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The criminalisation of symbols of the past: expression, law and memory

Agata Fijalkowski*

Abstract

This paper examines the criminalisation of symbols of the past. It considers the 2011 judgment of the Polish Constitutional Tribunal. In this compact and well-ordered decision, the Tribunal, with reference to key European examples, assessed critically the constitutionality of criminal law provisions that prohibit the dissemination and public use of symbols of the past pertaining to fascist, Communist or other totalitarian content. Its ruling, which found amendments to the law in Poland that tightened up restrictions on the use of totalitarian symbols to be unconstitutional, is considered within three important contexts: first, the broad European context, where the concept of totalitarian crimes has become subject to EU human rights legislation relating to the freedom of expression; second, the context of post-dictatorial Europe, where specific states have addressed the use of totalitarian symbols in their respective criminal laws; and finally, the context of transitional justice, where criminalising symbols of the past has become a central and permanent feature in European narratives about justice. Significantly, these cases reveal the temporal element of transitional justice. The paper discusses the two case-studies most relevant to Poland, namely those in Germany and Hungary. Reference is also made to the Baltic States, which, together with Poland, have made a concerted effort to bring the notion of totalitarian crimes and histories to the attention of Europe. The paper concurs with the contention that cases concerning the use of symbols provide an excellent illustration of where memory and law intersect. Using historical, comparative and contextual methodologies the paper demonstrates the legal and philosophical complexities of criminal uses of symbolism, the political realities, and the key dimension of transitional justice and its relationship to expression, law and memory.

I. Introduction

Breaking with the past has been a key feature of the transition from Communist rule to democracy in post-Communist Europe. When Communism collapsed in 1989, post-dictatorial states[1] in modern Europe faced a variety of questions and challenges in how to deal with injustices committed by the predecessor regime. In this vein, a critical step towards breaking with the past would involve a commitment to human rights and civil liberties, demonstrated by membership of the Council of Europe[2] and the ratification of human rights legal instruments, most significantly the European Convention on Human Rights (ECHR).[3] For the first time since World War II, the use of

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1 The reference to 'post-dictatorial' concerns discourses in the fields of transitional justice and transitional criminal justice. See Grosescu and Fijalkowski (forthcoming).

2 The Council of Europe extended its membership following the fall of Communism in 1989. See ‹http://hub.coe.int› (last accessed 2 January 2014).

3 For signatures and ratifications see ‹http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?CL=ENG&MA=3› (last accessed 2 January 2014).

totalitarian symbols is fast becoming the focus of attention, notably in Hungary. Symbolic representations of the past order, whether the Nazi swastika, the Communist hammer and sickle or any other symbol, have been prohibited from the public sphere in some states during periods of transition (Žalimas, forthcoming). From a European human rights perspective the question is relevant as an issue of freedom of expression. From the point of view of post-dictatorial states, criminal law regulation should prevent any suffering on the part of victims upon seeing a symbol that is connected to the former repressive regime (Koltay, 2013; Etkind *et al.*, 2012).

In many post-dictatorial states amendments to the criminal law were introduced recently to tighten up laws concerning the use of symbols, well after the periods of negotiation about conditions during the transition. For some commentators, such a time lapse matters in the light of contemporary European Court of Human Rights (ECtHR) jurisprudence, where 'transition-to-democracy circumstances that justified their adoption have ceased to exist' (Kosař, 2008, p. 462). For other writers, the issue is ongoing, and stronger efforts need to be made to rectify the wider European community's response, legally, morally and symbolically, to the legacy of Soviet Communism (Mälskoo, 2008, p. 1). Both national and regional courts contribute to temporal narratives about justice that derive from memories of historical events where, at times, institutional chronology is clearly disconnected from the national historical timeline and societal (and within this, victims') memory. An examination of the ban on totalitarian symbols within the selected case-studies indicates the intersection of law and memory, which 'have met, overlapped and intersected on numerous yet problematic occasions' (Fronza, 2006, p. 609). This paper asserts that there are several intersections of law and memory within the transitional justice context, indicating competing narratives about justice across national and regional levels. Indeed, the ECtHR, set up in 1959 to hear individual or state applications alleging violations of the rights set out in the ECHR, plays an increasingly important role in shaping jurisprudence in the area (Buyse and Hamilton, 2011), although some scholars caution against casting it in a role as the 'dispenser of transitional justice' on certain human rights questions (Sweeney, 2011, p. 124). But there will be implications for the field. Transitional justice, as a discipline, is concerned with the manner in which states deal with past injustices committed by predecessor regimes (Teitel, 2000). It is an area that inherently possesses a temporal dimension, because it deals with the past, and it is an area where legal measures concerned can have backward- and/or forward-looking features (David, 2011). In this sense, the law can ascribe temporality to a subject.

II. The Polish case

Poland's relationship with freedom of expression is dictated by historical and social contexts, both of which have come to the fore in the recent spate of cases before the national courts. It is worthwhile recalling that the country's twentieth-century history is characterised by three key events: regaining its statehood in 1918; a short-lived democracy-turned-authoritarian-rule that was cut short by World War II in 1939; and another period of imposed rule, i.e. Communist rule, which lasted forty-five years (1945–1989) (Zamoyski, 2009; Fijalkowski, 2010). Under Communism, the authorities controlled expression closely, as seen with respect to censorship in the press, media, arts and literature, as well as the functioning of trade unions (Garton Ash, 1983). In the post-Communist period, and in particular with the promulgation of key constitutional amendments, the Small Constitution from 1992 and then the 1997 Constitution, the social context is highlighted in debates concerning religion.[4] Such debates have centred mainly on the prominent role of the Catholic Church in

4 The majority of Poles are Catholic. The state has permitted the Catholic Church to have a role in education, despite state claims about the separation between the church and state. Poland concluded a Concordat with the Vatican in 1993.

public affairs and the increasing number of blasphemy cases (Lepka, 2009). The right to freedom of expression is found in Article 54 of the 1997 Polish Constitution,[5] which reads:

1. 'The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.'
2. 'Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.'

Despite guarantees, there is concern that freedom of expression continues to be in a vulnerable if not a precarious position, especially as concerns the relation between church and state, as state control of the media shows an 'alarming political dimension [to] all limitations on freedom of speech', resulting in niches or separate enclaves in which these dimensions operate.[6]

2.1 Relevant Polish criminal and constitutional provisions

For the purposes of our discussion, key criminal law provisions work together with the relevant constitutional provisions. Article 256 of the 1997 Polish Criminal Code is relevant. The provision concerns the promotion of fascism or other totalitarian systems, and comprises four paragraphs:

> *Para. 1* 'Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.'
> *Para. 2* 'Whoever, in order to distribute, produces, records or brings, buys, stores, possesses, presents, transports or sends print, record or other item containing the substance referred to in para. 1 or being a carrier of fascist, communist or other totalitarian symbolism shall be subject to a punishment as referred to in para. 1.'
> *Para. 3* 'The perpetrator of the prohibited act referred to in para. 2 shall not be deemed to have committed an offence if the act was committed as part of artistic, educational, collecting or scientific activity.'
> *Para. 4* 'In the event of conviction for the offence referred to in para. 2, the court shall order forfeiture of the objects specified in para. 2, even if they did not constitute the perpetrator's property.'[7]

5 See <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (last accessed 2 January 2014). Freedom of conscience is set out in Article 53, and freedom of assembly in Articles 57–59.

