

The (Non)Political Taboo: Why Democracies Ban Holocaust Denial¹

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The (Non)Political Taboo: Why Democracies Ban Holocaust Denial. This article unpacks the controversy that surrounds criminal law restrictions on Holocaust denial in democracies. By applying insights from postmodernist and post-structuralist theories on amendments of criminal legislation in three Central European democracies, I aim to understand the interplay between politics and truth in introducing legal bans on Holocaust denial. Through a comparative analysis of parliamentary discourse, I demonstrate that the various justifications in favor of such bans all postulate that truth should be separated from politics. In turn, this effort to transform the Holocaust into a taboo outside of politics has consequences on the nature of its remembrance.
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Introduction

The Holocaust is a fundamental and formative event in the history of humankind. An ‘archetypal genocide’ (Lobont 2006: 442, see also Huttenbach 1988), it was ‘born and executed in our modern rational society [...] and for this reason it is a problem of that society [...]’. (Bauman 1989: x) Therefore, it goes far beyond being a ‘private trauma and grievance of one nation’. (ibid.) Yet, even in developed democracies, there are individuals and groups who dispute segments or even the whole of this historically well documented event. For various reasons and motivations (see Shermer et al. 2009: 271-282 on the famous case of David Irving) they continue to dispute the undisputable. Democratic governments face the challenge of responding to such claims not least in order to protect the members of the minority whose identity is being targeted. (Gliszczynska-Grabias 2013: 246-247) Freedom of speech is considered as the fundamental, necessary condition for democracy (see e.g. Dworkin 2012; Barendt 2005, but cf. Waldron 2014), yet, democratic governments often choose to ban Holocaust denial as one part of the broader category of ‘hate speech’ (Whine 2008). The European Court of Human Rights

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acknowledged the legitimacy of restrictions of freedom of speech when it comes to Holocaust denial, as an 'exception' to the general principle of extensive protection of this right (see Lobba 2015, Gliszczyńska-Grabias 2013: 249-255 and the case law analysed there). In the US, Weinstein (2009: 89-90) argues, these restrictions would be found unconstitutional, however, he acknowledges that restrictions following the 'imminent lawless action' doctrine from the *Brandenburg* case that is directed at the 'persuasive effect of the speech'. (cf. also Yong 2011)

This controversy between upholding freedom of speech and preventing harms caused by speech denying the tragedy of the Holocaust informs my research question, which seeks to identify (1) the reasons the parliamentary representatives voice to ban Holocaust denial, and (2) the consequences such a ban has on the nature of remembrance of the Holocaust. Both questions together allow to juxtapose the presented justifications for introducing these bans with the deeper characteristics of the Holocaust, and thus present a novel argument on the consequences of these bans from a theoretical perspective. To do so, I firstly examine the special, dual nature of the Holocaust, following Bauman's emphasis on its uniqueness and normalcy and Agamben's analysis of the trauma of its witnesses, thus distinguishing it from other genocides. Together with some authors challenging or building on their understanding, I argue that although the Holocaust was a 'new evil on Earth' that was not spotted before in similar form, its formative element rests in its unfolding in a modern and developed society. This society transformed into a totalitarian one, and thus excluded the development of political relations among free individuals. The Holocaust, in this sense, appeared in part outside of the realm of politics, thus its exclusion from politics through banning the efforts to deny or undermine it makes it a more difficult phenomenon to recognize.

In the subsequent two sections, I apply this understanding to the justifications presented in three democratic states, the Czech Republic, Hungary and Slovakia, where bans on Holocaust denial were introduced in the post-2000 period³. By conducting an empirical analysis of parliamentary discourse, one of the most institutionalized and influential types of discourse (Bayley 2004), I show that in all three states, bans on Holocaust denial were adopted after presenting a mixture of justifications such as the need to protect the 'historical truth' and 'freedom', or to secure the dignity of the victims, survivors and their descendants. Fragments of 'duty' or 'responsibility' of the legislators, who mostly demonstrated a genuine conviction in favour of the limits on freedom of speech they had proposed, can also be identified.

³ As opposed to several other countries in the region where these bans have been in place earlier. (e.g. Poland, see Whine 2008: 64)

Next, when assessing these justifications of criminalization of Holocaust denial vis-à-vis the understanding of Agamben and Bauman, I identify an element of hypocrisy in the argumentation of the deputies, which is linked to the potential to damage the very source of dignity these laws are intended to preserve. Empirically, the consequence of these laws can be captured by the argument of inertia: after criminalizing Holocaust precisely because of the reason of its ‘speciality’ in modern history of humankind, there is a tendency of introduction of bans on other ‘denials’: in the countries under study these were the atrocities committed by communist regimes. This in turn diminishes the speciality argument and poses new questions in terms of dangers of criminalizing some crimes against humanity throughout history, as opposed to others, which often remain unnoticed by the political elites and the public alike.

Ultimately, an in-depth analysis of the concept of the Holocaust, and the possible motivations of the actors engaged in Holocaust denial (see Shermer et al. 2009: 75-97), are beyond the scope of this research. However, the approach adopted here allows to uncover the interplay between politics and truth (Arendt 2005) in the case of the bans on Holocaust denial. Thereby the effort to exclude the Holocaust from politics with the help of these bans makes it paradoxically more difficult to fully recognize its nature, that rests on the duality of not only uniqueness but also normalcy, and needs a genuinely political discussion for it to be remembered and understood by the current and future generations.

