The laws established by the French Parliament include: *Loi Gayssot* of 13 July 1990,[24] which punishes, with a fine and/or imprisonment of one year, denial of the crimes against humanity mentioned in Art. 9 of the London Agreement of 8 August 1945; *Loi Arménie* of 29 January 2001,[25] a law recognizing the Armenian genocide in the Ottoman Empire in 1915; *Loi Taubira* of 21 May 2001,[26] which defines both the Atlantic slave trade and slavery itself, practiced from the 15th century, as a crime against humanity; *Loi Rapatriés* of 15 February 2005,[27] declaring that the French nation expresses its gratitude for activities carried out by France in the territories previously under French sovereignty, and further declaring in its Art. 4 that French educational programs should teach the "positive role" of France's presence there (which is a rather controversial description of the nature of colonial domination).[28] The latest controversies emerged in January 2012 when both houses of the French Parliament adopted a new law criminalizing denial of the genocide of Armenians committed by the Turks during the First World War, with the same penalties applicable as in the case of Holocaust denial.[29] Even though the provision was shortly thereafter struck down by the Constitutional Council,[30] which examined the law after receiving numerous appeals against it signed by dozens of lawmakers from across the political spectrum arguing that it unconstitutionally violated freedom of speech, the fact of its adoption by the French Parliament led to a serious conflict between Paris and Ankara.[31]

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[21] For more on Stalinist crimes committed in, *inter alia*, Poland, *see e.g.* A. Applebaum, *Iron Curtain: The Crushing of Eastern Europe, 1944-1956*, Allen Lane, London: 2012.

[22] *See* N. Koposov, *Historical memory laws in Russia and Eastern Europe* (text of a speech delivered by Nikolay Koposov at the Liberté pour l'histoire General Assembly, Paris, France, 21 May 2011).

[23] For more on French memory laws, *see* D. Fraser, *Law's Holocaust Denial: State, Memory, Legality*, [in:] L. Hennebel, T. Hochmann (eds.), *Genocide Denials and the Law*, Oxford University Press, New York: 2011, pp. 28-48.

[24] Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe, JORF n° 162 du 14 juillet 1990.

[25] Loi n° 2001-70 du 29 janvier 2001 sur le génocide arménien.

[26] Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance, par la France, de la traite et de l'esclavage en tant que crime contre l'humanité.

[27] Loi n° 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés.

[28] This provision was ultimately repealed in 2006.

[29] Loi n° 3842 du 23 janvier 2012 portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l'existence du génocide arménien.

[30] Décision n° 2012-647 DC du 28 février 2012.

[31] As claimed by Robert Badinter, the decision of the Constitutional Council formally and ultimately dismissed historical memory laws as such. The Council stated that laws recognizing certain events as geno-

Turkey suspended military cooperation, bilateral political agreements, and economic contracts with France in reaction to the bill, which the Turkish Foreign Minister called a "black stain" on France.[32] Turkey had from the very beginning attacked the French initiative to penalize the denial of the genocide of Armenians. Yet at the same time Turkey has established and still applies provisions of its own Criminal Code prohibiting the "slandering of the Turkish nation" and "slandering of the state of the Republic of Turkey",[33] which in Turkey is used by the authorities as an instrument of repression against those who deal with the problems of the Armenian population in the Ottoman Empire, as well as against modern manifestations of these historical events.[34] In particular, the authorities punish persons for claiming that the events of 1915 constituted genocide against the Armenian people. Orhan Pamuk, a world-famous writer and Nobel Prize laureate, was among those accused of such an expression.[35]

Germany has not escaped serious controversy either. Although memory of the Nazi crimes committed during the Second World War is maintained there, including by means of legislation, in recent years a trend has been observed (monitored with particular intensity and concern in states such as Poland) to emphasize the war sufferings of the German people themselves, and to make attempts to equate some harms done to Germans with the harm done by them to others. The initiative to establish the Centre against Expulsions in Germany, mainly commemorating the German victims of expulsions carried out during and after the Second World War, opened with the support of the German government and parliament. This may be viewed as symptomatic of a change in political sensitivities, according to which all murders and oppressions are comparable.[36]

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cide does not possess the normative character essential to law. Furthermore, Parliament has no discretion to define such events as criminal acts, as it should be left to the independent judiciary, according with the separation of powers rule. R. Badinter, *Is this the end for the historical memory laws?*, paper presented to the General Assembly of Liberté pour l'histoire, Paris, France, 2 June 2012 (on file with the author).

[32] S. Sayare, S. Arsu, *Genocide Bill Angers Turks as It Passes in France*, New York Times, 23 January 2012.

[33] The law (Art. 301 of the Turkish Criminal Code) was significantly mitigated in May 2008, i.e. through limiting its material scope (earlier the insult concerned the broad term of "Turkishness") and reducing the severity of penalties. Moreover, the application of the said provision now depends on the formal consent of the Turkish Minister of Justice. See the Amnesty International comment on the provision: http://humanrightsturkey.org/2013/04/03/article-301-end-it-dont-amend-it/ (accessed 30 March 2015).

[34] *See e.g.* T. Akçam, V. Dadrian, *Judgment at Istanbul: The Armenian Genocide Trials*, Berghahn Books, New York: 2011.

[35] The charges against Pamuk were ultimately dropped following strong criticism by EU officials, questioning the readiness of Turkey for the EU accession negotiation process. The international outcry also led to a public reaction of the European Parliament: *Questions for written answer to the Commission, Subject: Turkish court judgment against Orhan Pamuk*, E-003754/2011 (19 April 2011), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-003754+0+DOC+XML+V0//EN&language=EN (accessed 30 March 2015).

[36] The Berlin Centre against Expulsions, the project put forward by the Federal Republic of Germany (and strongly criticized by the Polish government), is dedicated to the commemoration of the history of the German expellees and their homelands. The whole project was initiated by the influential German Federation of Expellees, representing the diaspora of ethnic Germans and their families, with strong far-right and revisionist sympathies.

The initiative was fiercely opposed in 2003 by Marek Edelman, the leader of the 1943 Warsaw Ghetto uprising. In response to the argument that Germans simply wanted to exercise their right to their own remembrance of those events, Edelman responded "What sort of remembrance? Did they suffer that much? Of course it is sad when you are forced to leave your house and abandon your land. But the Jews lost their houses and all of their relatives. Expulsions are about suffering, but there is so much suffering in this world. Sick people suffer, and nobody builds monuments to honour them."[37]

Thus it has been argued that German commemoration of expulsions must take into account their historical context. Any attempt at leaving the context aside will give rise to justified fears about the intentions of those who ignore the underlying reasons for the expulsions. Hence the resolution of the German Parliament of 2002 calling for "A centre against displacement with a European alignment" which in none of its paragraphs mentions the word "Nazism", can be considered very problematic.[38]

This short overview of the memory laws enacted in Europe demonstrates how divided and asymmetric the memory of European states and nations is, making the chances for even partial agreement very limited. This asymmetry usually involves, to a large extent, one nation ignoring or minimising its own guilt against other nations or peoples, while concentrating on the suffering of its own people and seeking to have such suffering acknowledged by the 'perpetrators'. Such an asymmetric approach is also visible in the different measures taken by the states to deal with the legacies of past crimes.