6 See <http://freepl.info/953-report-threats-freedom-expression-poland-2010-and-2011> (last accessed 2 January 2014).

7 Also relevant is Article 119, para. 1: 'Whoever uses violence or makes unlawful threat[s] towards a group of person[s] or a particular individual because o[f] their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years'; and para. 2: 'The same punishment shall be imposed on anyone, who incites commission of the offence specified under para. 1.' Article 194 concerns offences against freedom of conscience and religion and indicates that 'whoever restricts another person from exercising the rights vested in the latter, for the reason of this person['s] affiliation to a certain faith or their religious indifference[,] shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years'. Article 257 concerns publicly insulting a group of people or an individual person by reason of their national, ethnic or racial affiliation: 'Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years.'

> Significantly, Article 13 of the Constitution indicates:
>
> 'Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, Fascism and Communism, as well as those whose programmes or activities sanction racial or national hatred or the application of violence for the purpose of obtaining power or influencing the State policy, or providing for the secrecy of their own structure or membership, shall be prohibited.'

Additionally, the crime of denial is found in Article 55 of the Law Concerning the Institute of National Remembrance from 18 December 1998, which states:

> 'The person who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 [Nazi or Communist crimes] shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.'[8]

Poland is an excellent example of a post-Communist state showing 'sensitivities towards the historiographical issues of the 20th century' through the criminalisation of historical revisionism in the law (Belavusau, 2013, p. 17). Critical engagement with the criminalisation of historical revisionism is outside the scope of this paper, but it is worth noting that the relationship between law and specific histories is an association that for some scholars calls into question the 'ethics of memory', which can lead to a shortsightedness that is reflected in state actions that curtail freedom of speech (p. 17).

2.2 The Polish Constitutional Tribunal judgment

In July 2011, the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) rendered its decision in a case concerning totalitarian symbols. The case was the result of an application made by a group of parliamentary (*Sejm*) deputies, who sought clarification on the conformity of Article 1(28) of the Act of 5 November 2009 (which amended the Criminal Code, the Code of Criminal Procedure, the Executive Criminal Code, the Criminal Fiscal Code and certain other acts)[9] to Article 54(1) in conjunction with Article 2, Article 31(3) and Article 42 of the Constitution, as well as to Article 9 and Article 10 in conjunction with Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms[10] and Article 19 of the International Covenant on Civil and Political Rights.[11]

Article 1(28) of the amending Act extended the scope of criminal liability for two types of conduct specified in Article 256(2) of the Criminal Code. First, it included the production, recording or importing, purchase, storage, possession, presentation, transporting or sending, for the purpose of dissemination, of printed materials, recordings or other objects comprising the content specified in paragraph 1. Second, it included the production, recording or importing, purchase, storage, possession, presentation, transporting or sending, for the purpose of dissemination, of printed materials, recordings or other objects being carriers of fascist, Communist or other totalitarian symbols. The offences under Article 256(2) of the Criminal Code may be committed with direct intent, in other words, for the purpose of dissemination.

8 See ‹http://ipn.gov.pl/en/about-the-institute/documents/institute-documents/the-act-on-the-institute-of-national-remembrance› (last accessed 2 January 2014).

9 *Dziennik Ustaw* (*Journal of Laws*) No. 206, item 1589.

10 *Dziennik Ustaw* from 1993 No. 61, item 284.

11 *Dziennik Ustaw* from 1977 No. 38, item 167.

The amendments were not passed without controversy, and the Tribunal was clearly interested to know the underlying reasons for the proposed reform. The judgment refers to the draft amendments to Article 256 of the Criminal Code of 5 September 2008,[12] where it was revealed that the drafters of the amendments indicated, 'in [a] one-sentence comment',[13] that it was necessary to extend the scope of criminalisation to include acts that were not committed publicly, and as such not subject to Article 256 of the Criminal Code, which was legally binding at that time. The drafters assumed that the goal of the amendments was to penalise the production and private sale (including over the Internet) of objects that promoted a totalitarian system of government or were carriers of fascist, Communist or other totalitarian symbols. They felt that adding the second paragraph to Article 256 of the Criminal Code would result in a situation where:

> 'it will be prohibited not only to produce and sell, but also to possess and present, printed materials, recordings (including films) or other objects comprising the contents specified in paragraph 1 if those activities are undertaken for the purpose of dissemination of those contents ... *the introduction of such amendments addressed the expectations of Polish society which still had painful memories of the war and the crimes of the fascist and Communist regimes*.'[14]

The legal opinions submitted during the legislative process were critical of the draft amendments to Article 256 of the Criminal Code. These came from three important bodies representing the Polish legal community that were noted in the case: the National Council of the Judiciary of Poland (*Krajowa Rada Sądownictwa*);[15] the Minister of Justice–Prosecutor General; and the Bar. The criticisms centred on the practical application of the proposed amendment, rather than addressing the emotive dimension – the reference to memory – in the drafters' reasoning. This approach is consistent with criminal law in general, which is expected to be distanced from emotional justification. Nevertheless, the narrative that derives from the constitutional and human rights claims has the potential to shape the criminal law narrative in relation to memory, in this instance with respect to World War II and Communist rule.

In its ruling, the Tribunal found that in Article 256(2), the wording 'or other objects being carriers of fascist, Communist or other totalitarian symbols', was unconstitutional, because it was inconsistent with Articles 54(1) and (2) of the Polish Constitution, which concern freedom of expression. To appreciate the Tribunal's judgment it is important to consider the European position, which is the subject of Part III.

III. The European human rights regime

The European position is reflected in the human rights regime and framework decisions set out by the relevant European Union (EU) bodies. I will begin with the European human rights view.

Freedom of expression is a fundamental right. Article 10 of the ECHR contains two paragraphs, and the second paragraph outlines the parameters of the right, and signals that it is not absolute. In

12 The *Sejm* Paper No. 1288 debated in the sixth term of the *Sejm*, as noted in *The Use of Totalitarian Symbols Case*, K/11 judgment from 11 July 2011.

13 *Ibid.*

14 *Ibid.* (emphasis added).

