Memory Laws and the Rule of Law

Protecting the Good Name of the Nation as Memory Law

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Memory laws – Protecting the good name of the nation – *de facto* memory laws – Prohibiting statements about the past – Article 301 of the Turkish Criminal Code – Protecting the good name of Poland and the Polish nation – Protecting the good name of the nation as *de facto* memory laws – Role of organisations in implementing the laws – Rule of law – Independence of the judiciary – European Court of Human Rights – Chilling effect – European memory politics

Introduction

In January 2018 Poland adopted a package of memory-related laws,[1] which contained provisions intended to protect the good name of Poland and the Polish

[1] *Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary,* [the Act amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Act on War Graves and Cemeteries, the Act on Museums and the Act on the Liability of Collective Entities for Acts Prohibited under the Threat of a Penalty of 26 January 2018] Journal of Laws of 2018, item 369.

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nation.[2] These developments were widely construed as being intended to prohibit mentioning the involvement of Poles in crimes against Jews during the Second World War.[3] The amendments stirred international controversy, leading to the revocation of some of the criminal provisions in the package by parliament in June 2018 and some other provisions by the rulings of the Constitutional Tribunal in January 2019. However, several of the provisions that were introduced, including the one on the protection of the nation's good name, remained in force. A decade earlier, in 2005, international attention focused on charges brought in Turkey against writer Orhan Pamuk for an interview in a Swiss magazine, in which he stated that thirty thousand Kurds and a million Armenians had been killed in the Ottoman Empire. The case was eventually dropped. However, the criminal law provision on the basis of which the writer was charged – Article 301 of the Turkish Criminal Code – became world-renowned and, ever since, has been considered one of the most repressive 'memory laws'.[4] Article 301 does not mention history or statements about the past; it (merely) prohibits publicly degrading the Turkish nation.

This article demonstrates how the protection of the nation's good name can be used as a memory law[5] on the basis of the Polish and Turkish provisions that protect the nation's good name. While Poland and Turkey are pursuing policies to

[2]Ibid., para. 5, a new item (6c) was added to the Act on the Institute of National Remembrance titled 'Protection of the Good Name of the Republic of Poland and the Polish Nation'.

[3]The provision (merely) criminalises 'publicly and falsely attributes responsibility or co-responsibility to the Polish nation or the Polish State for the crimes committed by the German Third Reich': *see* M. Wyrzykowski, 'Waking Up Demons: Bad Legislation for an Even Wore Case', 5 *European Papers* (2020) p. 1171; A. Gliszczyńska-Grabias et al., 'Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards', *XXXVIII Polish Yearbook of International Law* (2019) p. 59; A. Gliszczyńska-Grabias and G. Baranowska, 'Using and Abusing Memory Laws in Search of "Historical Truth": The Case of the 2018 Amendments to the Polish Institute of National Remembrance Act', in N. Tirosh and A. Reading (eds.), *The Right to Memory: History, Media, Law, and Ethics* (Berghahn 2023) p. 112.

[4]N. Koposov, 'Memory Laws: Historical Evidence in Support of the "Slippery Slope" Argument', *Verfassungsblog,* 8 January 2018, https://verfassungsblog.de/memory-laws-historical-evidence-in-support-of-the-slippery-slope-argument, accessed 28 March 2023; U. Belavusau and A. Wójcik, 'Polish Memory Law: When History Becomes a Source of Mistrust', *New Eastern Europe*, 19 February 2018, http://neweasterneurope.eu/2018/02/19/polish-memory-law-history-becomes-source-mistrust/, visited 8 November 2023; I Tourkochoriti, 'Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece', in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory* (Cambridge University Press 2017) p. 171-172; O. Bakiner, 'Is Turkey Coming to Terms with Its Past? Politics of Memory and Majoritarian Conservatism', *Nationalities Papers 2013*, p. 702-703.

[5]The first section of this article contains a definition of 'memory laws' as used in this article, as well as a discussion of the term.

prohibit and limit mentioning crimes against Jews during the Second World War by Poles or the Armenian genocide by the Ottoman Empire respectively, neither have passed specific laws explicitly prohibiting such statements. Three critical similarities between the Turkish and Polish laws and the context in which they are implemented have been identified, namely the broad terms of the clause, the role of organisations in applying the law and larger memory politics pursued by the state. These two states have chosen to use such provisions instead of adopting what is referred to as memory law *per se*, which explicitly mentions a historical event. This article proposes three reasons why this has not been done. First, such an approach covers more historical events than a specific memory law. Second, using a *de facto* memory law allows for more flexibility, so the state authorities can choose when to react and when not to react to a certain statement about the past. Third, this approach enables the avoidance of major international criticism, which would very likely accompany a law explicitly penalising the mention of the Armenian genocide or crimes by Poles against Jews, respectively.[6]

The laws and their application need to be seen in the context of the serious rule of law crisis in Poland and Turkey.[7] In Poland, the post-2015 rule of law backsliding was accompanied by the introduction of a new historical narrative and an unprecedent adoption of various memory laws. Adopting such laws and changing the discourse was one of the explicit goals of the populist government.[8] The rule of law backsliding is highly relevant for how the laws are implemented, especially as the independence of the judiciary has been structurally weakened in both countries. The situation in Turkey applies much more stringently to both democratic institutions and limitations on the freedom of speech than in Poland. Turkey's position in Freedom House's World ranking has been dropping over the years and, since 2018, the state has been assessed as 'Not Free'.[9] While Poland's position in this ranking has also been declining significantly, it is still considered a 'Free' and semi-consolidated democracy. Both countries score currently only 1 out

[6]As also exemplified by the fact that the provisions in the 2018 package of memory-related laws criminalising attributing responsibility or co-responsibility to the Polish nation or the Polish State for the crimes committed by the German Third Reich received huge international criticism (and were revoked) – in contrast to the provisions on the protection of the nation's good name, which remained in force.