2. A CASE STUDY: POLAND

Poland is an interesting example of a state which, while putting its history on a pedestal of national values, wrestles with its difficult and often traumatic past, every now and then mixing it up with present-day politics and public life. I wish to emphasise that I am not making any claim for a strong exceptionalism of Poland in this regard. To the contrary, the way Poland has dealt with the legal vestiges of its Communist (and its earlier occupation-period) past is fairly typical of the dilemmas that the Central and Eastern European (CEE) legal systems face, and the measures which they adopt. The selection of this particular case study is influenced by the author's expertise and direct experience, as well as the fact that the legal measures described below raise stark questions about attempts to legalize a particular historical orthodoxy. During its four decades of life under communist rule, the Poles did not have the opportunity to engage in an open, public debate on its own recent history. In

[37] Passage from Marek Edelman's article published in Tygodnik Powszechny on 17.08.2003, quoted [in:] T. Judt, *From the House of the Dead: An Essay on Modern European Memory*, [in:] T. Judt, *Postwar: A History of Europe since 1945*, Penguin, New York: 2006, p. 829.

[38] Resolution of the German Federal Parliament of 4 July 2002, available at: http://www.z-g-v.de/english/aktuelles/?id=61 (accessed 30 March 2015).

communist times one went to prison for many years, and during Stalinist times could even lose his or her life, for telling the truth about the massacre of Polish prisoners of war by the Soviet secret police in the Katyń forest.[39] During the same period, and to a large extent in response to past and present injustices, the often mythical vision of Polish heroism was cherished and passed on to subsequent generations. This memory solidified the identity of the nation which regained its freedom and independence in 1989. In such circumstances the nation's own guilt for acts committed in the past was easily overlooked or ignored.

In Poland it is forbidden by law to deny, "publicly and contrary to the facts", Nazi crimes, communist crimes, and other crimes constituting crimes against peace, crimes against humanity or war crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity or nationality in the period between 1 September 1939 and 31 July 1990.[40] Such denial is subject to a fine and/or imprisonment of up to three years. In addition the judgment is to be made public.

In 2006 the Polish Parliament, with the votes of the right-nationalist coalition then in power, incorporated a new provision into the Criminal Code (Art. 132(a)) establishing as a crime the "public defamation of the Polish nation", deemed to consist specifically of accusing it of involvement in Nazi and communist crimes.[41] To a large extent this regulation constitutes proof that a part of Polish society is not capable of accepting certain truths, some of which were described by Jan Tomasz Gross in his books published around that time,[42] although in fact they had been unveiled much earlier by eminent Polish historians who studied the history of the Holocaust on Polish lands, including Barbara Engelking, Jan Grabowski and Jacek Leociak from the Polish Centre for Holocaust Research.[43] These truths concerned incidents of "blackmail, extortion, denunciation, betrayal, and plunder of the living and the dead" carried out

[39] In Spring 1940, in the forests of Katyń, the Soviets murdered almost 5,000 Polish prisoners of war – military officers, policemen, intellectuals. Under Communism, history was often a no-entry zone. Thus, for many years the official version, propagated and enforced by the Soviets, stipulated that the crime was committed by the Nazis. For more on the Katyń massacre, see in particular A. Paul, *Katyn: Stalin's Massacre and the Triumph of Truth*, Northern Illinois University Press, DeKalb, IL: 2010.

[40] Act of 18 December 1998 on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation, Polish Official Journal (Dz. U.), No.155, item 1016.

[41] For a detailed analysis of the provision, *see* I. C. Kamiński, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni* (Legal controversies around the crime of public defamation of the Polish nation by accusing it of crimes), 8 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 5 (2010).

[42] The revelation of the truth about Poles who burnt their Jewish neighbours in a barn in the town of Jedwabne in July 1941, recounted by Jan Tomasz Gross in his book *Neighbors*, redefined the consciousness of a large part of Polish society. At the same time, it sparked off extremely negative, frequently anti-Semitic reactions. J. T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton University Press, Princeton: 2001.

[43] *See e.g.* J. Grabowski, *Rescue for Money: 'Paid Helpers' in Poland, 1939-1945*, 13 Search and Research Series (2008); B. Engelking, J. Leociak, *Warsaw Ghetto: The Guide through the Perished City*, Yale University Press, New Haven: 2009.

by Poles against Jews in many places in Poland during the Second World War and in its aftermath.[44]

The 2006 defamation provision was declared unconstitutional by the Polish Constitutional Tribunal in its judgment of 19 September 2008, based on the faulty legislative process employed in its passage.[45] The grounds for the decision were fundamentally different from those cited by the Ombudsman, who lodged the motion of unconstitutionality to the Tribunal. The Ombudsman claimed that the honour of, and respect for, the Polish nation were already sufficiently protected by the Criminal Code, which penalized public defamation of Polish nation or the Republic of Poland (Art. 133 of the Code) – and that this general defamation provision was not objectionable because it rested upon the impossibility of distinguishing between the truth or falsity of a statement, and instead rested on evaluations only. However, the new, more specific provision concerned an imputation of certain facts which *may* be analyzed in terms of their truth/falsity, and this, in the view of the Ombudsman, clashes both with constitutional freedom of expression, including freedom of acquiring and spreading information (Art. 54 of the Constitution) and constitutional freedom of academic research (Art. 73). According to the Ombudsman, the new provision failed the test of proportionality by producing a real risk that people will abstain from public utterances and from scholarly research concerning Nazi and Communist crimes, and so may restrict public discourse concerning recent Polish history.

In particular, the Ombudsman raised an obvious question: at what point may we establish that an allegation is false? If, on one hand, it is an obvious fact that at least some Poles participated in committing these crimes, and on the other hand the law mandates penalization of such an attribution of these crimes to the Polish Nation – how can we establish a clear framework of the truth about historical events, while respecting freedom of speech regarding those matters?[46]

This last point seems quite troublesome: the establishment of what constitutes the imputation of a crime to a Nation as a whole is totally arbitrary, and hence would greatly restrict freedom of speech and of scholarly historical research. In its judgment, the Tribunal did not, however, take into account any of the substantive allegations which were listed by the Polish Ombudsman in the motion to find the law unconstitutional. Instead, the Tribunal found unconstitutionality in the legislative *process* only, not in the substance of the provision. The procedure was indeed rather peculiar: the Criminal Code was amended by way of an amendment to another statute (the so-called Lustration Act). In itself this would not have been legally objectionable, even if somewhat awkward. What the Tribunal found questionable, however, was that the new provision was included into the amendment at a late stage of the legislative process by the Senate rather than the lower chamber (the Sejm), which only subsequently adopted (passively, i.e. by not rejecting) the contro-

[44] M. Krygier, *Lifting the Burden of the Past* (keynote address for symposium *Why Poland? Facing the Demons of Polish-Jewish History*, Melbourne, Australia, 28 November 2012).

[45] Judgment of the Polish Constitutional Tribunal, case no. K 5/07, OTK 7A/2008, item 124.

