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Articles

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Transnational Aspects of Punitive Memory Laws Evidence from Germany, Poland, and Israel

Transgraniczne aspekty prawnokarnej ochrony pamięci narodowej na przykładach Niemiec, Polski i Izraela

ABSTRACT

The authors discuss the legal aspects (with specific attention to the criminal law aspects) of legal acts of remembrance in selected countries, related to the collective memory of Poles. In particular, the following issues are analysed: the effectiveness of legal interference in collective memory; the

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judicial practice (civil and criminal judgments) concerning the remembrance of the Holocaust in Poland; the relation of the protection of the reputation of a State (e.g., Poland), a Nation or certain individuals to the freedom of scientific research guaranteed by the international and constitutional law and international aspect of criminal responsibility in case of the crime committed abroad (double criminality). The way the law concerning national memory is applied in practice in the Polish legal order is subject to detailed analysis. Investigating the legal proceedings concerned with memory indicates that applying these laws constitutes a limitation of constitutionally guaranteed freedom of scientific investigation.

Keywords: collective memory; protection; freedom of scientific research; Holocaust

INTRODUCTION

During the last decades, a lot of countries have passed and enacted laws, attempting to regulate the way, in which past events are commemorated, debated, and presented in public. N. Koposov invented the label of *lois mémorielles* for the vast scope of these regulations, which comprises binding and non-binding legal acts, mere resolutions, which were not accompanied by retributive sanctions, and legal provisions threatening contraveners with the imposition of fines or even prison terms.[1] For the latter, the notion of "punitive memory laws" has become popular in the literature. These laws can serve different purposes: in some countries, they target minority interpretations of certain events and shelter mainstream or government-sponsored versions of the past from criticism, in others, they try to regulate societal conflicts of a civic rather than criminal nature.[2]

E.-C. Pettai and E. Heinze have proposed yet another distinction between punitive memory laws that ban criticism towards the in-group (e.g., Turkish legislation criminalizing the use of the label genocide for atrocities committed against Armenians) and memory laws that punish the denial of in-group atrocities (which applies to most of the Holocaust-denial laws).[3]

K. Bachmann, I. Lyubahsenko, C. Garuka, G. Baranowska, and V. Pavlaković have examined whether such punitive memory laws were supply- or demand-driven

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[1] N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia. New Studies in European History*, Cambridge 2017, p. 112; M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, "Hague Journal on the Rule of Law" 2019, vol. 11, p. 8.

[2] U. Belavusau, A. Gliszczyńska-Grabias, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, [in:] *Law and Memory: Towards Legal Governance of History*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2017, pp. 13–24.

[3] E.-C. Pettai, *Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia*, [in:] *Memory Laws: Criminalizing Historical Narratives*, eds. E. Barkan, A. Lang, London 2020, pp. 5–6; E. Heinze, *Should Governments Butt Out of History?*, 12.3.2019, https://freespeechdebate.com/discuss/should-governments-butt-out-of-history (access: 3.8.2023).

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and identified the normative tension between liberal democracies' commitment to pluralism on the one hand, and the enactment of punitive memory laws, which curb pluralism in the public sphere on the other. They found that such laws emerge in liberal democracies because of demand-driven, grass-root pressure from courts which find the existing civic regulations to solve the underlying conflicts (e.g., between victims' rights to recognition and denialists' rights to free speech) dissatisfying. In hybrid systems and outright autocracies, punitive memory laws tend to be imposed top-down by government initiatives no matter whether they enjoy public support or not.[4]

Punitive memory laws have often been examined from a normative perspective, which tries to assess their influence on competing rights, like freedom of speech, academic freedom, and the media.[5] Hardly ever do these analyses extend to the practical consequences and the way these laws are implemented.[6]