[7]For a broader context, *see* W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); F. Petersen and Z. Yanaşmayan (eds.), *The Failure of Popular Constitution Making in Turkey. Regressing Towards Constitutional Autocracy* (Cambridge University Press 2020).

[8]A. Wójcik, 'Laws Affecting Historical Memory from Human Rights Perspective' (PhD thesis, Institute of Law Studies, Polish Academy of Sciences 2021) Chs. 3 and 4, p. 127-212; A. Gliszczyńska-Grabias et al., 'Memory Laws in Poland and Hungary', Institute of Law Studies Polish Academy of Sciences 2023.

[9]https://freedomhouse.org/country/turkey/freedom-world/2023, visited 8 November 2023.

of 4 in the independent judiciary metric.[10] This feature is crucial for the application of broad provisions, such as protecting good name of the nation: when judiciary can be steered or influenced politically such provisions pose a major threat to the freedom of speech.

This article explores how the two specific laws protecting the good name of the two nations can be deployed as memory laws; as such, it focuses on the wording of the regulations and judgments that are applicable in the context of expressions about history and memory. The 2018 Polish law has not yet led to a court judgment.[11] In contrast, there is extensive case law on Article 301 of the Turkish Criminal Code. As first-instance judgments in the Turkish legal system are not publicly accessible, the analysis is based on second-instance (Yargıtay) judgments,[12] as well as on relevant judgments of the European Court of Human Rights.[13]

The first section explains the use of the term memory laws in this article. It then discusses the two laws under review. The application of the Turkish law which prohibits degrading the Turkish nation is discussed first, followed by the 2018 provision protecting Poland's good name. The next section presents the similarities between these two laws. The final section concludes by assessing why Poland and Turkey chose to apply provisions protecting the state's good name instead of adopting memory laws *per se*.

Memory law

The term 'memory law' is not well defined and unambiguous.[14] This article refers to memory laws as normative acts of law intended to prohibit the expression of a

[10]https://freedomhouse.org/country/poland/freedom-world/2023, visited 8 November 2023.

[11]However, it has already been mentioned in domestic judgments, and non-governmental organisations have initiated cases on its basis. The famous case against Engelking and Grabowski is a defamation lawsuit, not brought under this law; *see* the section below titled 'The role of organizations in applying the law'.

[12]All relevant Yargıtay judgments were collected from three databases: https://lib.kazanci.com.tr/kho3/ibb/anaindex.html, https://legalbank.net/arama, and https://www.lexpera.com.tr/ictihat, visited 8 November 2023.

[13]The HUDOC database was searched for cases regarding Arts. 301 and 159 (provisions in the former Criminal Code).

[14]There are different definitions of memory laws, covering just legal regulations prohibiting certain interpretation of the past (as memory laws are referred to in this article), as well as significantly broader categorisations, including also incentives to certain interpretation of the past, for example through parliamentany resolutions. For different definitions of memory laws *see* N. Koposov, *Memory Laws, Memory Wars* (Cambridge University Press 2018) p. 6; M. Bucholc, 'Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015', 11 *Hague Journal on the Rule of Law* (2008) p. 85; U. Belavusau and A. Gliszczyńska-Grabias, 'Introduction: Memory Laws: Mapping a new Subject in Comparative Law and

particular view about the past – namely events that took place at least a decade earlier. Consequently, *de facto* memory laws have the objective of prohibiting the expression of a particular view about the past while not explicitly stating this fact. Nikolay Koposov introduced the term *de facto* memory law with regard to Article 301 of the Turkish Criminal Code.[15] This article considers the laws protecting the state's good name as *de facto* memory laws when they are intended to achieve such objectives. It has been argued that memory laws have been increasingly adopted to protect not minorities but the majority population from what some consider 'wrong' historical interpretations.[16] The laws protecting the good name of the nation analysed in this article are a clear example of such a policy.

'Protecting the Turkish nation' as a memory law

Scholars have frequently identified Article 301 of the Turkish Criminal Code as the principal or most noteworthy provision of the law related to memory in Turkey, especially because of its association with the denial of the Armenian genocide.[17] While this article deals specifically with how 'protecting Turkishness/ the Turkish nation' has been applied as a *de facto* memory law, different criminal provisions have been used in Turkey to prosecute people for statements about the past, including those about the Armenian genocide. Several relevant provisions besides Article 301 can be identified as such, specifically Article 216(2) of the Turkish Criminal Code (the prohibition on inciting hatred with respect to a group),[18] Article 7(2) of the Anti-Terrorist Law (the prohibition on disseminating propaganda on behalf of a terrorist organisation)[19] and Law 5816 (law on crimes committed against the memory of Atatürk, the first president of the Republic of

Transitional Justice', in U. Belavusau and A. Gliszczyńska-Grabias, *Law and Memory: Towards Legal Governance of History* (Cambridge University Press 2017). *See also* R. Khan, 'Free Speech, Official History, and Nationalist Politics, Toward a Typology of Objections to Memory Laws', 31(1) *Florida Journal of International Law* (2019) p. 330, for a comprehensive evaluation of the three main objections to them, namely that the violate freedom of speech, create an official history and foster a narrow, particularistic politics.

[15]Koposov, *supra* n. 14, p. 112.

[16]E-C Pettai, 'Protecting Memory or Criminalising Dissent? Memory Laws in Lithuania and Latvia', in E. Barkan and A. Lang (eds.), *Memory Laws and Historical Justice. The Politics of Criminalising the Past* (Palgrave Macmillan Cham 2022) p. 167-193.

[17]*See* n. 4.

[18]Former Art. 312(2); D. Bayır, *Minorities and Nationalism in Turkish Law* (Routledge 2016) p. 234-243; Venice Commission, 'Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey' (CDL-AD(2016)002)).

