

Memory Laws and Free Expression: Comparing Democratic Approaches to Regulating Collective Memory

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ABSTRACT

How societies remember, interpret, and represent past violence is not only defined by historical scholarship but also legal regulation. Various democratic states have adopted techniques, like memory laws, to create restrictions on how historical information is remembered and discussed and to preserve particular interpretations of historical atrocities. This paper examines how different democratic states (particularly Germany, France, USA, and Poland) incorporate such laws into their systems. The paper also examines international frameworks and scholarly discourse on the topic to provide greater context and understanding. Using regulatory laws may be beneficial in safeguarding the dignity of victims and preventing spread of hatred, but it also raises concerns regarding state authority over historical narratives, viewpoint discrimination, and the control over public debate. This creates a vital point of contention that the paper will explore.

INTRODUCTION

Modern democracies today are not only governed by constitutions and institutions, but also by narratives. Maurice Halbwachs laid the framework for collective memory as a concept. He stated that the past is constructed by societal factors, and that present-day interests of social actors heavily influence our understanding of the past.¹ The strong legal and social condemnation of the Holocaust in Germany has undeniably played a pivotal role in shaping the country's societal structure and in limiting the normalization of antisemitism, thus exemplifying how memory laws work in action. Memory laws are legal instruments used by the State to enshrine state-approved interpretations of crucial historical events. They commemorate the victims of past atrocities as well as heroic individuals or events emblematic of national and social movements.² This paper seeks to explore how legal frameworks in different

¹ Maurice Halbwachs, *On Collective Memory*, ed. Lewis A. Coser (Chicago: University of Chicago Press, 1992).

² Imaging, S. (2016a). Memory Laws in European and Comparative Perspective | MELA. Melaproject. <https://melaproject.org/>

democracies regulate collective memory of past violence, and what tensions arise between such regulation and constitutional guarantees of free expression.

The numerous genocides and wars of the 20th century, such as the Rwandan Genocide and World War II led states to formulate memory laws. Government-approved versions of history and regulations on how citizens must talk about the past, arose across Europe, with the objective to curb hate speech and protect victims of atrocities. These regulations are often known as memory laws, a term coined by French historians in the early 2000s to protest the memory laws being implemented in France.³ Memory laws are judicial/legislative interventions that the government makes to impose an official interpretation of historical events (generally past violence) by prescribing what is allowed to be affirmed, denied, or sanctioned in public discourse. For example, section 130 of the German Criminal Code (§130(3) StGB (Volksverhetzung)) criminalizes Holocaust denial and incitement to hatred, which can lead to fines and imprisonment up to 5 years.⁴

George Orwell remarked, in his popular book 1984, that "Who controls the past controls the future, and Who controls the present controls the past."⁵ His quote reflects a totalitarian system where the State constantly rewrites, falsifies, and destroys history to ensure that its narrative is prevalent, through the Ministry of Truth. It destroyed objective reality and isolated individuals from the truth, acting as a warning about the political manipulation of information. His warning is relevant not because it reflects totalitarian control, but because it reveals an inherent tension: any attempt by the State to regulate facts, even if protective in nature, risks political misuse. This dynamic exposes a tension at the heart of democratic constitutionalism. Democratic States often justify interventions in historical discourse as a necessary tool required to protect vulnerable communities. Yet, many (Ronald Dworkin, Frederick Schauer, Pierre Nora) argue that the act of enacting a law that regulates the freedom of speech contradicts the very principles of a democracy. Hence, this brings us to the first question of this paper: How do legal frameworks in different democracies regulate collective memory of past violence, and what tensions arise between such regulation and constitutional guarantees of freedom of expression? This paper seeks to analyse readings of prominent scholars and develop an explanatory framework on collective memory⁶ and memory laws⁷. The paper also analyses Article 10 of the European Convention on Human Rights (ECHR), Article 19 & 20 (2) of the International Covenant on Civil and Political Rights (ICCPR), Article 19 of the Universal Declaration of Human Rights (UDHR), Article 13 of the American Convention on Human Rights (ACHR), and other relevant writings for a nuanced interpretation of the core tension at hand.

