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EUROPEAN COURT OF HUMAN RIGHTS, FREEDOM OF EXPRESSION AND DEBATING THE PAST AND HISTORY

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ARTICLE

I. Freedom of expression and its limits under the European Convention on Human Rights

The standards of the European Court of Human Rights (hereinafter: the ECtHR) on expressions that apply to the past and history arise from the ECtHR's more general approach to freedom of expression, as well as limitations and abuses of this freedom. Freedom of expression is enshrined in Article 10 of the European Convention on Human Rights (hereinafter: ECHR).[1] There is no exhaustive list of means and forms of expressions and the protection applies to highly diverse, imaginative and unconventional forms of communication.[2] However, under the ECHR, freedom of expression is not an absolute right and may be subject to restrictions, sanctions and responsibilities defined by law.

The ECHR requires that there is a pressing social need to restrict expression and the restrictions must be proportionate.[3] Furthermore, any restrictions must be convincingly established and narrowly interpreted.[4] Article 10.2 ECHR lists the grounds for limiting freedom of expression. These include the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

[2] W.A. Schabas, *The European convention on human rights: a commentary*, Oxford University Press, 2015, p. 455.

[3] See, for instance, ECtHR judgment of 6 April 2006, *Malisiewicz-Gąsior v. Poland*, App. No. 43797/98, para. 56.

[4] See, for instance, ECtHR judgment of 26 November 1991, *Observer and Guardian v. the United Kingdom*, App. No. 13585/88, para. 59.

of the disclosure of information received in confidence, as well as the maintenance of the authority and impartiality of the judiciary. Article 10.2 also requires any restrictions and penalties to be prescribed by law.

The ECtHR has warned about excessive limitations to freedom of expression when responding to real or purported preferences of the majority. The point is illustrated by the judgment in *Vajnai v. Hungary*, in which the ECtHR emphasised that a legal system that "applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto".[5]

Furthermore, the ECtHR developed a regime based on the "abuse clause" envisaged under Article 17 ECHR.[6] Article 17's "guillotine effect" emerged in 1961 in *Lawless v. Ireland*, where the ECtHR emphasised that the objective of the article is to make it impossible for individuals or groups "to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention".[7] According to Article 17 ECHR, expressions which are "gratuitously offensive or insulting, inciting disrespect or hate", expressions "casting doubt on clearly established historical facts", and expressions which "amount to the glorification of or to incitement to violence" run counter to the fundamental values set forth in the Preamble to the ECHR and are removed from the ECHR's protection.[8] The analysis of the ECtHR relevant case law shows that the ECtHR has also recognized certain expressions that relate to the past and history as such.

The first part of this article discusses examples or types of expressions about the past and history which, according to the ECtHR, fall outside of the protection of the ECHR. The second part discusses the approach of the ECtHR to the state's positive obligation to allow for free public debate about the past and history to take place.

2. Expressions about the past and history not protected under the ECHR

2.1. Expressions with the clear and sole intent to insult

With regard to expressions with the clear and sole intent to offend, the ECtHR highlighted that an offensive form of expression does not require that the expression falls out of the protection of Article 10 ECHR. Freedom of expression also protects expressions which are immoderate, provocative, vulgar, shocking or disturbing.[9]

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[5] ECtHR judgment of 8 July 2008, *Vajnai v. Hungary*, App. No. 33629/06, para. 57.

[6] P. Lobba, *Holocaust denial before the European Court of Human Rights: evolution of an exceptional regime*, European Journal of International Law 2015, vol. 26(1), pp. 237–253.

[7] ECtHR Judgment of 1 July 1961, *Lawless v. Ireland*, App. No. 332/57, para. 7.

[8] See Council of Europe. *Hate Speech, Apology of Violence, Promoting Negationism, and Condoning Terrorism. Thematic Factsheet*. July 2018 (accessible at: https://rm.coe.int/factsheet-on-hate-speech-july2018-docx/16808c168d).

[9] ECtHR judgment of 7 November 2006, *Mamère v. France*, Appl. No. 12697/03.

In *Uj v. Hungary*, a case regarding a harsh critique in a newspaper of a variety of wine traditionally produced in a region of Hungary, the ECtHR explained, that "the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression," as it may "serve merely stylistic purposes."[10] The style of the expression is part of the communication and, as such, is protected together with the content of the expression. While the style is not indicative of an offensive nature of the expression, the intention of the speaker is decisive when determining whether it is protected under the ECHR or not.