[46] Judgment of the Polish Constitutional Tribunal, case no. K 5/07, Part I (summarizing the arguments by the Ombudsman).

versial provision. The Tribunal, on the basis of the constitutional regulation of the Senate's legislative role (Art. 121 (2) of the Constitution) found that the Senate had unconstitutionally exceeded the scope of the subject-matter of the law submitted to it by the Sejm, thus exercising in fact its own legislative initiative through a defective procedure.[47]

In basing its decision on procedural grounds only, the Constitutional Tribunal avoided taking a stand on the socially, politically and historically sensitive issue of the permissibility of that type of "memory law", which penalizes persons for departing from a particular orthodoxy about recent history. By asserting, in a very cursory manner (one sentence only), that the unconstitutionality of a provision based on a defective procedure renders any discussion of its substance "pointless", and any further consideration of the provision, redundant,[48] the top judicial body squandered an opportunity to pronounce on the merits (and demerits) of a dangerous "memory law". In fact the Tribunal was not prevented from entering into a discussion on the merits by its finding of a procedural defect, as was plausibly (in the view of this author) asserted in a dissenting opinion by Judge Wojciech Hemerliński. The Judge pointed out that there has not been any coherent doctrine in the Tribunal case law to date about inappropriateness (or otherwise) of considering substantive objections once procedural defects have been found, and cited judgments giving both positive and negative answers to this question.[49] According to Judge Hemerliński, what should be decisive is the nature of the objections raised by the challenger. This, according to the dissenting Judge, is based on the principle that the Tribunal is bound by the scope of the challenge, and in this case the objections made by the Ombudsman were primarily substantive.

More ominously, Judge Hemerliński noted at the end of this dissent that since the provision had been struck down on the procedural grounds only, there are no obstacles towards re-adopting the same law, this time through a correct procedure. Fortunately this has not happened - not yet, in any event, and one hopes that it will not happen because the provision was undoubtedly an example of a dangerous and harmful memory law which, instead of defending the truth, would contribute to its denial in accordance with the legislator's will.

3. IS GENOCIDE DENIAL DIFFERENT? IS HOLOCAUST DENIAL UNIQUE?

Are regulations which penalize the denial, praise, or belittlement of the crime of genocide more justified than other memory laws, and is the penalization of Holocaust denial justified in a more convincing way? These questions are among the most difficult and controversial issues connected with memory laws. Many legal scholars trying to formulate the answers thereto find themselves in the position described by William

[47] *Ibidem*, Part III.3.
[48] *Ibidem*, Part III.6.
[49] *Ibidem*, Dissenting Opinion by Judge Wojciech Hemerliński, Part III.

Schabas, as being "[t]orn between the militant anti-racism of punishing denial and a latent libertarianism that bristles at any attempt to muzzle expression."[50]

3.1. Genocide denial

It can be argued that denial of the crime of genocide is not only harmful in the individual dimension, but also negatively influences society as a whole. Furthermore, the motivations behind a denial or trivialization of these crimes almost always arises from a hostile attitude toward the national, ethnic, racial or religious groups to which the victims belonged. Another argument in support of genocide denial laws is based on the view that the denial serves as a form of disguised hate speech.[51]

In a broader context, the denial of a genocide committed by former or present generations of a given society is often considered to be proof that this society is not ready to accept responsibility for its crime(s).[52] It can also be politically motivated, aimed at building unity and a shared identity of the nation (e.g. the French post-war policy of silence concerning the Vichy regime). A general negation of an established crime of genocide can be aimed at inciting hatred to a "hostile" state and society (consider e.g. the official policy of the Iranian administration against Israel and the Jews, of which denial of the Holocaust forms a central element).[53] Negationism can also be a mechanism used to incite the exclusion of minorities and socially weaker groups by stigmatizing them as liars who invented their sufferings, a tactic which facilitates further oppression. Many scholars studying the phenomenon of genocide, and its conditions and mechanisms, believe that denial of such a crime is a factor which increases the risk of its recurrence, which is one of the elements of the entire "process" of genocide. As observed by Henry Theriault: "Permitting genocide denial despite the damage it does not only reinforces deniers in their destructive activities but also opens an ethical loophole that will potentially allow a range of harassment, including violence, under various circumstances. At the extreme, successful genocide denial begets genocide."[54]

Laws which prohibit negationism are deemed to serve as preventive mechanisms to exclude the risk of such crimes reoccurring in the future. Thus, those who justify the intervention of the law into the area of history and memory argue that, in the case of the crime of genocide, it is not the penalization of negationism, but rather negationism itself which is in contradiction with democratic principles and values, and thus a violation of human rights.

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[50] W. Schabas, *Preface*, [in:] Hennebel and Hochmann, *supra* note 23, p. 13 (xiii).

[51] *See in particular* A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, New York: 2002; R. A. Kahn, *Holocaust Denial and Hate Speech*, [in:] Hennebel, and Hochmann, *supra* note 23; R. Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, 2(1) Amsterdam Law Forum (2009), Cohen-Almagor, *supra* note 6.

[52] *See* B. Cooper, *Denying Genocide: Law, Identity and Historical Memory in the Face of Mass Atrocity Conference*, 9 Cardozo Journal of Conflict Resolution 448 (2008).

[53] Y. Carmon, *The Role of Holocaust Denial in the Ideology and Strategy of the Iranian Regime*, 307 Middle East Media Research Institute (MEMRI), Inquiry and Analysis Series (2006).

[54] Henry Theriault, quoted by Sévane Garibian in S. Garibian, *Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law*, 9(2) Cardozo Journal of Conflict Resolution 479 (2008), p. 488.

The controversies surrounding the penalization of different forms of genocide denial have reached the supranational level in Europe. In November 2008, after a long and tumultuous legislative process,[55] the EU Council adopted its Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.[56] The material scope of the Framework Decision is stipulated in Art. 1, which describes intentional conduct to be made punishable by Member States. The prohibition of negationism expressed in the Framework Decision is not restricted to the obligation to punish the "negation" of specific crimes, but also defines their "condoning" and "gross trivialization" as punishable conduct. It also provides that EU Member States are allowed to take necessary measures to punish such conduct only if it is carried out in a manner likely to incite violence or hatred against groups or members of groups enumerated in the Decision.[57] The final draft chosen for adoption was connected with the considerable discrepancies in the position of individual states with respect to the penalization of different forms of negationism, including particularly Holocaust denial. The decision to leave it to the discretion of Member States whether to punish negationism even when there is no call for violence or incitement to hatred was emphasized by the Rapporteur Martine Roure during the consultations over the document in the European Parliament: "Trivialisation of the crime of genocide is a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved."[58] However, the Decision has been harshly criticized by authors generally opposed to penalizing negationism. As Uladzislau Belavusau observes "In the absence of a Luxembourg (Court of Justice of the European Union) specification of what constitutes 'the conduct carried out in a manner likely to incite to violence or hatred against such a group', it remains difficult to assess the potential of the severe and unequivocal criminalisation of historical revisionism in the EU. What is striking on the surface is the extremely broad scope of the criminalised offence. That makes the Decision a potential watchdog for a free historical discussion with regard to the contradictory aspects of the Second World War."[59]

[55] *See* M. Bell, *Racism and Equality in the European Union*, Oxford University Press, Oxford: 2008, p. 164.

[56] 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, Official Journal L 328, 06/12/2008 pp. 0055–0058.

[57] Furthermore, any Member State can make a statement that it will make punishable the act of public condoning, denying or grossly trivialising the crimes of genocide, crimes against humanity and war crimes, only if the crimes have been established by a final decision of a national court of the Member State and/or an international court, or by a final decision of an international court only.

[58] Report of 14 November 2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007–C6-0246/2007–2001/0270(CNS) (second consultations).