Why is Holocaust so ‘special’?

The Holocaust is one of the fundamental milestones of the history of the 20th century. Although the term itself is inappropriate for what it describes, as its original meaning is ‘completely burned’ (Agamben 2002: 28-31), it got used to denote the ‘final solution’ of the Third Reich against the Jews, who personified the existence of a nation without the state⁴.

This argument paves the way for Bauman’s (1989) understanding of the Holocaust that opposes its one-dimensional description as a unique event. Although it was an outcome of specific factors beginning with a particular ideology, the ‘final solution’ was more an outcome of the organization of modern state itself which largely rested upon the ‘enlightened’ bureaucracy as executioner of political decisions in the most effective way available. That is, the Holocaust encapsulates dimensions of ‘uniqueness’ *and* ‘normalcy’ at the same time: it ‘is unique among other historic cases of genocide because it is modern. And it stands unique against the quotidianity of modern society

⁴ The existence of such a phenomenon opposed the assumptions of fascism, which encapsulated the idea of ‘nation-statism’ as a biological, natural connection between the nation and the state. As Mann argues, it is tempting to denounce fascism as simply irrational because of this assumption taken for granted at the outset but in reality rationality is not completely absent from it, ‘for “rational” human calculation always comes entwined with ideology’. (Mann 2004: 62)

because it brings together some ordinary factors of modernity which normally are kept apart'. (Bauman 1989: 94) It should not be forgotten though that horrendous killings happened under the communist rule as well and although some aspects, as the killings as 'unintended consequences' in communist regimes versus bureaucratic final solution in Nazi Germany, are different (Mann 2005: 318-352), the necessary condition of both of them, that of ideology, does not change. Both of these regimes are 'totalitarian' as defined by Arendt (1958) and even the argument that Holocaust 'happened first' is not undisputed, given the vast evidence of Soviet genocide before the Nazi one. (See Snyder 2012)

Another problem with the 'uniqueness' argument is that there were genocides before and after the Holocaust and communist cleansings. A notable process of extermination took place in the New World, where Native Americans suffered tremendously. In her provocative essay, Friedberg 'dares to compare' the Holocaust to the process of marginalization of Native Americans.⁵ Friedberg uses the framework provided by Agamben and goes on to argue that 'in the Western biopolitical order, the "savage life" [that of Native Americans, in this context] acquires the status of one less than the bare life of Homo sacer'. (Friedberg 2000: 364) Although she does not dispute the 'Jewish Holocaust' and acknowledges its horrors, she criticizes the dominant academic discourse where, in her views, 'those holding to the postulates of Jewish exclusivism [...] are accorded a distinctly preferential treatment among the arbiters of scholarly integrity' (2000: 360). Her argument, therefore, points towards the idea of Western hegemony entailed in the very idea of the uniqueness of the Holocaust.

Can we thus see the Holocaust as a 'unique' event and therefore justify bans on its denial? As I have discussed, it entails a portion of uniqueness. However, it cannot be reduced to this element. Genocides with huge number of casualties are no less painful or important for human history than the one Nazi Germany committed at the high age of modernity and technological progress. Hence, critics as Friedberg seem to be partially right. What they, however, fail to acknowledge, is the recognition of the very element of uniqueness in the Holocaust, one that entailed the distinct combination of factors analyzed by Bauman (1989), and in a less direct way, Mann (2005). It is the combination of the extraordinary element, in a substantive sense, and of the normalcy element, in a procedural sense, that makes the Holocaust unique and at least to some extent distinct from communist cleansings and all other genocides. So, while 'absolutizing and fetishizing' the Holocaust is not helpful in so far as it carries

⁵ Friedberg's reading is important also from the perspective of American approach to freedom of speech. Indeed, if one acknowledges the 'American holocaust', the argument about the differences in contexts in Europe, where the Holocaust happened, and America, where no comparable tragedy took place, loses its validity.

the threat of causing the ‘eclipse [of] all the other victims of violence’ (Yakira 2009: 221), thinking about the justification of bans on Holocaust denial requires the awareness of the special relevance of this scarf for the modern history. When proceeding towards delimitation of the nature of bans on Holocaust denial in democracies, it should be recognized that ignoring the Holocaust may bring us closer to its repetition. It is the purpose of the next section to find out what this ‘ignorance’ means and how it manifests in the public spheres of democracies.

The status quo of Holocaust denial: Intersection of law and politics

To be able to evaluate the procedure and implications of the ban on Holocaust denial in democracies, we first have to understand what it is. On the surface, it seems no more or less than speech which argues that the Holocaust did not happen. According to Cohen-Almagor (2016: 11), it is a ‘propaganda movement that seeks to deny the *reality* of the Holocaust [...]’ (emphasis added). Wistrich (2012: 1) defines it as the ‘rejection of the historical *fact*’ (emphasis added) that ‘includes the minimization, banalization, and relativization of the relevant facts and events, so as to cast doubt on the uniqueness or authenticity of what happened during the Shoah.’ It is not the ‘historical fact’ or ‘reality’ element which matters most in this context – after all, if the whole dispute was relevant only at the factual level, then there would be no difference between a potential debate about the Holocaust and, for instance, some blurred circumstances of a medieval uprising. Instead, it is the doubt that it casts on the ‘uniqueness’ element (see Section 1), which, at least according to Wistrich, is the true danger of Holocaust denial.