[19]For prosecution based on this article (as well as former Art. 8(1) of the Act on the Prevention of Terrorism, with a similar meaning), *see* ECtHR 8 July 1999, No. 23168/94, *Karataş* v *Turkey*; ECtHR 10 February 2009, No. 27690/03, *Güçlü* v *Turkey*.

Turkey between 1923 and 1938).[20] Taken together, and especially in the light of their implementation, these provisions constitute a powerful tool for proscribing specific expressions regarding historical events.

History and content of Article 301 of the Turkish Criminal Code

Article 301 was introduced in 2005 as a part of a package of criminal law reforms preceding the opening of negotiations on Turkey's membership of the European Union. It is an amended version of Article 159 of the former Criminal Code from 1926.[21] It has been argued that, since its introduction into the Turkish Criminal Code almost a century ago, Article 159 has been used to suppress ethnoreligious minorities in Turkey.[22]

Article 301 currently reads as follows:

1. A person who publicly degrades the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months to two years.
2. A person who publicly degrades the military or security organisations of the State shall be sentenced to a penalty in accordance with paragraph 1 above.
3. The expression of an opinion for criticism does not constitute an offence.
4. The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.[23]

The procedure for ministerial approval (paragraph 4) was introduced by an amendment of 2008, which also withdrew the paragraph that increased the sentence by one-third when a Turkish citizen breached the provision in another country. Therefore, committing the 'denigration' outside Turkey was initially considered an aggravating feature. Furthermore, the 2008 amendment reduced the possible sentence of imprisonment from three to two years, replacing the much-debated term 'Turkishness' with the expression 'the Turkish

[20]G. Baranowska, 'Memory Laws in Turkey: Protecting the Memory of Mustafa Kemal Atatürk', in K. Bachmann and C. Garuka (eds.), *Criminalizing History. Legal Restrictions on Statements and Interpretations of the Past in Germany, Poland, Rwanda, Turkey and Ukraine* (Peter Lang 2020).

[21]For more on the amendments to the provision between 1926 and 2005, *see* T.Y. Sancar, *Türklüğü, Cumhuriyeti, Meclisi, Hükümeti, Adliyeyi, Bakanlıkları, Devletin Askeri ve Emniyet Muhafaza Kuvvetlerini Alenen Tahkir ve Tezyif Suçları (Eski TCK m.159/1 - Yeni TCK Md. 301/1–2)* (Seçkin Yayıncılık 2006) p. 46-57. *See also* T.Y. Sancar's assessments of the 2002 changes to Art. 159: T.Y. Sancar, 'Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı', 52 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* (2003) p. 89.

[22]Bayır, *supra* n. 18, p. 243-249.

[23]As cited in ECtHR 25 October 2011, No. 27520/07, *Altuğ Taner Akçam* v *Turkey*, para. 44.

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Nation'.[24] The judicial practice and Article 301 itself have been heavily criticised as breaching standards of human rights, a stance which has not changed since the 2008 amendments.[25]

While Article 301 is not a memory law *per se*, it has been instrumental in pursuing and imposing contested state narratives regarding certain historical facts, including the Armenian genocide. Significantly, Article 301 has been regarded as a memory law not only by its critics but also by its proponents. In the Turkish legal discourse, the use of this provision to regulate expressions about the past has been justified by the existence of memory laws in Europe.[26]

Application of Article 301 of the Turkish Criminal Code

Article 301 has been identified as one of the most restrictive existing laws used to regulate historical memory. One of the most well-known instances of restricting freedom of expression with respect to the discussion of historical injustices is the prosecution of individuals who make reference to the Armenian genocide in Turkey. Notably, Article 301 does not overtly convey a stance on historical revisionism. The provision has been extensively applied, which is reflected in dozens of Yargıtay (second-instance) cases and eight judgments from the European Court of Human Rights. The vast majority of relevant Yargıtay cases concern insults against police officers and soldiers. However, that does not mean that Article 301 is not highly relevant for statement about the past. First, European Court of Human Rights judgments and literature reveal that criminal investigations under Article 301 concerning historical events have been initiated, but eventually terminated. Second, as the cases concerning historical events received massive media coverage, they have a major chilling effect.

Only two identified Yargıtay judgments apply to statements related to historical events.[27] One is a 2006 judgment regarding Hrant Dink.[28] The

[24]For a discussion on the meaning of 'Turkishness', *see* Sancar (2006), *supra* n. 21, p. 70-87. She argues that the Yargıtay has considered the terms 'Turkish nation' and 'Turkishness' basically to be synonymous (p. 83).

[25]A. Bülent, 'The Brand New Version of Article 301 of the Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey', 9(12) *German Law Journal* (2008) p. 2237.

[26]*See* for example: A. Turhan, 'Düşünce ve İfade Özgürlüğü Kapsaminda Türk Ceza Kanunu'nun 301. Maddesinin Değişimi', 1(5) *TAAD* (2011).

[27]It should be noted that, in several cases, the publicly available short descriptions of the Yargıtay judgments do not explain the factual situation of the case (namely, the offences committed). Therefore no conclusions can be drawn as to what the actual reason for the prosecution was: *see* in particular Y.(9)CD, E. 2009/6883 K. 2011/1703, 15.3.2011; Y.(9)CD, E. 2008/1810, K. 2009/7001, 10.6.2009.