15 For further information about this body see Fijalkowski (2010) and ‹http://www.krs.pl› (last accessed 2 January 2014).

this respect Article 10 of the ECHR is much more restricted in scope than its American counterpart, the First Amendment of the US Constitution (Sottiaux, 2008).[16]

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Vajnai v. Hungary is the key case that was given effect by the Polish Constitutional Tribunal in its 2011 decision. It concerned the arrest of the Vice-President of the Workers' Party (*Munkáspárt*) at a demonstration for wearing a five-pointed red star, the symbol of the international workers' movement.[17] Vajnai refused to remove the red star at the request of the police. He was arrested further to a provision found in Hungary's post-Communist Criminal Code, section 269/B, which specifically deals with totalitarian symbols including the swastika, SS badges, the arrow and cross, the hammer and sickle or the red star, or designs incorporating any of those symbols. The ECtHR agreed that interference could be justified to protect the rights of others and prevent disorder, further to Article 10(2). But it was less convinced by the argument that these measures were necessary. The ECtHR rejected the following three arguments presented by the Hungarian government: (i) the symbols endangered Hungarian democracy; (ii) the symbols carried the meaning claimed by the Hungarian government; and (iii) the feelings of past victims should influence the case.

Concerning the first point, the ECtHR broke away from its previous position in *Rekvényi v. Hungary*,[18] a case noting that historical circumstances justified the measures taken with respect to the police and apolitical views.[19] In that case, the law that prohibited members of the armed forces, police and the security services from joining political parties was challenged unsuccessfully. On appeal, the ECtHR appreciated that in certain regimes, such as the Hungarian Communist regime (1949–1989), which were characterised 'by one political party and where, within the police force, membership of that party was expected as a manifestation of the individual's commitment to the regime', the provision in question 'could be seen as answering a "pressing social need" in a democratic society':[20] to break the association between the police and political activism. But the ECtHR stressed that the need for such measures (banning the police

16 Concerning the objective of the drafters of the said Polish provision, namely to penalise the production and private sale (including over the Internet) of objects that promoted a totalitarian system of government or were carriers of fascist, Communist or other totalitarian symbols, also note the diverging approaches between US and French positions to the selling of Nazi memorabilia by Yahoo! in *Yahoo! Inc., a Delaware Corporation v. La Ligue Contre Racisme et l'antisemitisme, a French Association*, United States Court of Appeals, Ninth Circuit. 433. F3d, 1199, 12 January 2006, at ‹http://caselaw.findlaw.com/us-9th-circuit/1144098.html› (last accessed 2 January 2014).

17 *Vajnai v. Hungary* [2008] 33629/06 (8 July 2008).

18 [1999] 25390/94 (21 September 1998).

19 *Ibid.*

20 *Ibid.*, para. 47.

from joining political organisations) is transient, as noted in *Rekvényi* and later considered in *Ždanoka v. Latvia* in the light of Article 3 Protocol 1. Moreover, in the *Ždanoka* case, the ECtHR steered clear of pronouncing a judgment on the correct version of events:

> '[A] number of historical events are disputed between the parties. However, in exercising its supervisory jurisdiction, the [ECtHR]'s task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation ... Furthermore, the [ECtHR] will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them.'[21]

The ECtHR engages with the temporality of transitional justice, albeit not directly. It also addresses competing historical narratives. While it arguably assumes a neutral position, the judgment at times validates one version of events over others.

In *Vajnai*, the ECtHR considered the red star to have multiple meanings. It held that 'the potential propaganda of that ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction'.[22] In this case the multiple meanings of a symbol, as presented by the parties, were considered by the ECtHR, in contrast to *Lautsi v. Italy*, where it was argued that the symbol in question (a crucifix) had a single main meaning (Buyse, 2011, pp. 136–137).[23] This case did not involve a state in transition, but was nonetheless significant in terms of case-law, which affects the application of the ECtHR's jurisprudence by the courts of the post-dictatorial European states. Significantly, in *Vajnai*, the ECtHR held that twenty years had passed after the collapse of Communism, making the authorities' actions unnecessary in a democractic society (Gliszczyńska-Grabias, 2013, p. 3).

Concerning the feelings of past victims and their families, the ECtHR appreciated the potential unease caused but it did not feel this was enough to justify such a limitation on expression. In other words, the ECtHR saw unfounded fears on the part of victims of Communism, which in the eyes of some commentators points to a different test being applied to such cases (Gliszczyńska-Grabias, 2013, p. 3). It is worthwhile recalling *Handyside v. United Kingdom*[24] when the ECtHR contended that freedom of speech and expression are subject to a 'heckler's vote', enabling restrictions on human rights in order to 'satisfy dictates of public feeling – real or imaginary'.[25] In cases concerning states in transition, the ECtHR is careful not to place feelings at the *centre* of its reasoning; rather, arguments about the effect on victims seem to be *tagged onto* its reasoning (Buyse, 2011, p. 137).

At the heart of ECtHR jurisprudence, it is the protection of political speech that matters (Janis, Kay and Bradley, 2008, pp. 256–264). When freedom of expression is exercised as political speech, which may involve symbols that have multiple meanings, limitations are justified only insofar as there exists a clear, pressing and specific social need.[26] The Court noted that the Hungarian government had not shown that wearing the red star was identified exclusively with totalitarian ideas, or that it was intrinsically offensive or shocking.[27] Therefore, the ban on wearing the red

21 [2006] 58278/00 (16 March 2006), para. 96.

22 *Vajnai v. Hungary*, [2008] 33629/06 (8 July 2008), para. 56.

23 [2013] 30814/06 (3 November 2009). See also Sweeney (2011).

24 [1976] 1 EHRR 737.

25 *Vajnai v. Hungary* [2008] 33629/06 (8 July 2008), para. 57.

26 *Ibid.*, para. 51.

27 *Ibid.*, para. 53.

star was too broad in view of the multiple meanings of that symbol, as it could encompass activities and ideas that clearly belonged to those protected by Article 10 of the ECHR.[28]

Its examination of the criminal law provision in question (section 269/B of the Hungarian Criminal Code) in the light of the requirement set out in Article 10 of the ECHR, illustrated its position further. The ECtHR stated that section 269/B prohibited the use of symbols with multiple meanings. In other words, legal uncertainties in that regard may result in a chilling effect on the freedom of expression and cause self-censorship.[29] The ECtHR also ruled that the basis for imposing restrictions on freedom of speech by way of a criminal sanction might not merely be a fear of promoting a totalitarian system of government using a given symbol. The fact that section 269/B of the Hungarian Criminal Code did not require proof that the actual display amounted to totalitarian propaganda was considered by the ECtHR as inappropriate. That the mere display is unquestionably considered to constitute propaganda unless it serves scientific, artistic, informational or educational purposes led the ECtHR to conclude that the provision under scrutiny was unacceptably broad.[30]

Part IV considers the place that these rulings have in transitional justice narratives, which are now found within, and alongside, European narratives about justice.

