XXXVIII POLISH YEARBOOK OF INTERNATIONAL LAW
2018
DOI 10.24425/pyil.2019.129606
PL ISSN 0554-498X

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LAW-SECURED NARRATIVES OF THE PAST IN POLAND IN LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW STANDARDS

Abstract:
Given the whole spectrum of doubts and controversies that arise in discussions about laws affecting historical memory (and their subcategory of memory laws), the question of assessing them in the context of international standards of human rights protection – and in particular the European system of human rights protection – is often overlooked. Thus this article focuses on the implications and conditions for introducing memory laws in light of international human rights standards using selected examples of various types of recently-adopted Polish memory laws as case studies. The authors begin with a brief description of the phenomenon of memory laws and the most significant threats that they pose to the protection of international human rights standards. The following sections analyse selected Polish laws affecting historical memory vis-à-vis these standards. The analysis covers non-binding declaratory laws affecting historical memory, and acts that include criminal law sanctions. The article attempts to sketch the circumstances linking laws affecting historical memory with the human rights protection standards, including those entailed both in binding treaties and other instruments of international law.

Keywords: laws affecting historical memory, memory laws, human rights law, European Court of Human Rights

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Memory Laws in European and Comparative Perspective MELA (www.melaproject.org) research consortium is supported with HERA grant no. 15.094.

INTRODUCTION

Comparative research demonstrates that there has been a proliferation and expansion of laws affecting historical memory in Europe since 2000,[1] mirrored by a parallel explosion of objections to them, often on the grounds of both domestic constitutional as well as international human rights law.[2] There is no official, binding definition of "memory law" in either international law, the law of the European Union, nor in the Polish domestic law. However, the Council of Europe has adopted working definition of memory laws, as those that:

> enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past, by banning, for example, the propagation of totalitarian ideologies or criminalising expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law.[3]

Originally, the term *lois mémorielles* (English *memory laws*, German *Erinnerungsgesetze*, Polish *prawa pamięci*) referred to the French legislator's successful attempts to use criminal law to respond to deliberate falsifications and distortions of historical facts – especially those concerning the Holocaust and other forms of genocide denial. The French discussion on *les lois mémorielles* also included declaratory laws, notably those recognizing historical crimes as genocide, and laws introducing an official narrative of the French colonial history.[4] Since the 2010s, a broad conventional use of the term *memory laws* can be observed. The term is applied to a variety of state-orchestrated laws, often without an obvious common denominator: from the Fundamental Law of Hungary[5] to Ukraine's "decommunization" laws[6] and even to the whole of the US legal system.[7] Necessary conceptual clarifications naturally followed in the scholarly literature, which distinguish between a wider category of "laws affecting historical memory", and a narrower category of "memory laws" included therein. This article understands these terms as follows.

According to Eric Heinze, the term "laws affecting historical memory" encapsulates normative acts which give preference, or "an expressive weight", to a narrative about

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[1] N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, Cambridge: 2017, p. 8.

[2] R. Kahn, *Free Speech, Official History and Nationalist Politics: Toward a Typology of Objections to Memory Laws*, University of St. Thomas Legal Studies Research Paper No. 25 (2018).

[3] Council of Europe, *Memory Laws and Freedom of Expression. Thematic Factsheet*, July 2018, available at: https://bit.ly/2Xu2glX (accessed 30 May 2019).

[4] S. Garibian, *Pour une lecture juridique des quatre lois «mémorielles»*, 2 Esprit 158 (2006); F. Hamon, *Le Conseil constitutionnel et les lois mémorielles*, 2 Revue française de droit administrative 7 (2012).

[5] M. Könczöl, *Dealing with the Past in and around the Fundamental Law of Hungary*, in: U. Belavusau, A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge: 2017, pp. 246-262.

[6] M. Malksoo, *Decommunization in Times of War: Ukraine's Militant Democracy Problem*, Verfassungsblog 9 January 2018, available at: https://bit.ly/2GNbZ1X (accessed 30 May 2019).

[7] R. Kahn, *Charlottesville, Ferguson and Laws Affecting Memory in the United States*, available at SSRN: https://bit.ly/2BVejzO (accessed 30 May 2019).

the past, irrespective of its substantive weight.[8] Such laws indicate that the legislator pronounces a particular evaluation on certain historical events or elements of the national past, thus establishing the official position of the state about a particular historical issue. According to Heinze, laws affecting historical memory do not have to explicitly disfavour other, competing narratives; they are instruments used by the state in the process of constructing, disseminating, promoting, and also ordering public knowledge about the past.