[28]YCGK, E. 2006/9-169, K. 2006/184, 11.7.2006 (this judgment was issued after the amended Criminal Code, but the first instance case applied to Art. 159 of the former Criminal Code).

journalist and editor-in-chief of a Turkish-Armenian newspaper, *Agos*, was convicted for denigrating Turkishness because he published a series of articles on the identity of Turkish citizens of Armenian descent and the Armenian genocide. In particular, the Turkish court held that Article 301 had been breached by a statement on poisoned blood, which the judges construed as 'Turkish blood' (and therefore found it to be an instance of denigrating Turkishness). Hrant Dink simultaneously argued that what he described as 'poison' for the identity of the Armenians was their obsession with having the Turks recognise that the events of 1915 constituted genocide.[29] While this Yargıtay judgment upheld the first instance judgment convicting Hrant Dink under Article 301, the European Court of Human Rights ruled in 2010 that Turkey had failed to protect Hrant Dink's freedom of expression and life (as the journalist was killed in 2007 by an ultra-nationalist).[30] Hrant Dink's assassination received immense national and international attention and was one of the factors leading to the 2008 amendment of Article 301.[31] The second identified Yargıtay judgment applying Article 301 to a statement about the past was issued in 2013. It upheld a conviction of a person who sent emails insulting the memory of the first president of the Republic of Turkey.[32]

The analysis of domestic judgments gives a different impression of Article 301 than the eight judgments on Article 301 issued by the European Court of Human Rights.[33] Those eight rulings include the above-mentioned Hrant Dink case in 2010; one concerning the history professor, Altuğ Taner Akçam (2011); five about the publisher, Fatih Taş (2011, 2017, and three in 2018); and one regarding the journalist, Abdurrahman Dilipak (2015). Except for the *Dilipak* v *Turkey* judgment (which involved criticism of high-ranking officers), those cases can be categorised as statements about historical events. Both *Hrant Dink* v *Turkey* and *Altuğ Taner Akçam* v *Turkey* – arguably the best-known Article 301-related rulings of the European Court of Human Rights – apply to statements specifically about the Armenian

[29]ECtHR 14 September 2010, No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, *Dink* v *Turkey*, para. 24.

[30]Ibid.

[31]Bayır, *supra* n. 18, p. 246.

[32]The accused sent several emails in 2005 to the Turkish military, one of which was considered by the court to be insulting the memory of Mustafa Kemal Atatürk, the first president of Turkey (since 1923 until his death in 1938). Mustafa Kemal Atatürk is considered to be the founding father of Turkey and – while some controversies to his heritage remain, particularly with regard to treatment of minorities – is highly respected in Turkey: Y.(9)CD, E. 2012/4775, K. 2013/9266, 18.6.2013.

[33]As most of the Art. 301 cases that reach the ECtHR apply to historical cases, in contrast with the analysis of the Yargıtay judgments. These might be cases that are more likely to be brought to the ECtHR or more likely to be found admissible by the Court. Additionally, not all of the Art. 301 cases filed with the ECtHR applied to cases litigated domestically, as some did not apply to convictions (*see*, for example, *Altuğ Taner Akçam* v *Turkey*, *supra* n. 23).

genocide. As mentioned above, Hrant Dink was sentenced for writing a series of articles. Altuğ Taner Akçam, an academic working on Armenian history, complained that the existence of Article 301 interfered with his right to freedom of expression. He was charged in 2006 under Article 301 for an article in which he publicly criticised the prosecution of Hrant Dink and asked to be prosecuted on the same grounds for his opinions on the Armenian issue. While the domestic proceedings were eventually terminated, he was summoned to a prosecutor's office to make a statement.[34] Altuğ Taner Akçam argued at the European Court of Human Rights that 'the mere fact that an investigation could potentially be brought against him under this provision for his scholarly work on the Armenian issue caused him great stress, apprehension and fear of prosecution and thus constituted a continuous and direct violation of his rights under Article 10' (freedom to expression).[35] The Court agreed with this assessment. The cases against publisher Fatih Taş applied to books published on the internal conflict between the State of Turkey and the Kurdistan Workers' Party.[36] The conflict is ongoing, so categorising Article 301 in these cases as related to historical memory could be disputed. However, it is noteworthy that all of the books in question depicted events that had taken place at least a decade before their publication, with the majority of them constituting memoirs. Although the content of these works was undeniably pertinent to the contemporary context, they nevertheless constituted representations of historical events.

In the *Altuğ Taner Akçam* case the European Court of Human Rights found that not only could a conviction based on Article 301 violate the right of freedom of speech, but so could criminal investigations under the article, even though they were ultimately terminated. This is particularly relevant, as charges under Article 301 that did not result in sentences have been brought against many intellectuals. Aside from Altuğ Taner Akçam and Orhan Pamuk, this situation applied, for example, to the writer, Elif Şafak. Overall, it can be concluded that Article 301 has been used with regard to certain statements about the past,[37] and that those prosecutions received the most international attention and are more likely to reach the Strasbourg court.

[34]*Altuğ Taner Akçam* v *Turkey*, *supra* n. 23, paras. 7-8.

[35]Ibid., para. 53.

[36]ECtHR 5 April 2011, No. 36635/08, *Fatih Taş* v *Turkey*; ECtHR 10 October 2017, No. 6813/09, *Fatih Taş* v *Turkey (2)*; ECtHR 24 April 2018, No. 45281/08, *Fatih Taş* v *Turkey (3)*; ECtHR 24 April 2018, No. 51511/08, *Fatih Taş* v *Turkey (4)*; ECtHR 4 September 2018, No. 6810/09, *Fatih Taş* v *Turkey (5)*.

[37]While Art. 301 is well known for being applied to people mentioning the Armenian genocide, with regard to historical cases, it seems to be more frequently used for statements about atrocities committed against the Kurdish population. This is also the case with regard to applications that reached the ECtHR: five of the eight cases apply to books about the conflict between the Turkish state and Partiya Karkerên Kurdistanê (the Kurdistan Workers' Party): *see* the *Fatih Taş* v *Turkey* cases, *supra* n. 36.

