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The European Court of Human Rights on Nazi and Soviet Past in Central and Eastern Europe¹

Abstract: The article demonstrates how references to Nazi and Soviet past are perceived and evaluated by the European Court of Human Rights. Individual cases concerning Holocaust and Nazism, which the Court has examined so far, are compared here to judgments rendered with regard to Communist regime. The article proves that the Court treats more leniently state interference with freedom of expression when memory about Nazism and Holocaust is protected than when a post-Communist state wants to preserve a critical memory about the regime. The authors of the article agree with the attitude of the Court which offers a wide margin of appreciation to states restrictively treating references to Nazism and Holocaust, including comparisons to the Holocaust, Nazism or fascism used as rhetorical devices. At the same time they postulate that other totalitarian systems should be treated by the Court equally.

Keywords: ECtHR; European Court of Human Rights; ECHR; European Convention on Human Rights; memory laws

Introduction

The countries of Central and Eastern Europe, in their transition to democracy and freedom, have had to face a difficult legacy of both Nazi occupation and Soviet domination. Hence, those countries deal with memory differently than countries in

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Western Europe, who have not experienced communism (Geyer & Fitzpark, 2009; Snyder, 2010; Snyder, 2015)². The consequences of such dualism are also visible in the sphere of law: in Poland there is an equation in the scope of penalization of the public dissemination of denial of Nazi and Communist crimes³.

However, the Council of Europe human rights protection system, with its central component – European Court of Human Rights (ECtHR), has been set up and developed with regard to countries which have been influenced only by one of those regimes – Nazism (Sweeney, 2013). It was the attitude to Nazism and the Holocaust which came to be seen as the main measure of belonging to a free, democratic and the rule-of-law respecting Europe. The ECtHR developed standards relating to the Nazi regime (Kamiński, 2010a), which have not been extrapolated into the Courts' jurisprudence concerning communist regimes⁴. While dealing with the history of European nations poses specific difficulties for the Court, determined by its "distance" from national experiences (Buratti, 2013), those challenges have been deepened by the different way Nazi and communist crimes are generally perceived in Europe. There is an asymmetry between the ECtHR's treatment of cases tracing back to the legacy of Communism and those concerning the legacy of Nazism (Gliszczyńska-Grabias, 2014, Gliszczyńska-Grabias, 2016).

The article demonstrates how references to Holocaust and Nazism are perceived and evaluated by the ECtHR. The methodology applied relies on the comparative analysis of the ECtHR's jurisprudence. Individual cases addressing references to Holocaust and Nazism, which the Court has handed down so far, will be compared to judgments rendered with regard to Communist regimes. A brief insight into the historical inclinations of the Council of Europe and its interpretation of the freedom of speech doctrine will be presented in the first part of the article. In part three and four of the article, examples of the ECtHR jurisprudence concerning Nazism and Holocaust will be discussed in detail. Subsequently, ECtHR jurisprudence with regard to countries dealing with the legacy of communist regimes will be introduced, with

² On the importance of remembering see e.g. Neumann & Thompson (2015).

³ Article 55 of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998, Polish Official Journal No. 63, item 424. Such laws that enshrine state-approved interpretation of crucial historical events are called 'memory laws' and affect society in various ways. They may take different forms, such as imposing criminal penalties on speech or leading to excluding persons connected to the old regime from holding public offices (Loytomaki, 2014; Belavusau, 2015; Heinze 2016).

⁴ On difficulties faced by multinational entities in reaching some kind of consensus on such a sensitive subject as history see A. Sierp (2014).

a particular emphasis on the issue of prohibiting the display of communist symbols. Final part of the article contains conclusions.