Conventionally, Holocaust deniers are divided into two groups: the negationists and the revisionists. The former are more ‘radical’ because they deny the event as such, while the latter are more ‘sophisticated’ since they contest particular aspects of the historical knowledge (e.g. number of victims, gas chambers, identity of the perpetrators). (Knechtle 2008: 44-45) Three factors which stimulate Holocaust denial are listed: an intention to renew the Nazi regime, classic anti-Semitism and ‘a way of denying the legitimacy of the state of Israel’. (Atkins 2009: 1) For Lipstadt, Holocaust denial is a prime manifestation of moral relativism and cynicism that is stimulated by contemporary academic environment as well. It is irrational in the sense that it builds on the ancient prejudices of anti-Semitism and, ‘like every other form of prejudice, is not responsive to logic’. (Lipstadt 1994: xvii)

While setting Holocaust denial into the context of anti-Semitism clarifies how it can be understood as ‘hate speech’, it does not provide a theoretically satisfactory answer as to why its criminalization would be required in a democracy. Such a reason is, in various forms, provided by those who argue

with the concept of dignity. For example, Knechtle (2005: 578) understands these laws as a result of 'elevating human dignity and equality above individual freedom of expression' after 'events like the Holocaust and the ethnic cleansing in former Yugoslavia' (notice that another event is put on the 'same level' as the Holocaust). Bangstad (2014: 280) stresses that Holocaust denial and speech of the like seeks to undermine 'the virtues of liberal and democratic society with formally equal citizenship rights and rights to dignity for individuals.' This line of reasoning has been strengthened by the approach of the Federal Constitutional Court in Germany, that affirmed the view of the Holocaust being part of 'Jewish identity' and thus its denial meaning denial of their very identity. (Grimm 2011)

There is certainly a valid point in the 'dignity argument' in the private pain and suffering the Holocaust caused for Jews in the first place but for other ethnic groups as well. However, it is not fully accepted by several theorists because it does not justify criminalization of the Holocaust denial from a consequentialist perspective (meaning, what would such action mean for the development of public sphere in a democracy). At least two somewhat different lines of thought can be identified. Firstly, departing from the view on the Holocaust as the perfection of legal positivism, Douglas stresses the difference between effective 'ordering of social world', that can be done by law, and reliably capturing the world's 'most difficult histories and most traumatic memories,' that are undermined precisely by the same law, which, as formal law necessarily does, takes and approach to the past from a 'position of formal agnosticism'. (Douglas 2005: 115-116) While the argument of the predominance of legal positivism in National Socialism (cf. Radbruch 2006) can be disputed, given that it captures only the 'administrative' element of the Holocaust without the 'ideological' one, Douglas points to the difficult relationship between law and politics as such in an original way in which laws against Holocaust denial may have an unintended consequence of fostering the formerly mentioned ignorance and therefore weakening their own power base (cf. the discussion in Carr 1946) as well as the foundations of democracy itself.

The second line advocated by scholars usually attributed to the 'post-modern' line of thought revolves around Agamben's argument of understanding the Holocaust only through testimonies of its true witnesses. Only such testimonies can succeed in 'bringing to speech an impossibility of speech' and thus make it possible to refute the denial of Auschwitz in its 'very foundation' and prove it 'absolutely and irrefutably'. (Agamben 2002: 164) Therefore, there are of core importance in countering Holocaust denial as well. The argument is criticized though, because, for example, according to Chare (2006: 53), denial of *these testimonies* is 'anyway a kind of acceptance' and so 'the Holocaust denier relies upon the Holocaust more than any other person; if

there was no Holocaust, then the denier would and could not be.' Then, however, is this paradoxical relationship not the reason why Agamben's Muselmann needs the Holocaust denier, and hence, 'in a gesture designed to deny denial, Agamben reaffirms it'? (Chare 2006: 54)

A similar but more empirical kind of criticism to (not only) Agamben's line of thinking is represented by Bellamy, for whom 'postmodern theory' cannot effectively respond to Holocaust denial. Although his main blame is on Lyotard because the language game framework Lyotard proposes is supposed to provide a fertile ground in which Holocaust denial can mushroom, he is not uncritical of Agamben either. In his views, Agamben's concept of the Muselmann provides only 'implicit contempt for Holocaust denial' which in a world where this phenomenon is still present, is 'irresponsible'. (Bellamy 2004: 92) Instead, Bellamy proposes careful and detailed historical research to establish and 'direct' the 'laboratories against Holocaust denial.'

