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# Holocaust Denial as Memory Criminal Law Seen Through the Nordic Lenses

KIMMO NUOTIO\*

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## Abstract

Dealing with historical matters by means of law has become increasingly common. The matters, such as the Holocaust, that have merited the attention of legislatures are, however, exceptional. The painful memory of the horrible events has required a profound rethinking of the basic premises of political and legal life in Europe.

When criminal law is being used to protect the memory of those facts and of the victims of the offences, we enter a level of highly symbolical legislation. In Continental Europe, the discussions concerning criminalisation of Holocaust denial emerged in the 1970's, and in the 1990's criminalising was already in full swing.

The Nordic countries have been slow in joining such developments. In this paper we will try to bring the Nordic countries on this map by introducing some of these discussions to the Nordic scholarly audience, but also by reporting to the international scholarly community about some Nordic and particularly Finnish aspects of those subject issues. It is time for Nordic criminal law scholars to join these debates and to bring in viewpoints on the basis of Nordic criminal law and theorising. This article aims at contributing to such a discussion.

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## 1. Introduction

Doctrinal criminal law scholars tend to avoid setting norms of criminal law in a historical and political context. The concept of legal validity and the present is what matters, not the past, not the future. The legislature decides on the criminalisation which the courts then apply in individual cases. In the ordinary running of criminal justice this seems to be enough. History has had a limited place in the sphere of criminal law thus far.

Once we start discussing issues such as the Holocaust denial, we enter a field in which political history draws the focus. It is a historical era which reaches out to the future. The evil events happened two, three generations ago, but their shadow on what humanity stands for is still there. All nations have their wounds, but some wounds are commonly European.

Dealing legally with the past introduces new types of issues for the discussion, especially when we would have to prioritise certain memories over others. We are caught up with dilemmas since legislating on historical matters is not the usual thing we do in the field of criminal law. The concept of memory laws has been introduced to describe this phenomenon. The term 'memory laws' (*lois mémorielles*) was coined in France in the 2000s precisely to refer to legislation penalising denial of Holocaust or recognising certain events as crimes against humanity while not prohibiting their denial.<sup>1</sup> Accordingly, we talk about the significance of certain established historical facts and attach legal obligations to ways in which these historical facts may be addressed in public. Memory laws aim at protecting and preserving certain historical truths which are deemed to possess a particular merit and value. Legislating memories also makes them a tool for politics. The legislation can be used for various purposes. Memory laws on human rights violations are a way of respecting the victims of those crimes. The Holocaust denial issue is the paradigmatic example here.

Another avenue has also been used: States may equally seek to protect themselves by memory politics. Memory laws may be used as tools for nationalistic purposes. Turkey is an example of a more state-centred memory politics: Offending the state and its key bodies has been rendered an offense. Barkan and Lang put this into words:<sup>2</sup>

*... if we are to map out a typology of memory laws, we must distinguish between those countries who pass memory laws to acknowledge their own criminal past and to protect against the defamation of minorities, and countries who promote memory laws in order to repress minorities and invent a cleansed nationalist tradition.*

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1 Kopusov (2018) p. 1.

2 On the two lines of sources of memory laws, see Barkan and Lang (2022) pp. 3-6, 12. We will below come back to Turkey and other contemporary examples.

In the following we will mainly be dealing with Continental European issues of Holocaust and genocide denial, yet it is still important to bear in mind that memory politics may arise from other than human rights concerns. Both strands are themselves historically conditioned. I will summarise some of that here as these developments may not be so familiar to the readers in the Nordic criminal law circles.

The Nordic countries have been in the outskirts of these developments, and they have also been generally hesitant in adopting memory laws, especially memory criminal laws. In academic books and articles on the matter, written mostly by historians, the Nordics are not discussed frequently.<sup>3</sup> The Nordic countries see themselves as forerunners in protecting democracy, freedom of speech and human rights. However, the discourse of Holocaust denial has not been strongly present on political agendas, and the legal literature on memory criminal laws in Nordic languages is scarce. It seems that the discussions have mainly landed in the Nordics through international and European law. Within academia, the traditional human dignity-oriented strand of memory laws is considered more prevalent than the strand stressing the national pride of (usually) authoritarian countries. Making ‘incitement to hatred’ a punishable act fits in the system of criminal law much more easily than having an offense of insulting the pride of a country, to give an example.

While criminalisation of using Nazi symbols has been somewhat discussed in the Nordics, Holocaust denial has attracted considerably less attention. The use of Nazi symbols has been understood as falling under the offence called an ‘incitement to hatred’. The Norwegian penal code entails a separate mention that symbols count as expressions, but this does not bring use of Nazi symbols automatically under that criminal provision.<sup>4</sup> In fact, there is case law pointing rather the opposite.<sup>5</sup> Norway is not a Member State of the European Union and thus is not obliged to implement the EU Framework Decision (FD) on racism and xenophobia.<sup>6</sup> During recent years no public debate on the need to introduce provisions on Holocaust denial has occurred. Norway is, however, part of the International Holocaust Remembrance Alliance (IHRA) and supports its activities in the field.<sup>7</sup>

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3 See, however, Simonsen (2021) and Miklóssy (2021).

4 Straffeloven § 185. *Hatefulle ytringer*.

5 Agder Appeal Court 29 June 2020 - LA-2019-152301. Three men were acquitted for committing hate speech after putting up Nazi-flags in Kristiansand city together with the slogan ‘We are back’.

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

7 NOU 2022: 9, p. 201.

Sweden applies the provision on incitement to racial hatred to the use of Nazi symbols. A case law of more than 100 convictions proves that this in fact happens. Hence, in Sweden there is rich case law on this offence.<sup>8</sup> However, no specific norms on the denial of the Holocaust have been passed. In 2021, a committee consisting of members of Parliament was set to scrutinise whether there was a need to amend existing legislation on the incitement to racial hatred in order to ensure that Holocaust denial and genocide denial, as well as some other actions, will be considered crimes according to the Swedish criminal law. The scrutiny was triggered by the notification of the EU Commission on a failure to correctly implement the FD on racism and xenophobia.<sup>9</sup> The Swedish committee has submitted its unanimous report in April 2023, and for clarification, it proposes the adoption of a specific offence.<sup>10</sup> However, the legislative process will take some time since the Swedish constitution needs to be amended as well.

Finland received a similar notification from the European Commission, but it has not (yet) opened a similar review procedure. Neither has Denmark. In Finland a political decision has been made to add a specific criminalisation of Holocaust denial to the Penal Code. The Finnish Penal Code provision on incitement to racial hatred is very similar to the Swedish one. The Finnish legal provision on incitement to hatred is placed in the chapter 11 on war crimes and crimes against humanity which is a unique solution in the Nordic setting and gives the provision a special weight.

