

## In defence of Europe's memory laws

There are two exceptional cases in which memory laws protect free speech, argue Grażyna Baranowska and Anna Wójcik.



One privilege of political authority is the ability to propagate collective memory. This can be enacted through a whole host of measures, whether it be funding archives and museums, erecting monuments, commemorating historical figures through the naming of public spaces, or producing history curricula. To greater or lesser degrees, most states regulate such activities with legal restrictions.

Numerous states are extending these legal restrictions through memory laws, which attempt to enforce state-approved views on sensitive and disputed chapters of history. Commentators such as [Nora and Salvatori](#) have expressed concern at such laws. Using the law to sanction historical narratives directly contradicts the democratic principle of free expression. There are however two exceptional instances in which it is legitimate to introduce proportionate limitations to historical discourses.

*The two cases*

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The first case in which memory laws help to protect free speech is to ban the denial or trivialisation of the Holocaust, genocides, and crimes against humanity. Many European countries have adopted an explicit ban so as to condemn historical atrocities and as a pre-emptive measure against racism, anti-Semitism and xenophobia.

[Bazyler's](#) research shows that as of 2016, Austria, Belgium, France, Germany, Italy, the Netherlands, and Romania punished Holocaust and Nazi crimes denial. Meanwhile in Andorra, Cyprus, Hungary, Latvia, Lichtenstein, Lithuania, Luxembourg, Macedonia, Malta, Slovakia, Slovenia, and Switzerland the denial of any genocide is punished. One of the main purposes of these laws is to restore the dignity of victims.

The second case in which memory laws help to protect free speech is by banning and preventing the promotion of ideologies deployed by violently repressive totalitarian governments. Glorification of these regimes by displaying their symbols and insignia falls within this remit. The primary aim of such a ban is to safeguard democratic institutions against political extremists.

### *The denial of history*

Holocaust denial bans [began to appear](#) across Europe several decades after the Second World War in various efforts to condemn the Nazi evils of the past and to remember their victims. Such laws were adopted both in countries, such as Germany and Austria, that bore responsibility for Holocaust crimes and in states whose citizens were victimized by Nazi atrocities, namely Belgium, Czechia, France, Greece, Hungary, Lithuania, Luxembourg Poland, Romania and Slovakia.

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Memory laws have not however been able to suppress anti-Semitism. The [growing resurgence](#) among contemporary European societies has prompted governments to increase the severity of punishment against anti-Semitic crimes. The [strong correlation](#) between Holocaust denial and anti-Semitism helps explain the sense of urgency among European states to implement Holocaust denial bans.

These national bans have been strengthened by rulings from both the United Nations Human Rights Committee (UNHRC) and the European Court of Human Rights (ECHR). The UNHRC for example ruled, in the case of *Faurisson v. France* in 1993, that the French government had exercised a legitimate power to limit the free speech of a French academic, Robert Faurisson, who had [argued](#) publicly that Nazis did not employ gas chambers for mass killings in Nazi concentration camps. In the case of *Garaudy v. France* in 2000, the ECHR [argued](#) that French Holocaust denialists had attempted to rehabilitate violent totalitarian ideologies and because of the threat to public order in France, their right to free speech must be exempted from usual protections. The Court found a link between denialist speech and risk to security of the French Jewish community.

This contrasted with another [case](#) the ECHR ruled on in 2013, *Perinçek v. Switzerland*. Denial of

genocide and crimes against humanity has been a criminal offence in Switzerland since 2015 when the Swiss National Council officially [recognised](#) the 1915 genocide against Armenians. Perinçek was convicted and punished by Swiss authorities for denying the genocidal nature of massacres perpetrated by the Ottoman Empire against its Armenian subjects during the First World War. At the same time, the Strasbourg court argued Perinçek did not incite hatred and violence against the Armenian community in Switzerland. It held, rather, that Perinçek's opinions [simply diverged](#) from dominant opinion in Switzerland but did not violate the dignity of Armenians.

