International Criminal Justice Series

Volume 19

Series Information

The *International Criminal Justice Series* aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

Editorial Office

Prof. Dr. Gerhard Werle
Humboldt-Universität zu Berlin
Faculty of Law
Unter den Linden 6,
10099 Berlin, Germany
gerhard.werle@rewi.hu-berlin.de
moritz.vormbaum@rewi.hu-berlin.de

More information about this series at http://www.springer.com/series/13470

Emanuela Fronza

Memory and Punishment

Historical Denialism, Free Speech and the Limits of Criminal Law

ASSER PRESS

Springer

Emanuela Fronza
Department of Legal Sciences
Alma Mater Studiorum
Università di Bologna
Bologna
Italy

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-233-0 ISBN 978-94-6265-234-7 (eBook)
https://doi.org/10.1007/978-94-6265-234-7

Library of Congress Control Number: 2017959910

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

This T.M.C. ASSER PRESS imprint is published by Springer Nature
The registered company is Springer Science+Business Media B.V.
The registered company address is: Van Godewijckstraat 30, 3311 GX Dordrecht, The Netherlands

For my father who taught me the culture of freedom and the culture of limits

For my mother who reminds me to forget

For Mattia, Cosimo and Simone,
my companions in time and memory

Foreword[1]

In the Outer London district of Walthamstow stands an eighteenth-century house originally used as a workhouse for the local poor, one of many that once dotted Britain. Today, the building is known (to the few who know it) as the Vestry House Museum. It is one of those museums whose two or three employees lavish an ardent welcome on visitors simply for walking through the door, delighted that someone is dropping in.

The collection comprises no more than half a dozen small rooms documenting local history through to the twentieth century, no different from countless small-town museums around Europe. What they lack in regal splendour they reclaim in humble charm.

Such places certainly tell us about the past. But do they teach us anything about how states use *law* to promote historical memory?

The Vestry House is not a private collection. Like many museums, it is government-run. The site was legally chartered by government as a museum as far back in 1931. Visitors who pay close attention will certainly carry away an impression different from the picture-book nostalgia which might at first have lured them in. They will leave with a remarkably bleak, un-celebratory history. The Vestry House stands not to sound trumpets of Britain's imperial past, but to invite critical reflection.

That, at its best, is what happens when governments use law, such as the Vestry House charter, to promote public understandings of history, not to woo the public with national self-flattery but to urge contemplation and dialogue. Even if that aim was not altogether clearly envisaged in the original charter, it is certainly how officials interpret it today.

Such use of law to shape historical consciousness does not always reflect any such socio-critical motive. Throughout the world today, states use legal means,

[1] Some passages from this Foreword are adapted from E. Heinze, 'Bans on Holocaust denial don't help Jews', 8 November 2016 (https://www.opendemocracy.net/can-europe-make-it/eric-heinze/bans-on-holocaust-denial-don-t-help-jews), originally published at *OpenDemocracy.net* under a Creative Commons Licence.

such as censorship and penalties for open dissent, to impose uncritically minded nationalism. In addition to such punitive means, states also use non-punitive means such as museums, but with no such dialectical aspiration in mind—spaces dedicated to one-sided national glorification, often at the expense of silencing more sinister pasts.[2]

Studies of state writings and rewritings of history are long established and well known. But detailed and comparative scholarly attention to the specific role played by law is remarkably new. One anthology undertaking that comparative study, edited by Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, is entitled *Law and Memory: Towards Legal Governance of History*. It includes chapters on Canada, the Czech Republic, Greece, Hungary, Israel-Palestine, Peru, Poland, Romania, Russia, Ukraine and Spain.[3] Another collection, edited by Kalliopi Chainoglou, Barry Collins, Michael Phillips and John Strawson, is entitled *Injustice, Memory and Faith in Human Rights*. It includes chapters on Australia, Bangladesh, ISIS, New Zealand, Northern Ireland and Spain.[4] With such anthologies, and many other published works, we are witnessing the birth of a new discipline, or rather an 'inter-discipline'. We observe the study of law intersecting not only that of history but also with studies of politics, culture and society.

Emanuela Fronza leads in this field. The present monograph offers a probing, rigorous analysis not only of the complex laws, but of the fraught ethics and emotions animating the legislation and adjudication of memory laws, along with the risks they pose to democratic public discourse. In the spirit of London's Vestry House, Fronza wholeheartedly commits herself to states adopting a socio-critical stance towards their national histories. This book shows how difficult that ideal can be to achieve.