These criticisms can be read in two ways. The first states that Agamben's framework speaks against criminalization of Holocaust denial because it is, in a paradoxical and somewhat perverse form, needed for understanding it. The other way goes that by accepting Agamben's conception, the need for precise historiography on the Holocaust is diminished which opens up the room for further revisionisms of the historical facts. One has to be careful there, though, as accepting the first reading does not imply accepting the second one. As outlined above, the Holocaust can be understood as a multi-dimensional phenomenon between normalcy and uniqueness. While its uniqueness can be captured by highlighting the horrors through historical research, is this method suitable to identify the element of normalcy in it? Moreover, does the resignation to careful historical research not lead to gradual diminishing of the power resting in the true testimony? These considerations should matter when political elites of a democratic state consider enacting laws banning Holocaust denial, not only because the obvious freedom of speech and (versus) individual dignity arguments but also because of the potential danger of planting the 'seeds of destruction', which in this case are represented by the ignorance of the Holocaust, its causes, consequences and responsibility for the crimes committed during it. Before trying to answer these questions from a theoretical perspective, it is necessary to dive into a (limited but illustrative) case of restricting Holocaust denial so that we understand, at the empirical level, how is the introduction of these laws usually justified in the specific context of transitional European democracies.

Justifying restrictions of ‘denials’: An inquiry into parliamentary discourse

The previous section has illustrated that laws are not created in vacuum; neither are laws against Holocaust denial. This section looks at the justifications raised when introducing such laws in democratic countries based on a brief comparative case analysis of postcommunist democracies: Slovakia, Czech Republic and Hungary. In all these countries, laws against Holocaust denial (followed by other ‘denials’, as we will see below) are part of the Criminal Code⁶. It is already puzzling to observe that in all these countries, criminalization of Holocaust denial had not been part of legislation since the outset of democratic transition but was introduced only in the 2000s when the first period of transformation could be considered to be already over⁷. Identifying the justifications for introducing the restrictions at this point of time helps understand the overall reasoning in favour of this decision. To do so, I firstly contextualize the problem of legal regulation of Holocaust denial in the studied countries. Then, I analyse parliamentary discourse which offers justifications for such restrictions. The debates subjected to the analysis were selected on the basis of keyword search for ‘the Holocaust’ and ‘denial’ in all forms that could appear given the grammar rules of the respective language. The time frame was determined inductively, based on when the first debates with such phrase occurred. Table 1 summarizes the basic statistics about these debates, which demonstrate that there was predominantly only limited discussion on matters concerning bans on ‘Holocaust denial’ with the involvement of few MPs.

The difference between Hungary and Slovakia on the one side and the Czech Republic on the other simply reflects the fact that in the latter, only one proposal was tabled, which directly connected the two types of bans (denial of the Holocaust and of crimes of other totalitarian regimes).

From a contextual point of view, after the fall of communism, Holocaust denial spread rather rapidly throughout the region. (Shafir 2012) In particular, while communist regimes in the region used the Holocaust to demonstrate the evilness of any other regime, while conducting consistent ‘de-Judaization’ of the phenomenon, the newly emerging unstable democracies witnessed the emergence of different forms of Holocaust denial, often embraced by MPs or

⁶ For long time, Hungary was an exception with its more ‘American’ approach to freedom of speech (Molnár 2011) but it finally enacted a paragraph banning Holocaust denial in 2010. The Czech Republic has this law since 2000 (Bartoň 2010) and Slovakia since 2001. (Steuer 2015)

⁷ One explanation for this could be the ambition of all of these countries to become members of the European Union. Moreover, from a historical point of view, Judt (2006: 820-831) argues that the Holocaust became part of the identity of these countries and they reacted to by institutionalizing various, more or less effective mechanisms and expressions, of its remembrance. I am grateful to one of the anonymous reviewers for pointing this out.

other influential public officials. (See Shafir 2012: 27-34) Rather than the usual forms of denial, the subtler ones became characteristic for some of the countries, such as ‘selective negationism’, in which any form of participation of the *own nation* in the atrocities is denied. (Shafir 2012: 56-60)⁸

Table 1: An overview of the parliamentary debates on ‘Holocaust denial’ from 1993 to April 2015

Country	Number of debates analyzed	No. of relevant amendments proposed	No. of interventions on the issue ⁹
Czech Republic	2 (first and second reading)	1	11 (first reading) 7 (second reading)
Hungary	4	2	3 (February) 26 (May-June)
Slovakia	3	2	25 (2001) 12 (2011)

Apart from the problem of the spread of Holocaust denial, the *right democratic attitude* towards Holocaust denial remains in question as well. The difficulty arises when realizing that there is no single answer developed which new democracies determined to follow the right rules can utilize. As Kahn’s (2004) comprehensive socio-legal analysis demonstrates, the regulation of Holocaust denial is each country’s deliberate decision based on its interpretation of ‘distinct norms of legal fairness’ (2004: 1)¹⁰. When looking at the implementation of the laws, additional factors enter into the picture. These are defections within legal systems and, more importantly, ‘the matrix of social forces concerned about the Holocaust’. (Kahn 2004: 157) Not unlike for Cox (1986), for Kahn it is these social forces which shape the law which, in turn, becomes intertwined with the society as it embodies its moral convictions. In other words, ‘when law fails, society fails’. (Kahn 2004: 159) However, this perspective puts the decision on (not) embracing laws against Holocaust denial into a new context, where these laws themselves may influence the society.