"Memory laws" are a subcategory of "laws affecting historical memory." The term refers to a normative legal act which prohibits the expression of a particular view about the past. Some memory laws are punitive and impose sanctions for publicly endorsing narratives which diverge from the official state-approved version. Marta Bucholc argues that the specific characteristic distinguishing "memory laws'" lies not in providing criminal penalties, but in limiting the freedom of expression of individuals, including the expression of memories, thus posing the risk of eliminating certain narratives about the past from circulation,[9] a goal which can also be achieved without recourse to criminal sanctions. Other scholars underscore the element of criminal sanctions as essential to memory laws. Notably, the leading scholar on memory laws Nikolai Koposov defines "memory laws *per se*" as "laws criminalizing certain statements about the past."[10]

This article scrutinizes two different forms of laws affecting historical memory, ranging from declaratory to punitive memory laws and demonstrates how they impact on the rights and freedoms of individuals through varied sanctions, notably symbolic and criminal. In particular, this article discusses two recent laws affecting historical memory adopted in Poland: 1) a genocide-focused parliamentary resolution; 2) a state and national defamation law, which is a memory law in the narrow sense of the term. The juxtaposition of these two laws affecting historical memory highlights the range, scope, and degree of the legislator's interference with the rights and freedoms of individuals and makes it possible to measure them against international human rights law standards, in particular those of the Council of Europe's monitoring body, the European Court of Human Rights (ECtHR).

1. GENOCIDE-FOCUSED DECLARATIVE LAW AFFECTING HISTORICAL MEMORY

Poland's 2018 amendments to the Institute of National Remembrance Act (INRA)[11] gained world-wide attention – and were widely criticized – mainly because

[8] E. Heinze, *Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*, in: Belavusau, Gliszczynska-Grabias, *supra* note 5, pp. 413-434.

[9] M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, 11(1) Hague Journal on the Rule of Law 85 (2019).

[10] Koposov, *supra* note 1, p. 25.

[11] *See* the contributions in the previous volume of the Polish Yearbook of International Law on the INRA: K. Wierczyńska, *Act of 18 December 1998 on the Institute of National remembrance – Commission for*

of the possibilities they offered to criminalize statements concerning the involvement of Poles in crimes committed against Jews during the Second World War.[12] The Polish parliament repealed this aspect of the INRA amendments just a few months after their passage, in June 2018, but the amendments also expanded the list of crimes covered by the INRA to include "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich" (Art. 1a).[13] The law further labelled as genocide crimes committed by "Ukrainian nationalists" against Polish citizens on the territory of Volhynia and eastern Lesser Poland (Art. 2). In January 2019 the Constitutional Tribunal declared the formulation "Ukrainian nationalists" unconstitutional,[14] but the part concerning genocide remains in the law.

The 2018 amendments to INRA had been preceded by a parliamentary resolution in 2016, in which the events in Volhynia were characterized as genocide.[15] Parliamentary resolutions, as acts adopted by the highest legislative body in a state, are the most significant form of declaratory memory laws. Eric Heinze divides memory laws into non-regulatory, declarative acts in which no government action is authorized; and regulatory acts, when government action is authorized.[16] Such declarative memory laws are particularly frequently used by legislators in the context of qualifying certain crimes as genocide, as will be shown in the following subsection. Nikolay Koposov described the 1991 Soviet Law "On the Rehabilitation of the Repressed People", which characterized Stalin's deportations of entire peoples as acts of genocide, as one the first of the "genocide-focused declarative memory laws."[17] Since then, this practice has become more prevalent, of which the Polish 2016 resolution is an example. While declarative memory laws are often labelled benign, they can introduce a concept into the legal discourse and eventually lead to punitive memory laws.

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the Prosecution of Crimes Against the Polish Nation as a Ground for Prosecution of Crimes Against Humanity, War Crimes, and Crimes Against Peace, 37 Polish Yearbook of International Law 275 (2018); 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*, 37 Polish Yearbook of International Law 288 (2018). *See also* U. Belavusau, A. Wójcik, *La criminalisation de l'expression historique en Pologne : la loi mémorielle de 2018*, 40 Archives de politique criminelle 175 (2018).

