

HISTORICAL MEMORY RETENTION: CAPABILITIES OF CRIMINAL POLICY

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Abstract: This paper examines the problem of criminalizing the distortion of historical memory. It largely concerns the Armenian Genocide carried out by the Ottoman Empire in 1915, as well as the events taking place during the Second World War. The work presents judicial practice of national courts and the European Court of Human Rights, which considered the material of such distortion. The authors study the criminal legislation of different countries providing for responsibility for the distortion of historical facts. The paper includes the results of Russian sociological studies on the need to introduce penal prohibitions for historical facts distortion. The findings of this research allowed the authors to conclude that it is advisable to contend with the phenomena under consideration through some social impact measures rather than with criminal legislation methods. Such measures are raising the legal culture of the population, increasing the number of academic hours dedicated to the problematic issues in the courses of history and social studies in educational institutions, organizing new and renovating and promoting existing museums and historical centers (especially such centers as “Khatyn”, Auschwitz, Yad Vashem holocaust remembrance center in Israel, the Armenian Genocide Museum in Yerevan and others), providing open access to archive documents for not only scientists, but general public as well - by using modern means of communication. Keywords: criminal policy, historical memory, falsification of history, criminal liability, genocide, Second World War.

1. INTRODUCTION

“Who controls the past controls the future. Who controls the present controls the past.”, wrote George Orwell. Those people who control our present now read Orwell and take his words seriously [1; P.336]. In today's world, historical memory can hardly be related to lasting and inviolable values. The desire of certain political figures, scientists and members of the public to rewrite history to suit the current political situation necessitates raising and discussing the legitimation of responsibility for intrusion into historical memory. First of all, it concerns the events of the Second World War, as the efforts to rewrite its history intensified after 70 years. In some post-Soviet countries (the Baltic countries, Ukraine and others), the current situation is so urgent that Nazi supporters receive words of sympathy and state rewards; authorities allow annual parades of veterans of the so-called “anti-Soviet resistance,” which have actually become the glorification of “Nazi henchmen.” At the same time, the media defames the scientists giving rebuff to those who distort the information about historical facts and revive the misanthropic ideology [2; 264 pp.].

A. Kungurov, the author of a series of historical movies, assumes that the distortion of history as a method of control is quite an efficient for reaching the consciousness of every person. Without knowledge of their roots and historical reality, people develop a wrong idea of their lives and modern reality. We live under the laws, which are profitable for the state, and behave accordingly. The distortion of history is a reality, about which most of us have no idea [3]. The war of 1939-1945 took many lives of Soviet citizens and left a deep wound in people's hearts. Therefore, it is no wondering that the falsification of the results of World War II is a focus of many studies in Russia [4; 5; 6; 7; 8; 9].

Heated debates about historical events concern other countries as well. Thus, some authors write about the falsification of history in Azerbaijan. They assume that the goal of nationalistically motivated distortions is the elevation of Albanians as possible ancestors of Azerbaijani and historical justification in the territorial conflicts with Armenia. In this case, the objective is, first, to enroot Azerbaijani in the territory of Azerbaijan and, second, to clear the latter from the Armenian heritage. These accusations are the most sharp and detailed among the specialists from Armenia; however, there ideas are supported by Russian historians V. A. Shnirelman [5; Pp. 216—222.], A. L. Yakobson [6; Pp. 448-456.], V. Zakharov, M. Meltyukhov etc., an Iranian historian Javadi [7; 226 p], American historians Philip Kol [8; P. 154.] and George Burnutyán. However, we should note that these authors treat the falsification of history as mostly a scientific and social issue. We instead will try to consider it from the legal standpoint.

2. METHODS

General methodology of such studies usually involves principles and categories of dialectics and a system approach to the issues in question. A particular methodology is based on special methods of cognition: historical, formal-logical, comparative-legal, sociological etc., as well as methods of system analysis and theory of decision-making, cognitive psychology etc.

3. RESULTS AND DISCUSSION

The issue of legal liability for the glorification of fascism and other falsifications of history should be approached very carefully. We need comprehensive expertise, as there is a difference between the materials of diligent historians adhering to an objective approach to the facts, and demagogues, for whom talking about freedom of expression and scientific research is just a cover for the propaganda of extremist ideas. It is known that a number of countries (Austria, Belgium, Germany, Lithuania, Luxembourg, Poland, Slovenia, France, Switzerland, Canada, Israel, Liechtenstein, Portugal, the Czech Republic, Slovakia, Hungary and others.) enacted laws on liability for denying genocide and Holocaust. Taking into account that the jurists' opinions about those laws are quite controversial, let us consider the existing complexity.