In theory, other justifications for these laws may be found, such as the one based on the settled/unsettled debate or the legitimacy of the state. The former considers Holocaust denial as not only anti-Semitic ‘hate speech’ but also a type of falsity. Both dimensions are harmful but while the former is, in the light of classic liberal arguments in favour of free speech, not sufficient for

⁸ Within the scope of this article, it is not possible to engage in a more in-depth analysis of classifications of Holocaust denial. Rather, the concept is used as an ‘umbrella term’, encompassing all the various types of this phenomenon.

⁹ These are statements of the deputies introducing or reacting to the proposals on inclusion of the respective provision(s) on bans of Holocaust or other denials into the Criminal Code.

¹⁰ For example, in case of Germany, through the Federal Constitutional Court’s decision-making, this decision was based on the link created between Holocaust denial and denial of Jewish identity. (Grimm 2011)

justifying legal restrictions, the latter is. (Schauer 2012) In a way, this is a mere reformulation of the consideration of the Holocaust as a historical truth, one to which I will return below. The state legitimacy argument, while not in conflict with the historical truth argument, claims that for a republican government to be legitimate, it needs to consciously repudiate anti-Semitism. (Suk 2012) Thus, there are multiple ways a democratic state can go when justifying Holocaust denial, although the dilemma whether and how these laws capture the normalcy/uniqueness dialectics does not disappear. In what follows, three brief inquiries into the parliamentary discourses will be presented to find out, which arguments the deputies of the Czech Republic, Slovakia and Hungary used to justify bans on Holocaust denial¹¹.

The Czech Republic

In the Czech Republic, a key debate took place around the proposal of MP Jiří Payne¹² (Chamber of Deputies 2001a)¹³. The sponsor introduced the proposal with two arguments: the rise of movements which ‘use for the support for their political ideas tools, which are not discussion, usage of democratic institutions, parliamentary institutions but instead they use pressure mechanisms, limiting rights and freedoms of others’, and the ‘principle, according to which all expressions of hatred, envy and intolerance have *the same basis* and *are equally dangerous for democratic society*’. (Chamber of Deputies 2001a, emphasis added, see also Chamber of Deputies 2001b) This already points to the lack of distinction between Nazi and communist crimes, which is more or less present in the Hungarian and Slovak cases as well.

In the debate which followed, some arguments against the proposal were introduced. Professor of law and social democrat Zdeněk Jičínský stated that criminalizing this kind of speech would signal that ‘something is not all right with our democracy’ as one of the greatest advantages of democracy is and should be that ‘everybody can, as (s)he wishes, shout: get rid of democracy, get rid of capitalism, long live the revolution or anything else.’ In particular, he objected to the inclusion of the crimes of Nazism and communism at the same level but with a rather unconventional reasoning. For him, while Nazis were definitively ‘directed towards liquidation of the Czech nation’, many Czechs were helping communism, so in the latter case ‘determining the border between

¹¹ All the translation of excerpts from debates or legislative proposals are my own. Their intention is not to provide a legally exact translation but to make it possible to understand the content and message of the speech or proposal.

¹² Payne’s party affiliation was with the centre-right Civic Democratic Party which supported the coalition through the so-called ‘Opposition Agreement’. He used the same arguments in the first reading to introduce the amendments. (Chamber of Deputies 2001b)

¹³ The proposal included an interval from six months to three years imprisonment in case of ‘publicly denying, doubting, appraising or trying to excuse the national-socialist or communist genocide or other crimes of national socialists or communist against humanity’. (Chamber of Deputies 2001c) This formulation is part of the Czech Criminal Code (2009) (in § 405).

us and them, between initiators and perpetrators, seduced, frightened and totally innocent is extremely difficult and usually it results in smaller or greater alibism, in efforts to hide one's own part of responsibility.' Hence, while the first argument is a typical free speech argument¹⁴, the second one appeals to the responsibility of Czechs for communist crimes, as opposed to Nazi ones¹⁵. An example of Holocaust denial is the remark of MP Dalibor Matulka (not surprisingly, from the Communist party), according to whom 'the proposers do not have a problem with genocide as such [...], they object towards *alleged crimes and genocide of communism and National Socialism*'. (Chamber of Deputies 2001a, emphasis added)

The reaction of the sponsor, MP Payne, to these various criticisms was a textbook example of ad hominem argument: 'if our colleagues [...] are determined in their political work or personal activities to spread hatred and violate human rights of others, then they can without doubt vote against this proposal.' In sum, the Czech debate implied a linear understanding of democracy as a regime that cannot tolerate denial of the Holocaust, nor of communist genocide. Apart from some interesting arguments about the relationship between the two, no deeper effort for looking at the implications of these laws for the understanding of the Holocaust can be identified.