The ECtHR has found that using an unsubstantiated comparison to a totalitarian regime and its supporters for a purely rhetorical effect with respect to present-day individuals or their activities may be a form of insult that is not protected as an expression under the ECHR. According to the case law of the ECtHR to date, this is especially the case when such expressions are publicly delivered in states responsible for historical forms of totalitarianism or which were affected by them. For instance, in *Wabl v. Austria,* the ECtHR considered that the use of the term "Nazi journalism" in reference to the work of a professional journalist was an unsubstantiated comparison between the conduct of the individual and the actions or methods of a totalitarian regime.[11] In this case, there was no connection between the individual, who was the target of such an expression, and his political stance or conduct. The ECtHR considered that such expressions also offend the memory of the victims of fascist and Nazi crimes and trivialise the magnitude of atrocities committed in undemocratic regimes. In a similar vein, the ECtHR held in cases originating from Germany that describing abortion as "Babycaust" and referring to killing animals as "the Holocaust of animals" abuses the rights of others, especially the survivors of the Holocaust and Jews living in Germany.[12]

Furthermore, in a recent judgment in *Petkevičiūtė v. Lithuania* – a case about a memoire of a well-known Lithuanian writer, where a character was described as "a friend of Hitler", "a KGB collaborator", and "a spy" – the ECtHR held that, in the context of Lithuanian history, both allegations of support of Nazi ideology and collaboration with the Soviet security services are clearly insulting, not only to the deceased person, but also to that person's living relatives.[13] This demonstrates that, in order to determine whether an expression is gratuitously offending or not, the ECtHR takes into account the historical context, as well as the current social and cultural setting of such expressions and how the public perceives them.

The ECtHR has also decided in cases where it balanced personal rights of living individuals in relation to the memory of their deceased relatives and freedom of

[10] ECtHR judgment of 19 July 2011, *Uj v. Hungary*, Judgment, Appl. No. 23954/10, para. 20.

[11] ECHR decision of 4 March 1998, *Wabl v. Austria*, Appl. No. 24773/94.

[12] ECtHR judgment of 13 January 2011, *Hoffer and Annen v. Germany*, Appl. Nos. 397/07 and 2322/07. See also: A. Gliszczyńska-Grabias, G. Baranowska, *The European Court of Human Rights on Nazi and Soviet Past in Central and Eastern Europe*, Polish Political Science Yearbook 2016, 45, pp. 117–129, p. 121.

[13] ECtHR judgment of 27 February 2018, *Petkevičiūtė v. Lithuania*, no. 57676/11, para. 21.

debate on historical topics. In the aforementioned judgment in *Petkevičiūtė v. Lithuania*, the ECtHR provided a useful checklist of aspects that should be taken into account while adjudicating in cases of infringement upon the reputation of the deceased. First, an assessment must be made as to whether the disputed statement contributes to a debate of public interest. Second, the degree of notoriety of the affected deceased must be taken into account. Third, consideration should be given to whether the statement is the subject of a news report. Fourth, the content, form and consequences of the publication of disputed statement must be considered. Fifth, the method of obtaining the information and its veracity must be analysed. Sixth, the prior conduct of the person in question must be reviewed and finally, seventh, the severity of the sanction imposed must be considered.[14]

The ECtHR emphatically confirmed the importance of taking into account the "public interest" in debates about past and well-known historical figures. In *Dzhugahvili v. Russia,* the ECtHR found the application on the protection of reputation of a deceased relative, who was a well-known historical figure, to be inadmissible, as it was manifestly ill-founded. The applicant, the grandson of the former Soviet leader, Joseph Stalin, unsuccessfully sued the newspaper for the defamation of his grandfather, for publishing an article about the Katyń massacre. The ECtHR emphasized that the event and the historical figure involved in the case are historical topics that are open to public scrutiny and criticism. The ECtHR emphasised that:

> Historical events of great importance, which affected the destinies of multitudes of people, as well as the historical figures involved therein and responsible for them, inevitably remain open to public historical scrutiny and criticism, as they present a matter of general interest for society.[15]

The decision in *Dzhugahvili v. Russia* conformed to the ECtHR's earlier reasoning presented in *Dink v. Turkey*[16] and *Fatullayev v. Azerbeijan*[17] that states must not interfere and restrict historical debates on acts of particular gravity, such as war crimes, genocide or crimes against humanity. In *Janowiec and others v. Russia,*[18] a case concerning access to truth about the Katyń massacre, the ECtHR held that statements which amount to an apology for or justification of war crimes established by international tribunals, are excluded from protection of Article 10 ECHR. Nonetheless, in *Orban and others v. France,*[19] while the ECtHR condemned expressions justifying or glorifying war crimes in a work of fiction, it found that, in that particu-

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[14] *Ibid*, para. 65.