³ Nora, Pierre. "Liberté pour l'histoire." In *Liberté pour l'histoire*, edited by Pierre Nora, 7–19. Paris: CNRS Éditions, 2008.

⁴ Germany, Federal Ministry of Justice, *German Criminal Code (Strafgesetzbuch – StGB)*, accessed June 9, 2026, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html

⁵ George Orwell, *Nineteen Eighty-Four* (London: Penguin Books, 2008), 37.

⁶ Maurice Halbwachs, *On Collective Memory*, ed. Lewis A. Coser (Chicago: University of Chicago Press, 1992)

⁷ Nora, Pierre. "Liberté pour l'histoire." In *Liberté pour l'histoire*, edited by Pierre Nora, 7–19. Paris: CNRS Éditions, 2008.

Existing scholarship has already researched collective memory, memory laws, and the philosophical limits of freedom of speech in great detail, but these areas of exploration are often analysed separately. This paper brings together the concepts of collective memory, hate speech, freedom of expression, memory laws, the tension between memory laws and freedom of speech, and existing legislation on memory laws, to contribute a comparative synthesis of these topics, and provide a clear connection between them to enhance understanding. Rather than treating memory laws solely as an isolated concept, this paper analyses them as a point of intersection between state power, collective memory, protection of vulnerable communities, and freedom of speech principles, while connecting these theoretical topics to real-world judicial frameworks.

Democracies differ significantly in how they regulate the balance between freedom of speech and the protection of collective memory, dignity, and public order. While philosophical debates create a theoretical understanding, it is important to examine the laws already enacted by various democracies in this context to gauge a more practical understanding. Germany criminalises Holocaust denial (and other such crimes) under section 130 (3) of the German Criminal Code, France criminalises Holocaust denial under *Loi Gayssot* (1990) and restricts hate speech under its Pleven law (1972), Poland's 2018 amendment to the Act on the Institute of National Remembrance criminalized claims that the Polish nation was complicit in Nazi crimes, etc.⁸

Nations like the UK and US, however, take a more permissive approach when it comes to such regulation, allowing more freedom in the interpretation of history and its discourse. Law enforcement against hate speech has experienced massive growth in the post-World War II (WW-2) context of all these countries. Nonetheless, a closer look reveals stark differences. For example, American law's focus on potential vulnerability contrasts with German law, which links protection of the vulnerable with concerns for the State.⁹ This brings us to the second question of this paper: Why are there such distinct national patterns in the regulation of memory and which approach has a history of better balancing freedom of speech and expression with regulation? This paper seeks to analytically answer these questions. Comparative legal frameworks from countries such as Germany, France, USA, and Poland have been examined to analytically underscore the differences in their hate speech laws, their historical contexts, their enforcement, and relevant case law.

This paper has been divided into various sections. The first segment spells out scholarly writing on the issue, from a philosophical lens. Then, key legislations on the regulation instruments governing memory in countries such as Germany, France, USA, and Poland have been evaluated thereafter. The tension between regulation and deregulation of speech through international frameworks (UDHR, ECHR, ICCPR, Camden Principles) and scholarly theories has also been conducted in the course of this paper.

⁸ Poland's Twisted Holocaust Law," *Human Rights Watch*, February 10, 2018, <https://www.hrw.org/news/2018/02/10/polands-twisted-holocaust-law>

⁹ Joachim J. Savelsberg and Ryan D. King, "Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States," *American Journal of Sociology* 111, no. 2 (2005): 579–616, <https://www.jstor.org/stable/10.1086/43277>.

THEORETICAL ANALYSIS: COLLECTIVE MEMORY, HATE SPEECH, AND FREEDOM OF EXPRESSION

It is difficult to objectively define collective memory, as the concept is used in various subjects like history, sociology, political science, legal studies, etc. However, it can be seen as a process through which groups consolidate individual memories into a shared narrative, shaping their identity and collective memory.¹⁰

Unlike individual memory, which is personal, collective memory is heavily contested. Different groups have their own narratives and versions of the same past, and it is often difficult to authoritatively dictate which version is the inherently correct one. Hence, collective memory becomes an area of struggle, where power tends to dictate which narratives are amplified and which ones are suppressed. This contestation is exactly what makes the regulation of memory, through laws, such a heavily debated topic.