[59] U. Belavusau, *Freedom of Speech. Importing European and US Constitutional Models in Transitional Democracies,* Routledge, London and New York: 2013, p. 189. Belavusau convincingly criticizes the Decision in many aspects, including the exclusion of gender and sexuality as the grounds for hate speech.

Analysis of the "changes: that the EU states have introduced into their national legislation to date in order to fulfil their obligations derived from the Framework Decision in the area of penalizing negationism indicates that the instrument is virtually meaningless, as all EU states claim that their regulations adopted prior to the Decision are sufficient.[60] It would seem therefore that the Decision is mainly of expressive or symbolic significance. This however only exacerbates the dilemmas raised by attempts to translate a historical discourse into the language of criminal prohibitions.

3.2. Holocaust denial

In a moving essay on European historical memory Tony Judt aptly explains that "Hitler's final solution to the Jewish problem" in Europe is not only the source of crucial areas of post-war international jurisprudence – "genocide" or "crimes against humanity". It also adjudicates the moral (and in certain European countries the legal) standing of those who pronounce upon it. To deny or belittle the Shoah – the Holocaust – is to place yourself beyond the pale of civilized public discourse."[61] The legal situation that Judt describes has been shaped in Europe by regulations which penalize the public dissemination of Holocaust denial. The question thus arises whether laws directed against Holocaust denial are more justified and convincing than those applying to other genocide denials. There are several arguments in favour of this point of view.[62]

It was nearly thirty years ago that Yisrael Gutman, at a seminar in the Hebrew University in Jerusalem, wondered aloud whether, with respect to Holocaust denial, the world was dealing with a negative but passing phenomenon, or whether it was yet another manifestation of traditional anti-Semitism. Today the answer is painfully explicit.[63] The 'arguments' of the Holocaust deniers are gaining support all over the world,[64] with the former President of Iran making Holocaust denial an official state doctrine,[65] while the

[60] Report from the Commission to the European Parliament and the 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 final, 27 January 2014.

[61] Judt, *supra* note 37, p. 804.

[62] There are a few authors who do not agree that legal bans on Holocaust denial should be included in the catalogue of "memory laws". Robert Badinter argues that the goals of the French *Loi Gayssot* is to fight racism and xenophobia, not to "relate" history, which is what other memory laws do. Additionally, he claims that the legal ban on Holocaust denial simply "[p]rohibits the rejection of the authority of res judicata, as determined by an international court whose authority stems from a treaty to which France is a signatory." The argumentation of Badinter confirms the thesis of a different and more legitimate position with respect to the ban of the Holocaust denial. But the motivation to pass these kinds of regulations and the consequences of following them are closely connected to memory and identity of certain states and nations, which also allows them to be included in the broader category of memory laws. Badinter, *supra* note 31.

[63] Y. Gutman, *Denying the Holocaust*, Shazar Library, Jerusalem: 1985, pp. 20-25.

[64] *See e.g.* D. E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, Plume, New York: 1994; M. Shermer, A. Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?,* University of California Press, Berkeley: 2000.

[65] A. Applebaum, *Teheran's Holocaust Lesson*, Washington Post online edition 12.12.2006, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/12/11/AR2006121101163.htm (accessed 30 March 2015).

survivors of German concentration camps are passing away. As a result, Holocaust denial today is, as observed by Wojciech Sadurski, "[a] part of a larger package of an ideology which maintains that Jews cannot be trusted on anything, even on their own past."[66]

In addition, the threat stemming from the dissemination of Holocaust denials becomes even more apparent when one considers the level of general knowledge in Europe about the Second World War and the Holocaust. As indicated in a poll commissioned in 2012 by the Forsa Research Institute on 25 January (just two days before the International Holocaust Memorial Day) 21 percent of Germans between 18 and 30 years of age, when asked about the most notorious Nazi extermination camp, had never heard of it.[67] Another survey revealed that in 2009 23 percent of British secondary school students did not know what happened in the concentration camp in Auschwitz. Answers to questions about this extermination camp included associations with a beer brand name, a state bordering on Germany, and a type of bread.[68] If education about the Holocaust has failed so dramatically in states such as Germany, the question which arises is how memory of it should be defended.

It is also worth emphasizing that a specific form of negationism is spreading rapidly in some Arab states, one which, in the context of the conflict in the Middle East may be seen as yet another factor which exacerbates it. The denials disseminated there differ from European negationism, but in no way should they be treated as less harmful.[69] What is distinctive is the assertion that the Holocaust was groundlessly used by the Jews to establish the state of Israel, an assertion often accompanied by an attempt to deprive the Holocaust of its exceptional character by equating the sufferings of the Palestinians with the sufferings of the Jews during the Extermination. Although these assertions do not involve a direct denial of the Holocaust, the consequences of disseminating such statements are similar to those which arise when the fact of the Holocaust is denied, and contribute to increased anti-Semitic attitudes and moods.

Finally, it must be emphasized that in the IT era, involving the use of modern communication techniques - predominantly the Internet - the scale of dissemination of negationist theories is almost unlimited. At present there are thousands of websites with information about the "great Jewish fraud", often published in a format designed to create an impression of reliable, scientifically proven facts.[70] Holocaust denial has

[66] Sadurski, *supra* note 13, p. 27. Although the present President of Iran, Hassan Rouhani, recognized Holocaust as a "reprehensible" crime in an interview given to CNN in September 2013, many remain sceptical about the sincerity of this shift in the official narrative. *See* Ch. Shalev, *Iran's Holocaust-denial trickery may point to nuclear duplicity as well*, Haaretz, 30 September 2013.

[67] For more on the results of the poll of 2012, see http://www.zeit.de/gesellschaft/2012-01/umfrage-auschwitz (accessed 30 March 2015).

[68] J. Pawlicki, *Auschwitz to takie piwo. Kraj. Albo chleb* (Auschwitz is a brand of beer. A country. Or bread), Gazeta Wyborcza, 11 March 2009.

[69] *See* R. Kahn, *Strange Bedfellows? Western Deniers and the Arab World*, [in:] M. Berenbaum (ed.), *Not Your Father's Antisemitism*, Paragon House, St. Paul: 2008, pp. 183-87.

[70] The importance of this problem has been noted in, for example, the Council of Europe's Additional Protocol to the Convention on Cybercrime, which provides that parties to the Convention will punish

never before reached such a degree of international institutionalisation, with its own structures, publications and Facebook profiles.

However, the main argument, in the context of the penalisation of Holocaust denial, is that it is one of the modern forms of anti-Semitism, a type of hate speech directed against Jews. Although in most instances statements denying the Holocaust do not contain overtly hostile or hateful anti-Semitic slogans, to anyone reading them in the broader context the anti-Semitic motives are obvious. It is difficult to see any motivation other than anti-Semitism in the assertions that the "myth of the Holocaust" was born out of a Jewish conspiracy.[71] The presentation of Jews as liars who try to extort compensation and sympathy for crimes which were not committed, eventually gaining control over the world, constitutes an integral part of most traditional forms of anti-Semitic rhetoric.[72] According to Holocaust deniers, devious Jews, greedy for power and wealth, should arouse mistrust, contempt and consequently, hatred. Therefore, if we assume that Holocaust denial is a form of spreading hatred against Jews, and hence a manifestation of anti-Semitism, then legal regulations banning its dissemination must be acknowledged as an element of a broader state strategy to fight against all forms of racial, national or religious hatred and intolerance.[73]

While Holocaust denial does not automatically translate into sudden, intense explosions of anti-Semitic feelings, nor does it directly lead to acts of violence directed against Jews, a strong correlation is indisputable, however difficult it may be to determine the critical moment when words become actions.[74] It should be kept in mind that various forms of hostility may be submerged for long periods of time, only to suddenly erupt, even reaching the proportions of mass psychosis. The history of the Third Reich hate propaganda leaves no doubt about the influence that words can have on deeds. With surprising ease, hateful speech can transgress the barriers of

all distribution to the public through a computer system of materials which deny, grossly minimize, approve or justify genocide or crimes against humanity. See the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, CETS No.: 189.