Content analysis of publications devoted to the topic under consideration enables to conclude that in Germany, for example, there was a number of phases in overcoming the national-socialist past in the aspect of transforming the public memory of the Jews extermination. In the first phase (from the end of the war till the formation of Germany in May 1949), the Germans preferred to avoid mentioning the issue of the Holocaust in public, in spite of the available documents of the Nuremberg Tribunal [9; pp. 162-163], because the fate of their country was still unclear. In the second phase (in the 1950s), the subject matter of the Holocaust came into the focus of the German scientists' debate; they began to discuss how to develop a formula for *Bewältigung der Vergangenheit* (overcoming the past) against the

backdrop of a heightened sense of shame and responsibility among the German population. At the same time, they implemented the policy of “communicative suppression”, favorable for German ruling elite, as some officials (especially at the level of States) were former members of the Nazi Party and the SS, and did not want to exacerbate the situation in the country. In the third phase, when the world intensified the “cold war” and the Federal Republic of Germany joined NATO, there was a transformation of the Germans’ collective memory of the Jewish question, there was also a surge of anti-Semitism. The fourth stage, which fell on the end of XX - beginning of XXI centuries, is characterized by the fact that the majority of the German population recognized the implementation of the formula of *Erinnerungskultur* – the culture of memory that provided critical attitude towards the totalitarian period in the national history [10; Pp. 41-45]. However, Germany still has a non-reducing number of neo-Nazism supporters, backgrounded by the collapsed ideology of multiculturalism and the recently growing number of migrants.

In this connection, the position of Professor A.I. Boroznyak seems true. He believes that Germany's experience is quite instructive for Russia and the post-Soviet states, since during the transition from a totalitarian regime to a democracy setup, changes in people’s minds are slow [11; P.3.]. In European court practice [12], the cases of the Holocaust denial and the rehabilitation of fascism are regular. For instance, there was the well-known case Jürgen Graf – a Swiss publicist, who denied the generally accepted concept of the Holocaust. He was sentenced to a fine and a 15 months' imprisonment. By the decision of the Austrian Court, the British writer David Irving was sent prison for 3 years. Robert Faurisson, a teacher of literature at the University of Lyon, publicly declared that “the Germans did not have a single gas chamber” and, for that reason, concluded that “millions of tourists visiting Auschwitz, watch lies and falsification”; he was sentenced by the Paris Court to a fine and suspended sentence.

In relation to other particular facts of mass genocide, jurisprudence was contrasting. For example, on December 17, 2013, the European Court of Human Rights published the so-called “Judgement of the century” concerning the suit of the Turkish lawyer and politician Dogu Perincek vs. Switzerland, where the ECtHR expressed the view that the “Armenian genocide” was not a historical fact. This happened despite the fact that on March 9, 2007, Dogu Perincek was fined by the district court in Lausanne, at the suit of the Switzerland-Armenia Association (dated July 15, 2005) in connection with his three-time participation in conferences in Switzerland that year (in May, July and September) and the content of his speeches there; he denied that the Ottoman empire carried out genocide against the Armenians in 1915, and called the very idea of the “Armenian genocide” an “international lie”. In deciding against the Turkish defendant, the Lausanne court found him “guilty of racial discrimination according to the Swiss Criminal Code”, finding that “his motive was of racist nature and did not contribute to the historical discussion.”

According to the ECtHR judges, there is a clear difference between the facts in the case of Dogu Perincek and the Holocaust denial. Those who deny the Holocaust, deny the facts, despite there are incontrovertible evidences such as the gas chambers. They deny the crimes of the Nazi regime, notwithstanding the existence of a legal framework (i.e. the decision of the Nuremberg Tribunal) and the fact that the crimes of the regime was ascertained by the International Court. The Armenian accusations are different in nature – there are no incontrovertible evidences, no legal framework, no decisions of the International Court. The ECtHR actions look like legal casuistry, like a belief that without a full-fledged set of materials (in contrast with the case of the Holocaust), the massacre of Armenians is hard to fit into the framework of the concept “genocide” [13]. Still, many countries (in particular,

Russia, France, Italy, Uruguay, and others) condemned the events of 1915. In April 2015, the Armenian Genocide in the Ottoman Empire was recognized by Austria, in 2016 – by the Parliament of Germany.