Defining Collective Memory: Maurice Halbwachs, Paul Connerton, and Benedict Anderson

Famous French philosopher and sociologist Maurice Halbwachs stated that social memory is not a given but it is a constructed notion.¹¹ This statement rejects the idea that memory is objective, it is rather shaped by societal frameworks. One not only remembers the past but is also taught how to remember it. Thus, collective memory is highly systematic and dynamic, privileging certain narratives over others. British social anthropologist, Paul Connerton, suggests that it is an implicit social rule that individuals living in the same community tend to share the same collective memories. This amplifies the idea that collective memories are socially constructed, since people of the same community tend to share the same beliefs of the past.¹² States often try to regulate this collective memory to reinforce an 'imagined community', as Benedict Anderson puts it. Hence, the regulation of collective memory is not only about preserving history but also about shaping national identity and social cohesion.

Michel Foucault's Power-Knowledge Theory

Collective memory is commonly influenced by power, as dominant groups tend to shape mainstream narratives and how society remembers the past. Michel Foucault's power-knowledge theory further enunciates this. He explains that power and knowledge are inextricably linked. Power circulates through society, regulating behaviour and knowledge, and this knowledge in turn reinforces a power dynamic. This indicates that the 'truth' itself is shaped by those in power, who support narratives that reinforce their power.¹³ For example, under the Criminal Tribes Act, 1871 passed in colonial India, entire communities

¹⁰ Collective Memory," *EBSCO Research Starters*, accessed June 9, 2026, <https://www.ebsco.com/research-starters/psychology/collective-memory>.

¹¹ Maurice Halbwachs, *On Collective Memory*, ed. Lewis A. Coser (Chicago: University of Chicago Press, 1992).

¹² Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1989).

¹³ Unit 11: Collective Memory," *eGyanKosh*, <https://egyankosh.ac.in/bitstream/123456789/90663/1/Unit-11.pdf>.

were labelled as hereditary criminals by the British, on the pretext that some tribes are naturally criminal, without any logical basis.¹⁴

This knowledge led to these communities being policed more strictly and socially stigmatized, making knowledge a tool for governance. This example clearly demonstrates that knowledge in itself may not always be neutral, and may instead be shaped by power, often to serve the objectives of those wielding such power.

If collective memory is constructed and shaped by power, then the legal regulations governing hate speech and historical expression are not just safeguards to human dignity, but also active instruments in shaping this collective memory. Laws that criminalise certain narratives from being propagated (e.g. Section 130 of the German Criminal Code criminalizes Holocaust denial and incitement to hatred) are not only protecting the truth but are reinforcing State-sanctions versions of collective memory. Linking back to Foucault's theory, who is to say whether the chosen version of the 'truth' is the reality of past events or simply another tool to propagate and re-enforce agendas of those in power? Hence, the law plays a vital role in determining what versions of history are legitimised and what versions are excluded from collective memory.

Ultimately, this creates a fundamental dilemma: If (as Foucault argues) all systems of knowledge are instruments of power, are Holocaust denial laws ethically defensible? Memory laws can be viewed as instruments of historical distortion and mechanisms through which states institutionalise historical narratives. Yet, the Holocaust is a historical event with ample evidence and its denial is often been used as a tool to propagate antisemitism and hatred. Hence, Holocaust denial laws can be justified in most cases because of the robust historical evidence surrounding it and the well-documented history that Holocaust denial has in promoting hatred towards affected communities. Therefore, memory laws may be ethically defensible in certain cases in which they are specifically tailored to deal with targeted hatred, backed with sufficient and well-documented evidence proving that such laws are necessary to prevent further ostracisation of affected communities.