[15] *Ibid*, para. 32.

[16] ECtHR judgment of 14 September 2010, *Dink v. Turkey*, Appl. No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09.

[17] ECtHR judgment of 22 April 2010 in *Fatullayev v. Azerbeijan*, Appl. No. 40984/07.

[18] ECtHR judgment of 23 October 2013, *Janowiec v. Russia*, Appl. Nos. 55508/07 and 29520/09, para. 187.

[19] ECtHR judgment of 15 January 2009, *Orban and others v. France*, Appl. No. 20985/05, para. 46 and 47.

lar case, convicting the applicant in France for publishing a novel, which contained passages glorifying war was in breach of Article 10 ECHR.

Importantly, the ECtHR has also considered that it is in interest of the public to be informed of elements of national history, even, this is not the history of war crimes and other atrocities. In *Constantinescu v. Romania* – a case regarding sentencing a writer to pay a fine for publishing a book about her father, a well-known economist, and including derogatory comments about his colleagues, also well-known economists – the ECtHR emphasised that, in this case, publishing a factual historical account about the community of Romanian economists is a matter of important public debate and it emphasised that the public personalities depicted in that historical work must tolerate a higher level of scrutiny and criticism than ordinary people.[20]

The Parliamentary Assembly of the Council of Europe (hereinafter: PACE) has openly criticized laws protecting the memory of historical figures belonging to the "national pantheon", considering that they provide unnecessary protection to selected deceased figures. PACE reaffirmed that "the reputation of a nation, the military, historic figures or a religion cannot and must not be protected by defamation or insult laws" and demanded governments and parliaments to "clearly and openly reject false notions of national interest evoked against the work of journalists."[21] Despite the PACE's resolution adopted in 2007, laws protecting the reputation of key historical figures still exist and are enforced in some states within the CoE. Hence the ECtHR was presented with opportunities to rule in cases of convictions for insulting historical figures. In *Murat Vural v. Turkey,* the applicant was convicted for thirteen years' imprisonment and eleven years of suspension from voting in elections for pouring red paint on statues of Kemal Atatürk as a means of expressing a "lack of affection" for the historical Turkish leader and the Kemalist ideology.[22] The ECtHR held that there had been a violation of the applicant's right under Article 10 ECHR and Article 3 of Protocol No. 1 to the ECHR. However, the ECtHR was "struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant,"[23] especially given the non-violent nature of the act and declared that "no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question."[24]

To summarise, the ECtHR has ruled in favour of free debate about the past and historical figures, especially when such debates apply to the history of atrocities and gross infringements of human rights, but also, when they concern other elements of history, including the past of individuals. The ECtHR has also pronounced against criminal convictions for the crime of insulting historical figures and has ruled that freedom of debate about the past outweighs the protection of the person's right to the remembrance of the deceased, particularly when the historical figure was responsible for past atrocities and other human rights violations.

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[20] ECtHR judgment of 11 December 2012, *Constantinescu v. Romania*, Appl. No. no. 32563/04.

[21] Parliamentary Assembly of the Council of Europe, Towards decriminalization of defamation. Resolution no. 1577. Text adopted by the Assembly on 4 October 2007 (34th Sitting).

[22] ECtHR judgment of 21 October 2014, *Murat Vural v. Turkey*, Appl No. 9540/07.

[23] *Ibid*, para. 66.

[24] *Ibid*, para. 67.

2.2. Expressions denying or casting doubt on established historical fact

Knowingly false statements of facts are considered under the ECHR as exceeding the limits of public debate.[25] False statements are protected under Article 10 ECHR only if pronounced in good faith.[26] Consequently, some expressions, which intentionally negate or cast doubt on established historical facts fall outside the scope of Article 10 ECHR.