## 2. A rich vocabulary

Holocaust denial pertains a rich vocabulary. It is both a moral and a legal issue which can be addressed in the language of memory laws. It relates to symbolism, human rights and values, constitution and identity building, nationalism and political commitments, the universalism of human rights protection, concrete collective recognition of the persecution and victimisation of a particular group of people by and within a particular political regime. It is versatile. Even though memory laws deal with history, the interest in this history is of political nature. Holocaust denial is a practical political issue, but at the same time it reaches out beyond politics. It is a political history issue, but in a very particular sense. It entails a political legal definition of features of (national/European) history. 'The never again' promise of Holocaust denial norms indicates that the political choice of memory laws is meant to create a basis for politics after a disaster of politics.

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8 SOU 2019:27.

9 In Germany the notification led to an amendment of the StGB § 130 on the incitement to racial hatred in 2022.

10 SOU 2023:17.

Accordingly, when entering the discussion on these issues, we first have to commit ourselves to deepening our historical consciousness and recognising the sensitivities which are linked to it. But we will also have to be aware of the context in which the memory laws are being created and used. This is evidently a highly topical area for discussions on how law relates to politics. Memory laws tell about the polity itself which is issuing and cherishing such laws. Memory laws are glaring indicators of certain qualities of polities in question.

Memory laws are being used to manifest and to build collective identities. This is what makes them politically tempting. In Europe, it all started with the discussion on the significance of the Holocaust. Holocaust was a singular historical event or a chain of events which has become kind of a taboo, and rightly so. The absolute evil of destroying an entire group of people by means of an industrially organised persecution called for the founding of a human rights regime to prevent that such an event would ever reoccur.

And even though the significance of the Holocaust has set the tone for the post-WW2 Europe, different parts of Europe have also had their own individual experiences, views, relations and historical consciousnesses which weigh in when relating to issues of how and why to criminalise and how to put Holocaust or genocide denial in context. Europe was rebuilt on ashes. The systematic killing of Jews and other groups in Europe was the absolute ethical bankruptcy of Nazi politics and a painful memory that will haunt us forever.<sup>11</sup> The persecution was not carried out by breaching the legal order, but rather it was organised through legal means. We will later come back to issues on abuse of right. Nazi law was abusive in its entirety. Human dignity and the equal value of all human beings would be the definitional elements of the new ethical and legal order to emerge afterwards.

In the literature, there are references to the fact that the rise of memory politics and the idea of constituting identities through memory laws can also be linked to changes in contemporary societies. The rise of human rights law, the end of Europe being divided in two ideologically different blocks, the advancement of European integration and the weakening of a national-conservative view on history, and many other factors have played a role and shaped the space for memory laws to emerge. It is in this setting that the idea of memory laws started gaining ground. The question of criminalising Holocaust denial stands out as a European focal point in these debates. The emergence of fascist or neo-Nazi movements in Europe in the 1970's raised these issues. It seems that the state-centred nationalistic strand of memory laws arises from a different background. It is rather based on readings of history as self-victimisation combined with the aim to restore national pride.

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11 E.g., Snyder (2011).

### 3. Setting the scene

The founding of the United Nations, the Council of Europe as well as the European Union are all more or less reactions to the horrors of the war, not to mention the developments in the field of human rights protection. The Federal Republic of Germany was established, and its Constitution included *Ewigkeitsklausel*-provisions which should never be amended – not even with the greatest majority in the Federal Parliament. Certain fundamentals were politically locked. Human dignity, the right to life and physical integrity were defined as core constitutional values.

The Nuremberg trial of the Nazi leaders was in fact more about the crime of aggression, war crimes and crimes against humanity rather than directly about the Holocaust. The charges against Nazi leaders focused on the aggressive warfare rather than the horrendous destruction of Jews. The US arranged the prosecution of the perpetrators of the Holocaust in twelve additional trials concerning the middle-level actors of the Nazi regime. The idea of individual criminal responsibility under international law made its breakthrough, and the human rights-based concept of crimes against humanity was introduced, with Hersch Lauterpacht having been the influential theorist in that enterprise. The crime of genocide, the term coined by Raphael Lemkin, was being constructed and the international convention on genocide was drafted (1948). Over time, the Holocaust has become an important symbol of the evilness of the Nazi regime.<sup>12</sup> However, right after the end of the war and the Nuremberg trials, the Holocaust had not yet become a focal point, not even in the Central European countries. The perceptions of what had happened, and what was considered important, varied. It was only in the 1970's that Holocaust denial became a societally relevant matter, at least partly due to the emergence of loud revisionist and fascist movements causing social unrest in some Central European countries.

France is the home of memory laws and the related memory politics through law. The Gayssot Act from 1990 penalises Holocaust negationism, and the 'Armenian law' of 2001 recognises the 1915 massacre of Armenians in the Ottoman Empire as a genocide. Some of the French memory laws penalise negationism whereas some of them are declaratory and thus linked to the other laws. In a nutshell, during de Gaulle's time, the interpretation of the historical events was to perceive them from a national-conservative point of view and to celebrate the resistance (*La Résistance*) towards the Nazi occupation. Towards the 1970's, a leftist view gained ground in France refusing to rehabilitate this nationalistic history and accordingly to admit a French responsibility of the Holocaust. A test for this battle was when a French professor of literature named Faurisson had denied the existence of gas chambers for extermination purposes in an article in *Le Monde* in 1978. This caused a debate on the limits of the freedom of speech and triggered a lawsuit. The *affaire Faurisson* led to the view that if a person issuing such statements does not care about searching

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12 On the background of these developments, see, for instance, Sands (2016).

for the truth, such negationist claims deserve to be regarded hate speech.<sup>13</sup> As it was not unproblematic to bring evidence in an ordinary court of law on such issues, the idea emerged to draft a law on the matter. The trial of Klaus Barbie and other events contributed to the rising popularity of criminalising Holocaust denial. A political consensus emerged, supported by most intellectuals. It has also been mentioned that later, after 2000, France became a centre of intellectual criticism of memory laws such as the Gayssot Act.<sup>14</sup>

Concomitantly, in the 1970's and 1980's, several efforts were undertaken in Germany to introduce a specific criminalisation on Holocaust denial. These started during the social-democratic Brandt-Schmidt period and were continued under the rule of Christian democratic Kohl. It proved to be impossible to agree on a specific Holocaust denial offence, but a broader criminalisation also covering the denial of other genocidal events by authoritarian governments was introduced. This compromise enabled a broader support that not only a particular wrong was being addressed. At the same time, it paved the way for debates on other comparable evils.

*Building social consensus (and European identity) around the legacy of anti-fascism was important to the integration of the political tradition of the left into the post-Cold War order (which was gradually shifting to the right).<sup>15</sup>*

The *Historikerstreit* in Germany in 1986-1987 was about whether enough time had passed for Germany's guilt to have weakened and for the country to return as one nation among nations. Ernst Nolte, for instance, had claimed that the Holocaust had not been a singular event and that it could also be seen as a defence against the threat of communism. But for many, the Holocaust was a taboo which should not be dealt with.<sup>16</sup>

The plea for a distinct crime of Holocaust denial was then triggered by a court decision: in 1994 the Federal Court of Justice repealed a verdict of incitement to hatred against the leader of the neo-Nazi party National Democratic Party of Germany ('NPD').<sup>17</sup> Germany criminalised Holocaust denial already the same year. Even before that, it may have been a crime due to other existing offence descriptions.<sup>18</sup> The German Federal Constitutional Court reviewed the new act in terms of its compatibility with

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13 Kopusov (2018) pp. 82-84. Faurisson continued his activities and was finally dismissed from his chair in Lyon. He brought his conviction to the UN Human Rights Committee, which found no violation of freedom of speech in his conviction. *Robert Faurisson v. France*, Communication No. 550/1993 U.N. Doc. CCPR/C/58/D/550/1993 (1996).