IV. Transitional justice

The use of symbols is a narrative that has emerged in certain legal and political discourses about European accounts of the past. These discourses are referred to in case-law and key EU initiatives, set out below. As noted above, transitional justice concerns the manner in which post-dictatorial or post-conflict states deal with injustices committed by the predecessor regime. These legacies continue to evoke trauma, nationally and at the wider regional level, as aptly noted by Mälksoo, who observes: 'East European experiences with communism are still *les lieux d'oubli* rather than aspects of *les lieux de mémoire* of the officially endorsed collective European remembrance of WWII' (2008, p. 1). Such narratives point to a milestone in the transitional justice timeline, where it becomes permanent rather than marginal (Teitel, 2003). The reasons can be found in work by the scholars who produced *The Black Book of Communism* (Courtois *et al.*, 1999) and *Bloodlands* (Snyder, 2010). Both tomes present compelling cases about the nature of the crimes committed by the Communists, which then result in debates that address the redefinition of genocide. The shift of transitional justice from the margins to the mainstream also concerns political realities and their overlap with the ECtHR. In other words, certain political situations seem to be 'here to stay', and as a response legal measures such as the International Criminal Court are a permanent feature, replacing ad hoc legal measures with a temporary mandate (Teitel, 2003, pp. 89–92).

4.1 The criminalisation of symbols

Criminalising the use of symbols might seem like a new development but, like the crime of denial, it is a concept that has its origins in respective states' histories and timelines. Again, while present efforts to criminalise denial (starting by outlawing Holocaust denial) gained momentum in the 1990s, certain states' histories go back further than this (Fronza, 2006). The first states to introduce the crime of Holocaust denial were Austria, Germany and France, owing to their peculiar histories, which expressed themselves in their respective laws (Fronza, 2006). In other words, it is usual for society to look to the law to criminalise actions that threaten and potentially undermine its values. Yet expression (as opposed to action) presents a different sort of dilemma, as the 'notion

28 *Ibid.*, para. 54.

29 *Ibid.*

30 *Ibid.*, para. 56.

that someone might be held criminally responsible simply for denial of something is very controversial' (Žilinskas, 2012, p. 317).

4.2 Crime of denial

The crime of denial has been tested before the ECtHR. There have been a number of cases[31] where the ECtHR found no violation of the freedom of expression in relation to such practice and where it has been noted, as in *Lehideux and Isorni v. France*, that 'negation or revision of clearly established facts, such as the Holocaust, would be removed from the protection of Article 10 by Article 17 [abuse of rights]'.[32] This stance was reflected in *Garaudy*, where the ECtHR held that in relation to the Holocaust, denying crimes against humanity constitutes one of the gravest forms of racial defamation of Jews, and that the rewriting of this kind of historical fact destabilises the foundation on which combating racism and anti-Semitism are based.[33] In other words, freedom of expression does not extend to certain speech, such as Holocaust denial.

In the case of *Balsyté-Lideikiené* the ECtHR considered hate speech within the context of a 'society struggling with its past'.[34] The publisher of a Lithuanian calendar included important dates in the country's history, and referred to Jews, Poles and Russians as aggressors, killers and *génocidaires*. The ECtHR accepted Lithuania's justification for interference on the grounds that it protected ethnic groups and relations with its neighbours. Again, pressing social need was noted, as was the state's international obligation to combat the advocacy of national hatred. The doctrine of the margin of appreciation was invoked by the ECtHR, in relation to the authorities acting on their knowledge of domestic affairs to justify interference with freedom of expression. Equally, the ECtHR also noted that the confiscation of the materials was not accompanied by a fine, thus the mildest administrative penalty was imposed by the Lithuanian authorities.

In sum, arguments used about preventing the incitement of hatred against specific groups recall the ECtHR's position on hate speech, in this way bringing a transitional state like Lithuania into the European fold as a nascent democracy. Moreover, as a nation that has recently regained its independence from the Soviet Union (Buyse, 2011, p. 144), the judicial reasoning demonstrates the shift of transitional justice from the margins into the fold of European jurisprudence, as much as political realities that are normalised and historical peculiarities addressed from the regional lens. But for some commentators, efforts have not gone far enough, specifically in relation to the location of totalitarian Communist histories within the European legal and moral landscape and mentality (Mälksoo, 2008). The relevant European human rights and transitional justice narratives intersect at EU initiatives, which are the subject of Part V.

V. European Union initiatives

In addition to European human rights jurisprudence affecting national approaches to the definition and elements of the crime, in 2008 the EU Council passed a framework decision for combating racism and xenophobia by means of criminal law.[35] The decisions aim to approximate EU Member States'

31 *Remer v. Germany* [1995] 25096/94 (6 September 1995); *Nachtmann v. Austria* [1998] 36773/97 (9 September 1998); *Lehideux and Isorni v. France* [1998] 24662/94 (23 September 1998); *Witzsch v. Germany* [2005] 7485/03 (13 December 2005); *Garaudy v. France* [2003] 65831/01 (15 November 2001).

32 *Lehideux and Isorni v. France*, para. 47.

33 *Garaudy v. France*.

34 [2008] 72596/01 (4 November 2008), para. 143.

35 2008/913/JHA. See ‹http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33058_en.htm› (last accessed 2 January 2014).

criminal laws on the matter; their origin is found in a 1996 Council of European Union Joint Action (96/443/JHA) concerning action to combat racism and xenophobia. Article 1 of the Framework Decision criminalises certain more serious racist or xenophobic acts, such as public incitement to violence or hatred directed against a group of persons or member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin; public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia; and also publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity, war crimes as defined by the Statute for the International Criminal Court (Articles 6, 7, 8); and crimes defined in Article 6 of the Charter of the International Military Tribunal (when carried out in a manner likely to incite violence or hatred against such a group or member of such a group). In this fashion the crime of denial 'entered the legal domain of the European Union', obliging EU Member States to criminalise it (Žilinskas, 2012).

The reason that the Framework Decision is a key moment for post-dictatorial states is that it deals with the crime of denial in broader terms (including the denial of totalitarian and Communist actions). This would form the basis for other initiatives. It was recognised that the newer members of the EU (since 2004) had had different historical experiences (Žilinskas, 2012). To be sure, they shared the experience of Nazi occupation with other Member States, but with European enlargement came a reassessment of Communist rule and injustices following the fall of Communism in 1989. In 2008, the Prague Declaration on European Conscience and Communism called for a just recognition of the Communist legacy in Europe and an acknowledgement of the totalitarian crimes committed by former Communist officials.[36] This specific development was incorporated into the 2008 Framework Decision. In the Declaration the European Council expressed condemnation for the crimes of all totalitarian regimes and provided that the Commission would organise hearings on the crimes of totalitarian regime issues (Žilinskas, 2012). Unfortunately, the results were not conclusive, nor did they yield any further initiatives following a gathering of experts in the field in 2008 (with more than 100 delegates from national politicians, historians and representatives of national ministries of justice) (Žilinskas, 2012).[37] However, it was because of this that several states decided to create a crime of denial in relation to specific offences, including Communist and Soviet crimes (Žilinskas, 2012). I will return to this point later. The former Polish president, Lech Kaczyński, was at the forefront of Polish efforts to bring totalitarian crimes to the notice of the European public in the period 2005–2010.