For example, in *Radio France and others v. France*,[27] a journalist and a publisher were ordered to pay damages to the former mayor of Paris, who they accused in bad faith of being responsible of deporting French Jews in the Holocaust during the Second World War. The ECtHR emphasized that a restriction on the freedom of expression is a legitimate sanction "when there is a voluntary and conscious distortion of the truth or when there is a manifest absence of care and moderation regarding the professional duties of the author."[28]

The main source of ECtHR case law on denialism and other forms of distorting historical facts concerns the denial of the Holocaust. The ECtHR interpreted the denial of the Holocaust for the first time as being categorically excluded from the protection of Article 10 ECHR in *Lehidoux v. France*[29] and *Garaudy v. France.*[30] In *Kühnen v. Germany*, the ECtHR broadened the application of Article 17 to acts contravening "the basic value underlying the Convention."[31] Consequently, applicants convicted by domestic courts for denying the reality, extent and seriousness of the Holocaust cannot claim that Article 10 applies to their opinions, as such opinions breach the essence of the right of freedom of expression. The ECtHR rejects such applications as inadmissible solely on the grounds of their content.[32]

The ECtHR's stance on Holocaust denialism is evident in cases originating from Germany. Importantly, the ECtHR had recognised Germany's special moral and his-

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[25] ECtHR judgment of 25 November 1999, *Nilsen and Johnsen v. Norway*, Appl No. 23118/93, para. 49.

[26] ECthR judgment of 23 June 2015, *Niskasaari and Otavamedia Oy v. Finland,* Appl No. 32297/10, para. 58.

[27] ECtHR judgment of 30 March 2004, *Radio France and others v. France*, Appl No. 53984/00.

[28] P.O. de Broux, D. Staes, *History Watch by the European Court of Human Rights*, [in:] B. Bevernage, N. Wouters, P. Macmillan (eds.), *The Palgrave Handbook of State-Sponsored History After 1945*, Palgrave Macmillan, London 2018, pp. 101–119, here p. 105.

[29] ECtHR judgment of 23 September 1998, *Lehideux and Isorni v. France*, Appl. No. 24662/94, para. 47.

[30] ECHR decision of 24 June 2003, *Garaudy v. France*, Appl. No. 65831/01.

[31] P. Lobba, *Testing the 'Uniqueness': Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights*, [in:] U. Belavusau, A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press 2017, pp. 109–128, here p. 144.

[32] P. Lobba, *Punishing Denialism Beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends*, New Journal of European Criminal Law 2014, vol. 5(1), pp. 58–77, here p. 75.

torical responsibility to protect the memory of the Holocaust against devaluation.[33] The ECtHR has recently consistently dismissed applications concerning Holocaust denial or minimisation under Article 17. For instance, the ECtHR applied the abuse clause in *Witzsch v. Germany (2),*[34] an application in a case without a racist element and where domestic judges did not find a propagation of Nazism in statements disputing Adolf Hitler's and the NSDAP's responsibility for the extermination of European Jews. Similarly, the ECtHR found the application in *Williamson v. Germany,*[35] a case regarding a conviction in Germany for denying the Holocaust on Swedish TV, inadmissible. The ECtHR found no reason to depart from the national court's assessment that the applicant's denial and downplaying of the genocide perpetrated against the Jews had disparaged the dignity of the Jewish victims and had been capable of severely disturbing the public peace in Germany.

So far, the ECtHR has not extended this reasoning to the denial of historic crimes other than the Holocaust. It has been observed that the case law of the ECtHR is more conflicted when discussing denial, minimisation, or gross abetting of historical crimes, especially those which had taken place before the crime of genocide was introduced in international law in the Genocide Convention, as well as crimes to the qualification of which there is no agreement between the parties contracting to the ECHR.[36] Famously, in *Perinçek v. Switzerland*, a case concerning denial in Switzerland by a Turkish politician of the historical genocide against the Armenians and other minorities in the Ottoman Empire, the ECtHR found that Article 10 protects statements which do not deny the fact that the crime had taken place, but refer to disputed elements of historical context or the qualification of the crime.[37] The Grand Chamber considered, among others, the extent to which the applicant's statements affected the rights of the members of the Armenian community and the lack of consensus among the High Contracting Parties whether the historical massacres are genocide.[38] Paolo Lobba rightly distinguished two major novel points that the ECtHR Grand Chamber made in *Perinçek v. Switzerland*. First, the Grand Chamber reaffirmed that it considers negation of the Holocaust as the only form of denialism that does not require specific evidence to attest to its qualification as hate speech in order to be removed from the protection of ECHR. The second novelty, according to Lobba, was that the Grand Chamber appeared to justify denial bans "only on account of the historical experience of the states from which the denialism cases before the Court arose," pointing to the moral obligations of states responsible for historic

[33] Cf. A. Gliszczyńska-Grabias, G. Baranowska, *op. cit.*, p. 126.