Council of Europe, History and the Limits of Free Speech

As already noted above, the human rights protection system developed within the structures and mechanism of the CoE, emerged from the ashes of the victims of the II world war and constituted a response to the horrors of the concentration camps. At the same time, as noted critically by F. Rosenstiel, it was not a “wisdom of European nations” that led to the creation of human rights protection mechanism, but the “wisdom” produced by devastating violence, suffering and destruction on enormous scale.⁵ This “historical pedigree” of the CoE determined its attitude towards the limits of free expression in case of restricting hateful speech, with Holocaust denial penalisation being the most telling example. Thus, even though the CoE and the ECtHR in particular have always put freedom of speech at the pedestal of European freedoms and values⁶, whenever the complaint examined by the ECtHR concerned free speech of Holocaust deniers, neo-Nazi supporters or individuals promoting fascist ideology, the Strasbourg Court has accepted even most severe limitations on speech imposed by CoE’s member states. Dealing with Holocaust denial cases the Court has established its jurisprudence that was best summarised in its decision in *Garaudy v. France*, where it pointed out that denying crimes against humanity is “one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order.” It further noted that the applicants real purpose was to “rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history”. Such acts, in the view of the Court, were manifestly incompatible with the fundamental values which the Convention sought to promote. Simultaneously, quite

⁵ Rosenstiel F. (2000), Kamiński (2010b).

⁶ As noted by the ECtHR: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.” (*Handyside v. the United Kingdom* judgment of 7 December 1976, § 49).

a different approach has been taken by the Court in denial cases concerning different genocide, namely, the Armenian genocide, where in *Perinçek v. Switzerland* the Court scrutinised the character of crimes committed by the Ottoman Empire against the Armenian community. This difference in treatment caused, as it seems, to the large extent by the “uniqueness of the Holocaust” doctrine of the Strasbourg system, led to the situation described by U. Belavusau as “extremely questionable hierarchy between the Holocaust and other genocides” and “Holocaust rising over other “second-class” evils”⁷. These “double standards” are visible also in the way the ECtHR examines the application of criminal law sanctions by the states while limiting free speech: while the general tendency of the Court manifests and underlines the need to avoid such sanctions to the largest possible extent⁸, in cases touching any aspect of Nazi or Fascist sentiments, ECtHR’s judges have been ready to accept even far-reaching criminal law sanctions resulting in long-term imprisonment⁹. As noted by Buratti “Whether it is the history of the horrors of the Second World War, or the history of the liberation from religious fundamentalism, or the history of transition from Communist regimes, the Court protects certain selected historical narratives as traditions and foundations of the democratic order. In the Court’s vision, history is often a private place for the exercise of public freedoms – in some cases even sacred ground that cannot be trodden upon, criticism of which becomes abuse” (Buratti 2013).

Overstepping the Limits of Criticism

According to the ECtHR, comparing someone’s professional conduct to Nazi practices, transcends the limits of acceptable critique and does not benefit from the usual protection of opinions when they concern important social matters. The comparison with Nazism/Holocaust is viewed as being so outrageous as to lose protection from the principle of freedom of speech. Such an approach is illustrated by the judgments *Wabl v. Austria* and *Hoffer and Annen v. Germany*.

The *Wabl* case concerned a politician who used the words “Nazi-journalism” to describe press articles alleging that he was infected with AIDS. Austrian Supreme Court had issued an injunction against the politician prohibiting him from repeating the statement about “Nazi-journalism”, and the politician lodged a complaint in

⁷ Belavusau 2014.

⁸ See for example *Maciejewski v. Poland*.

⁹ See in particular the jurisprudence concerning cases against Austria, where the strict Austrian criminal law against Neo-Nazi sympathies was found compatible with the Convention: *B.H, M. W, H.P and G.K. v. Austria* (*Nachtmann v. Austria, Schimanek v. Austria*).

Strasbourg about violation of Article 10 of the Convention¹⁰. The Court agreed with the Austrian Court, and determined that “the applicant’s indignation about defamatory reporting, associating him with a disease provoking fear and antipathy amongst the majority of the population could not justify the reproach of Nazi working methods (...). In coming to this conclusion, the Court had particular regard to the special stigma which attaches to activities inspired by National Socialist ideas” (par. 41).