In this article, we concentrate on a specific and, so far, under-researched aspect of punitive memory laws – their transnational impact. Most punitive memory laws are approved by parliaments to address domestic political interests: to shelter an important person from criticism and contribute to his or her idolization (like in the case of K. Attatürk, whose reputation is protected by a special law in Turkey),[7] to criminalize an ideology or strand of thinking (like the German law against Holocaust denial which sanctions anti-constitutional tendencies, the Rwandan laws against genocide ideology, and the Ukrainian lustration laws' anti-Soviet edge), or to protect the official memory policy of the government from challenges (like the IPN-Law [Institute of the National Memory] is the state agenda) in Poland and the Turkish legislation banning references to the "Armenian genocide" as offences against the Turkish nation). In some of these cases, lawmakers have included explicit transnational provisions, with the intent to make offences punishable beyond their own territorial jurisdiction. Polish legislators included a provision in the IPN-Law, which provided for the prosecution (and for civil lawsuits) of violations even if they took place abroad. They did so with the explicit aim to shelter the "good

[4] K. Bachmann, I. Lyubashenko, C. Garuka, G. Baranowska, V. Pavlaković, *The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws*, "East European Politics and Societies" 2020, vol. 35(4).

[5] G. Soroka, G.F. Krawatzek, *Nationalism, Democracy, and Memory Laws*, "Journal of Democracy" 2019, vol. 30(2), pp. 157–171.

[6] An exception is *Criminalizing History: Legal Restrictions on Statements and Interpretations of the Past in Germany* edited by K. Bachmann and C. Garuka (Bern 2020), which comprises statistics about delinquency and jurisprudence and shows that often memory laws are enforced against apolitical trespassers without any political agenda (hooligans, as they label them).

[7] G. Baranowska, *Memory Laws in Turkey: Protecting the Memory of Mustafa Kemal Atatürk*, [in:] *Criminalizing History…*, pp. 107–126. In Poland such protection was given to Marshal Józef Piłsudski in the Act of 7 April 1938 on the protection of the name of Józef Piłsudski, First Marshal of Poland (Journal of Laws 1938, no. 25, item 219).

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name of the nation" not only in Poland, but worldwide. These attempts have failed so far, either because of the pressure from foreign governments or because Polish courts refused to extend their territorial jurisdiction to authors without any link to Poland. So far, Polish courts have not issued a single verdict against foreign authors or organizations, which would refer to the IPN-Law in its novel version.

Nevertheless, punitive memory laws can have a transnational impact, even if their creators not envisage them. This may happen either because a suspect or plaintiff holds double citizenship, because courts apply legal provisions in transnational contexts or because punitive memory laws are enacted in reaction to international agreements. The 2008 EU framework decision is the best example.[8] All EU member countries and some accession countries ratified it, sometimes broadening it or linking its ratification with additional criminal offences and retributive provisions (like Poland, which went much beyond the scope of the 2008 framework decision).

In this article, we first examine specifically whether such transnational aspects were intended by lawmakers. Did the intention to apply the law beyond the country's borders already transpire from the societal and parliamentary debates about the law, or was it the result of judges' judicial activism or the result of external factors? If the lawmakers had transnational ambitions, how did they justify and explain them? Secondly, we investigate the way in which the judiciary dealt with these transnational aspects. Did prosecutors use and courts apply these transnational provisions? How did the judiciary of the respective target country respond?[9] We are especially interested in the potential dynamics of transnationally applied punitive memory laws. What kind of response do they trigger? Did the target country refuse to cooperate, adopt its own legislation in line with the laws of the country of origin (the offence is included into the domestic legislation), or did it cooperate? Did these responses lead to international cooperation and, possibly, even to the emergence of broader transnational agreements, like conventions or phenomena like the above-mentioned EU framework decision?

We selected Germany, Poland, and Israel for our analysis, because these countries already have relatively long traditions of punitive memory laws, long enough to enable us to find answers to these questions. Many punitive memory laws, e.g. in Russia and Ukraine, have a rather recent origin and therefore the lack of jurisprudence impedes the analysis of these laws' practical consequences for law enforcement.

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[8] P. Lobba, *Punishing Denialism beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends*, "New Journal of European Criminal Law" 2014, vol. 5(1), pp. 58–77.

[9] As the target country we understand the country, whose judiciary is confronted to requests (e.g., of prosecuting or surrendering a suspect who allegedly violated the respective punitive memory law). The country which either seeks extradition, legal assistance, or the implementation of court decisions broad is the country of origin. We examine both kinds of possible transnational aspects: civil and criminal law – related ones.