5.1 The Lithuanian case

In fact, after several attempts, Lithuania adopted the crime of denial in its 2000 Criminal Code, further to the Framework Decision (Žilinskas, 2012; Žalimas, forthcoming).[38] As observed by Žilinskas, the peculiarities of the definition include historical and legal facts, i.e. international crimes established by various sources of international law (the International Military Tribunal (IMT) Charter and its case-law, the International Criminal Court (ICC) Statute, etc.), EU law, and statute and case-law in Lithuania. Lithuania also implemented measures to bar the public use of Nazi and Soviet symbols, introducing criminal responsibility for the public glorification of international crimes (the so-called 'denial crimes', comprising public condoning, denial or gross

36 See ‹http://www.praguedeclaration.eu/news› (last accessed 2 January 2014).

37 Article 170 of the 2000 Lithuanian Criminal Code concerns the public endorsement of international crimes, public endorsement of crimes committed by the USSR or Nazi Germany against the Lithuanian Republic or its residents, and denying or grossly diminishing such crimes. Cited in part in Žilinskas (2012, p. 321).

38 For the Lithuanian Criminal Code see ‹http://legislationline.org/documents/section/criminal-codes› (last accessed 2 January 2014).

trivialisation). The first measure prohibits the use of Nazi and Soviet symbols in public meetings.[39] It establishes administrative legal responsibility for the dissemination and public use of Nazi and Soviet symbols.[40] The second measure, introduced on 15 June 2010, concerns the crime of denial and glorification.[41] As such, the provision refers to specific events concerning Lithuania, such as the Soviet occupation, the Nazi occupation, Soviet actions against Lithuanian resistance fighters and the Soviet action against the Lithuanian struggle for independence in 1991. Importantly, these events are partially reflected in international case-law (Žilinskas, 2012, p. 321). Not surprisingly, introducing the notion of Soviet crimes would prove controversial in Russia (p. 321). Žilinskas notes that in two cases where the charge was the crime of denial, a question remains as to legal clarity; both cases demonstrate the difficulty concerning the burden of proof of intent (pp. 322–326). On the other hand was the *Algirdas Paleckis* case, in which a person was punished by fine for the denial of Soviet aggression and crimes committed in 1991. This judgment was upheld by the Supreme Court and signals, in the eyes of some scholars, an important start of much-needed practice in the interpretation and application of the provision.[42] The Lithuanian law makes specific mention of the 'Nazi swastika' and the 'Soviet red star' to note the context in which they are used – the lesson learned from *Vajnai*.[43]

In the context of the Polish case under examination, whether the use of objects that comprise content related to a totalitarian system of government or incite hatred is criminalised depends on

39 The measure was introduced 17 June 2008, Law No. X-1609 supplementing the law on association.

40 The measure was introduced 3 July 2008, Law No. X-1675 supplementing the Code on Administrative Offences. The following Nazi and Soviet symbols are barred from dissemination and use in public: (i) official state symbols (flags, coats of arms and anthems) of Nazi Germany and the Soviet Union, including the Lithuanian SSR – an illegal puppet Soviet entity on Lithuanian territory (the so-called Lithuanian Soviet Socialist Republic); (ii) symbols (flags, badges, uniforms), incorporating an official state symbol (a flag or coat of arms) of Nazi Germany, the USSR or the Lithuanian SSR; (iii) symbols (including uniforms) of Nazi and Communist organisations, including the symbols of the Nazi swastika, the Nazi SS, the Soviet hammer and sickle, and the Soviet five-pointed red star; (iv) symbols composed on the basis of official state symbols (a flag or coat of arms) of Nazi Germany, the USSR and the Lithuanian SSR or on the basis of Nazi or Communist symbols (the symbols of the Nazi swastika, the Nazi SS, the Soviet hammer and sickle, the Soviet five-pointed red star). This group of prohibited symbols has been defined in order to outlaw the modified Nazi and Soviet symbols that can be perceived in the same way and can be used for the same purposes (misleadingly similar substitutes according to their purpose); (v) images of organisers of genocide, crimes against humanity and war crimes against the people of Lithuania – the leaders of the German National Socialist Party or the USSR Communist Party responsible for repressions against the Lithuanian population (Žalimas, forthcoming).

41 Law No. XI-901 supplementing the Criminal Code by Article 170(2): 'Public condoning, denial or gross trivialisation of international crimes or the crimes of the USSR or Nazi Germany against the Republic of Lithuania or its population.' The text of this Article reads as follows:

> '1. Anyone who publicly condoned or denied or grossly trivialised crimes of genocide or other crimes against humanity or war crimes, as well as anyone who publicly condoned or denied or grossly trivialised the aggression of the USSR or Nazi Germany against the Republic of Lithuania or the crimes of genocide, other crimes against humanity or war crimes committed by the USSR or Nazi Germany in the territory of the Republic of Lithuania or against the population of the Republic of Lithuania, or other grave crimes or felonies committed against the Republic of Lithuania or its population by persons, who carried out or participated in the aggression against the Republic of Lithuania, provided that such a conduct was carried out in a manner that was threatening, abusive or insulting or likely to disturb public order, shall be punishable by a fine, arrest or imprisonment up to two years.' Cited in part in Žilinskas (2012, p. 321).
> 2. 'A legal person shall be also responsible for the conduct described in this Article' (Žalimas, forthcoming).

42 'Lithuania's Supreme Court Upholds Verdict for Paleckis' *Lithuania Tribune*, 22 January 2013, at ‹http://www.lithuaniatribune.com/27612/lithuanias-supreme-court-upholds-verdict-for-paleckis-201327612/› (last accessed 2 January 2014). Paleckis has appealed to the European Court of Human Rights.

43 I thank Professor Dainius Žalimas for his comments. Personal correspondence with author, 15 June 2013.

whether those objects are used in public for the purpose of promoting a totalitarian system of government, or inciting hatred. Thus, German and Hungarian jurisprudence regarding provisions that are similar to Article 256(2) of the Polish Criminal Code are considered in sections 5.2 and 5.3.

5.2 The German case

Germany is of relevance to the Polish experience for a variety of reasons. The German Empire imposed its legal codes onto its Polish annex in the eighteenth and nineteenth centuries in an effort to germanise the Poles (Davies, 1982). Equally, Polish lawyers were accepted and trained under eminent legal scholars in German law faculties. Poland and Germany share historical legal experience that is noted in the Polish legal debates of the early twentieth century when it regained its independence;[44] likewise, they shared experiences in the twentieth century. (Outside the scope of this paper, World War II is relevant to our discussion inasmuch as post-war Germany responded to the use of fascist and Nazi symbols, further to the Allied Control Council Laws, discussed below.) The other modern experience shared between the two countries is Communism. In this vein, briefly, East Germany, or the German Democratic Republic (GDR), came into existence in 1949. The intra-German border that was created between East and West has been the subject of case-law concerning the criminal prosecution of border guards and former Communist Party officials for the illegal use of force at the border. East Germany boasted one of the most extensive secret police networks (*Staatssicherheit*, or *Stasi*), which controlled all aspects of the public and private lives of its citizens: the hallmark of a totalitarian state (Quint, 1997, 1999).[45] This would inevitably affect freedom of expression. Aspects of this repression are shared by respective Communist states.