The Intention Behind Memory Laws

Collective memory laws are specific, legally enforceable instruments that govern how societies recall, represent, or deny certain historical events. As explored in the foregoing sections, these laws are not merely rules, but they also shape how society remembers and treats the past. Generally, they are targeted at past violence and mass atrocities, aiming to protect vulnerable groups. For example, several European states criminalise and penalise Holocaust denial and/or glorification (German Penal Code, § 130; Loi Gayssot, 1990). The predominant intention behind such laws is to prevent social harm and protect the dignity of citizens. However, this has not been the case in every country. Poland's 2018 amendment to the Act on the Institute of National Remembrance¹⁵ criminalized claims that the country was complicit in

¹⁴ C. Simhadri, "Collective Memory and Social Identity," <https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/Simhadri.pdf>.

¹⁵ The President Signed the Amendment of the Act on the Institute of National Remembrance," Office of the President of the Republic of Poland, February 6, 2018,

Nazi crimes. This amendment aimed to protect national reputation, rather than individual dignity and, thus, generated intense backlash with scholars warning of a chilling effect on Holocaust studies, international governments accusing Poland of rewriting history, and free-speech advocates condemning the politicization of memory. Hence, in response to the uproar, the Polish government removed the criminal penalties emanating from the Act in June 2018.

Historical Origin of Memory Laws

In present times, most European countries have enacted laws to regulate hate speech, reflecting a post-World War II attitude towards the protection of human dignity. Such laws typically exist to protect human dignity, maintain social harmony, and prevent the escalation of hateful rhetoric into discrimination, violence, and hate crimes, whereas prior to WW-2, such laws often sought to suppress dissent and reinforce power. For instance, the English Seditious Libel Act of 1661, punished any person who spread anti-King propaganda. In the 1820s and 1830s, France implemented the first modern hate speech laws in opposition to the burgeoning socialist and labour movements. Following the German revolutions of 1848–1849, Prussia passed a hate speech law in 1851. This statute later became the foundation of the German penal code of 1871.¹⁶ In the 1890s large Jewish communities in Europe faced rising antisemitism. Hence, some groups began to use the law as a tool to push courts to recognise harmful speech (particularly antisemitic hate speech).¹⁷ This historical trajectory demonstrates that the attitude towards hate speech had a significant shift in the late 1800s. This origin of hate speech laws demonstrates that the perception and purpose of hate speech laws has significantly evolved through the centuries. Hate speech laws have moved from suppression to protection. In contemporary democracies, this shift is reflected in the laws that are crafted to regulate collective memory.

The Tension: Collective Memory VS Freedom of Speech

The shift from suppression to protection creates a fundamental tension between protecting absolute freedom of speech and placing certain restrictions on it to protect human dignity. While such regulations may be justified in the sense that they protect democratic values, this very argument could also work against it. A distasteful outcome of absolute freedom of speech is hate speech. There is yet no universally accepted definition of hate speech, which makes its regulation even more difficult. However, the EU law defines illegal hate speech as public incitement to violence or hatred based on certain characteristics, including race, colour, religion, descent and national or ethnic origin.¹⁸

<https://www.president.pl/archives/andrzej-duda/news/the-president-signed-the-amendment-of-the-act-on-the-institute-of-national-remembrance.36635>.

¹⁶ Nina Gorenc, "Hate Speech or Free Speech: An Ethical Dilemma?," *International Review of Sociology* 32, no. 3 (2022): 413–425, <https://doi.org/10.1080/03906701.2022.2133406>.

¹⁷ Amir Goldberg, "Hate Speech and Identity Politics in Germany, 1848–1914," *Central European History* 48, no. 4 (2015): 480–497, <https://doi.org/10.1017/S0008938915000886>.