One of the salient problems to arise under the more controversial memory laws involves the necessary extent and limits of free speech within a robust democracy. That states must commemorate the victims of atrocities is certain; that they must punish those who, however benignly or maliciously, may challenge such histories, is, as Fronza explains, far less certain. The present study emerges from Fronza's years of painstaking and comprehensive examination of the criminal penalisation of 'negationism' (historical denialism), particularly of twentieth-century genocides. Fronza examines denialism as a criminal offence, its evolution and questions of constitutional legitimacy through a comparative European survey, exploring them as part of the internationalisation of legal norms and criminal justice—a study

[2] On distinctions between punitive and non-punitive approaches to disseminating state-approved histories, see, e.g. Heinze, E., 'Beyond "memory laws": Towards a general theory of law and historical discourse', *in* U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History.* Cambridge: Cambridge University Press (2017), pp. 413–33, at 415–21.

[3] U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History.* Cambridge: Cambridge University Press (2017), pp. 413–33, at 415–21.

[4] K. Chainoglou et al. eds., *Injustice, Memory and Faith in Human Rights.* Abingdon, UK: Routledge (2017).

particularly relevant in our era of 'post-truth' and fake news proliferated through new electronic technologies.

Consider the example of modern-day Germany. 'I'd rather not think about how horrible Germany would be', exclaimed Stephan J. Kramer, General Secretary of Germany's Central Council of Jews, 'if Holocaust denial were lawful'.[5] What else could he say? The Holocaust had almost extinguished Germany's Jewish community. Numbers have revived since the fall of the Berlin Wall, but remain tiny.[6] For many who have studied the rise of fascism in the early twentieth century, Kramer's response seems obvious. Of course, German law today provides iron-clad guarantees for free speech. For decades, the range and quality of the country's print and broadcast media have been second to none, noticeably superior in breadth and depth to those of English-speaking nations. Notwithstanding the bogus scientific façade, however, Holocaust denial is unequivocally hate speech, as research has repeatedly shown.[7]

For most of the German population, the scale and brutality of the Shoah have created a moral absolute. Nothing that would appear to minimise its gravity can be ethical. Many Germans believe that their law must reflect that ethics. For them, no moral value, not even the one most distinctive of a democratic sphere—free speech—can trump the nation's duty to honour both the dead and the survivors.

In 2008, Dr. Wolfgang Hoffmann-Riem, retiring from the Constitutional Court, nevertheless voiced his reservations about anti-negationist bans. Kramer then fired back. 'It is irresponsible for a legal authority to speak so thoughtlessly'. Yet Hoffmann-Riem is hardly famous as a political extremist. Any political affiliations traceable to him appear to be of a moderate centre-left. His reputation as guardian of civil liberties, on one of the most respected courts in the Western world, remains untainted. Whatever personal faults he may harbour as an individual or as a judge, careless speech scarcely counts among them.

What Hoffmann-Riem doubted was whether the bans serve their purpose, the same purpose Kramer pursues, namely, to safeguard the memory of millions of innocent dead. I share his doubt. Emerging and transitional democracies—as the Federal Republic had been in the war's aftermath—may benefit from bans on hateful expression. (And even that concession can be made only with weighty qualifications. In many such societies, hate speech bans are manipulated by

[5] See, e.g. Frank Jansen, 'Holocaust-Leugner nicht bestrafen', *Der Tagesspiegel*, 10 July 2008, at http://www.tagesspiegel.de/politik/ex-verfassungsrichter-holocaust-leugner-nicht-bestrafen/1275952.html (retrieved 25 September 2017).

[6] S. Urban, 'The Jewish Community in Germany: Living with Recognition, Anti-Semitism and Symbolic Roles', *Jerusalem Center for Public Affairs—Israeli Security, Regional Diplomacy, and International Law*, 29 October 2009, at http://jcpa.org/article/the-jewish-community-in-germany-living-with-recognition-anti-semitism-and-symbolic-roles/.

[7] Benz, W. (2005) *Was ist Antisemitismus?* (2nd edn.) Munich: Beck, R. Cohen-Almagor, 'Holocaust Denial is a Form of Hate Speech', 2 Amsterdam Law Forum 1 (2009); Taguieff, P.-A. (2002) *La Nouvelle judéophobie.* Paris: Mille et Une Nuits; Taguieff, P.-A. (2004). *Prêcheurs de haine : Traversée de la judéophobie planétaire.* Paris: Mille et Une Nuits.

governments not to protect vulnerable groups but to quell dissenters.) But Germany ceased long ago to be an emerging democracy. For many years now, *The Economist's* annual *Democracy Index* has placed Europe's dominant power among the world leaders, joined by societies like Norway and Canada—far in front of the USA, and also ahead of France and Britain.[8]

But don't those countries also ban certain forms of hate speech? Yes (aside from the USA). Even within the top-ranked democracies, however, we hear doubts about whether banning speech is right in principle. Some have also asked, as a practical matter, whether bans end up doing more harm than good.[9] Those concerns are not voiced by fanatics or by people indifferent to the plight of the historically repressed.