[71] These arguments are advanced by Richard Williamson, a Lefebvrist catholic priest. *See also* W. Laqueur, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day*, Oxford University Press, Oxford: 2006, p. 137.

[72] Cohen-Almagor, *supra* note 6, pp. 35-36.

[73] Such a position is taken, among others, by the European Commission against Racism and Intolerance of the Council of Europe. See ECRI General Policy Recommendation No. 9: The fight against antisemitism, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/default_en.asp (accessed 30 March 2015).

[74] One of the most dramatic examples of this correlation can be found in the radio broadcasts aired on Rwandan radio stations at the time of the genocide in 1994. Due to high rates of illiteracy in Rwanda, radio served as the most powerful and effective way of incitement to hatred and violence against the *inyenzi* (cockroaches), as the Tutsis were called. *See The Media and the Rwanda Genocide*, Report by the International Development Research Centre, available at: http://www.internews.org/sites/default/files/resources/TheMedia&TheRwandaGenocide.pdf (accessed 30 March 2015).

time and place and, like a dormant plague virus, come to life after a long period of inactivity.[75]

Martin Krygier, referring to the Holocaust, rightly points out that: "Human history is not an overwhelmingly happy story, and atrocities are available in virtually any time and any place. But an enterprise on this scale, with its demonic malevolence, and such overwhelming consequences, is extremely rare; perhaps, as many believe, uniquely so."[76] However, when articulating the reasons for which the penalisation of the Holocaust denial is more justified than in the case of other memory laws, it is important to emphasise the role of these bans as instruments to counteract anti-Semitism, i.e. anti-Jewish hatred. Grounding one's argumentation in the thesis on the unique nature of the Holocaust rather than on the special character of Holocaust denial as a vehicle for anti-Semitism can be a 'slippery slope'. In this way the scale or hierarchy of the suffering of victims of the different genocides becomes constantly ranked, prescribing by law which of these sufferings deserves legal acknowledgement and which one does not.

4. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE DILEMMAS OVER MEMORY LAWS

Various memory laws established by European legislators have also been the subject of judgments by the European Court of Human Rights (ECHR) in Strasbourg.[77] The Court was asked in several cases to decide whether the rights and freedoms of individuals (in particular freedom of speech), guaranteed in the European Convention on Human Rights (ECHR), were violated by memory laws in particular instances. The case law of the ECHR does not provide an unambiguous answer to the general question whether such laws are compliant with the standards of human rights protection provided by the European Convention.[78] The only exception is with respect to penalization of the public assertion that the Holocaust did not take place or a gross trivialization of the Holocaust

[75] In Albert Camus' novel, "the plague bug" is a universal symbol of evil existing in every man, which is brought to life at times of hazard, such as epidemics, war, and totalitarianism. A. Camus, *The Plague*, Penguin Books, London: 1998.

[76] Krygier, *supra* note 44.

[77] For a detailed and comprehensive analysis of the jurisprudence of the ECHR in memory law cases, *see* I. C. Kamiński, *Historical Situations in the Jurisprudence of the European Court of Human Rights in Strasbourg*, 30 Polish Yearbook of International Law 9 (2010).

[78] By contrast, a clear position on this issue was taken by the UN Human Rights Committee with respect to the compatibility of such laws with the International Covenant on Civil and Political Rights. In its General Comment No. 34 concerning interpretation of Article 19 of the International Covenant on Civil and Political Rights, the Committee states 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. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events" (para. 49, CCPR/C/GC/34, 12 September 2011).

– in this case ECHR permits far-reaching restrictions to be placed on the freedom of speech of Holocaust deniers, or persons referring in their theories or actions to the ideology and heritage of National Socialism (Nazism).[79] The exceptional treatment of the Holocaust was recently thrown into sharp relief when the Court ruled in the highly controversial case of *PETA v. Germany.*[80] The applicant association was forbidden by the German courts to launch an advertising campaign under the slogan "The Holocaust on your plate", consisting of posters, each of which bore a photograph of concentration camp victims along with a picture of animals kept in mass stocks. The ECHR shared the arguments of the German domestic courts, which limited PETA's freedom of speech, holding that the association had trivialised the fate of the Holocaust victims.

An even more significant example of the distinctive approach taken with respect to the Holocaust is provided by a recent judgment by the ECHR in *Perinçek v. Switzerland*, which concerned Armenian genocide denial.[81] Some commentators have even derided this decision as a symptom of "[a] sort of legal hypocrisy embedded in the Court's distinction between the Holocaust and other mass atrocities of the 20th century."[82] The ECHR, in a judgment which has been recently referred to Grand Chamber,[83] found that Switzerland breached the European Convention's right to freedom of expression by punishing a Turkish politician for publicly denying, during a series of events in Switzerland, that there had been any genocide of the Armenian people by the Ottoman Empire, and by describing the idea of an Armenian genocide as an "international lie". One of the arguments the Court used was the passage of time; that it is inappropriate to deal with the events in a more remote past as severely as with more recent ones.[84] Most importantly, however, the Court found the alleged absence of a general consensus in Europe, and in the world, about the scope and nature of the atrocities against Armenians in the Ottoman Empire, and whether they amounted to "genocide".[85] In this context, the Court drew a clear distinction between denial of the Holocaust and denial of the (alleged) Armenian genocide: in the former case (but not in the latter), the

[79] Holocaust deniers' complaints have been found inadmissible in numerous cases, including: *T. v. Belgium* (9777/82) Decision on inadmissibility, ECHR 14 July 1983; *F.P. v. Germany* (19459/92) Decision on inadmissibility, ECHR 29 March 1993; *Honsik v. Austria* (25062/94) Decision on inadmissibility, ECHR 18 October 1995; *Remer v. Germany* (25096/94) Decision on inadmissibility, ECHR 6 September 1995; *Nachtmann v. Austria* (36773/97) Decision on inadmissibility, ECHR 9 September 1998; *Witzsch v. Germany* (41448/98) Decision on inadmissibility, ECHR 20 April 1999, all available at http://www.echr.coe.int.

[80] *PETA Deutschland v. Germany* (43481/09) Chamber Judgment, ECHR 8 November 2012.

[81] *Perinçek v. Switzerland,* Judgment of 17 December 2013 (Second Section), Application No. 27510/08.

[82] *See e.g.* the comments of Uladzislau Belavusau: http://www.verfassungsblog.de/en/armenian-genocide-v-holocaust-in-strasbourg-trivialisation-in-comparison/#.VKWlXbHciW8 and Dirk Voorhoof: http://strasbourgobservers.com/2014/01/08/criminal-conviction-for-denying-the-existence-of-the-armenian-genocide-violates-freedom-of-expression/ (both accessed 30 March 2015).

[83] Referral of 2 June 2014.