¹⁸ Nina Gorenc (2022) Hate speech or free speech: an ethical dilemma?, *International Review of Sociology*, 32:3, 413-425, DOI: 10.1080/03906701.2022.2133406

John Stuart Mill perfectly encapsulated the liberal idea of complete freedom of speech, by stating that if all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.¹⁹ The quote highlights the liberal idea of unrestricted freedom of speech, conveying that no matter the societal belief, every individual has the right to voice their opinion, thus contrasting heavily with the idea of State regulation of historical truths. Jeremy Waldron, on the other hand, remarked that the aim of hate speech regulation is not to protect people from offense but to protect their dignity from assault, which underscores the idea that hate speech goes beyond just disrupting public order. It fractures the very dignity of the victim, making restriction on such hate speech as an essential element of a democracy, and not as a curtailment of freedom.²⁰ Such contrasting views by eminent scholars highlight the core tension between free speech and regulation for the purpose of upholding human dignity.

At a theoretical level, this tension emerges from the basic understanding of what speech really is. Classical liberal theory treats this speech as an inherent right. Thinkers such as John Locke, Adam Smith, and Thomas Hobbes place absolute freedom of speech at the core of a democracy.

John Locke stated that the greatest error in the pursuit of knowledge is the belief that one has certain knowledge that is beyond scrutiny.²¹ This implies that no knowledge is certain, keeping the capacity of human error in mind, and hence no opinion should be debarred from public discussion simply because it is offensive. He says that all men are capable of errors and hence no individual may claim authority over another in an area of knowledge. His rejection of innate principles underscores his belief that no individual should have the authority to dictate truth to others. The human proneness to error rejects the idea that anybody should have monopoly over intellectual property, because anyone can be wrong.²² Locke's famous *Two Treatises on Government* provides another explanation on his opposition to hate speech regulation, which is personal autonomy. It was written as a response to Thomas Hobbes's *Leviathan*. Hobbes advocated for a strong sovereign along with an unbreakable social contract between the citizens and the government, in response to the political turmoil of England at the time. Locke's main concern to this advocacy was the rise of rule by fiat. Thomas Filmer's *Patriarcha* was also criticised by Locke in his *First treatise on Government* for its advocacy of a hereditary, absolutist, divine-right monarchy in England.²³ Locke's suspicion of concentrated power is relevant in the case of memory laws

¹⁹ John Stuart Mill, *On Liberty* (1859), chap. 2, 18,

<https://eet.pixel-online.org/files/etranslation/original/Mill.%20On%20Liberty.pdf>

²⁰ Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012),

<https://www.scribd.com/document/368722377/Waldron-The-Harm-in-Hate-Speech-pdf>.

²¹ John Locke, *An Essay Concerning Human Understanding*.

²² Alex Daniel, "Speech Locked Up: John Locke, Liberalism and the Regulation of Speech," *Seton Hall University ScholarWorks*,

https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1154&context=student_scholarship.

²³ Alex Daniel, "Speech Locked Up: John Locke, Liberalism and the Regulation of Speech," *Seton Hall University ScholarWorks*,

https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1154&context=student_scholarship.

and State regulation of speech and historical truths. If states are given the power to determine what truths are legitimate and what truths are forbidden, the State acquires a monopoly over information- something he was fundamentally opposed to. His emphasis on the human tendency to make errors reinforces the idea that no institution can claim infallible authority over information. Hence, laws criminalising certain forms of historical expression run the risk of turning democratic authorities into autocratic despots.

“I disapprove of what you say, but I will defend to the death your right to say it”²⁴ –this extraordinary quote by Evelyn Beatrice Hall perfectly encapsulated Voltaire’s attitude toward freedom of speech. He believed that the ability to think and speak freely is an indispensable part of a human’s rights. He viewed censorship as a form of tyranny. In ‘Treatise on Tolerance’, he wrote, “think for yourselves and let others enjoy the privilege to do so too”,²⁵ thus reflecting his firm belief that truth arises from open dialogue, and not regulation or suppression.