14 Kopusov (2018) pp. 84-85.

15 Kopusov (2018) p. 80.

16 Wandres (1999) p. 26.

17 Rhein-Fischer and P-Mensing S (2022) p. 14.

18 Gesetz zur Änderung des Strafgesetzbuches, der Strafprozessordnung und anderer Gesetze v. 28. 10. 1994. Wandres (1999) pp. 123-141.

the constitutionally protected rights, especially freedom of expression. According to Dieter Grimm, the Court approved the criminalisation only due to specific German conditions. The decisive factor was not that the Holocaust would have been seen as 'the evil as such', but it was the interest of the Jews still living in Germany, 70 years after, which called for protection. Grimm observes that the European Court of Human Rights seems to accept a broader criminalisation.<sup>19</sup>

As such, it took almost half a century from the actual events of the Holocaust to the criminalising of its denial. The Holocaust denial made its way to the Joint Action which was adopted by the Council of the European Union in 1996. Then, however, the Joint Action was not yet a legally binding instrument but rather an expression of a common political will. Moreover, the term Holocaust did not appear in the text of the JA. Instead, a broader scope was covered:

*(b) public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;*

*(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;*<sup>20</sup>

A legally binding duty to criminalise Holocaust denial arises out of the EU Framework Decision (FD) against racism and xenophobia from 2008<sup>21</sup> which was adopted following a German initiative. The negotiations lasted for seven years, even though quite a few Member States had already by then introduced memory laws on the issue. The debates concerned mainly whether the use of Nazi symbols should be included as well, and whether the crimes of communist regimes would be covered. In the end, both of them were dropped.<sup>22</sup>

Following the principle adopted already in 1996, the sphere of the criminalisation extended beyond the denial of Holocaust. The FD was founded on the values of the European Union. Already in the lead Article 29 of the Amsterdam Treaty of the EU (1997/1999), combatting racism and xenophobia was mentioned as a target of the Union. We could also refer to the Article 2 of the Treaty of the European Union from 2009:

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including*

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19 Grimm (2009) pp. 557-561.

20 96/443/JHA: Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

21 Council Framework Decision 2008/913/JHA pp. 55-58.

22 Matuschek (2011) p. 239.

*the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The FD has contributed to an increased number of national criminalisation in the field.<sup>23</sup> The Council of Europe has drafted an Additional Protocol to its Cybercrime Convention. It addresses Holocaust denial practically the same way as the European Union does.<sup>24</sup>

In 2022, the UN General Assembly issued a resolution on Holocaust denial, following two previous ones from 2005 and 2007.<sup>25</sup> Promoting the criminalisation of Holocaust denial has not yet become a completely global project. When going beyond the liberal West, the countries backing that resolution are not that numerous.

#### **4. The variable anatomy of memory laws and memory criminal laws**

The idea of the memory laws is to recognise past wrongs and secure the presence of those wrongs in contemporary society and politics. Memory policies and laws may have a link to museums and remembrance days: They establish a truth, often originally an unpleasant one, and are signs of a change. Often, we even speak of a 'duty to remember' (*devoir de mémoire*): The Holocaust should never be forgotten.

Not remembering the Holocaust or denying the truth about it are regarded as wrongful actions. And, in fact, they are, since distancing oneself from these truths is often linked with political ambitions to repeat something similar. They may stand for a revival of ideologies that stood behind those events in the past. There are thus both practical contemporary reasons and in-depth theoretical and value-related reasons to see Holocaust denial as a wrongful action.

Memory laws tell the story of a victimisation. The memory of the Holocaust is not only the memory of the horrific crimes the Holocaust represents, but it includes the memory of the victims of the genocide. Memory criminal laws are more than just ordinary memory laws. Memory criminal laws criminalise the denial, mitigation or trivialising of historical truths. The sphere of memory criminal laws is thus more limited than that of the memory laws in general. Memory laws in this broader sense are not as problematic and as exceptional as memory criminal laws. Memories of this kind fall outside of what has usually been protected by means of criminal law. However, they have a link to protecting the rights of a group. Criminalising negationist activities is closely related to provisions on incitement to hatred, which

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23 For a review of the current state of affairs, see the report: Bąkowski (2022).

24 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. (2003).

25 <https://new-york-un.diplo.de/un-en/-/2507408>. Last accessed 11.9.2023.

have a background in international law. These have already entered the penal codes of the world's legal orders some decades ago due to obligations following the adoption of UN convention ICERD in 1965 (Art 4), for example.

Holocaust (or genocide) denial is a specific issue since a denial expresses a defaming action not only vis-à-vis specific groups of people, but also insulting the memory of the victims of the factual historical chain of events. Incitement to hatred is a well-established crime, and Holocaust denial shares features with it. Holocaust denial stands out as an even more symbolical criminalisation. It is an extension of incitement to hatred. Memory criminal laws addressing gross human rights violations are sort of a sub-category of incitement to hatred, but not all incitement to hatred provisions share the character of memory laws. Some state-centred nationalistic memory criminal laws are not connected to suppression of incitement to hatred.

Memory laws are a sign of collective remembering. Collective memories are important in identity building, and there are political aspects involved in choosing the things to remember. The issue of memory laws, as exemplified by the Holocaust denial, are in a scholarly sense a meeting ground for legal scholarship, political history and political studies more in general. Memory laws are signs of memory politics which point out historical facts as identity builders. They tell not only about victims in a collective sense, but also about new political identities keeping their distance from certain practices. In political history, reading the theoretical questions pertains to the choice of the wrongs that carry with themselves a historical meaning which the memory laws then can operationalise. Memory laws also are a topical issue simply because of a general rise of memory and identity issues during the last decades. Quite obviously, memory laws may appear in a nationalistic context and are part of nations dealing with the past.