[12] A. Gliszczyńska-Grabias, W. Kozłowski, *Calling Murders by Their Names as a Criminal Offence – A Risk of Statutory Negotionism in Poland*, Verfassungsblog, 1 February 2018, available at: https://bit.ly/2XsZzBq; N. Kebranian, *Poland's 'holocaust law' redefines hate speech*, Open Democracy Net, 9 April 2018, available at: https://bit.ly/2PaHmUv (both accessed 30 May 2019).

[13] All translations from Polish into English are by the authors unless otherwise noted.

[14] Constitutional Tribunal Judgment of 17 January 2019, K 1/18.

[15] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 22 lipca 2016 r. w sprawie oddania hołdu ofiarom ludobójstwa dokonanego przez nacjonalistów ukraińskich na obywatelach II Rzeczypospolitej Polskiej w latach 1943–1945 [Resolution of the Sejm of the Republic of Poland of 22 July 2016 on paying tribute to the victims of the genocide perpetrated by Ukrainian nationalists on citizens of the II Polish Republic in the years 1943-1945].

[16] Heinze, *supra* note 8, p. 418.

[17] Koposov, *supra* note 1, p. 222.

Genocide, as a legal term, is clearly defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.[18] Nevertheless, in recent years some scholars have advanced a more inclusive and less legalistic definition of the crime of genocide.[19] Similarly, parliaments have adopted declarative memory laws without regard to the conventional definition. It is clear that parliamentary political initiatives to call a historical event "genocide" signify a desire to recognize it as the worst possible crime and attract attention to its memory. Such declarative memory laws have a substantial symbolic significance and may lead to international tension[20] and influence the creation of punitive memory laws.

A major part of such parliamentary resolutions concern the Armenian genocide.[21] This is an effect of the efforts of the Armenian diaspora to recognize what happened to the Armenians as genocide, which is a response to the official policy of denial of the Turkish state.[22] This has undoubtedly contributed to the spreading of genocide-focused declarative memory laws. Many national parliaments, including the Polish parliament as well as the European Parliament, have adopted resolutions on the Armenian genocide.[23] Genocide-focused parliamentary resolutions have also concerned Bosnia, Rwanda and the Holodomor in Ukraine.[24]

The Polish parliament has so far adopted three resolutions that qualified certain situations as genocide, labelled in their respective titles: in 2005 on the Armenian genocide;[25] in 2014 on the genocide by ISIS on Christians, Yazidis, Kurds and other religious and ethnic minorities in Iraq and Syria;[26] and in 2016 in the "Volhynia genocide" resolution.[27]

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[18] 78 UNTS 277.

[19] *E.g.* M. Shaw, *Genocide and International Relations: Changing Patterns in the Upheavals of the Late Modern World*, Cambridge University Press, Cambridge: 2013; A. Jones, *Genocide: A Comprehensive Introduction*, Routledge, New York: 2011.

[20] For more with respect to how memory laws have led to extreme tension between countries, *see* Koposov *supra* note 1.

[21] *Ibidem*, p. 101.

[22] S. Bayraktar, *The Politics of Denial and Recognition: Turkey, Armenia and the EU*, in: D. Alexis (ed.), *The Armenian Genocide*, Palgrave Macmillan, New York: 2016.

[23] European Parliament resolution of 15 April 2015 on the Centenary of the Armenian Genocide.

[24] With respect to Ukrainian initiatives aimed at recognizing the Holodomor as genocide, *see* Koposov, *supra* note 1, p. 185.

[25] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 19 kwietnia 2005 r. w 90. rocznicę ludobójstwa popełnionego na ludności ormiańskiej w Turcji podczas I Wojny Światowej [Resolution of the Sejm of the Republic of Poland of 19 April 2005 on the anniversary of the genocide on the Armenian population in Turkey during the First World War].

[26] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 26 września 2014 r. w sprawie ludobójstwa dokonywanego na chrześcijanach, jazydach, Kurdach oraz przedstawicielach innych mniejszości religijnych i etnicznych przez organizację terrorystyczną Państwo Islamskie na obszarze północnego Iraku i Syrii [Resolution of the Sejm of the Republic of Poland of 26 September 2014 on the genocide on Christians, Yazidis, Kurds and representatives of other religious and ethnic minorities by the terrorist organizations Islamic State on the territory of Northern Iraq and Syria].