In contrast to the above, philosophers such as Karl Popper, emphasise the need for restrictions. He showcases this through his theory ‘The Paradox of Tolerance’ which states that if everyone is tolerant of every idea, then intolerant ideas will soon emerge. Then, tolerant people will tolerate these intolerant ideas, and intolerant people will not tolerate the tolerant people. Therefore, sooner or later the intolerant people will take over society and create a society of intolerance. Hence, his paradox is that to create a society of tolerance, the tolerant must be intolerant to intolerance.²⁶ He used this to explain the rise of the Nazis in Germany: the Nazi Party was able to use the freedoms provided by the democratic Weimar Republic to spread its ideology and gain political power, before dismantling those very freedoms, once in government. Hence, one may conclude that to establish harmonious societies, we must have certain restrictions on extremist and hateful expressions, to prevent dangerous ideologies like Nazism from arising.

COMPARATIVE FRAMEWORK: THE DIVERGING DEMOCRATIC APPROACHES TO REGULATING COLLECTIVE MEMORY

Democratic states do not follow a uniform ideology or model when it comes to regulating speech and collective memory of the past. Their divergent approaches not only reveal the difference in legal frameworks but also reflect their deeply embedded constitutional priorities. For the purpose of this paper, they can be broadly categorized into 3 categories: dignity- based regulation, liberal non-intervention, and identity- based regulation. The restriction of this analysis to only democratic regimes is necessary, as democracies champion open discourse, but the regulation of memory directly challenges this. On the other hand, non-democratic regimes (totalitarian, authoritarian) evidently exhibit disregard for freedom of speech, thereby alleviating this tension to a large extent. Moreover, focusing on one system allows for a

²⁴ S. G. Tallentyre [Evelyn Beatrice Hall], *The Friends of Voltaire* (London: John Murray, 1906), 199.

²⁵ Voltaire, "Tolerance," in *Toleration and Other Essays*, trans. Joseph McCabe (New York: G. P. Putnam's Sons, 1912)

²⁶ Mark Manson, "The Paradox of Tolerance," <https://markmanson.net/the-paradox-of-tolerance>.

more controlled analysis across systems that share the same foundational values to the rule of law and protection of rights.

Dignity- Based Regulation: Germany & France

In states such as Germany and France, regulation of speech and collective memory is largely grounded in the protection of democratic order and dignity of citizens.

Germany represents the clearest example of a democracy that views historical memory as something requiring legal protection. Under section 130 of the German Criminal Code, Holocaust denial, glorification of Nazi crimes, and public speech that violates the dignity of victims are all treated as criminal offences, punishable with fine and up to 5 years of imprisonment.²⁷ Müller argues that this is grounded in the idea of ‘militant democracy’, wherein a democratic State may restrict certain rights to prevent the revival of totalitarian or extremist ideologies.²⁸ This statement indicates that Germany’s approach isn’t just abstract, it is the response to the collapse of the extremist Nazi regime after World War II. Under German law, the system is designed to be self- defensive, illustrating that Germany rejects the idea that all speech must be protected. Banning Nazi symbols and extremist parties (German Criminal Code section 86)²⁹ are not merely restrictions on speech, they are in place to prevent harmful ideologies from cropping up once again. According to Robert Post, such laws exist in Germany because their constitution is based on a dignitarian foundation in which protection of dignity can override the freedom of speech.³⁰ In the USA, the denial of the Holocaust is protected under free speech. However, German law treats this as an assault to human dignity, not an opinion.

France adopts a similar stance through the Loi Gayssot Act 1990, which criminalizes Holocaust denial.³¹ France’s 1972 Pleven law on racism outlaws racist speech and writing against individuals, and bans provocations of hatred, racial violence, and discrimination.³² These laws regulate how the past is remembered and play an important role in shaping public order and moral identity. Hence, in France, the State plays a vital role in shaping how the society remembers the past, through what is called the ‘memorialist approach’. However, critics argue that France’s approach judicializes history, meaning

²⁷ Germany, Federal Ministry of Justice, *German Criminal Code (Strafgesetzbuch – StGB)*, last modified November 22, 2021, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

²⁸ Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007).

²⁹ Germany, Federal Ministry of Justice, *German Criminal Code (Strafgesetzbuch – StGB)*, last modified November 22, 2021, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

³⁰ Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad," *Constellations* 14, no. 1 (2007).