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SHAPING COLLECTIVE MEMORY BY MEANS OF LEGAL INSTRUMENTS

The use of law to shape national memory is not a recent phenomenon, although it occurs more frequently after World War II. This use is also clearly becoming more diverse.[10]

It can be a matter of preserving the memory of a particular historical fact in a certain shape, which is important for the state for various reasons, or it can be a matter of shaping collective memory of a wider phenomenon consisting of single facts that cannot be questioned individually.[11] An example of the first one is the Katyn massacre,[12] an event in Polish history which is extremely important both for its contemporaries and for the future of the State. An example of the second is, not only in the case of Poland, the memory of the Holocaust. In the case of Poland, however, it is not primarily a matter of denying the fact of the Holocaust, but more a matter of determining the attitude of Poles towards it at the time when it took place.

The Polish state did not interfere in the remembrance of the Katyn massacre by law but used the existing instruments, mainly preventive censorship. Nothing was allowed to be published, including scientific studies which suggested that the Soviets were the perpetrators of the murder of Polish officers – prisoners of the Polish-Soviet (1939) war. The official version of history, presented to pupils and students in textbooks, pointed to the Germans as the perpetrators, allowing no doubts.[13] Nevertheless, the matter remained alive and no one in Polish society had any doubts who was responsible for this mass murder.

The issue of the Holocaust perpetrated on Polish territory by the Germans, and above all, the extent to which the deaths of specific individuals of Jewish nationality

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[10] J. Wüstenberg, A. Sierp, *Introduction: Agency and Practice in the Making of Transnational Memory Spaces*, [in:] *Agency in Transnational Memory Politics*, eds. J. Wüstenberg, A. Sierp, New York 2020, pp. 6–7.

[11] E. Langenbacher (*Twenty-first Century Memory Regimes in Germany and Poland: An Analysis of Elite Discourses and Public Opinion*, "German Politics & Society" 2008, vol. 26(4), p. 51) writes as follows: "Collective memories are a kind of attitude and, as such, can potentially influence other attitudinal phenomena-most importantly, values, 'core conceptions of the desirable', and then political behavior and outcomes".

[12] The Katyn Massacre is the execution of Polish POW officers by the NKVD in the spring of 1940 in the Katyn forest. Graves of officers were discovered by the Germans in 1943, while the Soviets denied responsibility until 1990. At the request of the Soviet prosecutor, the charge of murdering officers was included in the indictment during the Nuremberg trial (20.9.1945–1.10.1946). In the end, the Nuremberg trial did not prove that the Germans were responsible for the murder, and the verdict did not mention Katyn. It was not until April 1990 that the Soviets admitted that it was a crime of Stalinism.

[13] This did not happen. Immediately after the Soviet *perestroika*, Poles returned to the topic of Katyn, and in Polish society there was practically no doubt about the perpetration of the murder.

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during the so-called "Final Solution" were contributed to by their Polish fellow citizens, are still relevant today.

Of course, no one considers Poles to be the organizers of the Holocaust. However, historical facts show that, in addition to the Poles who helped the Jews, there were also those who tracked them down and delivered them to death, or even inflicted death themselves,[14] inspired by the Germans. The extent of such a phenomenon is still the subject of examination.

The Holocaust was an extraordinary phenomenon in modern history. It happened in the center of Europe, before the eyes of the world, whose political leaders knew about the crime, later called genocide.[15] It shamed not only the direct perpetrators but also those who openly supported the criminals or benefited materially from the consequences of their crimes. The memory of the Holocaust is protected in various ways, i.a. protection from the deniers, who generally question the very fact of the Holocaust, protection of the reporting of the number of people murdered during the Holocaust, and finally, as in the case of Poland, protection of reporting of collaboration of some Poles and Germans in the killing.[16]

Memory laws containing punitive provisions are numerous. For a complete list, see Appendix 1 of *The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws*.[17]

The State of Israel, the most naturally interested in the history of the Holocaust, issued a law on 8 July 1986: Denial of Holocaust (Prohibition) Law, 5746-1986, with the following content:

1. Definitions – Article 1: In this Law "crime against the Jewish people" and "crime against humanity" have the same respective meanings as in the Nazi Collaborators Law, 5710-1950 (Sefer Ha-Chukkim of 5710, p. 28-1, LSI, vol. IV, p. 154.203, no. 56).
2. Prohibition of denial of Holocaust – Article 2: A person who, in writing or by word of mouth, publishes any statement denying or diminishing the proportions of acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, with intend to

[14] See *Rethinking Poles and Jews: Troubled Past, Brighter Future*, eds. R. Cherry, A. Orla-Bukowska, Lanham 2007; *The Neighbors Respond: The Controversy Over the Jedwabne Massacre in Poland*, eds. A. Polonsky, J.B. Michlic, Oxford 2009; J.T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, New Jersey 2001.

[15] The name "genocide" was created by Polish lawyer R. Lemkin in the book *Axis Rule in Occupied Europe: Laws of Occupation* (Washington 1944).

[16] D. Lawrence, *The Memory of Judgment: The Law, the Holocaust, and Denial*, "History and Memory" 1995, vol. 7(2), pp. 100–120.

[17] K. Bachmann, I. Lyubashenko, C. Garuka, G. Baranowska, V. Pavlaković, *op. cit*. See also U. Belavusau, A. Gliszczyńska-Grabias, *op. cit.*, pp. 13–24.

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defend the perpetrators of those acts or to express sympathy or identification with them, shall be liable to imprisonment for a term of five years.

3. Prohibition of publication of expression for sympathy for Nazi crimes – Article 3: A person who, in writing or by word of mouth, publishes any statement expressing praise or sympathy for or identification with acts done in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, shall be liable to imprisonment for a term of five years.
4. Permitted publication – Article 4: The publication of a correct and fair report of a publication prohibited by this Law shall not be regarded as an offence thereunder so long as it is not made with intent to express sympathy or identification with the perpetrators of crimes against the Jewish people or against humanity.
5. Filing of charge – Article 5: An indictment for offences under this Law shall only be filed by or with the consent of the Attorney General.

Much earlier, in 1953, a law was passed in Israel entitled Martyrs' and Heroes Remembrance (Yad Vashem) Law 5713-1953. This law, however, does not contain criminal provisions. It deals with the manner of commemorating the Holocaust.

In Germany, provisions for the preservation of memory are found in the Penal Code in Articles 130, 131, 185, and in Article 194, which was amended in 1986. This amendment was made primarily to criminalize the so-called "Auschwitz lie" – the claim that European Jews were not murdered by the Germans.[18]

COURT PROCEEDINGS IN MEMORY PROTECTION CASES ON THE EXAMPLE OF POLAND

Legal intervention in the formation of national/historical memory is an expression of the state's determination to preserve memory in a certain shape. As we mentioned before (in the case of the Katyn massacre), the shape which is sought to be preserved is not always true. Since such legal intervention appears in different states and also in different historical moments, it is worth discussing and evaluating.

It is important to consider the impact of such laws, especially criminal laws, on the freedom of expression, including on those presenting the results of scientific (primarily historical) research.

Freedom of expression is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in Article 10

[18] See E. Stein, *History against Free Speech: The New German Law against the "Auschwitz" – and Other – "Lies"*, "Michigan Law Review" 1986, vol. 85(2), pp. 277–324. In the appendix to this article, the author cites the text of the legislation. See also E. Langenbacher, *op. cit.*, pp. 50–81.

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(Freedom of Expression), with limitations set forth in paragraph 2. At least two important judgments of the European Court of Human Rights refer to this freedom in the context of expression concerning the memory of events related to World War II.[19] 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[20] is also devoted to this issue.

In the current Polish Penal Code of 1997, there is Article 256, which establishes the crime of public propagation of fascist or other totalitarian state system and the crime of public incitement to hatred based on differences in nationality, race, religion or irreligiousness (§ 1), and the crime of producing, recording or importing, purchasing, storing, possessing, displaying, transporting or transmitting with the intent to distribute a print, recording or other object containing the content specified in § 1.[21] The provision, existing in Polish criminal law since 1945, is clearly related to collective memory, from which certain symbols should disappear.