A common argument in defence of bans is that democracies are not immune from the excesses of hate speech.[10] The Weimar republic, on that view, shows how hate speech in today's democracy can snowball into tomorrow's genocide. The problem with that claim is its 'one size fits all' assumption. Not all democracies are alike. Risks associated with a highly flawed state cannot so casually be attributed to all democracies across the board. Weimar was scarcely more than an on-paper democracy, boasting none of the historical, institutional or cultural supports so conspicuous among the *Economist's* top ten or fifteen contenders.

In a word, the familiar cry of 'Never Again' meant something very different in 1946 than it means in 2016. The law must start to reflect that change. The Nazi regime represented absolute evil. It is by no means obvious, however, what the 'opposite' of that regime should look like. One evil of the Third Reich was indeed hate speech,[11] from which we might deduce the need for its opposite—the need for bans.

An equal evil, however, was suppression of *free* speech,[12] of the type that might have countered Nazi excesses. From that evil we can just as plausibly deduce a need for the abolition of censorship. Neither view is self-evident. Therefore neither is horrible, silly, nor worthy simply to be derided. Yet that is what Kramer did by chastising Hoffmann-Riem in such dismissive terms. Kramer did not simply condemn either the Holocaust or its denial—horrors which we must indeed decry. He instead took a very worrying step further. He ended up condemning a proposal made by an experienced, conscientious jurist concerning the best response of law and of government.

---

[8] The Economist—Intelligence Unit, 'Democracy Index 2015: Democracy in an Age of Anxiety'.

[9] Alexandre Lévy, 'Les groupes violents, plus faciles à fustiger qu'à interdire', *L'Opinion*, 09 June 2013, at http://www.lopinion.fr/edition/politique/groupes-violents-plus-faciles-a-fustiger-qu-a-interdire-868.

[10] Eric Heinze, 'Nineteen Arguments for Hate Speech Bans—And Against Them', *Free Speech Debate*, 3 March 2014, at http://freespeechdebate.com/en/discuss/nineteen-arguments-for-hate-speech-bans-and-against-them/.

[11] 'Der Stürmer—*"Die Juden sind unser Unglück!"*', Holocaust Education & Archive Research Team, at http://www.holocaustresearchproject.org/holoprelude/dersturmer.html.

[12] 'Nazi Propaganda and Censorship', *The Holocaust: A Learning Site for Students*, at https://www.ushmm.org/outreach/en/article.php?ModuleId=10007677.

When that abrupt 'Shut your mouth!' follows from the spirit of Holocaust commemoration, then something has gone wrong. I certainly share Kramer's raw emotion. And I admire the Council's longstanding and constructive contributions to European cultural life. But nothing could make the Jewish community look worse. And nothing renders such questionable homage to the Holocaust's victims. If we are to honour both the dead and the survivors, we are inevitably forced to talk about their experience in collective terms. There is something worrying, however, about the assumption that any one policy could ever speak for all the victims.

Yes, some of those who perished, if we could revive them today, would surely and understandably endorse anti-negationist bans. But it would be ludicrous, even insulting, to suggest that all of them would do so—or indeed that all Jews should take the same view on *any* complex moral question. The great German Jewish tradition from Moses Mendelssohn to Hannah Arendt wholly collapses if does not represent open, frank and intelligent discussion even of the most painful ethical dilemmas. The German Council of Jews is right to keep historical memory alive and informed. Hoffmann-Riem, however, is also right to ask whether speech bans do indeed further that effort. Europeans have not yet learned to have that debate.

Controversy about the role of the state in promoting historical memory will continue well into the future, in Europe and internationally. With *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, and at a time of ever greater divisions about Europe's past, Fronza offers a valuable tool indeed for evaluating and perhaps even revising current approaches.

Eric Heinze
Professor of Law and Humanities
School of Law Queen Mary
University of London

Preface

The term 'denialism' ('*négationnisme*') was first used by the French historian Henry Rousso in his book *Vichy Syndrome*.[13] The term was specifically used by this author in reference to statements which denied the existence of gas chambers in the Nazi extermination camps.

Today, historical denialism must be distinguished from revisionism, which is a trend characterised by the tendency to revise confirmed historical facts based on new data, testimonies, documents and interpretations. In principle, of course, revisionism *per se* merely refers to the historiographical process of reviewing established historical opinions in the light of new information and knowledge, thereby making it possible to reinterpret and rewrite history. Every historian can be a revisionist by trade since his or her work consists in reviewing previous reconstructions according to changing theoretical paradigms and models. As long as it does not mix fact with fabrication, revisionism is a standard practice of historical scholarship. Historical denialism, by contrast, refuses to initiate a dialogue with well established historical data and methodological paradigm.