'Protecting the good name of the Polish nation' as a memory law

2018 memory law package

The provision on the protection of the good name of the Polish state and nation was passed in January 2018 as part of a legislative initiative that included various amendments to existing laws. The package comprised modifications to multiple laws, including offences perpetrated in Poland and against Polish nationals, regulations regarding cemeteries and the protection of memorial sites. The explanatory memorandum of the Bill starts with the condemnation of the use of the term 'Polish concentration camps' with respect to German Nazi camps created and operated on the territory of occupied Poland during the Second World War. It further explains that these terms breach the good name of the Republic of Poland and the Polish nation. As Poland's authorities have reacted to statements about 'Polish concentration camps' in the past through diplomatic channels, the explanatory memorandum continues that this has not proved sufficient and effective legal tools need to be established to protect the good name of the Republic of Poland and the Polish Nation. Next, the explanatory memorandum justifies the new provisions with the need to implement EU Framework Decision 2008/913.[38] According to the Framework Decisions EU member states shall make punishable, *inter alia*, 'publicly condoning, denying or grossly trivialising' crimes defined in the Charter of the International Military Tribunal (1945), 'when the conduct is carried out in a manner likely to incite to violence or hatred against' a group or a person 'defined by reference to race, colour, religion, descent or national or ethnic origin'.[39] The reference the Framework Decision is misleading, as the package of 2018 memory-related laws does not serve it implementation: the laws do not criminalise statements that are incitements to violence or hatred. The Polish legislature (mis)used the Framework Decision and EU memory politics to justify its own, nationalistic, initiative. As the EU was aiming to protect minorities from hate, and the Polish laws aimed at protecting one official historical narrative, the interplay between EU and Polish memory politics produced the opposite effect to that which had been desired.

The 2018 amendments received global attention and criticism, mainly because of a provision that introduced criminal sanctions of up to three years'

[38]Explanatory memorandum to the Bill, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=806, visited 8 November 2023.

[39]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. On the Framework Decision *see* L. Pech, 'The Law of Holocaust Denial in Europe. Toward a (Qualified) EU-wide Criminal Prohibition', in L. Hennebel and T. Hochmann (eds.), *Genocide Denials and the Law* (Oxford University Press 2011) p. 185.

imprisonment for 'publicly and contrary to the facts claiming that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich, as specified in Article 6 of the Charter of the International Military Tribunal'.[40] The provision was interpreted as being intended to prohibit mentioning the involvement of Poles in crimes against Jews during the Second World War. This was not the first time such a provision had been adopted in Poland. In 2006, when the Law and Justice party (Polish: *Prawo i Sprawiedliwość*, PiS) was first voted into government, an amendment was introduced to the Penal Code which provided that 'anyone who publicly accuses the Polish Nation of participating in, organising, or being responsible for communist or Nazi crimes may be imprisoned for up to 3 years'.[41] However, the provision was repealed by the Constitutional Tribunal for procedural rather than substantive reasons.[42] This paved the way for the subsequent adoption of this provision during the Law and Justice party's next term of office. A great deal of international controversy resulted in the repeal in June 2018 of a part of the memory law package that criminalised attributing responsibility for Nazi crimes to the Polish nation or the Polish State.[43] However, it should be noted that the provisions that remain in force, including those protecting the good name of the Polish nation, have the potential to create a chilling effect.[44]

Protecting the good name of the Polish nation

The provision on the protection of the good name of the Polish nation and the Republic of Poland was added to the Act on the Institute of National Remembrance, a state institution with, among other things, investigative powers. There already existed a provision penalising insults to the Nation or Republic of Poland (Article 133 of the Polish Criminal Code); however, that is narrower than

[40] *See supra* n. 1.

[41] *See* K. Wierczyńska, 'Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace', in *Polish Yearbook of International Law, 2017*, p. 275 ff.; I.C. Kamiński, 'Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni', in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, 2010*, p. 5 ff.

[42] Constitutional Tribunal, 19 September 2008, No. K5/07.

[43] *Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu* [the Act on the amendment of the Act on the Institute of National Remembrance – Commission for the Investigation of Crimes Against the Polish Nation of 27 June 2018], Journal of Laws of 2018, item 1277.

[44] Gliszczyńska-Grabias et al., *supra* n. 3, p. 59–72, at p. 66; J. Hackmann, 'Defending the "Good Name" of the Polish Nation: Politics of History as a Battlefield in Poland, 2015–18', 20(4)_*Journal of Genocide Research* (2018) p. 587.

the new provision introduced in 2018.[45] A section was added to the law entitled 'Protection of the good name of the Republic of Poland and the Polish Nation'. The new provisions, which are still in force today, read as follows:

> Article 53o: The provisions of the Civil Code of 23 April 1964 (Journal of Laws of 2016, items 380 and 585) on the protection of personal interests shall apply accordingly to the protection of the good name of the Republic of Poland and the Polish Nation. An action for the protection of the good name of the Republic of Poland and the Polish Nation may be brought by a non-governmental organisation acting within the scope of its statutory goals. Any damages or compensation awarded shall be due to the State Treasury.
>
> Article 53p: An action for the protection of the good name of the Republic of Poland and the Polish Nation may also be brought by the Institute of National Remembrance. In such cases, the Institute of National Remembrance shall have the capacity to be a party to court proceedings.
>
> Article 53q: The provisions of Articles 53o and 53p apply irrespective of the governing law.[46]

It is worth noting that these provisions have not had nearly as much attention as the aforementioned criminal sanctions, which have since been revoked. There have been no concerted efforts to date to repeal these provisions and, while no judgments have been passed on their basis, at least one organisation has filed a case. In 2018, the 'Polish League Against Defamation' (Polish: *Reduta Dobrego Imienia*), an organisation with close links to the ruling government, filed a complaint against an Argentinian newspaper about an article on the Jedwabne pogrom of 1941, during which Poles