Convictions under this provision (and its predecessor provisions)[22] in Poland, by year, between 1949 and 1959 were as follows: 1947 – 142 convictions, 1949 – 281, 1950 – 466, 1951 – 284, 1952 – 176, 1953 – 195, 1954 – 242, 1955 – 210, 1956 – 80, 1957 – 8, 1958 – 20, 1959 – 31.

After the entry into force of the Penal Code of 1997[23] until 2012, the number of convictions under Article 256 did not exceed 100 per year (e.g., in 2012 – 86 convictions), then increased significantly in 2015 (413 convictions), and remains at this level (in 2019 – 378 convictions).

In January 2018, an attempt was made to legally protect national memory. This resulted in Chapter 6c being added to the Act on the Institute of National Remembrance, titled "Protection of the Good Name of the Republic of Poland and the

[19] Decision of the ECtHR (Fifth Section) of 13 May 2018, *Hans Burkhard Nix v. Germany*, application no. 35285/16; decision of the ECtHR (Fourth Section) of 7 July 2003, *Garaudy v. France*, application no. 658311/01. See also P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, "European Journal of International Law" 2015, vol. 26(1), pp. 237–253.

[20] OJ L 328/55, 6.12.2008. See also P. Parisi, *The Obligation to Criminalize Historical Denialism in a Multilevel Human Rights System*, [in:] *Responsibility for Negation of International Crimes*, ed. P. Grzebyk, Warsaw 2020, pp. 42–54.

[21] Article 256 § 2 of the Penal Code, introduced to the Penal Code in 2010, still contained at the end the words: "or carrying a fascist, communist or other totalitarian symbolism". This part lost its power as a result of the judgment of the Constitutional Court of 19 July 2011 (K 11/10, Journal of Laws 2011, no. 160, item 964).

[22] The so-called Little Penal Code – decree of 13 June 1946 on especially dangerous crimes during the period of national reconstruction (Journal of Laws 1946, no. 30, item 192), adopted on 13 June 1946, entered into force on 12 July 1946, repealed on 1 January 2970.

[23] This Code went into effect on 1 September 1998.

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Polish Nation".[24] This protection was based on a civil law construction, duplicating the institution of protection of personal property of natural persons (Articles 23 and 24 of the Polish Civil Code[25]). Actions can be brought by non-governmental organizations within the framework of their statutory tasks, as well as by the Institute of National Remembrance, which has been granted judicial capacity in this respect (Article 53p of the Act 26 January 2018).

Pursuant to Article 53q of the Act 26 January 2018, the provisions on protection of the reputation of the Republic of Poland or of the Polish Nation are applicable regardless of which law is applicable. This means only that under Polish law Polish courts will always hear such cases under Polish law. Such a provision of domestic law is not binding on foreign courts.

The Act on the Institute of National Remembrance contained, before the 2018 amendment, a criminal provision in Article 55: Whoever publicly and against the facts[26] denies the crimes referred to in Article 1 (1),[27] shall be subject to a fine or the penalty of deprivation of liberty for up to 3 years. The sentence shall be made public. The amendment added two new provisions – Articles 55a and 55b,[28] sub-

[24] See Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Act on graves and cemeteries, the Act on museums, and the Act on the responsibility of collective entities for acts prohibited under penalty (Journal of Laws 2018, item 369).

[25] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2020, item 1740, as amended). Pursuant to Article 53o of the Act of 26 January 2018, to protect the good name of the Republic of Poland and the Polish Nation, the provisions of the Act of 23 April 1964 – Civil Code (Journal of Laws of 2017, items 459, 933, and 1132) on the protection of personal rights shall apply accordingly. See also Act of 18 November 2020 on electronic delivery (consolidated text, Journal of Laws 2020, item 2320). An action for protection of the reputation of the Republic of Poland or the Polish Nation may be brought by a non-governmental organization within the scope of its statutory tasks. Compensation or damages shall be paid to the State Treasury.