[27] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 22 lipca 2016 r. w sprawie oddania hołdu ofiarom ludobójstwa dokonanego przez nacjonalistów ukraińskich na obywatelach II Rzeczypospolitej Polskiej w

The events, which the 2016 resolution – and subsequently the relevant 2018 amendments to INRA – relate to, took place between 1943 and 1945, when a number of Ukrainian organizations killed an estimated up to 100,000 Polish civilians in the so-called "Polish Eastern Borderlands". The actions were part of an ethnic cleansing operation carried out by the Ukrainian Insurgent Army (UPA), and took place predominantly in Volhynia (present day north-western part of Ukraine), as well as in Eastern Galicia (presently partly in Poland and in Ukraine). The crimes are most frequently described in Polish as the "Volhynia slaughter" (Polish *rzeź wołyńska*), and are regarded by many Polish historians as genocide.[28] The massacres in Volhynia have been previously mentioned many times in the Polish Sejm, and have also been included in parliamentary resolutions, however without qualifying them as genocide.[29] Prosecutors of the Polish Institute of National Remembrance – Commission for Investigation of Crimes Against the Polish Nation (*Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni Przeciw Narodowi Polskiemu*, INR) stated that the massacres have all the traits of genocide listed in the 1948 UN Convention, and have qualified the events as genocide. They are currently investigating 32 crimes related to the massacres, all of which have been recognized as genocide.[30]

As already mentioned, before the 2016 resolution the Polish parliament had twice qualified certain events as genocide. While the 2005 and 2014 resolution were merely qualifying the genocides and calling for remembrance (Armenian genocide) and an urgent intervention (massacres carried out by ISIS), the Volhynia resolution is one-and-a-half pages long. It contains a historical introduction and specifically states who committed the genocide on whom, stating also that retaliatory actions on Ukrainian villages should not be relativized. The resolution voices appreciation to those who helped the victims and those who kept a remembrance of the massacres over the decades. It further expresses solidarity with present-day Ukraine, which is fighting against foreign aggression for its territorial integrity.

The 2016 resolution stated that "the mass murders have not been called genocide in accordance with historical truth." Since INR prosecutors have in fact repeatedly called

latach 1943–1945 [Resolution of the Sejm of the Republic of Poland of 22 July 2016 on paying tribute to the victims of the genocide perpetrated by Ukrainian nationalists on citizens of the II Polish Republic in the years 1943-1945].

[28] For more on the events and the different perspectives as to their characterization, *see* G. Motyka, *Od rzezi wołyńskiej do akcji „Wisła". Konflikt polsko-ukraiński 1943–1947* [From the Volhyna slaughter to the Operation Vistula. Polish-Ukrainian conflict 1943-1947], Wydawnictwo Literackie, Kraków: 2011 and W. Siemaszko, E. Siemaszko, *Ludobójstwo dokonane przez nacjonalistów ukraińskich na ludności polskiej Wołynia 1939–1945* [Genocide on the Polish population in Volhyn commeited by Ukrainian nationalists in 1939-1945], Wydawnictwo 'von Borowiecky', Warszawa: 2000.

[29] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 12 lipca 2013 r. w sprawie uczczenia 70. rocznicy Zbrodni Wołyńskiej i oddania hołdu Jej ofiarom [Resolution of the Sejm of the Republic of Poland of 12 July 2013 on commemorating the 70th anniversary of the Wołyń Crime and paying tribute to the victims]. In 2013 the Sejm adopted a resolution on Volhynia, defining the UPA crimes as "an ethnic cleansing with signs of genocide."

[30] *See* the webpage of the Institute on the Volhynia crimes in English: http://volhyniamassacre.eu/ (accessed 30 May 2019).

the massacres genocide, what the drafters of the resolution probably intended to change was that the events are not considered genocide on the international level.