In turn in *Hoffer*, the applicants had been punished in Germany for comparing legal abortions administered in German hospital by a particular doctor to Holocaust by calling the practice „Babycaust”. German courts found that all other harsh terms used by anti-abortion activists had been within the legally protected public discourse: all – but one. The ECtHR agreed with this approach and decided that the statement in pamphlets distributed to passer-by in front of a Nuremberg medical centre: “Then: Holocaust / today: Babycaust” does not fall within the scope of freedom of expression. The European Court observed that the impact an expression of opinion has on another person’s rights cannot be detached from the historical and social context in which the statement was made. Furthermore the court said that the reference to the Holocaust must also be seen in the specific context of the German past (par. 48).

The ECtHR judgment in *PETA v. Germany* encapsulates the fact that the Holocaust memory is an extremely sensitive issue. PETA, the German branch of the animal rights organisation (People for the Ethical Treatment of Animals), planned in 2004 to start an advertising campaign under the heading “The Holocaust on your plate”. The intended campaign consisted of a number of posters, each of which bore a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. German courts granted an injunction, requested by some German-Jewish Holocaust survivors ordering PETA to desist from publishing the posters via the internet, on the basis that they violated respect for human dignity of Holocaust victims, while Art. 1 (1) of the German Basic Law puts human dignity in its centre. In its complaint to the ECtHR PETA argued that the injunctions breached Article 10 of the Convention: the association stressed that its campaign was not meant to debase the depicted Holocaust victims or trivialise their suffering. In particular, PETA referred to a judgment of the Supreme Court of Austria of October 2006 which had rejected a request for injunction against the publication of the same posters in Austria. Austrian judges recognized that a special degree of protection should be afforded to expressions of opinions in the course of a debate on

¹⁰ Article 10 of the ECHR provides the right to freedom of expression and information, subject to certain restriction. For more information on the Article 10 in cases in which the ECtHR has dealt with the past see Buyse 2011.

matters of public interest, and that the PETA campaign may even contribute to the public knowledge about the Holocaust.

Nevertheless, Strasbourg judges sided with the German government and did not find the breach of Article 10. They agreed with their German colleagues that in this case it was the “instrumentalisation” of the plaintiffs’ suffering which violated their personal rights in their capacity as Jews living in Germany and as survivors of the Holocaust. According to the ECtHR this violation was aggravated by the fact that the depicted Holocaust victims were shown in a most vulnerable state. As a consequence, the Convention rights of PETA were not breached (par. 48).

At the same time the reasoning of the Court comes with a qualification which may raise doubts. The judges used the formula from *Hoffer and Annen* that “the reference to the Holocaust must also be seen in the specific context of the German past” but – importantly – followed up by a suggestion that the courts elsewhere (assumedly, not burdened by a historical responsibility for the Holocaust) may come legitimately to a different legal conclusion (par. 49). In their concurring opinion, Judges Zupančič and Spielmann took issue with what they called the “relativisation of an unacceptable use of the freedom of expression” (par. 3). Their point is well taken. Adopting the doctrine of margin of appreciation (expressing a degree of deference by the ECtHR to national legislative choices), it is fair to say that such a „margin” should be accorded to any other state which would like to follow the German example. It is very hard to find the reasons why different standards should apply for instance to France which, when prohibiting a similar poster campaign would refer to French responsibility for the Vichy government sending tens of thousands of French Jews to Nazi concentration camps.

In *PETA* the comparison of a practice with Holocaust transgresses the limits of acceptable (and legally protected) discourse (because it demeans the horror of the “real” Holocaust), while in *Hoffer and Annen* and *Webl* it is the individualized, person-oriented character of comparison with Nazism which renders the speech unprotected. The common denominator of all three cases is that a comparison with Nazism/Holocaust is viewed as being so outrageous as to lose protection from the principle of freedom of speech.