[45]'Whoever insults the Nation or the Republic of Poland in public shall be subject to the penalty of the deprivation of liberty for up to 3 years', *Ustawa z dnia 6 czerwca 1997 r. Kodeks karny* [the Polish Penal Code of 6 June 1997], Journal of Laws of 2019, item 1950 as amended. It has been argued that Art 133 of the Criminal Code cannot be used to circumstances in which crimes (Nazi, communist or others) are attributed to the Polish Nation or Republic of Poland (C. Kłak, 'Prawnokarna ochrona dobrego imienia i godności Narodu Polskiego i Rzczypospolitej Polskiej', *Teka Komisji Prawniczej PAN Oddział w Lublinie, t. XIII, 2020, nr 1*, pp. 219–234) and that it can only be applied when the insult takes an abusive or offensive form (Kamiński, *supra* n. 41, p. 14-15; Kamiński also compared Art. 133 with the Turkish Article 301, *see* p. 28-34). The good name of the Republic of Poland is further protected by laws prohibiting official symbols of the state against insult: the national emblem, the white eagle, state seals, the red and white colours of the national flag and the national anthem in Art. 28, para. 4 of the Constitution and in the Art. 1 of *Ustawa z dnia 31 stycznia 1980 r. o godle, barwach i hymnie Rzeczypospolitej Polskiej oraz o pieczęciach państwowych* [the Act on the Coat of Arms, National Colours and National Anthem of the Republic of Poland, and on State Seals of 31 January 1980] (Journal of Laws of 1980, no. 7, item 18).

[46]*See supra* n. 1.

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murdered their Jewish neighbours.[47] The complaint concerned a picture accompanying the text that showed dead Polish partisans.[48]

Interestingly, the only judgment in which this provision has been mentioned so far was in the context of organisations bringing cases to protect the 'historical truth'. The case applied to the defamation of a partisan group that was portrayed as being anti-Semitic in a TV programme. While deliberating on the principle that individuals are not entitled to pursue claims of the whole community or state, the court noted that this principle had been acknowledged by the legislature when introducing the new provision on the protection of the good name of the nation, which allows only specific non-governmental organisations to file claims, not individuals.[49]

This complaint and judgment illustrate three important features, the first being the central role that organisations, including non-governmental, play in implementing the law. The provision has specifically given the Institute of National Remembrance the ability to file cases about Poland's good name.[50] The second feature is that – just as expected – it is particularly likely that the provision will be applied to crimes committed by Poles against Jews. Third, the amendment made it possible to file cases against statements made in other jurisdictions,[51] which was used in the lawsuit filed against the Argentinian newspaper. This also relates to Article 301 of the Turkish Criminal Code, which initially increased the sentence by one-third when a Turkish citizen breached the provision in another country. This parallel shows that both of those laws were introduced with the objective of particularly protecting the nation's good name outside the country.[52]

Three similarities between the Polish and Turkish *de facto* memory laws

Broad terms of the clause

As the European Court of Human Rights stated in 2011: 'Article 301 of the [Turkish] Criminal Code does not meet the "quality of law" required by the Court's settled case-law, since its unacceptably broad terms result in a lack of

[47]J.T. Gross, *Neighbors. The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton University Press 2001).

[48]https://www.wprost.pl/kraj/10108767/jest-odpowiedz-na-pozew-reduty-dobrego-imienia-masowe-publikacje-tekstu-o-jedwabnem.html, visited 8 November 2023.

[49]Court of Appeal in Kraków Case I ACa 808/19, National identity as a personal good. Breach of a personal good in the form of national identity.

[50]Art. 53p.

[51]Art. 53q.

[52]*See also* the explanatory memorandum of the package of memory-related amendments.

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foreseeability as to its effects'.[53] While the Polish *de facto* memory law has not yet been analysed by that Court, it is highly likely that a similar statement on the broad terms and lack of foreseeability could be issued. The broad language used in these provisions is what makes them particularly effective for the state authorities, as it grants domestic courts and prosecutors an extensive amount of discretion when evaluating statements pertaining to the past. This latitude provides a substantial amount of leeway for judicial interpretation, which can be used to achieve the desired outcomes of the authorities. In Turkey, the substance of Article 301 remains consistent, whereby charges are brought against certain individuals, while others who have made similar statements remain unaffected. The practice of charges also varies periodically, depending on the current stance on history.[54] However, there is considerable flexibility in the application of Article 301. Although there is no existing case law on the Polish provision, the wording of the law similarly grants judges and prosecutors a great deal of discretion in its interpretation and application.

The broad and general phrasing of the clause inevitably leads to uncertainty for anyone who may be accused under it. In countries where the rule of law is weakening and the executive is attempting to exert control over the judiciary, such as Turkey and Poland, the broad phrasing of such provisions is particularly concerning, as it allows the executive to significantly influence their application. Therefore, the decision of when and against whom such provisions are to be applied becomes political. In this context also the broad phrasing of the clauses, coupled with a not fully independent judiciary, achieve a chilling effect. This situation has been found to induce self-censorship among translators, editors, and publishers.[55] The European Court of Human Rights has explicitly acknowledged the chilling effect with regard to charges brought under Article 301.[56]

[53]*Altuğ Taner Akçam* v *Turkey*, *supra* n. 23, para. 95.

[54]On changes in Turkish memory politics, *see*, for example, İ. Parlak and O. Aycan, 'Turkey's Memory Politics in Transformation: AKP's New and Old Turkey', in A. Bilgin and A. Öztürk (eds.), *Political Culture of Turkey in the Rule of the AKP. Change and Continuity* (Nomos 2016) p. 67-87; and E. Özyürek, *Nostalgia for the ModernState Secularism and Everyday Politics in Turkey* (Duke University Press 2007) p. 114-137; Y. Çolak, 'Ottomanism vs. Kemalism: Collective Memory and Cultural Pluralism in 1990s Turkey', 42(4) *Middle Eastern Studies* (2006) p. 587; J.M. Dixon, 'Defending the Nation? Maintaining Turkey's Narrative of the Armenian Genocide', 15(3) *South European Society and Politics* (2010) p. 470 at p. 477-479.