[84] *Perinçek v. Switzerland,* para. 103.

[85] *Ibidem*, para. 115.

denial concerned crimes that had resulted in convictions "with a clear legal basis", and "the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established."[86] Most importantly, however, the Court found that there was no "pressing social need" for the restriction on speech imposed by Switzerland, in contrast to the Holocaust denial, which "is nowadays the main vehicle of anti-Semitism (...) [i]t cannot be maintained that the rejection of the legal characterisation of the tragic events of 1915 and subsequent years as 'genocide' could have a similar repercussion."[87] Hence, the comments made by Mr Perinçek during his speeches in Switzerland "were not likely to stir up hatred or violence."[88]

The European Court of Human Rights issued a consistent ruling in a related case, but from the opposite side. In *Dink v. Turkey* it considered the case of a journalist and editor-in-chief of a Turkish-Armenian newspaper who was found guilty, by a Turkish court, of denigrating "Turkishness".[89] The European Court found that the journalist, Firat Dink, had expressed his resentment at attitudes which in his view amounted to "denial of the incidents of 1915", and in doing so he had been merely conveying his ideas and opinions on an issue of indisputable public concern. The European Court considered it crucial that the debate about historical events should be able to take place freely. It also noted that "it is an integral part of freedom of expression to seek historical truth" and that "it is not the Court's role to arbitrate" on a historical matter forming part of an ongoing public debate. In addition, the ECHR found that the articles by Mr Dink had not been "gratuitously offensive" or insulting, and had not fostered disrespect or hatred.[90]

The ECHR has frequently taken a stance on various matters related to memory triggered by attempts to deal with the past in Central and Eastern Europe (CEE). While these judgments do not concern "memory laws" *sensu stricto*, but rather belong to what is usually described as "militant democracy", the boundaries between these two categories are not precise, and in any event the Court's treatment of Communist symbols or the designation of a political party as "Communist" is indicative to the Court's approach to the legal treatment of the oppressive past in CEE. Hence these cases can be usefully evoked in our context. One of the most significant judgments in this regard was issued in July 2008 in the case of *Vajnai v. Hungary*.[91] Mr Attila Vajnai, Vice-President of the Workers' Party, complained that his freedom of speech had been violated when, in 2004, he was convicted of the offence of using a totalitarian symbol for wearing a five-pointed red star on his jacket during a public assembly. The Hungarian authorities claimed that they had to counteract the dangers associated with a totalitarian communist regime.

[86] *Ibidem*, para. 117.
[87] *Ibidem*, para. 119.
[88] *Ibidem*, para. 119.
[89] Judgment of 14 September 2010, Application Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09.
[90] *Ibidem*, para. 135.
[91] *Vajnai v. Hungary* (33629/06) Chamber Judgment, ECHR 8 July 2008.

The ECHR found that the applicant's right to free speech was breached, controversially claiming that, twenty years after the fall of Communism in Hungary, the authorities' actions were neither necessary nor permissible in a democratic society, as there was no real danger of the communist regime being restored. The Court emphasized that the well-known mass violations of human rights committed under Communism had discredited the symbolic value of the red star. In addition, in the Court's view it could not be understood as representing exclusively Communist totalitarian rule. It determined that the red star also symbolised the international workers' movement, as well as certain lawful political parties. In the opinion of ECHR, the ban on displaying symbols such as the red star in public, when such displays are unaccompanied by a dissemination of propaganda in support of a totalitarian system and are used by a member of a party with no "totalitarian ambitions", is too severe a ban and for that reason unacceptable.[92]

Another relevant example of the ECHR's rulings on memory laws originating from CEE countries is the judgment issued in the case of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*.[93] The applicants alleged that the State's refusal to register the Party of Communists as a political party had infringed their right to freedom of association, as guaranteed by Article 11 of the Convention.[94] In finding a violation of Art. 11 of the European Convention, the Court emphasized that the documents used by the national courts as the basis to refuse the registration "[d]id not contain any passages that might be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles – which was an essential factor to be taken into consideration – or for the 'dictatorship of the proletariat'."

Thus the Court has ruled that the mere reference, either via the name or programme of an organization, to the Communist heritage did not amount to a rejection of the principles of democracy. Although the Strasbourg judges declared that they were ready to take into account the historical background of Romania's experience with a totalitarian regime prior to 1989, they nevertheless concluded that this historical context could not by itself justify the need for the interference. When, however, the cases originating in CEE involved the issue of anti-Semitism rather than (what we may call, for want of a better term "post-Communist nostalgia"), the Court has been much less lenient to the applicants and much more willing to accord the states a broad margin of appreciation in dealing with reprehensible expressions or propositions. For instance, in *W.P. and Others v. Poland*, applicants complained of an alleged breach by Poland of their right to freedom of association (Art. 11) because of, among other things, the

[92] *Ibidem*, para. 25.

[93] *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* (46626/99) Chamber Judgment, ECHR 3 February 2005.

[94] In addition the applicants, relying on Art. 14 of the European Convention (prohibition of discrimination), submitted that they had been discriminated against on the basis of their political views. However, in its ruling the Court decided, that "[s]ince the applicants' complaint under Article 14 had the same factual basis as the complaint under Article 11, the Court considered that no separate examination of it was necessary."

prohibition against forming "The National and Patriotic Association of Polish Victims of Bolshevism and Zionism."[95] Some of the objectives of the association included "[t]aking action aimed at equality between ethnic Poles and citizens of Jewish origin by striving to abolish the privileges of ethnic Jews and by striving to end the persecution of ethnic Poles", as well as "[t]aking action aimed at improving the living conditions of Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists." The European Court did not need to spend much time deliberating (and rightly so in my view) to agree with the Polish Government's submission that the objectives of the association had been insulting and discriminating against members of an ethnic minority. Relying on the doctrine of margin of appreciation it declared the application inadmissible. In particular the Court found the applicants' ideas as "reviving anti-Semitism", and that these ideas therefore justified the need of bringing Art. 17 into play because the general purpose of the provision is, as the Court observed in the context of the applicants' anti-Semitism, "to prevent totalitarian groups from exploiting in their own interests the principles enunciated in the Convention." While this case did not concern a "memory law" *sensu stricto*, it is helpful in illustrating the proposition that the Court has adopted a differentiated attitude towards different types of Europe's pathologies, stemming from (or associated with) different dimensions of Europe's past.[96]

Another case originating from Poland deserves mention. While it also is not directly connected with "memory laws", it starkly illustrates the ECHR's relatively 'lenient' attitude to the Stalinist past at its worst, and thus should be alluded to here as part of the background for discussing the bifurcated approach by the Court to Europe's murderous, totalitarian regimes.[97] In fact, while it is correct to say that *Janowiec and Others v. Russia* does not directly involve a memory *law*, but it would certainly be incorrect to say that it does not involve *memory.* It does so to such a great extent that one thoughtful commentator writing about the case added a subtitle to her comment - "Polish Collective Memory Deceived in Strasbourg".[98] And it was. The applicants were the relatives of Polish nationals murdered by Stalin's NKVD secret police in Katyń in April/May 1940. They complained that Russia breached its obligations under Arts. 2 and 3 of the European Convention, respectively, by discontinuing the investigation into the massacre in 2004 (thus, breaching the procedural limb of Art. 2 by not conducting an adequate and effective investigation into the deaths of the applicants' relatives during a period after ratification of the European Convention by Russia), and by failing to account for

[95] *W.P. and Others v. Poland*, Third Section Decision as to the Admissibility, 2 September 2004, Application No. 42264/98.