Russia also did not stay aloof from the on-going processes. Most Russians find that to combat the falsification of history is of particular importance. The conducted study of public opinion in Russia showed that 83% of citizens consider the fight against the falsification of the history of their country to be important and justified, especially in terms of belittling the role of the USSR in the victory in World War II. Russian citizens indicate the state authorities and the media to be the subjects of struggle against historical falsification (11%). Among ways and methods, they note improvement of the quality of teaching history, and dialogue in the society (8%). Punishment of historical falsification was supported by 8% of the surveyed people. In order to defend the historical truth, people proposed conducting counter-propaganda (3%), instituting the death penalty for “intentional distortion of the history of Russia” (2%) and deportation (1%) [14].

Because of globalism and present escalation of conflicts around the world, the cases of deliberate distortion of historical events are not uncommon. Russia’s society believes that intentional misrepresentation of historical facts in the media, literature, cinema has a negative impact on the education of the younger generation, and undermines the reputation of states in the international arena. In this regard, the Russian Federal Law of 05.05.2014 No. 128-FZ “On Amendments to Certain Legislative Acts of the Russian Federation” introduced criminal responsibility for the rehabilitation of Nazism. As a result, in accordance with Article 354.1 Item 1 of the Criminal Code of the RF, the publicly committed denial of the facts ascertained by the decision of the International Military Tribunal for the trial and punishment of the major war criminals of the European Axis countries, the public approval of the offenses confirmed by the said decision, as well as dissemination of deliberately false information about the activities of the Soviet Union in World War II, entail criminal liability and shall be punished by a fine not exceeding three hundred thousand rubles or the salary or any other income of the convicted person for a period of up to two years, or compulsory works for up to three years, or imprisonment for the same term.

In the case of commission of such crimes by a person through his official position or by using the mass media, as well as the artificial creation of prosecution evidence, entails a fine in the amount of one hundred thousand to five hundred thousand rubles or the salary or any other income of the convicted person for the a period of one year to three years, or compulsory works for a term of up to five years, or imprisonment for the same period, with deprivation of the right to hold certain positions or be engaged in certain activities for up to three years (Article 354.1 Item 2 of the Criminal Code of the Russian Federation).

In case of propagation of information expressing clear disrespect to society concerning the days of Russia’s military glory and memorable dates related to the Motherland protection, as well as publicly committed desecration of symbols of Russia’s military glory, an offender may be subject to a fine of up to three hundred thousand rubles or the salary or any other income of the convicted person for a period of up to two years, or compulsory works for a term of up to 360 hours, or correctional work for up to 1 year.

Federal Law of the RF of 05.05.2014 No. 128-FZ supplemented Article 13.15 of the RF Code on Administrative Offences with Item 4 [15], which establishes the administrative liability of legal entities for the public dissemination of information expressing clear disrespect to society concerning the days of Russia’s military glory and memorable dates related to the Motherland protection, or public desecration of symbols of Russia's military glory, including those committed using the mass media or the Internet. The fine ranges from

400 thousand to 1 million rubles. Judicial practice within the framework of this article is not yet available - first of all, due to the fact that the indicated deeds are very difficult to prove *a fortiori*.

At the same time, the people's deputies of Ukraine Vyacheslav Kirilenko (faction "Fatherland") and Andrey Mischenko (faction "Freedom") registered a number of draft laws in the Verkhovna Rada of Ukraine; they propose to introduce criminal responsibility for excusing or denying the crimes of Nazism and Stalinism, as well as for abusing the graves of victims of Bolshevism. The topicality of the subject under consideration can be confirmed by the information (it became available during preparation of this article for publication) that the Cabinet of Ministers of the Republic of Poland approved the bill submitted by the Ministry of Justice that is to amend the law on the Institute of National Remembrance in Poland (IPN). According to the press-service of the Government of Poland, the novelty of the bill is in criminal prosecution of individuals and organizations for libeling against Poland. In particular, it is about the use of the expression "Polish concentration camps" in determining the German Nazi concentration camps built by the Germans in occupied Poland during the Second World War. The bill, which will soon be submitted for consideration at the Sejm, implies punishment for public counterfactual attribution of responsibility or involvement in the German Nazi crimes of the Second World War to Poland or the Polish people. For committing such a crime, it is proposed to introduce liability in the form of imprisonment for a term up to three years.