The Slovak Republic

The Slovak leaning towards restriction of Holocaust denial, intertwined with denial of crimes of communism in basically the same way as in the Czech Republic, began in 2001 and continued in 2011, when the communist element was added. In both cases, the debate on the amendment of the Criminal Code was the most important and heated among all issues connected to freedom of speech and its limits. (Steuer 2015: 60) The main driver of this process was one conservative government MP being for a few years a member of a liberal party, Peter Osuský. In 2001, defending a joint proposal with other MPs to explicitly criminalize 'sympathies towards fascism' or efforts to excuse, deny, accept or question its crimes (National Council 2001) he asserted that 'although it is true that one must stress freedom is at the centre of our civilization, we must still protect it. Only by protecting freedom do we prove that we value it above the blood spilled and lives lost fighting for it'. (Transcript of the fifty-first session 2001, also Steuer 2015: 63)¹⁶

¹⁴ This kind of argument was repeated by MP Ransdorf later in the discussion, who considered 'diving into inquisitorial and censorial thinking as simply something stupid and unacceptable [...] for a civilized country.'

¹⁵ One can still question, though, whether this kind of distinction is not an example of selective negationism outlined above.

¹⁶ Additionally, he stressed that although criminalization may increase the publicity of revisionists, 'the method of fighting against crimes and criminal systems cannot rest in appeasement, in some non-confrontational position because the real truth is that the real values and principles must be defended. [...] This law is concerned with gas chambers, with the fate of Jews, Gypsies but also the fates of those who were thrown into the lime factory in Kremnička [a town where hundreds of Jews and

Osuský clearly provided a more complex defence of criminalization of the Holocaust than Payne, although his ideas also revolved around the danger of ‘leaving freedom unprotected’. But he also argued in the line Payne was not, via operating with the term ‘historical truth’ in the context of gas chambers and other elements of the Holocaust. His critics, mostly from the main opposition party of nationalist positioning did not provide convincing arguments in contrast to Czech MPs. The only visible line they defended was the concern with limitations put on historical research of that period because, ‘if freedom of speech is banned, which is what you [Osuský and his supporters, author’s note] propose, that is not any more the protection of freedom but protection of non-freedom’. (Transcript of the fifty-second session 2001)

After Osuský’s and others’ proposal in 2001 was enacted, the MP himself opened the topic again ten years later, this time proposing an addition to 2001 provision. He defended prosecuting anybody ‘who publicly denies, questions, agrees with or tries to excuse the Holocaust, crimes of the regime grounded on fascist ideology, *crimes of the regime grounded on communist ideology or crimes of a similar movement*’. (Transcript of the twentieth session 2011, emphasis added) His 2011 proposal was intended to continue in the ‘somewhat difficult genesis of treatment of the problem’¹⁷, the core of which is ‘strictly speaking, protection of truth [...] in times when truth is being relativized’¹⁸. Afterwards, he listed several examples of both Nazi and communist crimes, from gas chambers, through Stalinist camps to ‘skulls in the museum near Phnom Penh.’ The general message he inserted into his speech was that freedom of speech has its limits which are ‘totally normal and stemming from common sense’. (Transcript of the twentieth session 2011, emphasis added) Only two comments were raised as a response to his views. The first was made by a Christian democrat according to whom from the proposal ‘hatred can be felt against the martyr of the Slovak nation, Jozef Tiso [...]’. (One of the chief collaborators with the Nazis, for a more detailed analysis see Ward 2013) The second comment came from Osuský’s colleague from a liberal party, to the caucus of which he at that time belonged. The MP supported the proposal because, in his views, it allowed ‘the Slovaks to look directly at what their ancestors committed in this country, name it, apologize it, and then, if we one day can do a thick line, we will be able to say goodbye to punishments because of opinions on communism and fascism’. (Transcript of the twentieth session

Roma were killed during the period of the Slovak state, a satellite of the Nazis (Kamenec 2013)] but it does not prevent researching history. It prevents only denying of what history already settled. And the gas chambers and the lime factory in Kremnička are essentially historically settled’. (Transcript of the fifty-second session 2001)

¹⁷ Osuský studied medicine.

¹⁸ In the oral statement, he stressed that although he wanted to include denial of crimes of communism already in 2001, he was prevented to do so by the other sponsors of the original provision.

2011) In the end, Osuský's proposal was accepted and is part of the Slovak Criminal Code currently in force¹⁹.

The evidence shows that the narrative developed in the Slovak parliament defending criminalization of Holocaust denial primarily focused on the need for protection of (historical) truth and 'freedom', i.e. goals which were seen as achievable through the proposed regulations. Still, same as in the Czech Republic, they were based the initiatives of deputies, not the executive, and although the denial of communist crimes was included ten years later, they now consider the crimes of the two regimes in an equal way.

Hungary

Known for its 'Americanized' approach to freedom of speech (see above), the Hungarian parliament (*Országgyűlés*) in 2010 (one during the Bajnai government and one already with the Fidesz government after the general elections) adopted two amendments of the Criminal Code, banning, firstly, Holocaust denial, and a few months later, denial of crimes of communism, thereby achieving virtually the same legislative status quo as in Slovakia and the Czech Republic. How were these amendments justified?