From the perspective of political studies, which is nowadays somewhat critical towards the use of history in identity building, one problem is the selective utilisation of the truths and the related simplification of history. The Holocaust, for instance, was a complex phenomenon, and even though the main drivers were the Nazi leaders, there were many collaborators including citizens of the occupied countries. In France, for instance, some historians have been protesting against the idea of memory laws. In 2008, in the same year of the above-mentioned EU FD against racism and xenophobia, an association of historians published a manifesto 'Blois Appeal' (*Appel de Blois*) which was signed by several world class historians including Eric Hobsbawm and Jacques Le Goff.<sup>26</sup> However, in the European debates also other dark legacies of the European past have been seen as worth memorising and addressing. Past colonialism

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26 An excerpt in English: 'History must not be a slave to contemporary politics nor can it be written on the command of competing memories. In a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions.' The appeal was published in French in *Le Monde*: see Nora (2008). See, generally on the criticism by historians, Kuposov (2018) pp. 119-125.

and imperialism have caused enormous suffering and still cast a shadow on the place of Europe in human history. The enlargement of the European Union brought up also the crimes committed in the name of communist and other dictatorial regimes. Recently even the Holodomor, the man-made famine in Ukraine, has been listed among them.<sup>27</sup>

During the communist rule in the former Soviet Union, the Holocaust memorials were interpreted in line with antifascism. The Great Patriotic War of Soviet Union had ended the fascist crimes. In Russia, this narrative still dominates. Winning the war counts more than the crimes against humanity that Stalin's regime was responsible for. The culture of victimhood so to speak did not play the same role as in the West. In Russia, the Soviet people were regarded both the victims and heroes of the war.<sup>28</sup> In the communist East European countries, dissidents were targeted by 'memory laws' which criminalised utterances that could be interpreted fascist or slander against the state.<sup>29</sup> After the fall of communism, the memory laws sometimes addressed the denial of both the Nazi crimes and the communist crimes. Poland did this in 1998. The denial of the Holocaust was covered by the law, but only implicitly. The Polish model was later adopted by Lithuania, Hungary, Latvia and Ukraine.<sup>30</sup>

In fact, Ukraine is a case in point when looking at how memory politics works. For Ukraine, the memory of the Holodomor was a symbol that could unite people better than the memory of the Nazi crimes. The Russian Great Patriotic War was politically not an option, and as Ukrainian national heroes had been collaborating with the Nazis, that was problematic as well. The Holodomor was a nearly forgotten event, which could be activated in the memory. The memory of the Holodomor also fitted the story of communist crimes and it provided for a tempting a distance from the Russian memory politics.<sup>31</sup> The Ukrainian situation led to disagreements on the interpretation of the past, and various law proposals followed one another. A law from 2015 called for memorising all victims of the World War II, but also the victory over Nazism had its Memorial Day.<sup>32</sup>

The case of Russia is a special one since memory politics and memory laws occupy a particular position in Putin's rule. The collapse of the communist rule in 1991 led to a period when the Soviet legacy was assessed critically. Towards the end of the 1990's, memory politics started drawing more attention, and the European models had an influence on the discussions. When Putin came into power, extremist activities were

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27 See the discussion in Löytömäki (2014) Chapter 2, esp. p. 34: 'In the present we can find a surplus of memory in Europe.'

28 Kopusov (2018) p. 137.

29 Kopusov (2018) pp. 148-152.

30 Kopusov (2018) p. 160.

31 Kopusov (2018) pp. 181-187.

32 Kopusov (2018) p. 202. See also Zhurzhenko (2022) pp. 97-130.

made an administrative offence.<sup>33</sup> Memory politics was developed along with political technology. In 2012, a further conservative turn followed. The perception of Stalin shifted towards heroism, but since the people's memory of Stalin was still contested, a new object for a collective memory had to be found. The Great Patriotic War took that place and the victimhood of the war was reallocated from the Jews to the Russians. The war was about fighting fascism, and it was a tragic war fought by the Russian people and the Russian state. This is a remarkable result of a technological refinement of a memory. This memory could be shared by all Russians, and at the same time it would grant legitimacy to the Russian leadership.<sup>34</sup> The war against Ukraine has narrowed the core of the memory: the aim is to protect the military glory of Russia.<sup>35</sup>

Learning about the many purposes for enacting memory (criminal) laws in Europe demands a reflection on how they settle within our criminal justice systems. For us legal scholars to answer to the criticism that the legislatures are selectively picking symbols and using them in identity building, we would need to explain the reasons for addressing them in law, even by means of criminal law. Here, there are two different routes available to reason and to address these issues. The first one would stress the risks and dangers of a return of movements and ideologies with obvious discriminatory programs, and often with illiberal and authoritarian views. The other route would be a more complex one. Namely, we could seek to ground the memory laws with a broader, even universal substance. Instead of Holocaust denial we could speak about the denial of gross human rights violations, or the denial of international core crimes, for instance. This would be close to the approach of the European Union, which stands for the equality of all humanity as well as standing up for fundamental rights. This approach would be based on the expressive function of law rather than utilitarian consequentialist concerns.<sup>36</sup>

As criminal law should only be used to protect rights and interests, the question arises: What is the interest in this case? A memory itself cannot be grasped as easily as a protected interest, unless a certain memory is regarded as a part of our self-definition as persons, as societies, as countries, or as nations. Such use of criminal law looks rather questionable since criminalisation does not only concern natural and institutional facts, but political phenomena. In a political order where rights and liberties of the individual are core values, such a public law perspective on identity building through criminal law looks suspicious.

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33 Kopusov (2018) p. 237.

34 Kopusov (2018) pp. 243-253.

35 Kopusov (2022) p. 165: 'Russian legislation of the past and its application focus almost exclusively on the country's military glory. This makes this legislation the exact opposite of its West European homologue.'

36 See Sunstein (2021) p. 2045.

We might also look at the phenomenon of Holocaust denial as an offence from another viewpoint. Perhaps one can consider that kind of criminalisation to be an expression of deeper underlying values such as humanity and human dignity.<sup>37</sup> In that sense a criminalisation of Holocaust denial and the denial of the gravest human rights violations in general, would be the core point of reference in the system of criminal law overall. Not only is genocide the crime of the crimes, but also in terms of values: It represents an anti-thesis, a violation of a concentration of the values informing a human rights and anti-discrimination based legal order. Holocaust denial as well as Nazi symbols condense content which simply must be excluded. In the European human rights context, the doctrine of the abuse of rights takes the stage here. The 'programs' that these symbols stand for threatens the liberal legal and political order. Therefore, they will have to be excluded as a matter of principle.

It is this link to the deeper values which connects a specific concrete wrong to universal values. This, in turn, should also be brought up with the aspect of temporality. The public blame for concrete evil offenses may diminish over time. There is often no statute of limitations for cases of murder but still we would not stress the necessity to remember all murders. Individual wrongs have different scale than collective evils. Societies cannot only look backwards; they will have to move on. The matter with genocide is different. Due to its significance and its connections with core constitutional values, one could maintain that such memory of the past should not weaken over time. The universalism of the phenomenon may ground the argument that the passing of time should not be allowed to undermine the memory.

I will later come back to the issue of Nazi flags and how their use should or could be criminalised today. Notably, a Nazi flag is not only a general symbol, but a particular symbol of a very particular political regime. Waiving a Nazi flag in public sends messages to bystanders and passers-by. It triggers memories, connotations and sensitivities. It was the sign of the regime which caused the horrors of the Holocaust and other atrocities. We would need to move over to a semiotic scrutiny. A Nazi flag equals with the evil on a semiotic level nowadays. It is the epitome of the claim for the primacy of the Aryan race and the elimination of Judaism. We should also be mindful that Nazi ideology was heavily propagated by modern mass media tools. Nazi symbols were incremental tools for Nazi propaganda. This further underlines the symbolic value of Nazi symbols and renders them an incitement of hatred. It is impossible to refute the presumption that these symbols were not connected to hatred directed at minorities.