[34] ECtHR decision of 13 December 2005, *Witzsch v. Germany (2)*, Appl. No. 7485/03.

[35] ECtHR decision of 31 January 2019, *Williamson v. Germany*, Appl. No. 64496/17.

[36] Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 1948, approved and proposed for signature, ratification or accession by the General Assembly of the United Nations, Resolution 260 A (iii) of 9 December 1948 (entry into force 12 January 1951).

[37] ECtHR judgment of 10 October 2015, *Perinçek v. Switzerland*, Appl. No. 27510/08.

[38] C. Pégorier, *Speech and harm: Genocide denial, hate speech and freedom of expression*, International Criminal Law Review 2018, vol. 18(1), pp. 97–126.

totalitarian regimes to ban denial and any forms of downplaying of those regimes.[39] Therefore, the ECtHR expects democratic states with a history of totalitarianism to condemn and distance themselves from these dark elements of their history, at least when it applies to responsibility for Nazi crimes. It is not certain whether the same applies to crimes perpetuated under Fascism, Communism or other forms of undemocratic regimes that states within the CoE had experienced first-hand.

The ECtHR links Holocaust denial with incitement to violence against present-day minorities. In *Garaudy v. France*, the ECtHR argued that Holocaust denial epitomises one of the most serious forms of racial defamation of Jews and of incitement to hatred towards them: "The denial or rewriting of this type of historic fact undermines the values on which the fight against racism and anti-Semitism are based …. Such acts are incompatible with democracy and human rights because they breach the rights of others".[40]

Moreover, in the same judgment, the ECtHR declared that denying the reality of clearly established historical facts does not constitute historical research akin to a quest for the truth and that the real aim and result of the approach of denialists is to rehabilitate the National-Socialist regime and, in consequence, accuse the victims of falsifying history.[41] The ECtHR reiterated this argument in the previously abundantly cited judgment in *Perinçek v. Switzerland*:

> the justification for making its denial a criminal offence lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned … its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism.[42]

The ECtHR also astutely acknowledged that support for Holocaust denial could be veiled under the guise of scientific or artistic production. For instance in *M'Bala M'Bala v. France*, the ECtHR confirmed that a satirical performance can, in fact, be a demonstration of hatred and anti-Semitism, as well as support of Holocaust denial through justification and admiration of one of most well-known and convicted Holocaust deniers in France, Robert Faurisson.[43] Recently, the ECtHR unanimously held that denial of the Holocaust is not protected under Article 10 ECHR in *Pastörs v. Germany*.[44] The ECtHR emphasised that intentionally untrue statements delivered publicly by a politician that aimed to defame Jews and cast doubt over persecution that they had suffered cannot be afforded protection of Article 10 ECHR. The ECtHR sided with the national courts, which had carefully analysed the statements made by the applicant to conclude that the applicant attempted to conceal or whitewash his qualified Holocaust denial. The Regional Court vividly described that the applicant

[39] P. Lobba, *op. cit.*, p. 126.

[40] ECtHR decision of 24 June 2003, in *Garaudy v. France*, Appl. No. 65831/01.

[41] *Ibid.*

[42] ECtHR judgment of 10 October 2015, *Perinçek v. Switzerland*, Appl. No. 27510/08.

[43] ECtHR judgment of 20 October 2015, *M'Bala M'Bala v. France*, Appl. No. 25239/13.

[44] The ECtHR judgment of 3 October 2019, *Pastörs v. Germany*, Appl. No. 55225/14.

inserted denialist statements into the speech as if he were pouring poison into a glass of water, hoping that it would not be detected immediately.

To conclude, Holocaust denial is clearly not protected under Article 10 ECHR because of Article 17 ECHR. Denial of other historical events is excluded from the protection of Article 10 ECHR only if it incites violence or otherwise threatens public order or the rights and reputations of others.[45] The ECtHR has recognized that there are states whose historical experience (and their responsibility for it) particularly compels them to preserve the truth about the Holocaust and the memory of its victims, as well as distancing themselves from Nazism. According to ECtHR, Germany, in particular, has a special responsibility to introduce Holocaust denial bans. Other states are not equally obliged to do so.

