The Soviet Famine and Criminalising "Denialism"

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On November 30, 2022, the Bundestag decided to recognise the Ukrainian experience of the Soviet Famine of 1930-33 (also referred to as "the Holodomor") as a "genocide". The text of the resolution voted by the lower house of the German parliament made explicit references to the ongoing Russian military intervention in Ukraine, while Green and Christian Democratic MPs who supported the resolution drew parallels between the Soviet Union and the Russian Federation.

On its own, this recent recognition could have been interpreted as a bold political move to express solidarity with the state of Ukraine. At most, it could have been criticised by legal scholars and practitioners following the late Georges Vedel's line of thought in arguing that legislative bodies should not usurp the functions of the judiciary by effectively ruling on the existence of what William Schabas calls "the crime of crimes". However, if one views this resolution in light of a recent reform concerning Section 130 of the German Criminal Code (hereinafter StGB), it is inevitable to link the "Holodomor resolution" to the criminalisation of "denialism".

Indeed, when the Bundestag (and, more recently, the Bundesrat) decided to expand the scope of StGB 130 and criminalise the public approval, denial or "gross trivialisation" of acts of "genocide, crimes against humanity and war crimes", the matter was primarily discussed within the framework of the Russian military intervention in Ukraine. Notwithstanding the political nature of this debate, German lawmakers demonstrated a degree of prudence in specifying that such public acts of "denialism" would constitute an offence only if they were committed in a way that incited "hatred or violence" against a "national, racial, religious group or a group defined by their ethnic origin" (or an individual belonging to those groups) and "disturbed public peace". Furthermore, in its explanatory "Q&A" article regarding the reform, the German Ministry of Justice (hereinafter BMJ) sought to clarify that if a court is unable to "unequivocally determine" that the object of the "act of denialism" constitutes a genocide, a crime against humanity or a war crime, criminal liability will be out of the question.

At face value, it may seem that this rules out the theory that "Holodomor denial" would *ipso facto* constitute a criminal offence – considering that no competent tribunal could ever sentence the alleged offenders in a fair trial and that historians have been divided over the existence of the *mens rea* of the crime of genocide in the Famine with scholars like Mike B. Tauger of West Virginia University arguing that natural factors were the primary reason behind the calamity. Nevertheless, it is evident that there are ambiguities both in the wording of the reform and the "common knowledge" (*allgemeinkundig*) "doctrine" referenced by the BMJ, with the former being formally linked to EU law. It is possible, however, to clarify said "grey areas"

with international human rights law and comparative law so as to prevent illegitimate interferences with free speech.

Council Framework Decision of 2008 and the reformed StGB 130

Despite the emphasis on the Russian military intervention, German lawmakers formally justified the decision to reform StGB 130 with the Council of the European Union's Framework Decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law" (2008/913/JHA), which was also the basis of the infringement procedures brought against Germany by the European Commission in December 2021. Truly, the wording of the reform largely mirrors Article 1.1(c) of the Framework Decision (hereinafter "FD") – with the specific addition of "gatherings" in terms of where the offence may be committed. There is, however, one key difference within the framework of Article 1: while the FD provides the option to limit the object of "denialism" to those events which have been "established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only" (Article 1.4), the text of the reformed provision makes no such specification – which logically expands the scope of the provision and contradicts the BMJ's explanation.

What makes this "grey area" even more ominous is the reference to ongoing conflicts. Notwithstanding the fact that laws on "denialism" are usually discussed in the context of interferences with academic freedom or political speech, we can, in fact, expect interferences with freedom of the press in view of the German lawmakers' intent. Thus, despite the assurances of German legal scholars and the BMJ, it cannot be ruled out that a broad interpretation of "incitement to hatred" and "disturbing public peace" may potentially bring about not just the penalisation of "Holodomor denial" but also that of conflicting reports from the frontlines. Arguably, such a prospect would even go against the spirit of the FD, which specifies in Article 7.2 that Member States cannot implement measures "in contradiction with freedom of the press."

"Denialism" and international human rights law

When addressing the concept of "denialism" within the framework of international human rights law, it is impossible to omit the judgments of the European Court of Human Rights in *Perinçek v Switzerland* and the consequent *Mercan and others v Switzerland*. In both cases, the European Court of Human Rights (hereinafter ECtHR or "the Court") had to strike a balance between the applicants' right to freedom of expression and the collective human dignity of the Armenian community in Switzerland. In this regard, the Court ruled that the debate on the existence of the crime of genocide could not, *per se*, be deemed as discriminatory against a national, ethnical, racial or religious group, and stressed the relevance of the "*Handyside* formula" in ruling that the mere contestation of the legal definition of a historical event in a political or academic context was protected by Article 10 of the European

Convention of Human Rights even when said contestation was uttered in a “virulent” manner.