Since 1989, post-dictatorial states have turned to the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*: FCC) for direction and inspiration (Dupré, 2007). This is done on the historical grounds of shared legacies, as noted above, but also because the FCC has a peculiar approach to constitutional interpretation and balancing rights, and the area of freedom of expression frequently arises in significant cases. So, for the Polish Constitutional Tribunal, Germany's specific history is further justification for referring to German constitutional jurisprudence.

The Polish Constitutional Tribunal referred to section 86 of the German Criminal Code. This section addresses actions that endanger the democratic state under the rule of law,[46] prohibiting the dissemination, production, stocking, importation, exportation or making publicly accessible through data-storage media – for dissemination within Germany or abroad – propaganda materials of banned organisations, namely political parties that have been declared unconstitutional by the FCC. The provision does not apply if the propaganda materials or the act is meant to serve civil education, to prevent unconstitutional movements, to promote art or science, research or teaching, or the reporting of current or historical events or similar purposes. Section 86a of the German Criminal Code regulates the use of symbols of unconstitutional organisations, and criminalises the distribution or public use of those symbols in meetings or in written materials, as well as the production, stocking, import or export of objects that depict or contain such symbols, for distribution or use in Germany or abroad, providing for imprisonment not exceeding three years, or a fine.[47] It is a punishable offence to disseminate, publicly display, post or present such

44 See, for example, Babb (1937, 1938).

45 Part of the unification process that began in 1990 comprised an investigation into the decision-making process concerning the regulation of the intra-German border. See, for example, Quint (1997, 1999).

46 See ‹http://www.gesetze-im-internet.de/englisch_stgb/› (last accessed 2 January 2014).

47 The German Code regulates separately the offence of incitement to hatred and the dissemination of materials inciting hatred (para. 130).

materials, or otherwise make them accessible to others, including persons under eighteen, as well as to produce, obtain, supply, stock, offer, announce, commend or undertake to import or export them, in order to use them in any of the above-mentioned ways, as found in section 130(2). The application of sections 86a and 103 of the German Criminal Code in specific cases was the subject of review by the FCC, and none of those provisions has been declared to be inconsistent with the German Constitution, the Basic Law (*Grundgesetz*).

5.2.1 Two national cases

The Polish Constitutional Tribunal referred to two German cases concerning the application of section 86a of the Criminal Code, where the FCC noted that the common courts failed to take sufficiently into account the specificity of the law when applying the said provision. Briefly, in the 'glory and honour to the Waffen SS' (*Ruhm und Ehre der Waffen*-SS) case,[48] the FCC concluded that the words (shouted by a person) in question did not constitute the slogan of any unconstitutional organisation or a slogan that was similar to the extent that it could be mistaken for such a motto, and the wide interpretation of the court had spread the application of the provision also to symbols that *evoked the impression* of being the symbols of an unconstitutional organisation, which, in the eyes of the FCC, infringed the principle of specificity of law.

In the 'Nazi salute' case,[49] the FCC stated that section 86a of the Criminal Code did not raise any constitutional doubts in a situation where the interpretation and application of the provision allowed for freedom of expression, which is protected under Article 5 of the Basic Law. In other words, section 86a is consistent with the constitutional provision on freedom of speech, especially where efforts are made to revive unconstitutional political parties.

Constitutional provisions are clearly important. Freedom of expression in Germany is regulated by Article 5 of the Basic Law:

> '(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
> (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.'[50]

According to Stegbauer, the Federal Administrative Court (*Bundesverwaltungsgericht* (BverwG)) has argued that the licence to show one's opinion by using a certain symbol is protected by the principle of freedom of expression according to Article 5(1) clause 1 of the Basic Law. While section 86a interferes with this freedom, Article 5(2) also permits limitations. In short, criminal rules that safeguard those bans by prohibiting propaganda or symbols of illegal organisations like section 86a do not infringe Article 5(1). Interestingly, and as noted above, crimes are linked to a peculiar past. The historic National Socialist organisations had already been dissolved after World War II, inter alia, further to the Allied Control Council Laws nos. 2 and 16. The dissolution of

48 1 BvR 150/03 (1 June 2006).

49 1 BvR 204/03 (23 March 2006). Concerning the context of freedom of art see 1 BvR 680/86 and 1 BVR 681/86 (3 April 1990). In August 2013 a German court acquitted the artist Jonathan Meese for displaying Nazi salutes, see 'German Artist Jonathan Meese Wins Nazi Salute Case' (15 August 2013) at ‹http://www.bbc.co.uk/news/world-europe-23710715› (last accessed 3 January 2014).

50 See ‹http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0030› (last accessed 2 January 2014).

those organisations was meant to continue beyond the abolition of the occupation law. This provided a basis for the German Basic Law of 1949 (Stegbauer, 2007). In his commentary on section 86a, Stegbauer notes that the rise in right-wing extremism in the 1990s corresponds to the rise in propaganda cases, or situations in which the actions of an individual(s) or group appear to support illegal or unconstitutional organisations (p. 173).

One of the most vexing problems of the practical application of section 86a is the question of what turns a sign into the symbol of an unconstitutional organisation. As mentioned before, the purpose of section 86a is to prevent the revival of banned organisations and to safeguard political peace. An impartial observer would be most likely to recognise a sign as the symbol of a certain organisation if it were formally created for that purpose. However, studies have shown that most right-wing extremist symbols already existed in various contexts and were only adopted later (Stegbauer, 2007, pp. 178–179).

At the heart of this issue, and of relevance to the Polish Constitutional Tribunal, is the relationship between legal certainty and curtailment of a right. The FCC draws attention to the precision and clarity of the criminal law provisions, which provide for criminal liability for the use of symbols signifying a totalitarian regime. In contrast, it expects the courts to interpret the said provisions in a precise way, taking freedom of expression into account. Having said this, there are ongoing debates about the practical application of the German Criminal Code provisions, despite good intentions on the part of law-makers and efforts to ensure legal certainty (Stegbauer, 2007, pp. 183–184). Even though case-law addresses this problem, as noted above in the Lithuanian example, for some commentators, most political and social problems cannot be resolved by the criminal law (p. 184).

5.3 The Hungarian case

In many ways the Hungarian experience is even closer to Poland. Poland and Hungary have been treated by commentators as being more open than their post-Communist counterparts and 'undoubtedly represented the first group of countries in which round-table talks played a central role' (Přibáň, 2007, p. 143). Hungarian constitutional law post-1989 has looked to German constitutional developments. In fact, it is asserted that Hungary is a nation of lawyers,[51] which makes for an interesting setting in which to place the Sólyom Court (Scheppele, 2006). This meeting of Polish, German and Hungarian constitutional courts is in many ways not accidental, having tangible contextual, historical and legal similarities; all are affected by the temporal dimension of transitional justice because of the shared totalitarian experience.