Value Judgments with Factual Basis

There is yet another category of cases of the ECtHR belonging to a set of issues discussed here, namely, when national courts punished someone (usually, a journalist) for calling another person “Nazi” or „Fascist” in conjunction with his or her political past or ideological involvement. A difference with the three cases considered so far

is that, what was at stake was not so much an *analogy* of a practice or behaviour to Holocaust or Nazism but rather an accusation, an insinuation, or allegation that a person *is* connected to Nazism or fascism, in a meaningful sense of the word. A pattern of cases belonging to the category now considered is usually the same: a journalist or an activist reveals the facts which are alleged to connect another person with the Nazi/Fascist past, and demands drawing consequences from this allegation. Domestic courts in these cases usually found that the boundaries of freedom of expression were transcended because describing someone as a Fascist or a Nazi is extremely offensive, given the historical context and the fact that both regimes represent, in the common perception, the “tragedy and evil”. Faced with these cases, the Court invariably observed that it is crucial to make a distinction between a statement of facts and value judgments; the Court always categorized the descriptions such as „local neo-fascist” as belonging to the latter category and kept emphasizing that protection of value judgments is one of the key elements of freedom of expression: “the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself” (*Dyuldin and Kislov v. Russia*, par. 46) and “a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10, the difference between a value judgment and a statement of fact finally lies in the degree of factual proof which has to be established” (par. 48). In all of the cases considered here the Court found that they concerned value judgments with sufficient factual basis. Moreover, terms such as “Nazi” or “fascist past” must be understood and interpreted broadly, as describing general political affiliation with a given ideology. As the Court has put it in one of the crucial judgments concerning this problem: “calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person’s party affiliation” (*Bodrožić v. Serbia*, par. 52)

A very good illustration for the European Court’s approach is *Scharsach and News Verlagsgesellschaft mbH v. Austria*. The judgment contains all the requisite elements leading to a conclusion that the freedom of the applicant (a journalist and the publisher of the newspaper) was breached by a conviction in response to calling a politician an “old closet Nazi”. In 1995 the Austrian weekly *News* published an article in which the journalist, Mr Scharsach explained why he opposed the possibility of a government coalition including the right-wing Austrian Freedom Party (AFP). In his article, Scharsach mentioned a number of persons by name, including Mrs Rosenkrantz, both an AFP politician in her own right, and wife of a prominent right-wing politician. The journalist and the newspaper were punished for defamation, and after unsuccessful appeals in Austria, complained to the ECtHR.

The Strasbourg Court ruled that article 10 of the Convention had been violated, and underlined in particular that “Considering, on the one hand, that Mrs Rosenkrantz

is a politician and, on the other, the role of a journalist and the press of imparting information and ideas on matters of public interest, even those that may offend, shock or disturb, the use of the term “closet Nazi” did not exceed what may be considered acceptable in the circumstances of the present case” (par. 45).

Dealing with the Legacy of Communist Regimes

As has been shown in the previous parts, the ECtHR has developed standards relating to how countries deal with Nazi past. In doing that, the Court has been very sensitive to the meaning of this past for the general public, and found that – in certain circumstances – freedom of expression can be limited in that context. However, these standards have not been extrapolated into the Court’s jurisprudence concerning communist regimes.

The ECtHR has dealt with a wide range of problematic issues relating to communist regimes. For example the Court considered whether disqualifying a Latvian politician from standing for parliamentary election on account of her former membership in the Communist Party of Latvia and decided that this was not a breach of the Convention. While considering the case, the ECtHR did not pay attention to the past of the applicant or to the events that have occurred in Latvia since 1940 (Flauss, 2006). The decision was not unanimous – in the initial ruling the court found a violation of the Convention, while in the Grand Chamber judgment six judges attached dissenting opinions (*Ždanoka v. Latvia*).