[26] The historical facts are extremely disputable. Different authors present various numbers of people involved in hiding persecuted Jews and in their denunciation, based on diverse premises. The term "contrary to facts" is not and probably never will be unambiguous. See, e.g., G.S. Paulsson, *Utajone miasto. Żydzi po aryjskiej stronie Warszawy (1940–1945)*, Warszawa 2007.

[27] Article 1 (1) of the Act on the Institute of National Remembrance lists the following crimes: Nazi; communist; crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich; other crimes constituting crimes against peace, humanity, or war crimes. The words "Ukrainian nationalists" were removed on the basis of the judgment of the Constitutional Court of 17 January 2019, K 1/18, Journal of Laws 2019, item 131.

[28] Article 55a (1) of the Act on the Institute of National Remembrance: Whoever, publicly and contrary to the facts, attributes to the Polish Nation or Polish State responsibility or shared responsibility for Nazi crimes committed by the Third German Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws 1947, no. 63, item 367), or for other crimes constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the real perpetrators of such crimes, shall be subject to a fine or imprisonment for up to 3 years. The sentence shall be

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sequently repealed by the Act of 27 June 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the responsibility of collective entities for criminal offences.[29] This was undoubtedly influenced by the diplomatic intervention of the United States and Israel. Article 55 remained in effect.[30]

This is Poland's attempt to restrict freedom of historical research. The first was in 2006, when Article 132a was introduced into the Penal Code, which reads: Whoever publicly slanders the Polish Nation about participating in, organizing, or being responsible for communist or Nazi crimes, shall be subject to the penalty of deprivation of liberty for up to 3 years. This offence was able to be prosecuted regardless of the law applicable where the relevant act was committed (point 1a was added to Article 112 of the Penal Code).

On the basis of this provision, there was an attempt to bring J.T. Gross to criminal responsibility by formulating two criminal charges: the first one, of publicly insulting and slandering the Polish Nation on 11 January 2008 in Krakow and other places in Poland about the participation, organization or responsibility for Nazi crimes in the book by J.T. Gross titled *Strach. Antysemityzm w Polsce tuż po wojnie. Historia moralnej zapaści* (*Fear: Anti-Semitism in Poland Right After the War. History of Moral Collapse*), published by the Znak Publishing House, i.e. an offence under Article 132a in conjunction with Article 11 (2) of the Penal Code; and second, public incitement to hatred on grounds of national differences in the book by J.T. Gross, published by the Znak Publishing House on 11 January 2008 in Krakow and other places in Poland, i.e. an offence under Article 256 of the Penal Code. It is worth to name, the Public Prosecutor of the District Prosecutor's Office in Krakow-Krowodrza, M. Bańdo, who refused to prosecute the case in a decision of 11 February 2008 (5 Ds. 11/08).[31]

made public. (2) If the perpetrator of the act specified in section (1) acts unintentionally, he shall be subject to a fine or the penalty of restriction of liberty. (3) The perpetrator of the offence specified in sections (1) and (2) shall not commit an offence if he has committed the act in the course of artistic or scientific activity. Article 55b of this Act: Irrespective of the regulations in force in the place where the prohibited act has been committed, this Act shall apply to a Polish citizen and to a foreigner when the offences referred to in Article 55 and Article 55a have been committed.

[29] Journal of Laws 2018, item 1277.

[30] Ministry of Justice statistics and available data do not show that there have been convictions under this provision.

[31] In the justification she wrote: "Since a considerable part of his book contains quotations from specifically indicated sources, it is also difficult to indicate, without comprehensive historical research, that J.T. Gross's theses were put forward without any factual basis. On the other hand, the object of accusation of slander cannot be the selection of facts and their interpretation only because they show Poles in a negative light and the author omitted the positive behaviors of the Polish people towards Jews during the occupation and after the war. Therefore, one cannot accuse the author for what he did not write, because this lack does not prejudge the falsity of what was written or said".

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Both of the above-mentioned provisions (Article 112 (1a) and Article 132a of the Penal Code) were repealed by the judgment of the Constitutional Tribunal of 19 September 2008.[32] This provision was deemed unconstitutional due to a defect in legislative procedure, namely doubts about the scope of penalization introduced by the provision of Article 132a. The case of J.T. Gross's book was the only one initiated on the basis of this provision.