3. Freedom of historical debate under the ECHR

The ECtHR places special importance on public debate in democratic society and has consistently required very strong reasons for justifying any restrictions to it. The ECtHR confirmed that states have a positive obligation to assure conditions for public debate to take place. It has found, among others, that it is a role of the state "to create a supportive environment for everyone concerned to participate in public debate" and "to allow them to express without fear their ideas and opinions, even if they are contrary to those supported by official authorities or by another important actor of public opinion, even though [the ideas and opinions] are irritating or shocking for others."[46]

The ECtHR repeatedly held that states that are party to ECHR must assure tolerance for open discussions on historical topics. In *Monnat v. Switzerland*,[47] the ECtHR argued that tolerance and freedom of expression "[form a] part of the efforts that every country must make to debate its own history openly and dispassionately."[48] In *Handyside v. the United Kingdom*,[49] the ECtHR contended that the freedom of expression encompasses also the statements that offend, shock, or disturb the state or any part of the population. In *Chauvy v. France*,[50] the ECtHR emphasized that it is an integral part of the freedom of expression to seek historical truth, which was later reiterated among others in *Fatullayev v. Azerbeijan*[51] and *Perinçek v. Switzerland*[52].

Furthermore, the ECtHR has reiterated in its case law that it distances itself from pronouncing on historical issues, which are "a part of ongoing debate between

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[45] See P. Lobba, *op. cit*.

[46] The ECtHR judgment of 14 September 2010, *Dink v. Turkey*, App. Nos 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, para. 137.

[47] The ECtHR judgment of October 2006, *Monnat v. Switzerland*, Appl. No. 73604/01.

[48] *Ibid*.

[49] The ECtHR judgment of 7 December 1976, *Handyside v. United Kingdom*, Appl. No. 5493/72.

[50] The ECtHR judgment of 29 September 2009 in Chauvy versus France, Appl. No. 64915/01.

[51] The ECtHR judgment of 22 April 2010 in *Fatullayev v. Azerbeijan*, Appl. No. 40984/07.

[52] The ECtHR judgment of 10 October 2015, *Perinçek v. Switzerland*, Appl. No. 27510/08.

historians."[53] In *Lehideux and Isorni v. France*, the ECtHR contended that it is not its role to "settle the point" about a disputed historical issue, which is "part of an ongoing debate among historians about the events in question and their interpretation."[54] Likewise, in *Ždanoka v. Latvia*, the ECtHR declared that, it is not its role to "take the place of the competent national authorities" and that it will "abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction." Judge Lech Garlicki reminded in dissenting opinion in *Adamsons v. Latvia*, that ECtHR judges are "experts in law and legality, but not in politics and history" and therefore must not "venture into these territories unless in cases of absolute need."[55]

However, while the ECtHR declares that it shall withdraw from interpreting or judging history, its case law provides many examples that the ECtHR is not always following its own recommendation. In fact, it has been widely discussed that the ECtHR actively participates in history writing and is an important actor in historical disputes among ECHR contracting states. To illustrate the point, the ECtHR considered as if certain interpretations or qualifications of historical events and processes are commonly known and accepted, often without referencing to relevant academic literature or sources. At the same time, states within CoE continue to dispute a character and qualification of these events and processes.[56]

For instance, the ECtHR had considered in 2008 that the Belgian state is not liable to pay damages for war crimes committed against Jews and Roma victims during the Second World War.[57] Such an assessment may obfuscate or diminish the Belgian authorities and state's responsibility for persecution of Jews in Belgium.[58] The Belgian legislator later explicitly acknowledged such responsibility in a declaratory law adopted by the Belgian Senate.[59]

This tension was felt most acutely in cases where the ECtHR has sided with master historical narrative in Estonia, Latvia and Lithuania about the Soviet Union's illegal occupation of these countries' territories.[60] Such a narrative contrasts with

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[53] *Ibid.*

[54] The ECtHR judgment of 23 September 1998 *Lehideux and Isorni v. France*, Appl. No. 24662/94.

[55] The ECtHR judgment of 24 June 2008, *Adamsons v. Latvia*, Appl. No. 3669/03.