The resolution appeals to "historical truth", a concept inherently connected with the "right to truth", which is gaining importance in international human rights law. It relates to the obligation of the state to provide information about the circumstances surrounding serious violations of human rights. While the concept of the "right to truth" raises questions as to its scope and implementation,[31] as stated by Patricia Naftali the right to truth has gained momentum in UN human rights bodies, which accommodate a maximalist vision of the concept.[32] This is visible in various UN-adopted documents.[33] However, the ECtHR has been more reluctant to recognize the right to truth,[34] and has specifically stated that procedural obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) do not include inquiries carried out for the purpose of establishing a historical truth.[35] While both the UN and the ECtHR recognize the collective dimension of the right to truth, this concerns the right of society in general to know the truth about past events concerning heinous crimes, as well as circumstances and reasons that led to massive or systemic violations related to those crimes, and not the *qualification* of crimes.[36] However parliamentary resolutions qualifying certain events as genocide are not in violation of international human rights standards, as countries are free to shape their own memory politics, as long as they do not violate human rights. As the following section shows, the situation is different for punitive memory laws: they need to be carefully assessed in the context of international human rights law.

2. STATE AND NATION DEFAMATION LAWS AFFECTING HISTORICAL MEMORY

Now that more than a year has passed since an amended version of the INRA was made part of Poland's legal system, the time is ripe for taking a stock of the legal land-

[31] J.E. Mendez, F.J. Bariffi, *Right to truth*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press: 2012. On right to truth and memory laws see: G. Baranowska, A. Gliszczyńska-Grabias, *"Right to truth" and Memory Laws: General Rules and Practical Implications*, 47 Polish Political Science Yearbook 97 (2018).

[32] P. Naftali, *The 'Right to Truth' in International Law: the 'Last Utopia'?* in: Belavusau and Gliszczyńska-Grabias, *supra* note 5, p. 84.

[33] 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity

[34] Naftali, *supra* note 32, pp. 81-84.

[35] ECtHR, *Janowiec and Others v. Russia* (App. No. 55508/07 and 29520/09), Grand Chamber, 21 October 2013, para. 143.

[36] *See* principles 2 and 4 of the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1; ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia* (App. No. 39630/09), 13 December 2012, para. 191.

scape it created.[37] The very passage of the unconstitutional legislation should be criticised. However, the same law was flying in the face of international standards of human rights protection, even after its most problematic provisions were eventually jettisoned.[38] Simultaneously, what is still left of the January 2018 INRA amendment (after its June 2018 sudden review), may cause a chilling effect and unlawful restriction of rights and freedoms of individuals a real possibility. In the analysis that follows we look at the consistency – or rather inconsistency – of the selected provisions of the amended INRA with the standards of freedom of speech prevailing in the European system of human rights protection. We are focusing here mainly at the original version of this legislation, enacted in January 2018, to better present the dangers inherent in attempts to foist upon the public a memory of the past preferred by the powers that be.

The assessment of INRA most problematic provision in the light of international law has already been, at least partly, addressed, also on the pages of the Polish Yearbook of International Law.[39] However, some of the core aspects of the troubling legislation still need to be raised. To start with an explanatory arrangement, the full quote from the most controversial provision of INRA seems to be desirable:

> Article 55a.
> 1. Anyone who publicly and falsely attributes responsibility or co-responsibility to the Polish Nation or the Polish State for the crimes committed by the German Third Reich, as specified in Article 6 of the Charter of the International Military Court – Annex 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 any other crimes that are crimes against peace, crimes against humanity or war crimes, or who otherwise glaringly trivialises the responsibility of their actual perpetrators, shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public.

Any legal analysis of the provision quoted above should balance judiciously two fundamental aspects that have a bearing on their effectiveness: (1) measures which are desirable for attaining the objective pursued and (2) measures which are proportional and can be implemented by the Polish law. The legal standards of responding to statements described in point 1 must be compatible not only with the Polish Constitution, but also with the relevant norms of international law, especially the ECHR. This compatibility

[37] Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Law of 26 January 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation, the Military Graves and Cemeteries Act, the Museums Act and the Corporate Liability for Proscribed Punishable Conduct Act], O.J. 2018, item 369.

[38] Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [The Law of 27 June 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation and the Corporate Liability for Proscribed Punishable Conduct Act], O.J. 2018, item 1277.

[39] *See* Grzebyk, *supra* note 11; Wierczyńska, *supra* note 11.

must be ensured for the protection of dignity and reputation on the one hand, and the protection of freedom of expression and research, on the other. As such and for the purpose of this article, we will examine the INRA January 2018 amendment in terms of the ECHR, including the case law of the ECtHR.