The semiotic value overrides the individual goals, whatever they are, and the aims of the carrier of the flag. It is in fact difficult to see any other purpose for the flag than the promotion of the Nazi ideology, if the person is in his or her sound mind. The flag

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37 Jeremy Waldron has been advocating a dignity-based approach to the limiting of free speech in the interest of hate speech. See Waldron (2012).

is directly connected to the object of the memory that has been addressed in memory laws. The universalism of underlying constitutional values calls for a prohibition of using Nazi flags, at least in public.

There is something deeply contradictory in even attempting to justify the use of a Nazi flag. The contradictory element comes with the feature that a Nazi flag represents a total negation of the rights of groups of people. A Nazi flag represents the Nazi law and its view on minorities and the ideas of rights. It is no coincidence that Nazi flags fall into the area of abuse of rights, the abuse of law. You cannot claim a right to use Nazi symbols since such use falls outside any idea of an exercise of a right. Thus, prohibiting the use of Nazi symbols is not really restricting any rights, since there cannot be a right.<sup>38</sup> This is an exceptional constellation in the field of criminal law, where usually you can say that penal prohibitions are precisely limiting the exercise of rights. Thus, it would not be surprising to consider that the use of Nazi symbols would constitute an incitement to hatred as prohibited by criminal laws in Europe, since the symbol is in itself threatening.

We cannot go into detail here, but it is important to note that the Holocaust has given a name to a specific regime. The persecution of the Jewish people, and other groups, was not a random separate feature of a 'normal' State governance, but it was an elementary part of the emerging Nazi thinking and ideology. By condemning the Nazi past, we are condemning the entire way of thinking about law and justice in those terms. Nazi legal thinking was presenting itself as a materially justified entity, as a law with ethical qualities. As lawyers and as legal scholars, we would have to bother to dig into this in order to understand the depth of the intellectual bankruptcy that followed. It was something very different from the legal positivist thinking which starts with the letter of law.<sup>39</sup>

Undoubtedly, the Holocaust became a defining moment in the European 20th century history. It is understandable that memory laws have been enacted to further cement the foundation of the European law and the European constitutional identity in defining it as a universal choice of values. Suppressing hate crime, hate speech and Holocaust denial are not only issues for the EU Member States' domestic law, but an important part of the European criminal law. There is a link also to a developing European constitutionalism.<sup>40</sup> The universalism in Europe does not, however, equal to being universal globally.

But not only is it relevant to discuss the universalism in terms of geographical coverage, since there are other factors which must be taken into account when discussing the legitimacy of memory criminal laws. Memory criminal laws are restricting the freedom of speech, and an understanding of how this can happen is a part of the

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38 Wagrandl (2019) names this a performative self-contradiction.

39 Jouanjan (2017). Cf. also Fraenkl (2017).

40 Cf. some of the observations in Nuotio (2011) pp. 311-337.

question. The U.S. is known for a very strong protection of the freedom of speech whereas in the European constitutional and human rights tradition restrictions can be more easily introduced. We could thus say that the European human rights law, which is partly a product of the post WW2 legal and political development, has been a prerequisite for the memory criminal laws to emerge.<sup>41</sup>

Memory criminal laws share a strong symbolical nature. They preserve memories for securing that these facts are not being denied and forgotten. Winfried Hassemer, among others, has pointed out risks in stressing too much the symbolical nature of the criminalisation.<sup>42</sup> The more we stress such aspects, the more difficult it will be to assess the necessity and effectivity of such a regulation. It is simply the foundational symbolic value which could motivate an approach of legislating through memory criminal laws.

## 5. Finland – positioned on the scene

I will now seek to link the previous discussion to a particular Finnish point of view, knowing that the thoughts presented here are of a character of hypothesis rather than established truths. I think it makes sense to start a discussion of these things in law, especially in criminal law, and I believe we here might gain new insights into the role of history and politics in our criminal law scholarship.

Finland ratified the Genocide Convention in 1970 and amended the Finnish Penal Code accordingly. In early 1970's, a provision on the incitement to hatred was added. In the Government Bill it was stated that the criminalisation is based on Finland's international obligations, and it is unlikely it will ever be applied. However, since 1990, case law on incitement to hatred has emerged. The Finnish Penal Code entails no specific criminalisation on Nazi symbols or the Holocaust denial, but a common understanding among experts has been that the provision of incitement to hatred applies for acts of this kind.<sup>43</sup>

The current state of affairs was discussed in the Finnish Government Bill (2010) that dealt among other issues with the national implementation of the FD on racism and xenophobia. It was explained in the Bill that the laws on the Holocaust denial were typical of countries that had been occupied by the Germans during the war, whereas the Nordic countries had not faced that road. They were also strong supporters of the freedom of speech. Reference was made to the case law of ECHR, such as *Lehideux and Isorni v France*, in which a negationist action of Holocaust denial had been regarded as not being protected by the Art. 10 of the ECHR, the provision on the freedom of

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41 See, e.g., the discussion in Knechtle (2008) pp. 41-66.

42 Hassemer (1989).

43 See, generally, Nuotio (2021).

speech.<sup>44</sup> As a result, Finland should apply the incitement to hatred provision of the penal code in cases in which a racist and inciting motive can be proved. One should, however, be able to discuss the events of the Holocaust on journalistic accounts and in scholarly history writings, as this may shed light on these events. It was also stated that plain negationist claims fall under incitement to hatred. At the time, this was confirmed by a judgment by a court of appeal, in which a negationist writing in media had led to a conviction.<sup>45</sup> Finland ratified the Additional Protocol of the Cybercrime Convention, but has kept in force the reservations regarding the protection of freedom of speech. The same applies to the other four Nordic countries.

The formulations above tell of a calm and principled approach. Negationist claims are already considered criminal actions, but some details of Holocaust denial may still be open to debate. On the one hand, it could be said that the Finnish approach might not be categorised as that of memory criminal laws, since the memory of the Holocaust has not been lifted as a taboo which stands outside of what can be questioned in science and journalism. On the other hand, the practical reason to criminalise it arises from the obvious connection with the current-day politics: promoting a neo-Nazi ideology. Thus, in fact, this is not so different from the other utterances that are covered by that piece of legislation. In the very limited case law, negationism has in fact been linked to the Nazi ideology and racism also otherwise. Presumably, this will often be the case: Negationism will be embedded in a context which itself constitutes the elements needed by the description of the offence.

Such ideologies have gained some backing of a small minority, even though a marginal one. In the 1970's in Finland some small associations with a (neo-)Nazi character were ordered by a court to disband based on the rules on banning an association which operates unlawfully and violates good manners. Recently this became topical again. In its decision (2020:68) the Finnish Supreme Court (FSC) ordered the banning of the association Nordic Resistance Front which was promoting a program of Nordic white male supremacy. The FSC reasoned that the National Socialist goals and the anti-Jewish agendas including the denial or the trivialisation of the Holocaust, and the acceptance of violent actions for that purpose, justified banning the association. Several aspects in the program of the association amounted to incitement to hatred as defined by the criminal law provision. The association was not protected by the freedom of association or the freedom of speech as the FSC regarded that the

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44 *Lehideux and Isorni v. France*. The case concerned an advertisement inviting for a rehabilitation of Marshall Pétain who acted as the head of the Vichy administration under the occupation. It was rather *obiter dicta* that the Court observed that a Holocaust denial would have fallen outside of the scope of protection of Art. 10. See, *ibid.*, para 47.