Indeed, it is well known that Poland suffered huge human and material losses in the Second World War. The book "Neighbors" written by an American historian, sociologist and political scientist of Polish origin, Jan Tomasz Gross, became a real toss of the glove for the martyrologic image of Poland of the war years. It was issued in Polish in 2000 by the publishing house "Pogranichye". The book was dedicated to the events of July 10, 1941, when the Jews of the Jedwabne town were burned alive by a group of Polish residents of the same town - more than 1600 Jews were killed then. Gross's book was a bombshell. Basing on the memoirs of the Jews - survivors of the Holocaust and the trial acts of 1949 against 22 men accused of committing the crime in Jedwabne, Gross set out his thesis that the murder of Jews in the town was carried out by the local Poles because of anti-Semitism and desire to have profit; and that the Germans only passively observed the events, making photos and videos. Developing this topic in an interview published in the German «Die Welt» on September 13, 2015 and entitled "Have the Eastern Europeans no sense of shame?", Gross said, "The Poles, for example, were rightly proud of the resistance of their society to the Nazis, but in reality, during the war, they killed more Jews than the Germans." Apparently, upon the adoption of the mentioned law in Poland, Jan Tomasz Gross, awarded by the Order of Merit of the Republic of Poland, to be brought to trial for committing a crime.

So why does the today's world have diametrically opposed approaches to the same historical facts? The question is a bit naive. Of course, this is due to the political regime realized by these countries' authorities, the level of interaction between the society and the state, the ambit of human rights and freedoms, the methods of political institutions formation, the style and methods of political control. They also actively use various forms of propaganda, including interpretation of historical facts in favor of domestic and foreign policy pursued by them.

It should be borne in mind that a person, expressing a certain viewpoint on historical facts, may be really sure of his correctness and even refer to some evidence to prove his point of view - without any intention to harm the public interests. In this case, possible application of the aforementioned criminal laws may bring to the cases of objective imputation.

Meanwhile, this standard is prohibited in a number of countries. For example, in Russia, in accordance with Article 5 Item 2 of the Criminal Code, objective imputation, which is criminal liability for innocent causing of harm, is not allowed. However, court practice includes a significant proportion of evaluation elements, which may lead to possible objective imputation. M.V. Bavsun made a critical remark that only the development of law enforcement based on expediency (not on mere legitimacy) is the real subsistence of objective imputation, which contradicts the principle of liability for fault. Objective imputation is caused by the lack of a clearly defined uniform penal policy. Objective imputation should be currently considered as a result of violating the fundamental principles of the penal policy, such as the priority of human rights, compliance with international standards.

4. CONCLUSIONS

In conclusion, we would like to say that the study of modern judicial practice shows that such an approach possibly does not meet the needs of society. The adoption of such laws may become a way to solve the problem of preserving the historical memory of the world, but it is not the best one, in view of possible miscarriages of justice and the criminal process politicization. Perhaps, the situation can be changed through introducing the “*scienter*” term in the penal prohibition of the countries concerned. *Scienter* means that the person brought to criminal liability for unlawful interpretation of various historical events was aware of the illegality of his actions, knew about the falsity of his statements. However, it is quite possible that such a correction in the criminal law would not play any significant role, since it would be problematic to prove a person’s guilt in this case. Besides, there is an opinion that the problems of beliefs and faith cannot be solved by means of criminal law.

There are other, much more effective ways: creating discussion platforms to debate these issues, including those at the international level; raising the legal culture of the population; increasing the number of hours dedicated to the problematic issues within the courses of history and social studies in educational institutions; organizing new or restoring and promoting existing museums and historical centers, especially such museums as the memorial complex “Khatyn”, Auschwitz, Yad Vashem Holocaust Remembrance Center in Israel, the Armenian Genocide Museum in Yerevan and others; providing open access to archive documents to not only scientists, but also the general public via modern means of communication. It is better to cultivate respect to historical facts in human beings, rather than to put them on trial for their misunderstanding of the history. In other words, it is preferable to organize proper knowledge and education, rather than to pressurize the citizens with criminal prosecution.

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