The debate on banning Holocaust denial was rather short; the amendment was put forward by a Socialist coalition MP Attila Mesterházy. (National Assembly 2010a) It was justified with the rise of anti-Semitic speech in the country which 'is getting developed into a serious ideology' and with the criticism of previous efforts to enact such a provision, hampered mostly by the activism of the Constitutional Court. (National Assembly 2010b) Fidesz representatives criticized the one-sidedness of the approach because it did not include communist regimes, yet, they did not present another proposal. In response to this criticism, another Socialist MP, János Schiffer, made a noteworthy argument on why a distinction is necessary. He stressed that the Holocaust was about 'industrial extinction of humans', not comparable to the 'Gulag island or the inquisition'. (National Assembly 2010b)²⁰ On this basis, that seems to encompass a sense for the duality between normalcy and uniqueness of the Holocaust, yet prioritising the latter by approving criminalization, the proposal, criminalizing Holocaust denial but not denial of crimes of communism, was enacted.

¹⁹ § 422d of the Slovak Criminal Code (Act No. 300/2005 Coll.) on 'denial and endorsement of the Holocaust, crimes of political regimes and crimes against humanity' in section 1 enshrines that 'Whoever publicly denies, questions, endorses or tries to excuse the Holocaust, crimes of a regime based on fascist ideology, crimes of a regime based on communist ideology or crimes of other similar movement, which is directed to suppression of human rights and freedoms of persons through violence, threat of violence or threat of other high damage, will be punished with imprisonment of six months to three years.'

²⁰ The argument was illustrated by a story about an old Jewish man who posed the question in Dohány Street in Budapest in a public talk, whether God did not see what was happening in the ghettos. The man, as Schiffer told it, himself answered: 'maybe because the human smoke covered the earth before his eyes.'

A few months later but already in the next electoral term, a group of MPs, mostly from the governing party Fidesz, proposed a complex amendment of the Criminal Code, one of the points of which was the criminalization of denial, questioning or diminishing of the fact of genocides committed by national socialist or communist regimes before a 'large public'. (National Assembly 2010c)²¹ The main justifications by the initiators were two. There is no need to deal in detail with the first one²² but the second one is crucial. Introduced by one of the sponsors, Fidesz MP István Balsai, it stressed that 'it is not possible to regulate the two in a different way, or pay attention to one and not to the other one'. (National Assembly 2010f)²³ Simply, like Payne in the Czech Republic and Osuský in Slovakia, Fidesz MPs in Hungary argued with the similar nature of the two regimes, which necessitates the same approach to speech that denies their crimes²⁴. The provision equating denial of Holocaust and communist atrocities was successfully enacted²⁵.

Summary of the results

The journey through the nodal points of parliamentary debates about Holocaust denial in three democracies has shown that, firstly, they all adopted the criminal provisions in this regard after the transitional period based on proposals coming from a single deputy or a small group of MPs. Secondly, the initiators of these laws used a similar set of justifications, comprising a mixture of concerns with the rise of anti-Semitism, the harm caused to the identities of the victims and their successors by such kind of speech, and the need to protect 'historical truth' and 'freedom' in European democracies. None of these justifications was clearly dominant and analysed in greater detail by the MPs, except the Slovak case where one deputy seemed to make up the 'driving force' behind the entire process²⁶. Thirdly, objections towards these provisions revolved mostly around the pure value of freedom of speech in democracies

²¹ The debate took place on several days from the May 21 to June 8 (National Assembly 2010d, 2010e, 2010f) and its detailed overview would require a separate analysis.

²² It was connected to the likely position of the Constitutional Court and the then Hungarian president László Sólyom (who was the former president of the Court and signed the previous amendment on criminalizing Holocaust denial).

²³ Put in other, less clear-cut words, by another Fidesz MP (Répássy), 'it is right when [...] the human dignity of [...] different branches of totalitarian regimes [...] is [...] equally weighted'. (National Assembly 2010f)

²⁴ The main objection to this approach came from András Schiffer, an MP from the opposition party 'Politics can be different,' who reacted with the classic free speech theory resting on vivid public responses to this kind of speech: 'The memory of victims of the Holocaust or communism is much more protected if we realize that for creation of a democratic political atmosphere in a country, not everything needs to be legalized'. (National Assembly 2010f) However, this kind of argument represented a minority position in the debate.

²⁵ The current provision (§ 333 of Act C. of 2012 on the Criminal Code) reads: 'Any person who denies before the public large the crime of genocide and other crimes committed against humanity by Nazi and communist regimes, or expresses any doubt or implies that it is insignificant, or attempts to justify them is guilty of felony punishable by imprisonment not exceeding three years.'

²⁶ Further research could encompass interviews with the concerned MPs to shed more light on their thinking on the issue.

but, especially in the Hungarian case, they were also concerned with authoritatively delimiting the truth by the means of state coercion via law that could have potentially had dangerous effects.

In the end, regardless of the precise narrative which was adopted, the successful enshrinement of laws against Holocaust denial came with (in the Czech case) or triggered, in a shorter (Hungary) or longer (Slovakia) term the adoption of very similar provisions against the crimes of the communist regime. The principal justification for this step was the illegitimacy of having laws against Holocaust denial and not dealing in an equivalent way with denial of 'communist genocide' which was 'basically the same'. And, even though some evidence can be found on the vague intention of abolishing these laws in the uncertain future when the democracies will be 'mature', this is unlikely to happen. After all, who would dare to vote against such laws, if that means he or she is violating human rights of Jews and other minorities suffering under the Nazis (cf. Payne's statement)? And who of the democratically thinking deputies would dare to vote against a law that brings the commitment of democratic politicians to protect freedom 'to perfection' by placing the same restraint to communism, and thus committing the state and its people to the responsibility for their crimes or crimes of their predecessors? Regardless of how compelling the mixture of justifications provided by democracies banning Holocaust denial is, what remains to be addressed is the implications of the ban(s) for the 'living and breathing' of democracies.