[96] I am indebted to an anonymous reviewer of the first version of this paper for pointing out to me the relevance of this case to the themes under discussion here.

[97] *Janowiec and Others v. Russia*, Applications nos. 55508/07 and 29520/09; Fifth Section judgment of 16 April 2012 and Grand Chamber judgment of 21 October 2013.

[98] S. Sanz-Caballero, *How Could It Go So Wrong? Reformatio in Peius before the Grand Chamber of the ECtHR in the Case Janowiec and Others v. Russia (or Polish Collective Memory Deceived in Strasbourg)*, 33 Polish Yearbook of International Law 259 (2013).

the fate of Polish prisoners executed by NKVD (thus, breaching Art. 3 by continuously refuting historical facts and memory by withholding information about the fate of applicants' relatives and by denying the rehabilitation of Katyń victims, which amounted to inhuman and degrading treatment of the applicants). The Chamber judgment (of 16 April 2012) was a setback to the applicants' arguments: they won only partially on their Art. 3 claim (only with respect to those of the applicants who were already born when the massacre took place), while the Court refused to take cognizance of the merits of the complaints under Art. 2, relying on *rationae temporis* limitations on its competence. The Grand Chamber judgment (of 21 October 2013), however, was an even greater disappointment: not only did it uphold the refusal to examine complaint under Art. 2 but it added insult to injury by finding no breach of Art. 3 with respect to all applicants, regardless of their date of birth.

There are many things which are wrong in both decisions, and they have been subjected to broad criticism,[99] including in dissenting opinions attached to both of them, which proffered some stinging remarks about the majority's reasoning. This is not the place to review, nor even to summarize, these objections, but some points are directly relevant to the discussion in this paper. One concerns the cavalier approach by the Chamber to the Art. 3 claims, distinguishing between the anguish and suffering of those relatives born before and those born after the massacre.[100] The memory of a tragedy does not depend on the line drawn by the Court in this way, and family ties are no more "distant" depending on whether a similarly-placed relative was born before or after a crime took place. The Grand Chamber consolidated this insensitivity to the individual and collective memory by announcing that it could only take into account the anguish and distress suffered by the applicants from the date of ratification of the European Convention by Russia (1998), and concluding that there were no new elements contributing to any extension of their suffering after that date.[101] This ignores the fact that after 1998 the Russian authorities displayed a disdainful and dismissive attitude towards the actions taken by the relatives of the victims of the Katyń massacre, and as Judge Wojtyczek noted in his dissenting opinion to the Grand Chamber judgment: "On the date of Russia's ratification of the Convention, the situation was that those applicants who knew that their relatives had been victims of a war crime were still seeking to obtain more specific information about their fate and the location of their tombs."[102] The additional anguish suffered by those relatives after 1998 could well have constituted a special kind of suffering, distinct from the emotional distress inevitably suffered

[99] *See* in particular, several comments on the *Janowiec* case in vol. 33 of the Polish Yearbook of International Law (2013). Perhaps the most telling is the very title of a comment by G. Citroni, *Janowiec and Others v. Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied*, *ibidem* at pp. 295-362.

[100] Chamber judgment, paras. 153-54.

[101] Grand Chamber judgment, para. 186.

[102] Grand Chamber judgment, Partly concurring and partly dissenting opinion of Judge Wojtyczek, part 10.

by any relative of victims of a war crime, thus fulfilling the criteria of a violation of Art. 3. The Court chose not to follow this path and adopted a very narrow interpretation, generous to the Russian Government and insensitive to the applicants' claims. As a result, as Susana Sanz-Caballero observed, the Strasbourg Court failed to "force Russia to acknowledge the mistaken Soviet practices of denial and disinformation", adding that "Russia seems to be still unable to confront its past, and the ECHR's capacity of action is limited by the ECHR provisions, and in the *Janowiec and Others* case it interpreted its own competence in a very restrictive way."[103]

The judgments discussed so far indicate that the European Court has faced difficult dilemmas triggered by various memory laws enacted by different European states. In such cases the Court has attempted to balance the rights and liberties of those whose freedom has been restricted against the values formed by the historical context, within which specific prohibitions should be considered. Undoubtedly, however, there is a striking asymmetry between the Court's treatment of cases tracing back to the legacy of Stalinism/Communism and those concerning the legacy of Nazism and fascism. In the latter cases (but not in the former) the Court has shown a willingness to accept far-reaching restraints upon rights and freedoms if the laws imposing such restraints are aimed at preserving historical truth, protecting the honour of victims, preventing the dissemination of racial, ethnic and religious hatred (e.g. in the form of anti-Semitism), as well as to prevent the resurrection of Nazi ideology.

One may ask what may be the likely motives for such an evident instance of double standards in the Court's approach to the European past? Second-guessing judicial motivations is always a risky exercise, and one should avoid speculating about the intentions of judges beyond those which have been made explicit by the judges themselves. In particular, one should refrain from imputing motives which are disingenuous, dishonest or otherwise improper. Perhaps the most obvious (and at the same time, charitable) explanation is that judges, in their differentiated approach to the Nazi and Communist past, reflect a broader political aspect of European public culture where there is a strong consensus about the horrors of Nazism and much weaker condemnation of Communist crimes, even in their most extreme, Stalinist version. With all certainty, the crimes of Nazism are a fixed element of historical narration and identity of Europe, and this identity largely contributed to the setting up of the CoE and the ECHR as a central legal tool for responding to the atrocities of the Second World War.[104] As such, today's judges replicate this fundamental *raison d'etre* of the European system of protection of human rights in the first place. It was targeted primarily against any possible resurgence of the horrors inflicted upon Europeans by Hitler and Mussolini, and only secondarily and tangentially, by Stalin.

But there is more to the "double standards" issue than just the circumstances of the birth of the ECHR system. There is an ongoing debate – among historians, political

[103] Sanz-Caballero, *supra* note 98, p. 278.

[104] L. Pratchett, V. Lowndes, *Developing Democracy in Europe: An analytical summary of the Council of Europe's acquis*, Council of Europe, Strasbourg: 2004.

scientists, and public intellectuals – about comparing the two murderous regimes in the European past, and there are many people who offer a 'hierarchy' of horror, whereby the Stalinist version of Communism is somehow less reprehensible than Nazism. This "gradation" was nicely exemplified by a debate in the European Parliament (EP) in April 2009 on a proposed resolution establishing "The European Day of Remembrance for the Victims of All Totalitarian and Authoritarian Regimes."[105] While many speakers, including the then President of the EP Hans-Gert Pöttering, asserted the moral and political equivalence of the horrors of Nazism and Communism, there were also strong voices denying such equivalence. Characteristically, the representative of the Party of European Socialists, Glyn Ford, analogized such a claim of equivalence to "historical revisionism" and "political relativism", claiming that "the crimes of the Nazis, the Holocaust and the [Nazi] genocide" cannot be equated "with those of Stalinist Russia."[106] Judges of the European Court are not immune to such debates and such viewpoints, and even if they do not spell them out explicitly, they may genuinely share them. Furthermore, the double standards may hinge upon the temporal factor: the shorter passage of time since the post-Communist transformations may convince some judges that any strong measures addressed at extirpating "Communist nostalgia" may be dangerously divisive in the new democracies of CEE.