While it originally referred to denial of the Holocaust, today the phenomenon of denial of historical facts is much broader and much less controllable. It includes, more generally, genocide, crimes against humanity and war crimes, and it thrives on the same propagation mechanisms—filter bubbles, echo chambers and such—that contribute to the spreading of more trivial (yet just as worrisome) disinformation and misinformation on the World Wide Web. In this digital scenario, 'denialism' has also come to characterise phenomena and practices that have little in common with the original negation of the Holocaust which eventually resulted in criminalisation. From climate change denial to the moon landing, from the origins of the HIV-AIDS virus to the efficacy of vaccination, from Darwinist theories to the 9/11 attacks and other issues which might seem more insignificant, such as Barack Obama's birthplace, the creation and consumption of self-produced information on the Web has provided fertile ground for the multiplication of perspectives on issues

[13] Rousso 1987.

that in principle should not and must not be questioned, lest we wish to open the door to denying historically proven facts.

The concept of historical denialism has been revived to label those who dispute a dominant view ordinarily considered an agreed point of reference. In this new phase, the primary accusation is denying the 'truth', implying that what is being denied is an established fact. Conspiracy theories abound in the so-called post-truth era, triggering debates on whether a normative approach should be adopted to counter historical denialism, in what form, and on which players and stakeholders should be allowed to intervene without infringing the right to free speech and expression.

This consequently gives rise to other problematic aspects. An analysis of the experience of historical denialism itself, also as a crime, can therefore offer insights regarding these new phenomena as well, since they share similarities. Why are the foundations of core values increasingly attacked? Why are there consistently more statements based on simplistic beliefs, in political discourse, news and social media? Truth, post-truth, alternative facts, fake news and fact-checking—all these definitions have become a common currency in the global debate on information and the new media, and they all to some extent embody these dynamics and highlight the cacophony of opinions and the dangers at hand.

Despite their alarming significance, none of these manifestations of denialism will be analysed in this book. Instead this study focuses on criminal law as a response to the denial of the Holocaust and other mass atrocities. In particular, it examines historical denialism as a speech crime in Europe and discusses the implications of protecting historical institutional memory through criminal law. Nevertheless, this analysis also represents a jurist's contribution to the broader debate about the need for policies and regulations in the digital world, and more specifically in relationship to freedom of expression and the fake news phenomenon.

Holocaust denial both as conduct and as crime was originally concerned only with statements aimed at negating or belittling the Holocaust. For the purposes of this study, however, the phrase 'historical denialism' will have a wider scope, both as a form of conduct and as a criminal offence. As conduct, it consists in the denial, justification or trivialisation of historical events that constitute offences against humanity, as determined by the statute or case law of a domestic or international court. The related criminal offence, which varies among countries, generally punishes whoever purposely engages in public in one or more of those acts and thereby jeopardises an officially recognised narrative of those events.

Two basic assumptions underpin my research.

First, contemporary societies are strongly characterised by a 'cult for memory' (Todorov) and the 'will to remember' (Rousso), namely the tendency to remember the past to establish a sort of shared identity. Criminalisation of historical denialism is also a reflection of this trend, as it attributes a role to public memory and provides through law—increasingly criminal law—the means for establishing and protecting collective memory. The importance of a rigorous, open and critical scrutiny of memory in all aspects of public life is more frequently evident in Western societies.

The general tendency is that 'We must remember' in order to avoid the progressive weakening of a pillar of democratic society, namely the collective memory of historically significant crimes. Law, and especially criminal law, is considered to be the most powerful instrument available to promote collective historical memory within society. By imposing respect for the memory of a violent past that should never be forgotten, criminal law is used to pursue the objectives of narrating and reasserting historical memories. The importance of collective memory regarding past breaches of human rights is bolstered by the increasingly significant role of victims and results in the recognition of new categories of human rights (for instance, right to truth, memory and justice). Furthermore, international crimes are not subject to statutes of limitations or amnesty, and the principle of non-retroactivity of criminal law does not apply to them. The fight against impunity and the will to remember, therefore, redefines the relationship between memory and oblivion and between punishment and forgiveness. This polarisation between remembering and forgetting is the first area of conflict that makes criminalising historical denialism complex. It is in this context that the choice of giving a primary role to criminal law, which acts outside strictly national and global boundaries, is made. The *memory makers*, namely the actors through which memory is reaffirmed and consolidated,[14] also change and multiply. In fact, beyond national courts, one has to consider regional courts—such as the European Court of Human Rights and Inter-American Court of Human Rights—as well as the International Criminal Court and constitutional courts. Such institutions, albeit heterogeneous, are constantly in dialogue with each other.

Second, the crime of historical denialism reflects another European trend, whereby freedom of expression is limited to safeguard other values or to fight phenomena such as international terrorism. Indeed, Europe is displaying an increasing trend of limiting freedom of speech. The offence of historical denialism could catalyse this currently unfolding phase, resulting in 'new' speech crimes.

While it was first introduced in Israel, the crime of historical denialism has evolved primarily in Europe. In 1990, France was the first European country to include it as a crime in its national legislation and afterwards many other legal systems also opted to respond to this phenomenon with criminal law. Today, 21 European Union countries provide laws on historical denialism, distinguishing them from laws against condoning or instigating racial discrimination.