As a starting point, we should emphasise that in the numerous Holocaust denial cases, being invoked as a point of reference by the authors of the INRA January 2018 amendment, the ECtHR has always found as inadmissible applications from the convicted Holocaust deniers. In some of those cases, the ECtHR has found state interference with Art. 10 rights to be "necessary in a democratic society" (*Schimanek v. Austria*, *Witzsch v. Germany*, *Gollnisch v. France*).[40] On other times, it relied on Art. 17 (which prohibits the abuse of rights to undermine the values and essence of the ECHR) to find that applicants' complaints are incompatible *ratione materiae* with the provisions of the ECHR (*Garaudy v. France*).[41] However, in all of these cases, the applicants were charged with Holocaust denial or trivialisation, and not with the attribution of responsibility for the Holocaust to other states than those that should be held liable for those crimes. The ECtHR summarised this category of cases by saying that they "equally concerned statements that variously denied the existence of the gas chambers; described them as a "sham" and the Holocaust as a "myth"; called their depiction the "Shoah business", "mystifications for political ends" or "propaganda"; or called into question the number of dead and in ambiguous terms expressed the view that the gas chambers were a matter for the historians" (*Perincek v. Switzerland*, 210).[42] Clearly, none of the examples in which the ECtHR found the criminal conviction for denial to be compatible with the ECHR concerned the attribution of responsibility or co-responsibility to another state. Also, when characterising Holocaust denial convictions, the ECtHR described the denial statements as ones "almost invariably emanating from persons professing Nazi-like views or linked with Nazi-inspired movements."[43] This is highly unlikely to be the case with those expressing the views defined by Art. 55a. Accordingly, the ECtHR, which looks favourably on criminal convictions for denial, would almost certainly refuse to take the same approach in cases under Art. 55a.

The ECtHR made its view on denial penalisation very clear when it said that,

> the justification for making its denial a criminal offence lies not so much in that it 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. Holocaust denial is thus doubly dangerous, especially in States which have experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities (…) by, among other things, outlawing their denial.[44]

[40] ECtHR, *Schimanek v. Austria* (App. No. 32307/96), 1 February 2000; *Witzsch v. Germany* (App. No. 7485/03), 4 February 2003; *Gollnisch v. France* (App. No. 48135/08), 7 June 2011.

[41] ECtHR, *Garaudy v. France* (App. No. 65831/01), 24 June 2003.

[42] ECtHR, *Perincek v. Switzerland* (App. No. 27510/08), Grand Chamber, 15 October 2015.

[43] *Ibidem*, para. 209.

[44] *Ibidem*, para. 243.

Clearly, Art. 55a did not offer the *ratio legis*, which the ECtHR considers to be justified in legislation criminalising Holocaust denial. The justification that it finds to be of key importance is the obligation of a state to punish the deniers, and not the implicit obligation of a state that is not guilty of the Holocaust to punish anyone who denies the identity of the guilty persons (or states). Whatever our assessment of the ECtHR's views and the logical coherence or otherwise of the denial judgments with the Court's judicial decisions in other criminal liability cases concerning the use of defective memory codes, it seems legitimate to conclude that ECtHR would have decided that its denial judgments are unrelated to the criminal sanctions defined in the disputed amendment to INRA.

Moving on to the broader issue of criminalising opinions or statements (other than those concerning denial), the ECtHR has made it repeatedly clear that criminal sanctions are exceptional and generally incompatible with Art. 10 ECHR. Relying on its own relevant case law, the ECtHR held that a criminal conviction was a serious sanction, having regard to the existence of other means of legal intervention, particularly through civil remedies.[45] In that particular judgment, the ECtHR noted that what matters is not so much the severity of the sentence but the very fact that Perincek was criminally convicted, "which is one of the most serious forms of interference with the right to freedom of expression."[46] The ECtHR characterised the underlying legal problem as one of balancing two of the ECHR's rights: the right to freedom of expression (Art. 10) and the right to respect for private life (Art. 8).

Given the ECtHR's jurisprudence to date, it may be assumed that any Art. 55a case before that Court would have become subject to a very strict review, and that the ECtHR would have found the criminal sanction under Art. 55a to be incompatible with Art. 10 of the ECHR. This is exactly how the ECtHR assessed Art. 261bis of the Swiss Criminal Code under which Perincek was convicted. *Perincek* is given serious consideration here as it was one of the judgments used to justify the disputed amendment to INRA.[47] However, it does not seem to be quite an adequate basis to argue that Art. 55a was in any way compatible with the ECHR. As they could be related to a hypothetical criminal conviction under Art. 55a, it is very instructive to quote in full the key passage in which the ECtHR summaries its earlier argumentation and lists all the major reasons why the criminal sanction was not "necessary":

> Taking into account all the elements analysed above – that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring

[45] *Ibidem*, para. 273.