[56] P.O. de Broux, D. Staes, *History Watch by the European Court of Human Rights*, [in:] *The Palgrave Handbook of State-Sponsored History After 1945*, Palgrave Macmillan, London 2018, pp. 101–119.

[57] The ECtHR decision of 8 January 2008, *Epstein and Others v. Belgium*, appl. no. 9717/05, para. 3.

[58] E. Debruyne, R. van Doorslaer, F. Seberechts, N. Wouters, L. Saerens, *La Belgique docile. Les autorités belges et la persécution des Juifs en Belgique durant la Seconde Guerre mondiale, Rapport final d'une étude effectuée par le Centre d'Études et de Documentation Guerre et Sociétés contemporaines pour le compte du Gouvernement fédéral et à la demande du Sénat de Belgique, 2004–2007.*

[59] Sénat de Belgique. Résolution de 24 Janvier 2013 visant à reconnaître la responsabilité des autorités belges dans la persécution des Juifs en Belgique.

[60] The ECtHR judgment of 24 July 2008, *Kononov v. Latvia*, Appl. No. 36376/04; The ECtHR judgment of 3 December 2015, *Sõro v. Estonia*, Appl. No. 22588/08, para. 1.

an official historical account that the Russian Federation supports, among others, through its memory laws: that it acted as a liberator rather than aggressor.[61]

Nonetheless, admonishing the ECtHR for not achieving its self-imposed standard of abstaining from participating in historical disputes, it should be noted that states and its organs under the ECHR, including courts and tribunals, are not prohibited from taking part in historical debates, introducing binding interpretations of the past or supporting a particular narrative about historical issues – as long as such actions are compatible with ECHR and its underlying values. However, there is a positive obligation placed upon states contracting to ECHR: states must ensure that debate on historical topics can take place freely in society, without unnecessary and disproportionate intrusions, limitations or outright banning certain statements about the past and history. The ECtHR has made this point forcefully in its case law, as discussed earlier in this article. Reminding about this positive obligation of states that are party to ECHR is especially pertinent and urgent in the context of noted interest of many states – Poland included[62] – in conducting historical policy with means of law,[63] also through so-called memory laws,[64] understood as criminal prohibitions of certain expressions about past and history.[65]

4. Conclusions

ECtHR case law demonstrates that under ECHR, free study and debate about the past and history are encouraged, and states are required to provide sufficient conditions for them to take place. At the same time, there are certain limits to state interferences into researching and discussing the past and history. The ECtHR considered that while state may orientate debate on historical topics, it should not stifle or ban it. Historical debates concern matters of public interest, therefore state has very narrow margin to restrict them.

Nonetheless, the ECtHR case law allows the reconstruction that the ECtHR supports a certain standard of public debate, including the debate about the past and history. Importantly, this standard is only derivative of protecting other values, including public order or rights and reputations of others. Under the ECHR, debate on the past

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[61] M. Mälksoo, *Kononov v. Latvia as the Ontological Security Struggle Over Remembering the Second World War*, [in:] U. Belavusau, A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press 2017, pp. 91–108; N. Koposov, *Memory Laws in Putin's Russia*, [in:] *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*. Cambridge University Press 2017, p. 207–237.

[62] A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, Polish Yearbook of International Law 2018, vol. XXXVIII, pp. 59–72.

[63] N. Koposov, *op. cit.,* p. 8.

[64] *Memory Laws in European and Comparative Perspective*, Journal of Comparative Law 2018, vol. 13 (1), special issue.

[65] Council of Europe, *Memory Laws and Freedom of Expression*, Thematic Factsheet. July 2018. See also: E. Heinze, *Epilogue: Beyond "Memory Laws": Towards a General Theory of Law and Historical Discourse,* [in:] *Law and Memory*, *op. cit.*, pp. 413–434.

is framed within the meaning of Article 10, freedom of expression, and Article 17, abuse of rights clause. Thus expressions which are "gratuitously offensive or insulting, inciting disrespect or hate" and those "casting doubt on clearly established historical facts", as well statements that "amount to the glorification of or to incitement to violence" are not protected under Article 10 ECHR. According to the ECtHR, the harm they cause outweighs any benefit from open debate.