The Hungarian Criminal Code criminalises the use of certain symbols. Section 269/B of the Code, noted above, states that it is prohibited to distribute, use before a public assembly or exhibit in public: a swastika, the SS sign, an arrow-cross (the symbol of the Hungarian fascist movement), the hammer and sickle symbol, the five-pointed red star, or a symbol depicting any of the above. Any violation of that prohibition is subject to a fine, unless such conduct is required for the purposes of education, science, or art, concerns present-day official symbols of the state or provides information about history or current events.

A consideration of section 269/B by the Hungarian Constitutional Court (hereafter the Court) illustrates the complexities of the issue at hand. In its judgment of 9 May 2000,[52] the Court adjudicated that the said provision was consistent with the Constitution and international law. The Court has always been open to international norms; its jurisprudence refers to the state's obligations following from the respective international legal instruments that have been

51 Professor Roland Wittmann, personal correspondence, 31 March 2002.

52 Case 14/2000 AB.

incorporated into domestic law, and its reasoning noted for its adherence to legal certainty and the specific notion of the 'invisible constitution' (Sajó, 1999). However, the Court noted that assessing the constitutionality of specific provisions depended on the degree of precision and the scope of the statutory definitions of prohibited acts. It stated that section 269/B of the Criminal Code was precise and comprehensible, and thus it allowed the individual to adjust his/her conduct to conform to the requirements of the provision. At the same time, it stated that section 269/B does not constitute disproportionate interference with the realm of the individual's freedom of speech. Indeed, it is limited to three clearly specified types of conduct, which must have a public character for criminal liability to occur. The reviewed provision is a real measure for protecting democratic society, which is justified by the history of Hungary.

Several significant issues were addressed as to the reasons for the ban. It is worth quoting the Court at length.

> 'Allowing unrestricted, open and public use of the symbols concerned would, in the recent historical situation, seriously offend all persons committed to democracy who respect the human dignity of persons and thus condemn the ideologies of hatred and aggression, and would offend in particular those who were persecuted by Nazism and Communism. In Hungary, the memories of both ideologies represented by the prohibited symbols, as well as the sins committed under these symbols, are still alive in the public knowledge and in the communities of those who have survived persecution; these things are not forgotten. The individuals who suffered severely and their relatives live among us. The use of such symbols recalls the recent past, together with the threats of that time, the inhuman sufferings, the deportations and the deadly ideologies.'[53]

This is a commanding statement about the power and effect of the use of symbols. Under the former regime Nazi and fascist symbols were prohibited, but, as Buyse (2011) points out, both fascist and Communist regimes committed large-scale atrocities. The Court identifies the feelings of fear that could be engendered by the use of the symbols of these regimes (p. 134). It supported the law-makers' views in that memories were fresh and the restriction on expression was justified. But fresh in whose mind? It is worth remembering that the legacy of Communism continues to be addressed and evaluated by constitutional courts and parliamentarians alike, according to social or political agendas (Sadurski, 2005). These evaluations are more often than not motivated by politics, bringing an extra dimension to the already complex question of legacies of dictatorial rule. The *Vajnai* case resulted in heated debates in Hungary. As one commentator noted:

> '[T]he symbolic power of criminal law, with which it rejects all the dictatorships we experienced and would also provide protection for the human dignity of persecuted people. The essence of this rule of the Criminal Code is the demonstrative rejection of dictatorships and not the punishment of perpetrators following a course of action.' (Koltay, 2013)

Again, the emphasis is on the symbolic character of the criminal law and connects harm (upon seeing or being confronted with the symbol) with the dignity of the victims.

The regulations and court rulings of other European states, including in particular those from Germany and Hungary, signalled to the Polish Constitutional Tribunal that criminalising the preparation, distribution or publication of materials that promote totalitarian regimes or incite hatred based on national, ethnic, racial or religious differences is admissible, provided that

53 Case 14/2000 AB.

criminal law regulations are precise enough that they do not constitute unjustified interference with freedom of speech and do not allow for the use of a broadening interpretation.[54] Indeed, freedom of speech is a value that is subject to particular protection. Interference with that freedom by means of the regulation of criminal law requires precision and caution from both the legislators and the courts. From the perspective of the similar historical experiences of Poland and Hungary as well as the requirements of specificity of criminal law provisions interfering with the realm of the freedom of speech, it is noteworthy that the Hungarian regulation that corresponds to Article 256(2) of the Criminal Code provides for criminal liability only in the case of the use of precisely defined symbols and on the condition that such use is public.[55]

In assessing the Polish regulation, the Polish Constitutional Tribunal considered the consequences ensuing from the jurisprudence of the ECtHR. In particular, the Tribunal examined whether the provisions in question amount to a criminal sanction for conduct related to symbols that may have multiple meanings, or whether they violate the freedom of speech due to insufficient specificity. Significantly, the Tribunal noted that the Hungarian provisions were more precise than the Polish ones, which the ECtHR had found ambiguous. The Tribunal was worried by the absence of a closed list of prohibited symbols. It found that the Polish provisions might 'pose a more serious threat to the freedom of speech than the provisions of the Hungarian Criminal Code, which were assessed negatively by the ECHR'.[56]

In fact, the Hungarian courts and the Ministry of Justice and Administration refused to follow the *Vajnai* ruling, leading to the case of *Fratanolo v. Hungary*,[57] which reiterated the ECtHR's position in *Vajnai*. The government was urged to comply with the ECtHR ruling; the reply (addressed mainly to human rights organisations that had been at the forefront of critics of the government's position) was made by the secretary of state for the Ministry, who said in parliament: 'We believe that as a part of Hungary's sovereignty it can decide what triggers fear, what triggers terror in Hungarian citizens.'[58] The ruling of the ECtHR was viewed by the Hungarian authorities as an unwelcome encroachment on Hungarian national sovereignty. In what was probably an effort to retain control over decisions about criminal law matters, and to show the European human rights regime that certain matters are best left for national decision-makers, Parliament was also called upon to shield national courts from the ECtHR and effectively support the Hungarian courts in ignoring ECtHR jurisprudence. In 2013, the Hungarian Constitutional Court held that a ban on all totalitarian symbols would be unconstitutional.[59] In March 2013, the Hungarian government submitted new amendments banning totalitarian symbols. But the Hungarian ruling takes on an added meaning in the light of recent political developments, with the passage of an amendment to the law on constitutional review that results in, inter alia, the twenty-year rich jurisprudence of the Hungarian Constitutional Court being discarded, by annulling all its decisions made before 1 January 2012.[60] The law is in effect as from April 2013.