I should emphasize that these are only speculations. The Strasbourg judges do not make them explicit and even seem to be by-and-large unaware of these factors, but they all seem to be reasonable and plausible, and each of them – or any combination of the three – may explain the relative lenience of the ECtHR judges towards Communist past compared to the Nazi past, and the different scope of margin of appreciation accorded to those countries wishing to enact legally protected memories about these two chapters in Europe's recent history.

CONCLUSIONS

Can memory laws help Europeans cope with their past and retain their historical memory and identity? It seems that this question can be answered affirmatively only with respect to a limited set of such laws.

The memory of the CEE societies, trapped in the domination of the Soviet regime after the Second World War, is neither shared nor well understood by the societies of Western Europe. At the same time countries like Poland, which never engaged in colonialism, do not identify with the dilemmas generated by the French laws that regulate this problem. Furthermore, some memory laws consolidate a deliberately false identity of a nation, based on the belief that it was only a victim of crimes, never a perpetrator. Such laws must be criticized and the legislators who pass them must take

[105] European Parliament resolution of 2 April 2009 on European conscience and totalitarianism, P6_TA(2009)0213.

[106] Explanations of vote, Texts tabled: RC-B6-0165/2009, Debates, Thursday, 2 April 2009 – Brussels.

upon themselves the burden of responsibility for the harm they inflict upon their own society and future generations.

The experience and history of the entire post-war Europe has shown that although some convergence of narratives and historical memories is possible, there remain differences between various states which can probably never be overcome.[107] The consensus concerning recognition of the crime of the Holocaust must be seen as an exception. The Holocaust is a tragic heritage of all Europe and, in the face of the enormous social and cultural changes taking place in Europe today, it is crucially important to ensure that the truth about it, which constituted one of the cornerstones of the new, reborn continent, is neither forgotten nor trivialized.[108] This, however, could become a significant challenge if we take into account seemingly unimaginable scenarios such as, for example, if teaching about the Holocaust were to be abandoned by schools in European states owing to the protests of Muslim students and their parents.[109]

It is thus possible to postulate that, in Europe today, memory laws should fulfil two fundamental roles in order to be justified and legitimised. First, such laws should constitute a proof that a given state has assumed responsibility for crimes and serious violation of human rights in the past, either by the state or its citizens. The memory of Poles about the crimes committed against them by the Nazi and Stalinist regimes is well-shaped and deeply rooted, but the Poles often do not remember the crimes which they themselves have committed, and in addition this truth continues to be driven away from social consciousness.[110] However, these types of memory

[107] *E.g.* M. Pakier, B. Stråth (eds.), *A European Memory? Contested Histories and Politics of Remembrance*, Berghahn, Oxford, New York: 2012.

[108] For dramatic examples of the shift in narratives about the Holocaust and of how the truth about the Holocaust is being abused or neglected today, *see* in particular A. H. Rosenfeld, *The End of the Holocaust*, Indiana University Press, Bloomington: 2011.

[109] A study conducted in the Netherlands and in the UK revealed that some teachers are dropping the Holocaust from history lessons to avoid offending Muslim pupils, since for many of them the Holocaust is a "Jewish lie". See *Addressing Anti-Semitism: Why and How? A Guide for Educators*, OSCE/ODIHR, 2007 and L. Clark, *Teachers drop the Holocaust to avoid offending Muslims*, Daily Mail Online, available at: http://www.dailymail.co.uk/news/article-445979/Teachers-drop-Holocaust-avoid-offending-Muslims.html (accessed 30 March 2015). *See also* G. Jikieli, J. Allouche-Benayoun (eds.), *Perceptions of the Holocaust in Europe and Muslim Communities*, Springer, Dordrecht: 2013.

[110] The study of Antoni Sułek concerning the memory of the Poles about the Jedwabne pogrom, published in 2011, revealed that Jedwabne, considered as a historical event and a symbol of Polish guilt towards their Jewish neighbours, has not yet become a part of the national memory of the majority of Poles, and that there is still a great deal of confusion when it comes to defining the perpetrators of the massacre. Sułek considers the lack of official commemorations of other pogroms of Jews that occurred during the war together with the lack of information in high school history textbooks to be the main reasons for this situation. A. Sułek, *Pamięć Polaków o Zbrodni w Jedwabnem* (Polish memory of the crime in Jedwabne), 3 Nauka 39 (2011). *See also* J. B. Michlic, *"Remembering to Remember", "Remembering to Benefit", "Remembering to Forget": The Variety of Memories of Jews and the Holocaust in Postcommunist Poland*, Jerusalem Center for Public Affairs, available at: http://jcpa.org/article/remembering-to-remember-remembering-to-benefit-remembering-to-forget-the-variety-of-memories-of-jews-and-the-holocaust-in-postcommunist-poland/ (accessed 30 March 2015).

laws should be limited to political declarations without any coercive implications whatsoever.

Secondly, memory laws should constitute a barrier to the abuse of freedom of speech and academic research when it is used as a shield to spread hatred against specific groups, as is done through the public dissemination of Holocaust denials. By penalising such forms of negationism, states fulfil their obligation under international human rights law to prohibit incitement to hatred and hate-motivated violence.[111]

There is no other path to emerge from, or reconcile, the conflicts between different groups, including different nations, than to respect the coexistence of many memories. Any attempt at containing or reframing memory for the common good nearly always proves ineffective and it seems almost impossible to make a reality of the expression "Your past is our past".[112] However, in some cases the multitude of memories can become a convenient way for driving out what is disgraceful in the history of one's own nation. The gassing of the Jews in Auschwitz, the crimes committed by the pro-Nazi Hungarian "Arrow Cross" during the Second World War, or the massacre in Katyń cannot be "remembered differently". If a state adopts legal regulations that promote or sanction such a "reversed memory", such memory laws should be vehemently opposed. However, if individuals or groups "[c]over up the truth with lies"[113] injecting them into the heart of public discourse with hateful motives, the state must have the right to respond, including with the use of instruments of penal law.

The phenomenon of memory laws is one of the most controversial issues in the complex discussions about the relationship between memory, history, and law. Enacting memory laws which cover up or revise the most sensitive, often painful, parts of a nation's history may constitute an expression of societal expectations to have the nation's positive self-perception legally supported, and the basis of national pride legally enforced. And yet, in the light of mutually competing narratives within and among the nations about the past, the effectiveness of such guarantees is illusory and even dangerous. In contrast however, memory laws which are designed to protect against hatred or even future genocide should be considered as an appropriate response to the powerful call of Elie Wiesel: "Remembering is a noble and necessary act. The call of memory, the call to memory, reaches us from the very dawn of history."[114]

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[111] Such an obligation arises from Art. 20.2 of the International Covenant on Civil and Political Rights, which stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

[112] D. Warszawski, *Ku pamięci, przeciw pamięci* (For memory, against memory), Gazeta Wyborcza, 23 January 2013.

[113] B. Dylan, *Idiot Wind*, *Blood on the Tracks*, Columbia Records 1975, quoted after: L. Barnett Lidsky, *Where's the Harm? Free Speech and the Regulation of Lies*, 65 Washington & Lee Law Review 1091 (2008), p. 1094.

[114] E. Wiesel, *Hope, Despair and Memory* (Nobel Lecture, Oslo, Norway, 11 December 1986), available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html (accessed 30 March 2015).