Initially, at the national level, an earlier, narrower formulation was introduced, which protected the founding identity of the Shoah by punishing justification, trivialisation and negation of that event (historical denialism in the 'original' sense). Other countries have since implemented an expanded formulation, which punishes statements regarding both the Nazi regime and other international crimes (historical denialism in the 'broader' sense).

[14]This concept refers to legislators and judges (national or international) and quasi-judicial bodies as actors influencing historical collective memory and contributing to its construction and evolution.

This latter paradigm of criminalisation is now the most common within European law,[15] signalling an important change. In addition to the core message rejecting attacks on the universal values that emerged after World War II and contributed to the creation of new European constitutions, further emphasis is placed on the construction of the identity of European societies founded upon respect for human rights and the memory of all their most serious violations. Not only the Holocaust, but also other international crimes now occupy and play a role, shifting memory that cannot be challenged from a European level (the Holocaust) to a universal one (human rights).

In addition to the conflict between memory and oblivion, the expansion of historical denialism to other international crimes demonstrates another polarisation that makes it difficult to use criminal law for this phenomenon: the polarisation of what is relative and what is universal. The stakes at play are not creating a divided community but establishing a fragile European and international community with a value system based on human rights. The expansion of the criminal offence is incorporated within the 'Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law' adopted in 2008. Also the European Union has chosen criminal law to combat denialist statements, endorsing a further step in the evolution of the offence: from the exclusive national level to which it was relegated, criminalisation has now become supranational.

Since the adoption of the EU Framework Decision, twelve countries have implemented it, prompting the beginning of a new phase. Instead of a single European memory to be protected, several historical narratives have emerged from the varying forms of historical denialism implemented in each country. The paradoxical dynamic is quite clear: the universality of the human rights contained in the Framework Decision encountered relativity in application, demonstrating that there is no single national memory in Europe but many national historical memories. Therefore, the 'broader' model of the offence entails new critical issues which did not exist in the 'original' model. First, due to the extended application to all international crimes, it requires identification of the significant historical facts worthy of criminal protection. But who is to select the memories to be protected? Depending on the legal system, this function is assigned to the judge or to the legislator. When qualifying a historical fact as an international crime, the agent of memory will also recognise it as a fact, the memory of which cannot be challenged. The criminal offence, in its broader version, is therefore structured to oblige the judge to intervene in matters of history considerably more invasively than ever before, when the object of the punishable conduct was only limited to the Holocaust. Criminal trials are conducted in order to establish the historical narration of facts through the judgement, which establishes what is to become the official historical truth. In this 'broader' form, the role of the judge or legislator is complex. They must operate within a mosaic of historical memories and must investigate international crimes which at times have not yet become the object of historical

[15] Eighteen countries introduced a 'broader' form of historical denialism.

study. We certainly risk a dangerous overlap between judicial activity and historical research. Such a risk was already present in the 'original' form of historical denialism, but here becomes major.

But a new risk also emerges through the difficulty of identifying criteria for selecting which memories to protect. As already demonstrated by the national and European legislation and case law, a further danger is the potential establishment of a *hierarchy* of historical memories.

This analysis reveals the image of Europe not only protecting but also constructing historical collective memory and defending its values through law. It is necessary to distinguish laws that criminalise historical denialism from other types of laws, which, without resorting to criminal law, intervene in order to recognise or define certain relevant historical facts. These include, for example, the so-called remembrance laws, which introduce 'days of memory' in national or international calendars, inviting citizens to remember. Although lacking a strictly criminal nature and following the introduction of the offence of historical denialism from a chronological point of view, these typologies of laws play an important role in the criminalisation of denialism: they attribute to a fact the value of an historical event. They thereby delimit the scope of application of criminal law which protects the memory of that event. After all, remembrance laws and denialism criminal statutes mutually nourish each other.

This study analyses the costs and benefits of this juridical culture, in the framework of the denial of the Holocaust and other mass atrocities. The complexity of the matter at hand is apparent. It reacts to an insidious and widespread phenomenon which involves free speech, historical research and open debate, ultimately contradicting the principles of a liberal criminal law. It also paves the way to a broader discussion about freedom of expression in a digital world, about fake news and post-truth scenario, and ultimately about the need (and the tools) to protect established facts from the pollution of misinformation. In the so-called post-truth era, it becomes of paramount importance to define the principles of what can and cannot be publicly affirmed, to draw a line between the two areas. Historic denialism and the related jurisdiction represent a key step in exploring this complex field.

Some of the most problematic issues arising from the criminalisation of historical denialism are general in nature and concern the identification of the protected interests, the risk of punishing a lifestyle rather than of an offensive conduct and resorting to criminal law as a first response. Furthermore, the risk of penalising 'words' alone does not seem to be averted, not even by those measures which at the legislative level attempt to classify the crime in terms of its level of potential endangerment (for example, requiring that the statement must possess an element of incitement), or limit punishment to those crimes for which a judgement or conviction has already been issued.