The aforementioned grounds for redrawing the boundaries of free expression about the past and history are clear and sufficiently argued for by the ECtHR. However, it would be beneficial for national legislators and courts alike if the ECtHR devoted more reflection on an issue that remains in the background of cases concerning study and debate on history. Namely, whether "protecting historical truth" or protecting reputation of state or nation", or other grounds invoked in current debates on limiting debates on history, are values that in any case validate introducing proportionate restrictions to freedom of expression. The lack of interest of the ECtHR in reflecting on these issues is alarming, given burgeoning state practice of conducting historical policy with means of law and restricting freedom of expression with diverse legal means, including through memory laws. Regrettably, the ECtHR has so far only dealt with this problem marginally and thus had limited opportunity to influence legislative choices in states that are party to ECHR, which seek to use legal means to steer historical policy and historical debate.

This article also discussed the ECtHR role as a "tribunal of history" that considers as commonly accepted certain narratives or assessments of historical facts, which are disputed among state parties. This practice is controversial given the self-declared need to abstain from entering the domain of historical interpretation, but also in the light of a more general crisis of legitimacy of the ECtHR within some of contracting states.[66]

The ECtHR should become more assertive in claiming its actual role as an actor in historical disputes and it should explicitly state in its judgments what are the sources of the supported historical interpretation – be it conferring to assessment or qualification presented by claimant or government, or providing own assessment, in such case always supported with references to relevant scholarly literature. Implementing such practice could render the ECtHR judgments on the past and history more transparent.

[66] M. Breuer, *Principled Resistance to ECtHR Judgments. A New Paradigm?*, Springer 2019.

SUMMARY

The article provides an overview of standards of the European Convention on Human Rights (ECHR) concerning freedom of expression and its interpretation by the European Court of Human Rights (ECtHR) in case law regarding application of Article 10 and 17 ECHR in cases with public debate on the past and history in the background.

The article demonstrates that the ECtHR has considered expressions with clear and sole intent to insult and expressions denying or casting doubt on established historical fact as not protected as free expression under ECHR, and provides relevant examples from ECtHR case law. Furthermore, the article discusses a state's positive obligation under ECHR to assure conditions for free study and debate on the past and history to take place. It finds that the ECtHR has elaborated a certain standard of public debate on historical topics, yet that this standard is only derivative of reasoning in cases where protecting public order and rights and reputations of others are considered as protected values.

The article also points to the declared and actual role of the ECtHR itself in historical disputes. The article concludes with encouraging ECtHR to clearly establish whether such grounds as "protecting historical truth" or "protecting reputation of state or nation" validate introducing limits to free expression and to become more assertive in claiming its role as actor in historical disputes.

STRESZCZENIE

EUROPEJSKI TRYBUNAŁ PRAW CZŁOWIEKA, WOLNOŚĆ WYPOWIEDZI I DEBATA O PRZESZŁOŚCI I HISTORII

W artykule omówiono standardy Europejskiej Konwencji Praw Człowieka (EKPC) dotyczące wolności wypowiedzi oraz ich interpretację przez Europejski Trybunał Praw Człowieka (ETPC) w związku z zastosowaniem art. 10 i 17 EKPC w sprawach, których tłem jest publiczna debata o przeszłości i historii.

W artykule starano się dowieść, że ETPC uznaje, iż wypowiedzi, których wyłącznym i oczywistym celem jest znieważenie, a także które zaprzeczają lub podważają fakty historyczne, nie są chronione w ramach wolności wypowiedzi przez EKPC. Następnie omówiono pozytywny obowiązek zapewnienia przez państwo w ramach systemu EKPC warunków do wolnych badań i debat o przeszłości i historii. Wskazano również, że ETPC wypracował pewien standard debaty o przeszłości i historii, ale jako pochodną decyzji i wyroków w sprawach, w których dobrem chronionym był porządek publiczny oraz prawa i wolności innych osób.

W artykule wskazano także na deklarowaną i faktyczną rolę ETPC w debatach historycznych. Konkludując, stwierdzono, że ETPC powinien wyraźnie określić, czy „ochrona prawdy historycznej" i „dobrego imienia państwa i narodu" są na gruncie EKPC podsta-

wą do ograniczania wolności wypowiedzi, a także zasugerowano, żeby ETPC otwarcie przyznał, iż bierze udział w debatach o przeszłości.

Słowa kluczowe: Europejski Trybunał Praw Człowieka, Europejska Konwencja Praw Człowieka, wolność wypowiedzi, debata historyczna

Key words: European Court of Human Rights, European Convention of Human Rights, freedom of expression, historical debate