In another case the ECtHR found that refusing to register a “communist party” in Romania is a violation of the right to freedom of association protected by the Convention (*Partidul Comuniștilor (Nepecești) and Ungureanu v. Romania*). The Court did not apply the doctrine of margin of appreciation¹¹, which could have led to declaring the application inadmissible. It also rendered a number of judgments concerning public presence of Communist symbols and insignia¹², which can serve as an illustration of the ECtHR attitude toward dealing with communist past by countries of Central and Eastern Europe.

¹¹ See Flauss (2006) p. 8–16 for more detailed information on margin of appreciation in cases, in which the ECtHR has dealt with history.

¹² *Vajnai v. Hungary*, *Fratanoló v. Hungary*. See also Joint *amicus curiae* brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law no 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova submitted on 11 March 2013 by the European Commission for Democracy through Law of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights.

The case *Vajnai v. Hungary* concerned a display of a Communist symbol of the Red Star – which was an offence under the Hungarian criminal law. The ECtHR established that the rights of Mr Vajnai were breached when he was punished in Hungary for displaying in public a Red Star, and one of the main reasons for the judgment was an opinion that there was no real and present danger of „restoring communist dictatorship” (par. 49). Additionally, the Court argued that the star „also still symbolizes the international workers’ movement” (par. 52) and there was no proof that „wearing the red star exclusively means an identification with totalitarian ideas” (par. 53). The Court also stated that it “cannot conclude that the applicant’s display was intended to justify or propagate totalitarian oppression” (par. 25).

While the circumstances of the case indeed do not imply that there was a danger of restoring communism, or even that the applicant disseminated totalitarian propaganda, it is striking that in cases related to National Socialism the ECtHR does not analyse whether there was real and present danger of restoring the regime. For example, when reviewing a case brought by an Austrian neo-Nazi activist who the Court spent very little time rejecting the complaint, reciting rather formulaically its previous declaration that “the prohibition against activities involving the expression of National Socialist ideas is both lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime” (*Schimanek v. Austria*, Part 2 c). This proves a different approach of the ECtHR: with regard the Nazism, the Court not only does not consider whether there is danger of restoring the regime, but it also recalls, that in the case of National Socialism, the ECtHR has to consider that it formed the immediate background of the Convention.

Concluding Remarks

While it must be borne in mind that the Strasbourg Court is a judicial body „burdened” by various jurisdictional and purely technical-legal issues, such as the question of the standing of applicants, admissibility of claims, the margin of appreciation, it is fair to say that the ECtHR displays a great deal of sensitivity when dealing with the Holocaust, with the Nazi or Fascist past, as well as with the neo-Nazi activities. It is to a large extent because the historical pedigree of the Council of Europe, which includes also the European Court, goes back to a reaction against Fascism and Nazism, contrasted to the principles of democracy, the rule of law and human rights. The Council of Europe was set up as their guarantor. Taking this as a starting point which informs the entire Court’s thinking about the past, several conclusions can be offered.

First of all, the Court has displayed a strong disapproval of a loose talk which includes, as rhetorical devices, comparisons to the Holocaust, Nazism of fascism. When Council of Europe member-states censured such uses, denying them protection afforded by constitutional freedom of speech (as in *PETA*, “Babycaust” and “Nazi journalism” cases), the Court sided with the states. By refusing to protect such a bold rhetoric under Article 10, the Court aimed at preserving the special character of the Holocaust and Nazism in a collective European memory, and attempted to prevent inflation or devaluation of such analogies, the end-result of which would be to belittle the horrors associated with this particular past.

Secondly, there was no unanimity within the Court about the *universality* of legal refusal to protect comparisons with the Holocaust. In the *PETA* case, the majority of judges made gestures towards a theory which distinguishes between those countries which have special responsibility to protect memory about Holocaust against devaluation, and those where such need is much less urgent.