Conclusion: A decision to be made

In this article I have examined which justifications deputies use to ban Holocaust denial and what consequences such bans have on the nature of remembrance of the Holocaust²⁷. The spatially and temporarily limited cases of parliamentary discourse in Hungary, Slovakia, and the Czech Republic have demonstrated the presence of a mixture of justifications for enacting laws against Holocaust denial, and a profound follow-up to these laws in the simultaneous, or subsequent, adoption of laws criminalizing denial of communist crimes. In what follows I return to the theoretical framework for understanding of the Holocaust to highlight the key choice democratic countries face, that of treating the Holocaust as a matter of 'politics' or a matter of 'truth' with all the risks that each of these options carries.

When Agamben discusses democracy, he highlights the two different meanings of the term: 'a way of constituting the body politic (in which we are

²⁷ In the analysis, it was not possible to avoid discussing bans on crimes of communism entirely because of the close link between these laws and laws on Holocaust denial. This indicates the importance of the question of 'speciality' of the Holocaust. After all, one of the deepest concern around Holocaust denial is, how can it be justified without restricting the denial of some or all these other crimes leaving their mark on humanity, especially in the contexts in which they happened.

talking about public law) or a technique of governing (in which case our horizon is that of administrative practice)' (Agamben 2012: 1). This distinction would imply that in the former, 'political' understanding of democracy, such kind of laws against Holocaust denial should not work. However, the reality is too complicated to allow such a simplistic statement because in the very case of the Holocaust (or 'other' denial(s)), it brings us to the problematic relationship between truth and politics, which is, not accidentally, the title of one of Arendt's essays. (Arendt 2005)

This essay as well as other pieces of Arendt's thinking about the relationship in question are considered as full of 'fundamental and flagrant contradictions'. (Nelson 1978) For Arendt, factual truth (in our case it is the facts about Holocaust), as opposed to rational truth, 'is political by nature', because facts and opinions (e.g. as testimonies of witnesses of Holocaust) 'belong to the same realm'. (Arendt 2005: 301) At the same time, there is a tension between truth and politics which Arendt shows on the example of the philosopher versus the citizen: while the philosopher brings the 'everlasting' truth that makes it possible to derive 'principles [...] to stabilize human affairs' (i.e. governing), the citizen's ever changing opinion makes the truth relative but at the same time seems to be a necessary component of the political. (Arendt 2005: 298)²⁸

This bifurcation between truth and politics is precisely the one which underpins the distinction between enacting and not enacting laws against Holocaust denial. The law, in this case, cements a historical truth and 'shuts down' the debate on it²⁹. It moves the issue into the realm of administration and away from politics. Without the law, the Holocaust remains in 'the political' with all the dangers it brings up, most strikingly, the one that the liars – Holocaust deniers – prevail. In other words, laws against Holocaust denial bring to the fore the 'uniqueness' present in the Holocaust at the expense of the 'normalcy' element, while without these laws, there is no guarantee that the uniqueness element persists, although the normalcy one is likely to remain present because of ongoing political debate on the issue.

All these contradictions imply that the choice democracies need to make is whether to make the Holocaust a political taboo or not. The paradox is that if they do so, it gradually ceases to be political. That may be not a problem, until we find out that such a process uncomfortably resembles what the Nazis were doing with the Jews (and not only with them): eradicating their very capacity to

²⁸ In other words, there may be 'guardians who keep politicians from revising facts in a way that will generate murderous opinions (such as Nazism)', these will be 'non-political', and so 'truth must be beyond the *polis* to be safe from the *polis*'. (Riley 1987: 392)

²⁹ At least on the surface, while the debate may continue in the realm of the 'illegal', especially if the enforcement of the laws is ineffective. It would be interesting to examine how such kind of debate can exist 'against' or maybe 'outside' of the framework of the law and what are the implications of this kind of exclusion on the character of such a debate.

be 'political' in order to reduce their nature to the 'animal'. (Agamben 1998: 128-134; also Arendt's term 'fabrication of corpses' in Agamben 2002: 71) The threat of the Holocaust ceasing to be political to remain unique is that it ceases to be unique because the political is erased from it.

In more practical terms, when generations to come will be born into regimes where the Holocaust is a '(non)political taboo', what will motivate them to speak up for remembering its crimes and acting against even the smallest chance of its repetition? What will motivate historians to conduct more and more in-depth research to refute each false claim of each denier? In conclusion, whether to adopt or not to adopt restrictions on Holocaust denial requires a political decision that will determine whether the event as such remains in the realm of politics as understood by Arendt (2009) or it is taken out from it by appealing to the realm of truth. Either of them requires careful consideration and debate because it is a long-term decision and because of its connotations, once these laws are adopted, there is unlikely to be a way back.

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