Other problems are exclusive to the crime of historical denialism due to the profound interaction between law and memory. For example, the judge becomes judge of history although there cannot be only one historical truth. Further

complexities arise as the list of protected memories expands (e.g., including *all* international crimes, not just the Shoah). But which criteria are to determine the historical memories worthy of protection?

In the 'original' form of the offence, the role of the judge (or legislator) was more limited, as they were mainly called upon to reiterate that the memory of historical events already historically and judicially qualified as such (like the Holocaust) could not be questioned. At present, with the 'broader' form of the crime of historical denialism, the judge can be in the position of determining which historical memories should be protected. In addition to the risk of selective—and hierarchical—criminalisation, the danger of historical memory merely coinciding with judicial memory also increases. This configuration of public policies entails various implications for the structure and functions of the criminal trial. Its main aim should not be narrating history, but rather ascertaining individual responsibility in relation to identified facts. From a historical point of view there are a number of risks, such as elevating historical truth to the status of a legal truth and transforming historical truth into an official truth. In this manner, one gives credit to the idea that only one school of historical thought exists.

Congruent with the dual dynamic of the expansion of criminal law and the juridification of memory, the main purpose of the criminalisation of historical denialism is to build consensus around a sense of order and to send a message to the public regarding the reconstruction of collective identity and the establishment of a collective memory. The main purpose of the criminalisation of historical denialism is therefore not the protection of an important interest. The distorting effect that may ensue is caused by the prevalence of a purely pedagogical and expressive focus, with the consequence of punishing words and not criminal acts. However, certain fundamental principles comprise and limit liberal criminal law, namely a liberal state should never punish ideas. Thus, there is a paradox within the criminalisation of historical denialism since it results in the restriction of those same fundamental rights that form the foundation of what they seek to protect. This conundrum is more powerful today than ever since the World Wide Web made it possible to spread 'free' information without limits or boundaries.

Making historical denialism an offence differs from exploring in detail the debate, the validity and the content of denialist practices. This book intends only to analyse the former, namely the criminalisation of denialist conduct and not the larger issue of denial as a phenomenon. As for the latter, I wholly disapprove of the ideas advocated by denialists. Efforts should be made to stop similar practices from repeating themselves and prevent the ideologies that supported or fuelled mass atrocities (such as genocides and crimes against humanity) from gaining power and legitimacy. The urgency of a serious and comprehensive challenge to historical denialism requires that we address how to respond to it and the effectiveness of the instruments that have been chosen. Considering the importance of historical collective memory within a political and social system, the question arises as to what are the most appropriate and effective means to protect that memory.

Based on the assumption that it is necessary to respond to the denialist phenomenon and to protect collective historical memory, the underlying question that

guides this study is the following: how can we respond adequately and effectively to such problems? Is there merit in the position, privileged both at the national and supranational level, that considers criminal law an effective and appropriate tool to counter historical denialism?

The criminalisation of historical denialism has spread far beyond Europe. In recent years, initiatives in several Latin American countries have proposed the introduction of the offence of historical denialism similar to that found in European legislation, although culturally tailored to protect the historical memory of formative events of their different national identities. The expansive capacity of historical denialism does not stop there. It also circulates as a concept, with a strong symbolic and emotional impact. Whenever the perceived aim is to eradicate interpretations considered to differ from an 'authoritative truth' intended to protect a collective point of reference, the accusation of 'historical denialism' is voiced. It presents the possibility to consider those who criticise that truth to be falsifiers of history worthy of being punished. Therefore, historical denialism becomes a means of validating a memory and/or a truth that seeks to be stabilised.

A further objective of this study is therefore to demonstrate the global dynamics at play. According to media scholars we live in a 'post-truth era' where opinions and prejudices can trump factual truths thanks to the uncontrolled and massive proliferation of fake news and biased information. Opinions continue to multiply, and there is an alarming increase in misinformation, and the role it plays in polluting the ocean of digital information and knowledge.

This book analyses the matrix of these phenomena: the denial of the Holocaust and the most serious crimes, to which Europe responded 'never again' when adopting national constitutions and a series of documents affirming the centrality of human rights. While saying 'never again' to mass atrocities, with the criminalisation of denialism legislators have decided to intervene in the difficult area of opinions, establishing a distinction between true and false via the (problematic) use of criminal law. Historical denialism not only consists of the discriminatory and shameful statements attacking the core of post-World War II principles which have shaped our constitutional models. It also creates a space within which states and international institutions have said 'No' by drawing a red line between true and false, frequently using criminal law to draw that line. Historical denialism demonstrates the clash between two practices: a misleading approach and an accurate method, in which the empiricist works with various experimental models based on hypotheses. This conflict, the centrality of memory, the over-expansion of criminal law and the proliferation of speech crimes are all elements that link the subject of this study to a fundamentally global dynamic currently underway. The relevance of the debate on post-truth and on how to define and protect a core idea of 'truth' in the flow of digital information share common terrain with this study: the delicate operation of resorting to legal means to establish the distinction between true and false and, therefore, between what can and what cannot be publicly affirmed. The issues at stake are not merely academic in terms of their effects on norms and jurisdiction, but are indeed the key to one of the most urgent questions facing our societies: what strategies can (and should) be implemented to prevent the

misuse of the Internet as the most powerful information tool humanity has ever developed?