[46] *Ibidem*.

[47] Poselski projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, Druk sejmowy nr 771 [Parliamentary project of the Act amending the Act on the Institute of National Remembrance, parliamentary document item 771].

> a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.[48]

This extensive quote sets out all key elements that need to be taken into account to find whether a criminal conviction for statements (relating to historical claims and judgments) may be considered a "necessary" interference with the right arising from Art. 10 ECHR. The following considerations are of key importance:

(1) Does a statement bear on a matter of public interest? If yes, it is very unlikely a criminal conviction could be justified as a necessary sanction. For the purposes of Art. 55a, we were clearly dealing with statements, which bear on matters of public interest.
(2) Can a statement be thought of as a call for hatred or intolerance? That would make the case for a criminal sanction stronger. For the purposes of Art. 55a, it is rather unlikely that the relevant statements would be interpreted in this way.
(3) Is the context of a statement marked by heightened tensions? This was not the case with Art. 55a statements.
(4) Is the context of a statement pregnant in "special historical overtones"? Perhaps this element could have found for Art. 55a purposes in the delicate matter of Polish-Jewish relationships.
(5) Could any Art. 55a statement be regarded as affecting the dignity of those affected by it? Perhaps, but we need to note the special argumentative role in the ECtHR's judgment of the fact that that those affected are members of a "minority". This is what determines their specific position and the need for special protection.
(6) Is there any international law obligation to criminalise a statement? For the purposes of Art. 55a, there is not.
(7) Is a criminal conviction based on a critical assessment of a statement that was considered to diverge from established opinions? If yes, the ECtHR would take a negative view of it and this is what would undoubtedly have happened with an Art. 55a conviction.
(8) Did the interference take the form of a criminal conviction? This was the case with Art. 55a.

As is clear, out of the eight factors which the ECtHR relies on to decide whether a criminal sanction was necessary in relation to statements that (for the sake of argument) could be considered analogous to those defined in Art. 55a, only one (element 4) or perhaps two (including element 5) could be said to support the "necessity" requirement

[48] *Perincek v. Switzerland*, para. 280.

of a sanction. In terms of balancing the values enshrined in Art. 10 and Art. 8 against each other, the ECtHR considered that Art. 8 justified the protection of "identity, and thus the dignity of present-day Armenians."[49] At the same time, it rejected that argument concerning the dignity of the victims themselves. A similar argument would likely have been raised in respect of Art. 55a but it is arguable whether argumentation of that nature could be applied to those making Art. 55a statements, that is to say, whether those statements seriously impugn dignity understood as an element of the identity of Poles. In the Armenians' case, what is of fundamental importance is that they are a minority in many the countries in which they live (especially in Turkey) and that the fact of their genocide is denied in Turkey. The Armenians' minority status is what determines their delicate and sensitive situation. A person committing a crime under Art. 55a could have impugned the dignity of many Poles, but it could hardly be said that he or she would thereby impugn their sense of identity, and obviously this would not affect a minority group.

In a sudden about-face, the regulations just discussed were struck from the INRA, in a procedure that took just a single day in June 2018, crowned with a highly controversial joint declaration presented by the Prime Ministers of Poland and Israel.[50] This did not signal however the complete abandonment by the Polish authorities of their intent to counteract certain statements about history, as they did not remove from the INRA's amendment the civil liability provisions:

> Article 53o. The relevant provisions of the Civil Code Act of 23 April 1964 (Journal of Laws of 2016, items 380 and 585) concerning the protection of personal rights shall apply to the protection of the good name of the Republic of Poland and the Polish Nation. An action for the protection of the good name of the Republic of Poland and the Polish Nation may be filed by a non-governmental organisation acting in accordance with its statutory objects. Damages, whether special or general, shall be awarded to the State Treasury.