54 *The Use of Totalitarian Symbols Case.*

55 *Ibid.*

56 *Ibid.*, para. 5.1.2.3.

57 [2011] 29495/10 (3 November 2011).

58 See ‹http://www.verfassungsblog.de/en/hungarian-ban-of-totalitarian-symbols-the-constitutional-court-speaks-up-again-2/#.U39vHvldWoI› (last accessed 2 January 2014).

59 See ‹http://www.verfassungsblog.de/en/hungarian-ban-of-totalitarian-symbols-the-constitutional-court-speaks-up-again/#.UWLJ9r-Vj-Y› (last accessed 2 January 2014).

60 For details see ‹http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403520_text› (last accessed 2 January 2014). See Scheppele's critique at ‹http://lapa.princeton.edu/newsdetail.php?ID=63› (last accessed 2 January 2014).

VI. Analysis

As seen, there are common experiences and wide variations between the legal approaches adopted by states that share the totalitarian experience. These approaches are accompanied by divergent narratives concerning justice. More recently, the European narrative has been playing an important role in shaping the discourse on totalitarian crimes.

Žalimas (forthcoming) identifies the choices available to the regional bodies (such as the Council of Europe Parliamentary Assembly (PACE) or European Commission) in order to create a unified stance in relation to totalitarian crimes that include: (i) criminally prosecuting the perpetrators of crimes attributable to the Soviet occupation regime and compensating the victims of those crimes; (ii) condemning crimes committed by the Communist regimes; (iii) prohibiting the glorification of international crimes (to include the criminal prosecution of persons attempting to condone, justify, deny or grossly trivialise such crimes, which extend to the public use of Nazi and Soviet symbols).

As noted above, the Polish Constitutional Tribunal found the said provisions unconstitutional only in part.[61] As it stands, Polish criminal law prohibits the use of totalitarian symbols.[62] However, commentaries on the relevant provisions focus on their extension to hate crimes, anti-Semitism and xenophobia.[63]

There is no obligation on Member States to amend their respective criminal laws further to the 2008 Framework Decision. On 22 December 2010 the EU Commission released the Report[64] to the European Parliament and the Council on the Memory of Crimes Committed by Totalitarian Regimes in Europe. There, the Commission rejected the suggestion that an instrument further to the 2008 Framework Decision was needed to address crimes of denial and other hate crime (Žalimas, forthcoming), noting that only four EU Member States (the Czech Republic, Hungary, Poland[65] and Lithuania) have introduced national legislation on the denial of crimes committed by totalitarian regimes that explicitly includes the crimes committed by totalitarian Communist regimes. The Commission also acknowledged that very different approaches and practices between the Member States existed as concerns the legal instruments, measures and practices that relate to the legacy of the former totalitarian regimes. The Commission indicated that the matter would be kept under review (Püschel, 2013).

While the 2008 Framework Decision does not impose an obligation on the Member States to establish criminal responsibility for crimes of denial, crimes against humanity and war crimes, they are obliged, further to that provision, not to tolerate public condoning, denial or gross trivialisation of these crimes and equally to protect the dignity of victims of crimes of genocide, crimes against humanity and war crimes attributable only to some totalitarian regimes, including the Nazi regime. This does not extend to most of the crimes committed by the Communist regimes (Žalimas, forthcoming).

61 See also ‹http://www.monitorprawniczy.pl/index.php?mod=m_aktualnosci&cid=16&id=3678› (last accessed 2 January 2014).

62 Note that Communist crimes are defined in Polish law, specifically Article 2(1) of the Law Concerning the Institute of National Remembrance from 18 December 1998. See ‹http://ipn.gov.pl/en/about-the-institute/documents/institute-documents/the-act-on-the-institute-of-national-remembrance› (last accessed 2 January 2014).

63 See ‹http://info.wyborcza.pl/temat/wyborcza/art.+256+kodeks+karny› (last accessed 2 January 2014).

64 COM (2010)783 final. See ‹http://ec.europa.eu/commission_2010-2014/reding/pdf/com(2010)_873_1_en_act_part1_v61.pdf› (last accessed 2 January 2014).

65 Article 55 of the Law Concerning the Institute of National Remembrance from 18 December 1998.

The most compelling argument for criminalising specific offences related to totalitarian crimes relates to the need to protect the dignity of the victims. Although the Parliamentary Assembly of the European Council in its Resolution No. 1481 (2006) indicates that 'those victims of crimes committed by totalitarian Communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings',[66] the Hungarian narrative contrasts with the European position. Further to the reasoning of the Hungarian Constitutional Court, discussed above, the need to protect the dignity of communities that suffered under repressive totalitarian regimes is acknowledged as having a mnemonic character in national and European narratives. According to this reasoning, both the public use of totalitarian symbols and the public justification or denial of totalitarian crimes may be regarded as offensive to the dignity of members of any group that suffered from repressions (Žalimas, forthcoming). As Žalimas asserts:

> '[m]eanwhile the Framework Decision might lead to deplorable discrimination between victims of different totalitarian regimes. Any kind of discrimination between the victims of different totalitarian regimes is unacceptable in a democratic society; it is not compatible with the European values either.'

Moreover, if we are dealing with crimes that are time-barred (excluding genocide, war crimes and crimes against humanity), justice (in the form of criminal prosecution) might never be realised. Time dictates the shape and pace of transitional justice. In the post-dictatorial context, there is no better illustration of this point than the shared recognition of the uniquely criminal character of the crimes committed during early Communist rule.

VII. Conclusions

The 2011 judgment by the Polish Constitutional Tribunal framed the discussion in this paper. The decision was chosen because of its timely nature. The Tribunal's analysis through a comparative law lens into German and Hungarian jurisprudence, its awareness of European human rights law, and its recognition of the legacy of Communist histories in living memory make it a compact and tidy ruling. The paper analysed the judgment in three contexts of European, national and transitional justice. Reference was made to the context of the Baltic States. All the narratives relate to the discourse on justice that is occurring in post-dictatorial states and the limits afforded as to the shape and place in law with respect to speech and expression. The Polish narrative follows the German and Hungarian experiences, but only in part, as its ruling is one that shows awareness and application of the ECtHR's case-law. Where the use of symbols is concerned, there is a notable tension between the right of freedom of expression, and a prohibition based on a specific historical legacy. The European human rights regime appreciates the peculiar Communist histories, but in certain states, such as the Baltic States, the other dimension of the European narrative, that of the European Union, is seen as disappointing, and as reflecting a weak stance as concerns the legal, moral and symbolic aspects of totalitarian crimes. This then leads some scholars to assert that measures are still needed to provide satisfaction to the victims of totalitarian crimes (Žalimas, forthcoming). In this vein, criminalising the use of totalitarian symbols and other related forms of expression at least comprises a step in keeping the issue of totalitarian crimes on the European agenda, as seen above in particular with respect to the context of the Polish, Hungarian and Baltic states.

66 See ‹http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/Eres1481.htm› (last accessed 2 January 2014).

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