Consequently, the specific study of the offence of historical denialism focuses on a very contemporary and fundamental question about how to respond to refutations, radical dogmas and immutable ideologies that attack civic order. This analysis will explore the costs and benefits of choosing to respond with criminal law. There is no doubt that historical denialism and other racist phenomena require a response. But the point is *how* to respond to these serious, widespread and persistent statements? How can we avoid triggering a war of memories? How shall we prevent an excess of speech crimes? How not to question those same fundamental rights on which an open society is founded? How can we maintain those principles of legality and harm which must be the basis and limitation for every liberal criminal law? Why introduce another criminal offence when incitement is already punishable? These are questions that should be familiar to all those concerned with defining and protecting freedom of expression in the digital era and demonstrate the urgency of a shared analysis and approach.

Despite the fear of a logic based on myopic and unverifiable claims, particularly prominent in Holocaust denial, the premise is that criminal law may not be an appropriate response to historical denialism.

Given the political value of denialist statements and the limits of criminal law, it is necessary to attribute at least a minimum role to the restriction of freedom of expression, both on the dogmatic and criminal policy level. If it is required that the criminal trial intervenes to ascertain facts, to determine individual responsibility with regard to serious crimes, to consolidate memory and forgetting, and ultimately to stabilise civil order, then political intervention is required. The responsibility to react to denialist statements, as well as to all dogmas that seek to undermine fundamental values and civil order, should also pertain to the political sphere and not to criminal law alone. The response to historical denialism should therefore be a political commitment to the difficult long road of culture and education, and not the futile and merely symbolic shortcut of criminal law.

This book is the result of many years of research and reflection on the criminalisation of historical denialism. It continues an investigation of other previous publications and intends to contextualise the complex issues surrounding the criminal offence of historical denialism in the current dynamics of the criminal law system and its limits.

This publication is also part of my research as a Principal Investigator at the University of Bologna of the HERA-funded consortium ‘Memory Laws in European and Comparative Perspective’ which I would like to thank here for its support (http://www.melaproject.org/).

Bologna, Italy Emanuela Fronza
January 2018

Reference

Rousso H (1987) Le syndrome de Vichy. Seuil, Paris (translated as: The Vichy Syndrome. History and Memory in France Since 1944. Harvard University Press, Massachusetts)

Contents

Part II Denialism in Practice

Table of International and National Instruments

Table of International Instruments

Table of National Instruments

Argentina

Austria

Belgium

Bulgaria

Croatia

Cyprus

Law no. 134 (I) on combating certain forms and expressions of racism and xenophobia by means of criminal law, 21 October 2011

Czech Republic

Law of 9 February 2009

France

Freedom of the Press Act, 29 July 1881
Law no. 90-615, 13 July 1990
Law no. 2000-644 of 10 July 2000, *Journée nationale à la mémoire des victimes des crimes racistes et antisémites de l'Etat français et d'hommage aux 'Justes' de France*
Law no. 2001-70 on the recognition of the Armenian genocide, 29 January 2001
Law no. 434 on the recognition of the slave trade and slavery as a crime against humanity, (*reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité*), 21 May 2001
Law no. 2005-1 regarding the positive aspects of French colonisation, *Loi portant reconnaissance de la Nation et contribution nationale en faveur des Français repatriés (loi Mekhachera)*, 23 February 2005
President of the National Assembly, Report: Gathering the Nation around a shared memory (*Rapport d'information de l'Assemblée nationale - Rassembler la Nation autour d'une mémoire partagée*), n. 1262, 18 November 2008
Law no. 647 aiming at repressing the contestation of the existence of the genocides recognised by law ('*Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi*'), approved by the National Assembly on 22 December 2011 and the Senate on 23 January 2012
State Council's Public Report, INT-387525, 12 April 2013
Law No. 2014-1353 of 13 November 2014, Strengthening Provisions on the Fight Against Terrorism (Loi *renforçant les dispositions relatives à la lutte contre le terrorisme*
Decree no. 7,18 February 2015
Law no. 43, 17 April 2015
Law no. 2017-86 of 27 January 2017

Germany

Act amending the Criminal Code, the Code of Criminal Procedure and Other Acts ('*Gesetz zur Änderung des Strafgesetzbuches, der Strafprozessordnung und anderer Gesetze*'), 28 October 1994
Act amending the Assemblies Act and the Criminal Code ('*Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches*'), 24 March 2005