The question is whether it is possible to criminally prosecute cross-border proceedings under memorial statutes. It seems that it is not, at least with respect to the good name of the nation. The condition of criminal liability for an act committed on the territory of another state is that the act is punishable at the place where it was committed (double criminality). The possibility of prosecuting in Poland a foreigner for an act under Article 132a of the Penal Code committed outside Poland was to be ensured by explicitly abolishing the requirement of double criminality in Article 112 § 1a. This made it possible to convict in Poland a foreigner who was on Polish territory, but it did not make it possible to demand extradition, for which it was always required that the relevant act was an offence in the place where it was committed. The good of the Polish nation thus remained only a nationally protected good.

The Auschwitz lie, i.e. the denial of the fact of the Holocaust, if it took place in a state where criminal law concerning it exists (Germany, Israel, and many others), can be prosecuted without hindrance across borders. In Poland, this is the case under Article 55 of the Act on the Institute of National Remembrance.

When it comes to civil proceedings, the first civil case in Poland under Article 53o of the IPN Act, concerning the book by Professors J. Grabowski and B. Engelking titled *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski* (*Night without End: The Fates of Jews in Selected Countries of Occupied Poland*), published in 2018, was concluded in February 2021.[33] The District Court in Warsaw obliged the authors to publicly apologize to the plaintiff, an 84-year-old woman. The woman, who was supported by the organization Polish League Against Defamation, sued the authors for violating her personal good, that is the honor of a deceased relative who was mentioned in the book as someone who supported the Germans in persecuting Jews and appropriated their property.[34] This information was based on the testimony given against this man by E. Siemiatycka before the Spielberg Holocaust Testimonial Archive in the USA, referred to in a footnote.

This is how a provision, hitherto unused, has taken on a life of its own. Unfortunately, it may become a whip for independent historians.

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[32] K 5/07, Journal of Laws 2008, no. 173, item 1080.

[33] J. Grabowski, B. Engelking, *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski*, Warszawa 2018.

[34] M. Dekel, *Poland's Current Memory Politics Rewriting History*, "Boston Review" 2021 (1 June).

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CONCLUSIONS

There are two main conclusions of this study. First, shaping national memory by means of legal instruments is almost impossible. Even the use of criminal law provisions gives no result in changing the memory of historical events. Preventive censorship is as well not a tool in such a case. The memory is long lasting and the official version of the history is not able to change it. Secondly, the courts are not ready not only to punish but even to protect the official version of history by the civil law constructions (personal rights of a natural person).

Only the denial of basic historical facts (e.g., the Holocaust or the existence of Auschwitz as a place of organized murder) may be successfully punished by criminal law, as the verdict does not need any evaluation of the circumstances in an individual case.

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ABSTRAKT

Autorzy rozważają aspekty prawne (szczególnie z zakresu prawa karnego) ustaw odnoszących się do pamięci (zbiorowej, narodowej) w wybranych krajach, mających związek ze zbiorową pamięcią Polaków. W szczególności przedmiotem analizy są kwestie: skuteczności ingerencji w pamięć zbiorową środkami prawnymi; praktyka sądowa w zakresie spraw cywilnych i karnych dotyczących pamięci Holokaustu w Polsce; relacji między ochroną interesu Państwa (np. Polski), Narodu lub pamięci poszczególnych osób a gwarantowaną w prawie międzynarodowym i konstytucyjnym wolnością badań naukowych oraz odpowiedzialności karnej za przestępstwo popełnione za granicą (wymaganie podwójnej przestępności czynu). Przedmiotem szczegółowej analizy jest to, jak w praktyce wygląda zastosowanie prawa dotyczącego pamięci narodowej w polskim porządku prawnym. Zbadanie postępowań dotyczących pamięci wskazuje, że zastosowanie tych przepisów stanowi ograniczenie gwarantowanej konstytucyjnie wolności badań naukowych.

Słowa kluczowe: pamięć zbiorowa; ochrona; wolność badań naukowych; Holokaust