In principle, the international law standards applicable to human rights protection and the case law of the ECtHR do not preclude the applicability of civil remedies to the protection of personal rights, including the good name and reputation of individuals and legal persons. The limitation clauses found in Art. 10 ECHR (as well as in Art. 19 of the International Covenant on Civil and Political Rights and in Art. 54 of the Polish Constitution), stipulate that the exercise of the freedom of expression might be subject to certain restrictions, which should be clearly provided for in the legislation, and which are necessary, among others, to ensure that the rights and the good name of others are respected. Specifically, there is established case law of the ECtHR concerning cases where the good name of legal entities, such as NGOs, trade unions, etc., was tarnished, and where the application at the national level of civil remedies for the purpose of personal

[49] *Ibidem*, para. 156.

[50] Joint declaration of prime ministers of the State of Israel and the Republic of Poland, 27 June 2018, available at: https://bit.ly/2MqJs0U (accessed 30 May 2019).

rights protection has never been challenged.[51] Moreover, the previous jurisprudence on assessing the compatibility of memory laws, among which the INRA provisions at issue could be included, pertained only to their criminal law aspects and was criticized in that regard. It was precisely the criminalization of statements on historical subjects, particularly the Second World War and the Holocaust, which persuaded its critics to view such laws as falling short of the freedom of expression standard enshrined in the relevant provisions of the ECHR. Thus, it should be emphasized that the ECtHR has not yet examined an application pertaining to the use of civil remedies in an action to protect the good name of a state or nation.

However, even if a state does not criminalize, for example, defamatory statements or statements damaging the good name of others, freedom of expression still might be endangered by disproportionate legal measures. Such a situation might occur, for example, when a journalist, as a result of losing a civil lawsuit, is ordered to pay a large sum of money in damages. In such cases, the amount of damages as such might be found to be in breach of the principle of proportionality.[52]

While the consequences of civil liability may not seem as harsh as those of criminal liability, the risk of violations of individual rights and freedoms remains high. We will probably have to wait for a judgment from the ECtHR before we can definitively state whether or not the law currently in force in Poland is consistent with the standards embraced in the ECHR, but we should not wait that long with expressing the doubts raised in this article. The most important concern to note when considering the principal question we posed here, is that the Polish legislator, by drafting and adopting the amendments to the INRA, chose to ignore the key issue of consistency of the domestic regulations with the international standards of freedom of speech. This omission of the requirements arising from Poland's participation in the Strasbourg human rights protection system, should perhaps serve as a 'warning sign', heralding a more systemic and dangerous policy of shifting the legislator's perspective from the rights'-oriented to the political interest – driven one.

CONCLUDING REMARKS

The emerging trend of proliferation of laws affecting historical memory, including memory laws, in domestic jurisdictions goes hand in hand with reactions towards them which are visible in international law and in the jurisprudence of the international monitoring bodies, and the ECtHR in particular. The often obvious political motivation behind the introduction of laws affecting historical memory – including the intention to whitewash a nation's own history – clashes with the standards of international

[51] *See e.g.* the judgments: ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzogovina* (App. No. 17224/11), 7 June 2016; *Cicad v. Switzerland* (App. No. 17676/09), 7 June 2016.

[52] *See* the judgments: ECtHR, *Ungváry and Irodalom KfT v. Hungary* (App. No. 64520/10), 3 December 2013; *Tolstoy Miroslavsky v. United Kingdom* (App. No. 18139/91), 19 July 1995.

human rights law, most often in the context of free speech and other guarantees of fundamental rights and freedoms. A significant development can be observed: in the case of Polish laws affecting historical memory, the often visible contradiction between the international and national legal regulations leads this new field of governing the past to fall within the remit of the tools of law. However, what distinguishes these cases from other situations of conflicting norms and standards is precisely the strong ideological background of memory laws. Their compliance with international law standards is thus often secondary to their compliance with the current political will and the deemed social necessities. Considering the general political nature of memory laws, alternative ways of securing narratives about the past should be considered. Maria Mälksoo argues that in lieu of attempts to outlaw certain ways of remembrance, "a radically democratic, agonistic memory politics would be in order." While she calls for a "politics of memory between plural equals", she also states that the adoption of such a model is farfetched with respect to Eastern Europe.[53] Our contribution supports that claim: instead of *moving away* from regulating memory, the Polish legislator has been increasingly imposing new laws affecting historical memory, causing controversies and leading to negative impacts, both within the purely legal sphere and beyond.

[53] M. Mälksoo, '*Memory Must Be Defended': Beyond the Politics of Mnemonical Security*, 46(3) Security Dialogue 221 (2015).