45 The Finnish Government Bill 317/2010 vp. – There were actually two judgments by the Court of Appeal: a judgment from 25.5.2007 (R 07/629) and one from 18.2.2009 (R 08/607). This line of interpretation is further confirmed in two recent judgments of the Helsinki District Court (30.12.2022, 5.6.2023, two strands of R 21/5462, not final).

activities indicated an abuse of such rights and freedoms. The abuse of rights is a well-established principle and a doctrine which is provided by the article 17 of the ECHR, for instance. The Finnish Constitution remains silent on this principle.

In August 2021, the Helsinki District Court issued its judgment on a case where the prosecutor had pressed charges against members of the above-mentioned Nordic Resistance Movement on accounts of incitement to hatred.<sup>46</sup> The prosecutor claimed that the Nazi flag was an expression of the national socialist ideology which bore connotations of persecution of the Jewish people, of the denial or the trivialisation of the Holocaust as well as racist beliefs. The flags had been used during a march on the Finnish Day of Independence and could be regarded as a strong and clear statement against the Jewish community but also more generally against immigration and immigrants.

Surprisingly, the Court, considered the action was not criminal. According to the Court, the case resembled the case of *Faber v. Hungary* in which the European Court of Human Rights had reflected on using an old Hungarian flag which was the symbol of the short-lived Nazi regime in Hungary. Also in this case, the act had consisted only of the use of the flag, but no other verbal threat of violence or equivalent had been established. The ECHR allows for a margin of appreciation and that the national circumstances are considered. The Helsinki District Court held that Finland and the Nazi Germany had been allies during the war time and that the Nazis did not direct their crimes against Finland or Finnish nationals. The few Jewish citizens that were deported from Finland had been under Finnish jurisdiction and the decisions had been made by the Finnish authorities. The Nazi flag itself was not prohibited in Finland. The Court held that the Nazi persecution of the Jews and the Holocaust were undisputed facts, and the accused had spread the opposite messages. But it also held that without an extensive interpretation of the actions and the expressions the accused had been using, the Finnish Penal Code provision on incitement to hatred could not be applied. An appeal is pending at the Helsinki Court of Appeal.

The reasoning of the Helsinki District Court offers not only a narrow and legalistic approach on interpreting a provision of the Penal Code, but also a relativising approach to the issue of the Nazi ideology. The relativism does not concern the underlying ideology of the Nazis or the events of the Holocaust itself. It rather appears in the reference to the relationship of Finland and the Finnish people to those contents which create a certain distance, both temporarily, geographically and politically. To put it bluntly, Finland and the Finnish people were not amongst the victims of the Nazi regime. Finland was allied to Nazi Germany in its war against the Soviet Union. Time has passed.

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46 Helsinki District Court, judgment 30.8.2021, R 20/1163.

It is true that Finland was following a path of its own before and after WW2. Even though during the Continuation War Finland was militarily allied to Germany, Finland did not hand out the Finnish Jewish citizens to the Nazis. However, a handful of Jewish refugees and prisoners of war were extradited to Germany and later executed.<sup>47</sup> Finland maintained its independence throughout the war times, and afterwards it developed its identity as a neutral country and sought to stay out of the political struggles between the big powers and their alliances. Finland collaborated with the West, but joined the Council of Europe first after the iron curtain had fallen. It also joined the European Union in 1995. Finland had experienced tough wars, but it had not been occupied nor had there been times like that of a Nazi regime.

The relativism of the Helsinki District Court may be understandable. It is true that from a Finnish point of view, the Nazi ideology and the Holocaust are distant phenomena, and the alliance with the Nazi Germany was strategical, not ideological. Compared to the political history in the Continental Europe, the role of Nazi movements has been limited in Finland. Only the Nordic Resistance Movement, which drew attention after the wave of refugees to Europe around 2015-2016, could be seen as a visible carrier of that torch, and, as explained above, that organisation and its flags were effectively banned. The decision raises, however, the question of whether the relativism is compatible with an in-depth European understanding of the Holocaust.

Finland, as the Nordic countries in general, does not have memory laws of the kind referred to above. We should, however, be mindful that since Finland had been at war against the Allied Forces, the Paris Peace Treaties had been concluded in 1947 between the parties. In article 8 of the Treaty of Peace with Finland, Finland committed itself to dissolving all fascist political and military associations, and that it would never again allow for organisations to exist and operate which aim at denying the people of their democratic rights. This peace agreement is somewhat outdated in other respects, and it might be doubtful whether one still today should follow it literally. But it gives, in any case, additional support to the view that Finland should defend its democracy against illiberal movements especially of a fascist kind. In that sense, the issue of criminalising and banning certain types of actions is not only a requirement stemming from international law and being foreign to the national history of Finland, but there is a direct link connecting Finland to the conditions of peace after the war.

The political conditions in Finland are, anyway, somewhat different from the Continental European ones. The first two decades of independence were times of strong political divisions, and even a fascist organisation IKL (Patriotic National Movement) challenged the weak rule of law of a young nation. The Constitution and the legal order survived this test, and the legal and political institutions managed to steer the country away from those stormy waters. After WWII, the old cultural ties with Germany were weakened due to the ethical bankruptcy of that country.

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47 Ylikangas (2004) p. 34.

From the Finnish perspective, criminalising use of Nazi symbols and the Holocaust denial could make sense as a part of identity building in Europe, since Finland and the Finnish people identify strongly with Europe in this deeper sense which is manifested also in the political positioning after the fall of the iron curtain. The European system of human rights was even used as a model when drafting the new bill of rights for Finnish Constitution in 1995. In terms of a constitutional identity, the Finnish Constitution is certainly highly European and in line with the European constitutional traditions. The Finnish approach would sit well with a universalist interpretation of the Holocaust denial as a denial of a gross human rights violation which in turn constitutes the foundational principle of the European political community. Human rights, liberal democracy and the rule of law state are inseparable, and both the democracy and the people need to be protected against efforts to introduce discriminatory laws and practices that would go against that foundation.

From the standpoint of criminal law, the problem is that memory laws, which aim at abstract identity building and recognition of a collective victimhood, seem to escape the usual principles of criminalisation.<sup>48</sup> It is easier to introduce written constitutional provisions, which are of symbolic nature, than to do this in the field of criminal law. An additional factor is that criminal law norms should also be applied and not remain dead letters when relevant cases come to a court.

In the Finnish criminal law, the offense of incitement to hatred has been placed in Chapter 11 on War Crimes and Crimes against Humanity. This gives the penal provision a specific status. It is a grave offense even though it only consists of speech, broadly taken. In the Finnish Penal Code there is another potentially relevant Chapter, namely Chapter 17 on Crimes against Public Order. These days the criminalisations in that chapter are no longer that many, but if we take a closer look at the content, we find something related. The offence of breaching the peace of a grave is in fact one kind of a memory law even though we never thought about it. The offence covers for instance defamation of a grave or a memorial monument. In order to rethink the role of criminal law in this area, one would have to look at the understanding of public order offences as well. We might say that provisions such as the one concerning breach of the peace of a grave show that we have some criminalisation in force which serve the purpose of protecting symbolic values which cannot be easily reduced to the interests of the individual.