Greece

Law no. 4285, 4 September 2014

Hungary

Law no. XLVIII of 2013

Italy

Law no. 167, 20 November 2017
Law no. 654 on the Ratification and Execution of the International Convention on the Elimination of Forms of Racial Discrimination, opened for signature in New York on 7 March 1966, 13 October 1975
Law no. 211 of 20 July 2000 establishing the Day of remembrance in memory of the extermination and persecution of the Jewish people, Italian military and political deportees to Nazi camps'
Law no. 115, 16 June 2016

Israel

Denial of Holocaust (Prohibition) Law, 5746-1986, 8 July 1986

Latvia

Law of 21 May 2009

Lithuania

Law no. 75-3792 of 2010

Luxembourg

Law of 13 February 2011

Malta

Law of 3 November 2009

Peru

Draft on *Negacionismo de los delitos de terrorismo*, 28 August 2012

Poland

Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation, 18 December 1998

Portugal

Law no. 65, 2 September 1998

Romania

Emergency Ordinance of 13 March 2002
Decree no. 669, 22 July 2015

Slovakia

Law of 20 May 2005

Spain

Decree no. 3096 of 1973
Organic Law, no. 4, 11 May 1995
Organic Law, no. 10, 23 November 1995
Organic Law, no. 1, 30 March 2015
Law 52/2007 (Historical Memory Law), 31 October 2007

Slovenia

Law of 2 November 2011

United Kingdom

British Counter-Terrorism and Security Act, 12 February 2015

Table of Cases

European Court of Human Rights

ECtHR, *De Wilde, Ooms e Versyp ("Vagrancy") v. Belgium*, Judgement, 18 June 1971, Application nn. 2832/66, 2835/66, 2899/66

ECtHR, *Ireland v. United Kingdom*, Judgement, 18 January 1978, Application n. 5310/71

ECtHR, *Kuhnen v. Federal Republic of Germany*, Judgement, 12 May 1988, Application n. 12194/86,

ECtHR, *Lowes v. United Kingdom*, Judgement, 9 December 1988, Application n. 13214/87

ECtHR, *Remer v. Germany*, Judgement, 6 September 1995, Application n. 25096/94

ECtHR, *Pierre Marais v. France*, Judgement, 24 June 1996, Application n. 31159/96

ECtHR, Grand Chamber, *Lehideux and Isorni v. France*, Judgement, 23 September 1998, Application n. 24662/94

ECtHR, *Erdogdu v. Turkey*, Judgement, 8 July 1999, Applications n. 25067/94 and 25068/94.

ECtHR, *Garaudy v. France*, Judgement, 24 June 2003, Application n. 65831/01,

ECtHR, *Witzsch v. Germany*, Judgement, 13 December 2005, Application n. 7485/03

ECtHR, *Perınçek v. Switzerland*, Judgement, 17 December 2013, Application n. 27510/08

ECtHR, *M'Bala M'Bala v. France*, Judgement, 20 October 2015, Application n. 25239/13

France

Court of Cassation, Criminal Division, 17 November 1983

Court of Appeal of Paris, Judgement, 31 October 1990

Court of Appeal of Paris, Judgement, 1 April 1992, n. 5571/91

Germany

Italy

Spain

Provincial Court of Barcelona (Section 2), FD 6, 26 April 2010.
Supreme Court of Spain, Judgement, 12 April 2011, no. 259.
Supreme Court of Spain, Criminal Chamber, *Luciano Varela Castro*, 25 May 2017, no. 378/2017.

Switzerland

Federal Court, ATF 6B_398/2007, 12 December 2007

List of Judicial Bodies

Conseil Constitutionnel = French Constitutional Council
Tribunal de Grande Instance = High Court
Tribunal correctionel = Criminal Court
Cour de Cassation criminelle = Court of Cassation, Criminal Division
Cour d'Appel = Court of Appeal
Tribunal Constitucional = Spanish Constitutional Court
Bundesverfassungsgericht = Federal Constitutional Court (BVerfG)
Landesgericht = Regional Court
Oberlandesgericht = Higher Regional Court
Bundestag = German Bundestag
Tribunal Supremo = Spanish Supreme Court
Juzgado de Primera Instancia núm. 6 de Madrid = Madrid Court of First Instance n. 6
Audiencia Territorial de Madrid = Regional Court of Madrid
Sala Primera = First Chamber
Juzgado de lo Penal numéro 3 de Barcelona = Criminal Court, number 3 of Barcelona
Audiencia Provincial de Barcelona (séccion 3) = Provincial Court of Barcelona (section 3)
Sala de lo Penal = Criminal Chamber

Abbreviations

BGH	Federal Court of Justice (*Bundesgerichtshof*)
BverfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
COE	Council of Europe
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IMT	International Military Tribunal of Nuremberg
NPD	National Partei Deutschland
StGB	German Criminal Code (*Strafgesetzbuch*)
UN	United Nations
VStGB	German Code of Crimes against International Law (*Völkerstrafgesetzbuch*)