Evidently, this approach is in contrast with the Court’s treatment of Holocaust denial. Case in point, in rejecting the application lodged by Roger Garaudy against France, the Court seemingly justified its quasi-categorical approach to Holocaust denial by underlining that “questioning the reality, extent and seriousness of the Holocaust” *ipso facto* amounted to seeking to rehabilitate the Nazi regime. In less legal terms, such an “exceptional” treatment could also be linked to the haunting place of the Holocaust in the collective memory of all Europeans; yet, in (legal) practice, this results in a thorough assessment of geographical and temporal factors for the purpose of distinguishing the Holocaust from other historical events, which drew criticism from free speech scholars like Uladzislau Belavusau.

It must be noted, however, that a more comprehensive approach was offered by another human rights body; i.e., the UN Human Rights Committee (hereinafter “the Committee” or “the HRC”). Indeed, the treaty body of the International Covenant on Civil and Political Rights (hereinafter “the Covenant” or “the ICCPR”) addressed the exercise of freedom of expression in debating historical questions in its General Comment no. 34. In particular, regarding the “laws that penalise the expression of opinions about historical facts”, the Committee stated that such laws are *ipso facto* “incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.” Moreover, the legal scholar who had drafted General Comment no. 34, Michael O’Flaherty, later stated in an article that the General Comment had “overruled” the Committee’s earlier decision in *Faurisson v France*, thereby giving us a more definitive picture.

In light of the above, it is possible to infer that there may be potential conflicts between international human rights law and the implementation of not only the recent reform concerning StGB 130 but also the related FD (by Member States). However, we must also recall that Germany is not the first EU Member State to try to criminalise the acts defined under the FD.

“Denialism” and constitutional law

As Laurent Pech noted back in 2010, German and French approaches to the criminalisation of Holocaust denial prior to the FD were quite similar. One may recall, in this regard, that deeming “Holocaust denial” as intrinsically linked to the apology or trivialisation of the horrors of the Nazi regime was a common aspect in the assessments made by the high courts of both countries. Perhaps even more relevantly, in the same piece, Pech had also pointed out that Holocaust deniers could be punished under more “general” criminal provisions even before the specific criminalisation of “Holocaust denial”.

The FD therefore represents an expansion in this regard – even though it appears to “strictly” link the criminalisation of “denialism” to contexts which amount to a “likely”

threat in terms of conceiving hatred and/or violence against a protected group. Nevertheless, in a decision delivered in January 2017, the French Constitutional Council echoed Pech's views on the necessity of having comprehensive laws on "denialism": in fact, in paragraph 195 of said decision, the *Conseil* clearly affirmed that "causing discrimination, hatred or violence against a person or a group of people on the basis of their origin or their membership or non-membership of an ethnic group, nation, race or particular religion" was already an offence under the French "Act on the Freedom of the Press". The *Conseil* further complemented this point in paragraph 196, where it ruled that the criminalisation of "denying, minimising or trivialising a genocide, crime against humanity or war crimes" would lead to a "prosecution on the grounds of acts and remarks which deny, minimise or trivialise facts without these having yet been qualified as" one of the crimes in question, thereby constituting an illegitimate interference with freedom of expression.

It is worth adding that the French *Conseil Constitutionnel* was not the only the constitutional court in the EU to find an extensive law on "denialism" contrary to international human rights law as well as the national constitution. Case in point, judgment no. 235/2007 of the Spanish Constitutional Tribunal stressed that even in the case of penalising "denialism" in a context which prosecutors deem "likely" to incite "hatred" and "discrimination" against protected groups, the abstract threat of incitement would not justify a content-based restriction of free speech.

Thus, it could be said that the case law of the ECtHR, the approach of the HRC and the rulings of national constitutional courts rendered the implementation of the FD a problematic matter for Member States: Italian lawmakers, for instance, decided to make "denialism" an aggravating circumstance of hate speech rather than an autonomous offence; whereas Greek lawmakers were criticised by the European Commission for imposing a strict "public order condition" for the commission of a hate speech offence.

Concluding remarks

In view of the foregoing, it is possible to arrive at a simple conclusion: the precedent set by international human rights law and the case law of European constitutional courts allows the exceptional criminalisation of Holocaust denial but the same "exceptional" treatment does not apply to other events which may or may not consist of a "genocide, crime against humanity or a war crime". Thus, EU Member States struggle to strike a balance between their obligations deriving from international human rights law and those deriving from EU law.

It follows that there are two viable courses of action: resisting the Commission's procedures in order to advance a human rights argument before the Court of Justice of the EU or contemplating new, unambiguous legislative acts compatible with the prevailing approach in international human rights law.

Of course, this would not curb national lawmakers' desire to engage in "historical activism" or make a political statement with criminal law. However, if we are to achieve any form of mutual understanding, it is essential to be able to debate

historical events in a free public sphere and develop an informed opinion about current events without forcing journalists to resort to self-censorship. Alas, it is clear that the recent acts of parliament in Germany do not contribute to that end.