The Nordic countries have a strong record in protecting the freedom of speech. This may be one of the reasons why the memory laws have not become popular. The human rights such as the freedom of speech and the freedom of association have outweighed the protection of memory values in the sphere of criminal law. At the same time, however, the Nordic countries have been pragmatic and accepted the policy of making incitement to hatred punishable in broad terms. The Swedish courts

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48 Melander (2017).

have an ample case law on punishing the use of Nazi symbols as incitement to hatred. In Norway, the Penal Code provision on incitement to hatred has been amended to cover use of symbols as well, but it does not automatically cover use of Nazi symbols as also other legal criteria have to be fulfilled to trigger off punishability. In the Finnish law, this question is not quite clear yet, especially taken into account the judgement of the Helsinki District Court, referred above.

I would interpret the current situation so that through criminalising incitement to hatred, the Nordic countries have aligned themselves with the obligations of international law. The strong traditions in human rights law and a commitment to the values of the post-war European integration have made it relatively easy. Denmark and Norway even experienced a time under Nazi German rule whereas Sweden and Finland did not. In the Nordic understanding, the reason to suppress Nazi symbols is embedded in the protection of democracy, human rights and antidiscrimination as a whole. The focus is on the legal protections and restraints of today rather than on the recognition of history. Maybe one could also say that the Nordic countries have not experienced such a difficult identity crisis as Germany and France have, and the Nordics have never questioned their identity that deeply. Germany and France and certainly some other countries as well are deeply traumatised by their history, and Holocaust denialism triggers that trauma. The question of Holocaust denial is maybe the most difficult one precisely because it is a more complex construction than ordinary forms of incitement to hatred. It has the strongest touch of memory law.

After the parliamentary elections in Finland in 2023 and a heated debate about racism the new government issued a statement indicating a set of new political and legislative initiatives to address the issues. In that statement criminalising of holocaust denial has been included. Thus, Finland may be following the Swedish model. The statement includes also other memory related initiatives. A memorial day for victims of persecution will be introduced in Finland. The government also commits itself to the task of investigating whether use of Nazi symbols and Communist symbols could be criminalised when this happens in the context of promoting those ideologies.<sup>49</sup>

## **6. The challenge of passing the test of constitutionality**

Even though memory criminal laws on the Holocaust denial express the values of constitutional and human rights traditions, they themselves may have hurdles in fitting in that system. Here again, the issue is the compatibility with the freedom of speech.

The Constitutional Law Committee of the Finnish Parliament has developed a set of criteria which new criminalisations should pass in order to be legitimate limitations of rights of the individual. The Committee has noted that merely symbolic

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49 Valtioneuvoston tiedonanto (2023).

criminalisation would not pass the test.<sup>50</sup> The principles of criminalisation are being applied when amendments to domestic law are being made, but it seems that when the amendment is based on an international obligation, the test is not fully applicable. The theory behind what is symbolical and what is not, is however, underdeveloped in the Finnish practice of the review of the constitutional law.

Regarding the criminalisation of the Holocaust denial, the EU Framework Decision requires the Member States to introduce one unless it is already covered by the law. In that sense, the identity building issues, and the memory law aspects have been addressed on a European level. As observed above, the Framework Decision went beyond the vague mandate of the European Union of the time. It has not been that easy to transfer it to a post-Lisbon era since the list of the Euro-crimes would have to be amended first.

We should also be mindful of the fact that memory laws can be used for various purposes. Not only can they back up regionally European or universal identities and values, but they can be harnessed for narrower nationalistic purposes. It makes a difference whether we introduce memory criminal laws on serious human rights violations, or whether we demand respect for the glory of a state as Turkey or Russia are doing.

The constitutional law thematic has also to do with the issue of universality and time. To what extent should the context of negationist actions be taken into account? Can memories be protected forever, or is some relativism needed?

In recent times, there are some signs that the offence of a denial of genocide might be problematic from the point of view of protection of the freedom of speech. The Spanish Constitutional Court delivered a judgment in November 2007 (no. 235/2007; BOE-T-2007-21161) declaring the offence of genocide denial laid down in Article 607 § 2 of the Spanish Criminal Code unconstitutional. It stated that Spain was not a militant democracy and that the Spanish Constitution did not know the abuse of rights doctrine. Thus, the Constitution did not prohibit the speech contrary to its essence unless it could effectively harm constitutional rights. The French Constitutional Council declared an act criminalising the genocide denial unconstitutional by stating for instance the following: 'A legislative provision with the purpose of 'recognising' a crime of genocide cannot in itself have the normative scope attached to the law.'<sup>51</sup> Later, the Council mitigated this decision and recognised the principle of the abuse of right of the freedom of speech in relation to crimes against humanity.<sup>52</sup>

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50 E.g., Constitutional Law Committee of Finnish Parliament, Opinion 29/2001.

51 Decision of 28 February 2012, The French Constitutional Council.

52 Decision of 8 January 2016, The French Constitutional Council.

The case law of the European Court of Human Rights carries a special weight in such issues. Of particular relevance is the case of *Perincek v. Switzerland*.<sup>53</sup> A Turkish politician and party leader has issued statements in Switzerland in which he addressed the issue of the Armenian genocide repeatedly and in colourful terms. He claimed that the Armenian genocide was a lie and explained the historical and political roots of that lie. The Swiss courts had found him guilty of the genocide denial. The ECtHR, however, regarded that the Swiss courts had not dealt carefully enough with the freedom of speech of Mr. Perincek.

*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 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.*<sup>54</sup>

The ECtHR underlined that a criminal law conviction is a serious intervention on the part of a state and that a proper balance needs to be struck between the freedom of speech and the rights of the protected people.

Even though the saga of the offence of Holocaust denial and genocide denial in general has not ended yet, we can see that the human rights law which was one of the conditions of the memory laws on genocide to develop, is also setting limits to the development of memory criminal laws. It also seems on the basis of the case law that amongst the genocides the Holocaust denial occupies a special position. Regarding the Holocaust denial, it seems that such expressions by definition will and can be interpreted as racist and as socially intolerable, even to a point in which such views could be deemed an abuse of rights. In Europe, the memory of the Holocaust occupies a position in which the contexts of the expressions matter the least, whereas the denial of other genocides would be dealt with differently by the European Courts and the European national courts.

Interestingly, *Perincek v. Switzerland* and some other decisions could be seen as introducing a touch of relativism into a field which was supposed to have been built on universalism of the protection of human dignity. The ECtHR noticed, for instance,

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53 Case of *Perinçek v. Switzerland*.