Third, drawing an analogy between something totally unrelated to the Nazi crimes and a today’s practice that a speaker, rightly or wrongly, dislikes, cannot benefit from a protection of freedom of expression principle because it offends the memory of the victims of Nazi crimes, and trivializes their magnitude. But describing a person as a „Nazi” or „neo-Nazi” when the speaker has reasonable grounds for believing that the person – a politician or another public figure, in particular – expresses sympathy to or is influenced by Nazi ideology, must be subjected to usual rules governing protection of freedom of speech on issues of public concern. This is a lesson of the *Scharsach* case. Indeed, it would be perverse if our aim to protect the special character of the Nazi past or of the Holocaust prevented us from depicting and criticizing the ideological or political remnants of Nazi ideology in our societies today. The past imposes on us a responsibility to remember, but not constraints on speech and action aimed at preventing its repetition.

Finally, what about this *other* great, horrible totalitarianism in the recent European past: Stalinism and Communism in general? As *Vajnai* case demonstrates, the ECtHR is more critical of state condemnations of Stalinism and Communism than of Nazism. Or to put it in a converse way, the Court treats more leniently state interference with freedom of expression when memory about Nazism and Holocaust should be protected than when a post-Communist state wants to preserve a critical memory about Communism.

While there is (and certainly should be) *one* memory about the Holocaust across Europe, in contrast, the memory about the evils of Communism is strongly localized, confined as it is to the Eastern part of the Continent. So it may well be that comparing slaughter of animals (to use the analogy to the *PETA* case) to „gulag” can be seen as

absolutely intolerable in ex-Warsaw Pact countries, but less so in Italy or France. The public display of the Red Star can also carry quite different connotations in Hungary, than in Rome or Paris.

In the Central and Eastern European countries, which were under political transformation after 1989, the two regimes are remembered differently than in the “old” western democracies. At the same time for decades it was the attitude to Nazism and the Holocaust that came to be seen as the main measure of belonging to a free, democratic and the rule-of-law respecting Europe: a belonging required a total rejection and condemnation of national socialism. It has never expected from Western democracies to reject and condemn communism or even Stalinism, which led to a dualism in the European collective memory with regard to past atrocities. Meanwhile rejecting all references to non-democratic regimes should be the foundation of democratic states.

ECtHR:

Handyside v. the United Kingdom, no. 5493/72, judgment of 7 December 1976

B.H., M.W., H.P. and G.K. v. Austria, no. 12774/87, Commission’s inadmissibility decision of 12 October 1989

Nachtmann v. Austria, no. 36773/97, Commission’s inadmissibility decision of 9 September 1998

Schimanek v. Austria, no. 32307/96, inadmissibility decision of 1 February 2000

Wabl v. Austria, no. 24773/94, judgment of 21 March 2000

Garaudy v. France, no. 65831/01, inadmissibility decision of 24 June 2003

Scharsach and News Verlagsgesellschaft mBH v. Austria, no. 38384/98, judgment of 13 November 2003

Ždanoka v. Latvia, no. 58278/00, judgment of 17 June 2004

Partidul Comuniștilor (Nepecești) and Ungureanu v. Romania, no. 46626/99, judgment of 3 February 2005

Ždanoka v. Latvia, no. 58278/00, Great Chamber judgment of 16 March 2006

Dyuldin and Kislov v. Russia, no. 25968/02, judgment of 31 July 2007

Bodrožić v. Serbia, no. 32550/05, judgment of 23 June 2009

Hoffer and Annen v. Germany, no. 397/07 and 2322/07, judgment of 13 January 2011

Fratanoló v. Hungary, no. 29459/10, judgment of 3 November 2011

PETA v. Germany, no. 43481/09, judgment of 8 November 2012

Perinçek v. Switzerland, no. 27/08510, judgment of 17 December 2013

Maciejewski v. Poland, no. 34447/05 judgment of 13 January 2015

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