[55]N. Maksudyan, 'Walls of Silence: Translating the Armenian Genocide into Turkish and Self-Censorship', 37(4) *Critique: Journal of Socialist Theory* (2009) p. 635. Interestingly, the author did not find any direct correlation between censorship and the use of the word 'genocide' (p. 645).

[56]*Altuğ Taner Akçam* v *Turkey*, *supra* n. 23, para. 81.

The role of organisations in applying the law

A fascinating aspect when analysing the Polish and Turkish regulations and their application is the role of organisations. The involvement of such entities in the process has been explicitly included in Polish law, which allows non-governmental organisations, acting within the framework of their statutory objectives, to file civil cases for the protection of the good name of the Republic of Poland and the Polish nation.[57] Furthermore, court practice in Poland demonstrates the significance of organisations in similar cases, even in instances where the law does not explicitly provide for their involvement. For example, the libel case against Barbara Engelking and Jan Grabowski was brought by an individual but sponsored by the 'Polish League against Defamation'. The two recognised historians were sued in 2019 because of a book they co-edited on the fate of Jews in a number of regions in occupied Poland. The book also covered Polish–Jewish relations during that time and crimes committed by Poles. The 'Polish League against Defamation', a group that has denied such crimes in the past, contacted the niece of one of the people mentioned in the book as being responsible for the murder of Jews during the Second World War. The 89-year-old woman then filed a defamation lawsuit against Engelking and Grabowski.[58]

Although Article 301 of the Turkish Criminal Code does not contain a comparable provision, it is clear from the implementation of the law that organisations have played a role in instigating cases. For example, the lawsuit against Hrant Dink was filed by a member of an 'ultra-nationalist group', which was protesting outside the publishing house on the day the criminal complaint was filed against Dink.[59] An important role is played by the Talât Pasha Committee, an organisation which a court in Istanbul found was created 'for the purpose of "refuting the Armenian genocide allegations" and part of a "nationalist" and "chauvinist" organisation that stirred up hatred and enmity among peoples'.[60] To achieve these objectives, the organisation has supported proceedings under Article 301 against people referring to the Armenian genocide and has organised campaigns, such as Doğu Perinçek's campaign in Switzerland

[57]Art. 53p.

[58]For more on the case *see* A. Gliszczyńska-Grabias and M. Górski, 'Badacze historii w sali sądowej. Glosa do wyroku SA w Warszawie z 16.08.2021 r., I ACa 300/21', 11 *Państwo i Prawo* (2022) p. 161. On the court case, *see* for example, A. Gliszczyńska-Grabias, 'About the Trial of Two Polish Holocaust Scholars', *Cultures of History Forum*, 8 March 2021, https://www.cultures-of-history.uni-jena.de/politics/gliszczynska-grabias-about-the-trial-of-two-polish-holocaust-scholars, visited 8 November 2023; A. Wójcik 'Historians on Trial', *Verfassungsblog*, 11 March 2021, https://verfassungsblog.de/historians-on-trial/, visited 8 November 2023.

[59]ECtHR 14 September 2010, No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, *Dink* v *Turkey*, para. 18.

[60]Dink, Great Chamber judgment, para. 187.

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denying the Armenian genocide to test Swiss memory law.[61] Non-governmental organisations, such as the Talât Pasha Committee, are granted legal standing in Turkey under the Criminal Procedures Code, provided they can establish a sufficient connection to and harm resulting from the contested action.[62]

There is no need to assess whether the organisations involved in those forms of litigation can be considered 'governmental-organised non-governmental organisations', so-called 'GONGOs'.[63] It is, however, important to point out that their actions support the historical policy of the respective states. The organisations promote a vision of the past, which has the objective of denying certain events, such as the Armenian genocide and crimes by Poles against Jews during the Second World War. States can rely on such organisations – which they might support in various ways, including financially – in applying *de facto* memory laws, such as the provisions protecting the name of the nation. Drawing on these organisations is a mean by which states circumvent direct accountability for prosecutions. Current research demonstrates that wuch organisations play a role in undermining liberal democratic values.[64] Therefore, their involvement in implementing *de facto* memory laws can be another example of their role in weakening the rule of law.

Applied in the context of active memory politics

Another similar feature of the *de facto* memory laws in question is the context in which they are applied. Both Poland and Turkey pursue particular active memory politics and promote a certain narrative of the country's history, which does not acknowledge wrongdoings committed against minorities. As such, the truth about Armenian genocide or crimes against Jews by Poles during the Second World War is denied in various ways, including eliminating certain statements from the public discourse.

The unresolved historical issues in Turkey, such as the Armenian genocide or various crimes committed against Kurdish population,[65] and ongoing narratives are exerting an influence on the current situation and giving rise to both internal

[61]B. Ertür, 'Law of Denial', 30 *Law and Critique* (2019) p. 1 at p. 5.

[62]Art. 237 of the Turkish Criminal Procedure Code.

[63]R. Hasmath et al., 'Conceptualizing Government-organized Non-governmental Organizations', 15(3) *Journal of Civil Society* (2019) p. 267; *see also* F. McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organisations Engaging with United Nations Human Rights Mechanisms', 36(2) *Netherlands Quarterly of Human Rights* (2018) p. 111.

[64]Hasmath et al, *supra* n. 63, p. 2.