Many European countries, whilst treating Holocaust denial as an incitement of group hatred and violence, eschew Holocaust denial bans *per se* and instead maintain general anti-denial laws of genocides and crimes against humanity. European states such as [Greece](#), [Cyprus](#), [Switzerland](#), [and Lithuania](#) number among those with such general laws, with Australia as their non-European counterpart. Arguments to justify such universal bans claim that genocide denial intentionally falsifies, misleads, and antagonises groups with claims that contradict indisputable and widely documented facts about past atrocities and therefore do not merit the protection of a right to free speech. This approach was adopted in the European Union's 'Framework Declaration Against Racism and Xenophobia' in 2008, which [argued](#) for a ban against denial of genocides and crimes against humanity in the legislation of all EU member states.

France has adopted measures which go even further, its unprecedented and comprehensive system criminalises denial, trivialisation or gross underestimation of crimes against humanity, as outlined in the Gayssot Law of 1990, which [modifies](#) the 1881 Press Act. This law stipulates a prison sentence of up to a year and a fine of up to €45,000 for denialists. It was used by the French authorities in the prosecution of comedian Dieudonné M'Bala M'Bala for his anti-Semitic stage performance in 2008, when the comedian applauded a well-known Holocaust denialist Robert Faurisson. The European Court of Human Rights in Strasbourg upheld the conviction of French courts in 2013 judgment *M'bala M'Bala versus France*, stating that in this case M'Bala Bala [was not entitled](#) to free speech protections guaranteed by the European Convention of Human Rights. The controversial comedian is infamous, among others, for creating [quenelle](#), a contemporary anti-Semitic salute, which is [often associated](#) with questioning the existence and size of the Holocaust.

Many European states have banned expressions glorifying violent totalitarian regimes through symbolic imagery. The bans have received criticism from advocates of free expression, who have [argued](#) that the punishments are [counter-productive](#) and created martyrs. Nevertheless, we believe that our two cautious exceptions to the right to free speech have proven to work well in practice. A recent telling example comes from Germany, where in 2015 court of first instance sentenced Mr. Marcel Zech, a politician of a far-right National Democratic Party of Germany (ZPD), for 6 months in prison for publicly displaying in a swimming pool a neo-Nazi tattoo. The tattoo depicted the gate to Buchenwald concentration camp and was emblazoned with a German proverb that translates "to each what he deserves". Zech appealed the sentence. In 2016 the second instance court prolonged his sentence to 8 months in prison. This decision was [made final](#) in 2017 by German higher court of Brandenburg, Das Oberlandesgericht.

### *Contemporary denialists*

Whilst there is a largely a European consensus regarding the necessity of laws undermining neo-Nazism, such as in framework set out by the EU in 2008, many problems still remain about how to implement such bans and to deal effectively with the legacy of Soviet occupation and Stalinism in Central and Eastern Europe.

In practice, European nations have demonstrated a more selective application of extant Nazi bans and have differentiated between WWII Nazi occupiers' ideologies and those of home-grown neo-Nazis. It is unlikely, for instance, that a French judge would apply laws banning expressions of Nazism to convict someone referring to Vichy state ideology or that a Hungarian judge would use a similar law to pass a prison sentence for an outspoken sympathiser of the Hungarian national-socialist Arrow Cross Party.

A further problem is that European states have no legal obligation to uphold anti-totalitarianism laws drafted in neighbouring countries to prosecute public advocates or followers in their own territory. The idea of EU regulation to ban displays of totalitarian symbols has not gained wider traction, despite the [adoption](#) by the European Union of the Resolution on European Conscience and Totalitarianism in 2009. This seriously undermined the effectiveness of the anti-totalitarian bans, especially in an age of instant digital communication and the free movement of people within the European Union. Therefore, the utility of current bans on display of totalitarian systems is often disputed.

The importance for European collaboration is further strengthened by evidence that Neo-Nazis have circumvented these bans by registering their websites abroad and travelling to neighbouring countries. Today, Croatian far-right supporters have also managed to circumvent the Croatian laws because they stage *in situ* their rally commemorating 'Bleiburg massacres'. The "Bleiburg massacres" refer to killings of fleeing military forces of the fascist Croatian by the Communist-led Yugoslav resistance at the end of the Second World War. The killings occurred on the present-day Austrian territory. The Croatian fascist Ustaše ran concentration camps for Jews, Roma, and Serbs during the Second World War in addition to committing other mass atrocities but such rallies present them as victims rather than perpetrators. Propagation of Ustaše ideology and symbols [are banned](#) in Croatia under the law against public support of totalitarian ideologies.