54 *Ibid.*, para 280.

that the events that took place in 1915 were more distant in time than the events of the Holocaust.<sup>55</sup> Also the geographical remoteness to Switzerland was mentioned. Dissenting judges pointed out the risks involved in such a relativist way of reasoning. They asked: Would the memory of the Holocaust also weaken over time so that a criminalisation of the Holocaust denial would no longer stand a human rights test?

While European legislatures have been dwelling on the tailoring of memory laws concerning the Armenian genocide, Turkey has responded by criminalising utterances on the Armenian genocide as insults to the Turkish nation and government. Public denigration of the Turkish nation and the Turkish state and its political and juridical bodies has been rendered punishable in 2008 by a sentence of imprisonment.<sup>56</sup>

Thus, from the outset, there was tension and conflict in the memory laws. Nationalism-coloured interpretations of past events have prevailed, which was the case when Poland in 2018 introduced a law banning statements that Polish nationals had been involved in the Holocaust on the Polish soil. The criminalisation was soon repealed due to international and domestic criticism. The involvement was a fact indeed.<sup>57</sup>

If we return to Finland, or Sweden, we should mention that the lead criminal law provision, the one on incitement to hatred, has been written in vague terms and it does not contain any limiting clauses which would set the requirement of the threat to the public order, or abstract or concrete danger. The Finnish government had in 1993 proposed that an element of abstract endangerment would be added to the description of the act which would have improved its quality and its preciseness, but the Law Committee of the Parliament did not consider such an amendment needed. It referred to the fact that the application of the provision had not faced difficulties in the courts. The proposed amendment would have narrowed down the applicability of the penal provision.<sup>58</sup>

## 7. Holocaust denial – a matter for Europe

The example of Holocaust denial as a memory criminal law shows interesting characteristics when looked at in today's perspective. We have witnessed a march of memory laws including memory criminal laws first in the national setting of a few important continental jurisdictions. The criminalisation of the Holocaust denial was well aligned with the foundational values of both the Council of Europe and the European Union, which enabled these issues to be raised on the European level, ending up being a part of the European criminal law. The recent examples of Sweden and Germany show how the European legislation influences the national legal orders.

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55 *Ibid.*, paras 249-250.

56 Kuposov (2018) pp. 111-112.

57 On the abuse of memory criminal laws in Poland, see Grabowski (2022) pp. 75-95.

58 The Finnish Government Bill HE 94/1993 vp; The Finnish Law Committee, Opinion 22/1994 vp.

The Holocaust denial issue has proved to possess some rare features which has enabled it to progress on the normative level even though it builds upon a use of criminal law for symbolic purposes which is not common in criminal law. In case we would not wish to identify negationism as incitement to hatred, we could elaborate on adopting a provision on the issue within the context of crimes against the public order. It would maybe also push that concept to the limit since in Finland the idea has been not especially referred to any social morality, but rather social order and security in more concrete terms.

All this highlights the power of memory laws, of such a legally enshrined duty of remembrance. It has become a source of the European identity and the regional political cohesiveness. Perhaps this is the reason why it no longer makes sense to resort to the argument that a country's historical distance to the Holocaust would lessen its duty to remember. Being European means committing to the same values, in this case finding or building a consensus upon the memory criminal law on Holocaust denial.

Holocaust denial, by becoming a European issue, is also relevant to the development of the European constitutionalism. It resonates with the foundational European values. The road to the current state of affairs has been winding, and the European human rights law and the domestic traditions of the protection of the freedom of speech have shaped the making of this particular legal edifice. It has been a test case for the European criminal law. We, scholars, lawmakers, judges and practitioners are still in the middle of a formative process and it is not possible to predict in detail how it all will end. The constitutional courts have already had a say, and they will continue to exercise influence on how memory criminal laws will be adjusted to the constitutional frames nationally. We have not yet seen the EU Court of Justice to leave its fingerprint. That could take place in two ways. The notifications of the Member States on issues of infringement would be one such occasion. The other avenue would be the usual preliminary ruling method.

It seems that the critical political history debate which has called into question the value of legislating upon memory has not been able to do away with the results of the previous discussion and the legislative actions. Therefore, the next steps will be taken *at legal and political levels*. Different polities will define themselves in and through these battles. For Europe, the crucial inheritance of memory laws is the commitment to principles of human dignity and equality before the law.

The politico-legislative machinery has operated and produced the European memory laws. It may precisely be the close link to the European constitutionalism which has rendered this common European history too important to be left for a natural historical consciousness only: Memory laws have been drafted to give evidence of shared European value commitments. If this path also would be followed in the future and if constitutional courts will allow this to happen, the Holocaust denial regulation will at some point reach its objective: A universal European value basis

in protection of human dignity will be manifested by a shared commitment to fight Holocaust denial by means of criminal law. The underlying constitutional principles are what really matters, even more than the surface level case law. But it is important that the case law confirms the solid underpinnings as explained above.

The abuse of memory laws for nationalistic purposes, if we can use these words, reveals that these instruments may be diverted from the sole objective of protecting the human rights. It seems to me that these abuses should lead us to critically reflect upon the use of criminal law tools for symbolic recognition and identity building. Memory criminal law is like a fire. The controlled use of it may be fine, but when it runs wild, it may destroy the entire building. Even in Europe we already have examples of problematic uses as referred above.

In Nordic criminal law theory the so-called positive general prevention is often being named as the aim of punishment following the work of many scholars, including the famous Johannes Andenaes.<sup>59</sup> It fits rather well with the aim to communicate basic legal values by means of criminal law. Effective punishability of Holocaust denial is a reminder for us all of the basic values of the legal system, especially that of human dignity. It is the special weight of that type of wrongdoing that would legitimise the use of symbolical criminal law for this purpose.

The Nordic pragmatism may also be a helpful approach.<sup>60</sup> Following the Finnish approach, we could see that criminalising the Holocaust denial either separately or including it into the offence of the incitement to hatred are both possible solutions to the dilemma. Even though the Finns were not very directly involved in the horrors of the Holocaust, it makes perfect sense that Finland would recognise the gravity and significance of those atrocities and commit itself to recognising their special status. It also makes sense to see that criminalising the Holocaust denial, as the Finnish government has announced in August 2023, has also reasons that relate to refusing illiberal political movements. We need not talk about militant democracy, since we are not at war.<sup>61</sup> We are rather defending a democratic rule of law state by excluding the use of liberal rights for manifestly illiberal purposes.

From a Nordic point of view, the East European understanding that crimes of the Communist regimes were also horrific, is fully understandable. Yet, as things stand right now, there is maybe no pressing need to include them in the European memory criminal law. There is a European core of memory criminal law which already has been set up and which the member states of the European Union are expected to adopt. This *kernel* is the one that best *espouses* the values of the European Union along with the European liberal constitutional tradition. It is the core which carries strongest the universalist premises of protecting the human dignity, for which a relativisation

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59 Andenaes (1966).

60 Zweigert and Kötz (1998) p. 277 ff.

61 See, for various interpretations, Rhein-Fischer P and Mensing S (2022) pp. 109-113.

cannot be accepted. The symbolic representations such as Nazi symbols fall into this core area. The more we distance from the core, the more we will have to allow for a significance of national perspectives. The issue of the crimes of the Communist regimes is an example of that.

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