[65]For a (non-exhaustive) list of historical issues that have not been dealt with in Turkey, *see* M. Sancar, 'Geçmişle Hesaplaşma. Unutma Kültüründen Hatırlama Kültürüne', *İletişim Yayıncılık, İstanbul, 2010*, p. 255-256.

and external challenges.[66] The internationally best-known aspect of Turkey's memory politics is its denial of the Armenian genocide,[67] which, while it has been a long continuous practice, has assumed various forms.[68] The Armenian genocide denial has been perpetuated since the initial years of the Turkish Republic through constraints on democratic freedoms and the oppression of minorities domestically.[69] The denial of historical wrongdoings has been coupled with the increasing suppression of freedom of expression.

Poland experienced a 'memory boom' after the fall of the Iron Curtain in 1989 and the beginning of democratisation.[70] Poland's memory politics are very much centred on the nation's historical victimhood, most notably in the Second World War. This became significantly more noticeable after the Law and Justice party returned to government in 2015. Several organisations, including the 'Polish League against Defamation', help the ruling party pursue memory politics, highlighting Polish victimhood and rejecting certain facts about the involvement of Poles in crimes in the past. The 'politics of innocence',[71] which entails a denial of crimes committed by Poles against Jews during the Second World War and emphasises the support that Poles provided to Jews during that time, is a central part of this narrative.

Conclusions: preference of 'protecting the good name of the state' over memory laws

Although Poland and Turkey lack laws that explicitly prohibit discussing the crimes against Jews by Poles or the Armenian genocide respectively, it is clear that the authorities in both countries are trying to suppress certain statements about the past, including through legal action. This situation is reminiscent of Germany before 1994 and France before 1990, where Holocaust deniers faced prosecution

[66]A. Zarakol, 'Ontological (In)security and State Denial of Historical Crimes: Turkey and Japan', 24(3) *International Relations* (2010); Bakiner, *supra* n. 4, p. 701.

[67]N. Schrodt, *Modern Turkey and the Armenian Genocide: An Argument about the Meaning of the Past* (Springer 2014). For more on external influences on the debate over the Armenian genocide in Turkey, *see* S. Bayraktar, 'The Politics of Denial and Recognition: Turkey, Armenia and the EU', in A. Demirdijan (ed.), *The Armenian Genocide*, *Palgrave Studies of the History of Genocide* (Palgrave 2016) p. 197.

[68]J.M. Dixon, 'Rhetorical Adaptation and Resistance to International Norms', 15(1) *Perspectives on Politics* (2017) p. 83.

[69]Dixon, *supra* n. 54, p. 470.

[70]K. Kończal and J. Wawrzyniak, 'Provincialising Memory Studies: Polish Approaches in the Past and Present', 11(4) *Memory Studies* (2018) p. 391.

[71]K. Kończal, 'Politics of Innocence: Holocaust Memory in Poland', 24(2) *Journal of Genocide Research* (2022) p. 250.

under other criminal offences rather than explicit Holocaust denial laws. However, Germany[72] and France eventually passed Holocaust denial laws. This raises the question of why Turkey and Poland do not have laws explicitly banning specific assertions about the past. Arguably, there are three main reasons.

First, interpreting certain statements about the past as denigrating Turkishness or protecting the good name of the Polish nation allows a broader range of historical events to be covered than would be possible under a specific memory law. This is particularly visible in Turkey, where prosecution for statements about the Armenian genocide is the best known example of the use of *de facto* memory laws in Turkey. Nonetheless, prosecutions have taken place for a much broader range of statements about the past.

The second, which is connected with the first, is that the lack of adoption of an explicit memory law allows the authorities to react flexibly. Since its enforcement in 2018, the memory law in Poland has yet to result in any prosecutions. Turkey is explicit about its official interpretation of history. However, prosecutions are not conducted for all conflicting statements about the past. If Turkey had enacted more precise memory laws, it would have had less flexibility to prosecute individuals for opportunistic reasons.[73]

A third reason is international pressure. Not all prosecutions related to statements about the past have had significant international attention. An actual law about historical events would likely cause much more attention. This can be demonstrated by legislative initiatives in Poland and Turkey, in which historical events have explicitly been mentioned and that have consequently been removed due to international criticism. First, the provisions from the 2018 package of memory-related laws criminalising the false attribution of Second World War crimes to Poland and Poles received huge international criticism.[74] The provision was consequently revoked. The second example concerns 'reasons'[75] (*gerekçe*) to Article 305 of the Turkish Criminal Code which penalises offences against 'Fundamental National Interests'. It initially gave two examples of such offences: 'propaganda for withdrawal of Turkish troops from Cyprus, and claiming that, in the aftermath of the First World War, the Armenians were subjected to genocide

[72]The law was adopted in 1994 as a result of the Constitutional Court ruling stating that Holocaust denial did not necessarily constitute hate speech.

[73]Of course, this argument only works in legal systems in which authorities cannot open proceedings, and not in legal systems in which states must file an indictment when an offence is committed.

[74]The criticism led to a joint declaration by the Prime Ministers of Poland and Israel, 27 June 2018, www.gov.pl/web/premier/joint-declaration-of-prime-ministers-of-the-state-of-israel-and-the-republic-of-poland, accessed 20 November 2023.

[75]They have a similar role as explanatory notes.

in contradiction to historical realities with the sole purpose of damaging Turkey'.[76] This element was removed after the international reaction.

The narrower memory laws were perceived as being more visible and more likely to cause international criticism than the broader – and not less problematic – laws protecting the good name of the nation. As the broader provisions can produce effects beyond the context of challenges to historical memory, introducing them is potentially more harmful to the rule of law. At the same time, international memory politics were raised to argue the need for those provisions: the Polish law was – wrongly – justified by the need to implement the EU Framework Decision 2008/913, while Turkish scholars have argued that that applying Article 301 to statements about the past follows the practice of memory laws in Europe. Thus, efforts to preserve historical memory in the European arena may have indirectly strengthened (in the Turkish case) and caused (in the Polish case) the broadening of domestic instruments to combat challenges to official narratives.

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[76]Bayır, *supra* n. 18, p. 248.