In Central and Eastern European countries, including Bulgaria, Estonia, Hungary, Latvia, Lithuania, Ukraine, and Poland, the standards set out by the European Union have been [used](#) to denounce the period of Soviet occupation, and to outlaw the propagation of ideology and practices associated with totalitarian Stalinist and "communist" state. In 2006, the Ukrainian parliament, [passed a law](#) against public denial of the Holodomor, the Soviet government's systematic starvation of the Ukrainian population between 1932 and 1933. In Estonia meanwhile, the period of Nazi occupation and Soviet rule was explicitly denounced in its 2003 *Act on Persons Repressed by Occupying Powers*. This law [aims](#) to "alleviate the injustices committed against persons who were unlawfully

repressed by the states that occupied Estonia between 16 June 1940 and 20 August 1991”.

Vladimir Putin’s Russia has taken a very different approach to the Soviet legacy at home and abroad. In 2014, Russia [adopted a law](#) “against public rehabilitation of Nazism,” which de facto promotes positive interpretations of Soviet rule and its role in defeating Nazi Germany during WWII. This kind of glorification of the USSR has increased tensions between Russia and many Central and Eastern European states.

Several post-communist countries in East Central Europe, including Bulgaria, Estonia, Latvia, Hungary, Poland, and Ukraine, have experimented with bans on Soviet and communist symbols. Bulgaria has recently expanded its 2000 *Law on Declaring the Criminal Nature of the Communist Regime* to include fines for displaying communist symbols and to make instruction about communist crimes mandatory in schools. Importantly, many national high courts have criticised the scope of the bans and questioned whether they are constitutional. Similar reservations were expressed by the ECHR about a Hungarian ban on communist symbols in the 2010 [case](#) of *Vajani v. Hungary* without unfairly disadvantaging and silencing [contemporary](#) left-wing political groups.

Therefore whilst there is a consensus on the condemnation of atrocities and other gross human rights violation perpetrated by the occupier or a repressive state, European countries are more divided when discussing bans on Soviet and Communist symbols.

### *How effective are memory laws?*

Although laws and decrees number among the most traditional instruments of public policy, alternative instruments have proven to be more effective in governing collective memory. These include ongoing foreign policy efforts, strategic litigation and education. Proponents of memory laws nonetheless insist that such ‘soft’ regularly instruments are generally ineffective or that one never voluntarily learns lessons from the mistakes of the past. Memory laws, when used proportionately, act as a useful confrontation with political ignorance, historical revisionism, racism, anti-Semitism, and xenophobia. Criminal provisions are important for this legislation to be effective and proportionate. This can improve political debate in the ‘post-truth’ world, where technological advancements [threaten](#) to distort our perceptions of events

We have attempted to defend two groups of memory laws, which in our view are useful for safeguarding democracy and rights of citizens in face of violent radicalisation in Europe. Having investigated various memory laws, we are aware that even the best laws may turn bad in practice. There is a serious risk that many memory laws, despite explicitly aiming to fight with historical revisionism or historical inaccuracies, become a politicised tool used by states to diminish their historical guilt and improve both self-image and perception within the international community.

A [proposed amendment](#) to Poland’s Law in 2016 on the Institute of National Remembrance demonstrates that punitive approaches are often counter-productive. The proposal included a

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sentence of up to three years of imprisonment for those who intentionally refer to Nazi concentration and extermination camps in formerly occupied Poland as “Polish concentration/extermination camps.” While Poland is justified in its motivation to eliminate this phrasing from popular discourse, criminalising the act is excessive at best, and may, at worst, silence historians committed to documenting Polish acts of perpetration during the Second World War.

The juridical regulation of historical discourse poses significant risks. Lawmakers who oppose the democratic principle of unfettered, pluralistic discourse are tempted to impose a single, official, uncontested version of the past. This is a threat to fundamental freedoms, including the freedom of expression and the freedom of information, as well as right to scientific research.

Memory laws are therefore at risk of being overused in a climate dominated by the ‘politics of guilt’. A preference for narratives glorifying one’s community, nation, or country is all too understandable and commonplace. Too often, memory laws serve deliberately to dilute dark or unsettling elements of the past at the expense of historical accuracy. We must remain especially vigilant with respect to memory laws, which reject, undermine, or discredit results of scientific inquiry that contradict the established and comfortable narratives we are used to telling ourselves.

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