³¹ Sarah Gensburger, "Memory Laws in France and Their Implications: Institutionalizing Social Harmony," *Humanity in Action*, https://humanityinaction.org/knowledge_detail/memory-laws-in-france-and-their-implications-institutionalizing-social-harmony/.

³² Sarah Gensburger, "Memory Laws in France and Their Implications: Institutionalizing Social Harmony," *Humanity in Action*, https://humanityinaction.org/knowledge_detail/memory-laws-in-france-and-their-implications-institutionalizing-social-harmony/.

history is dictated in courts and not scholarly debate, significantly shrinking any room for intellectual arguments. They believe that this restricts academic freedom, politicizes memory, and undermines pluralism. For instance, Roger Garaudy, a French writer, was convicted under the Gayssot Act due to his work which undermined the atrocities of the Holocaust by casting doubt on the number of victims.³³ France does not only have memory laws regarding Holocaust denial. The Taubira Law 2001 officially recognizes the Transatlantic slave trade as a crime against humanity and requires school curriculum and public research to reflect this.³⁴

The Law of 23 February 2005 (Law No. 2005-158 of 23 February 2005 regarding Recognition of the Nation and National Contribution in Favour of French Repatriates) required teaching students the 'positive role' of French colonialism and became widely known for controversy over its portrayal of colonial history. Article 4 required school curricula to acknowledge 'the positive role of the French presence overseas'. However, after massive public backlash, President Jacques Chirac ordered the repeal of Article 4 in 2006 and later inspired efforts to separate political authority from historical interpretation.³⁵ This raises a critical question: if memory laws are supposed to preserve historical truth, then why are they used to promote a favourable view of colonialism, a historical evil associated with exploitation? This inconsistency suggests that memory laws may not always be used to preserve the truth but, on the flip side, could also be used to distort the truth.

Critics such as Henry Rousso strongly condemn such laws. They argue that while these laws arose out of intentions to protect democratic values, they risk historians being persecuted for nuanced perspectives and fresh interpretations of knowledge, which means that memory laws would freeze history rather than allow it to evolve. Mark Osiel argues that states use memory laws not only to prevent harm but also to promote national narratives. He warns that legislating historical truth risks turning history into ideology and that criminalizing certain interpretations may reduce public trust in historical scholarship.³⁶ For France, these laws are passed for censorship but to safeguard public morality.

The case of *Dieudonné M'bala M'bala v. France* highlights the European approach towards memory laws. Mr Dieudonné M'Bala M'Bala is a French national, who was living in Paris during the case. He is a comedian in profession and has engaged in political activities too. On 26 December 2008 he staged a performance at the Zénith venue in Paris. Towards the end of the show, he invited Robert Faurisson to join him on stage. Mr Faurisson had received several convictions in France for his negationist or revisionist opinions, mainly his denial of the existence of gas chambers in the Nazi concentration camps. During this show, Mr M'bala called on an actor wearing a pair of striped pyjamas with a stitched-on star of David (resembling the uniform of Nazi concentration camps) to award Mr Faurisson a "prize for

³³ "Client Challenge," n.d.,

<https://www.scribd.com/doc/204109661/The-Founding-Myths-of-Israeli-Politics-by-Roger-Garaudy>.

³⁴ "The Taubira Law," *Project Manifesto*, <https://www.projectmanifest.eu/the-taubira-law-en-fr/>.

³⁵ Angelique Chrisafis, "French Historians Attack 'Official' Version of History," *The Guardian*, April 15, 2005, <https://www.theguardian.com/world/2005/apr/15/highereducation.artsandhumanities>.

³⁶ Mark Osiel, "Ever Again? Legal Remembrance of Another Holocaust," *University of Chicago Law Review* 67 (2000).

unfrequentability and insolence”.³⁷ On 27 October 2009 the Paris tribunal de grande instance found the applicant guilty as charged and sentenced him to a fine of 10,000 euros. His actions led to further legal proceedings for antisemitism, which was ultimately brought before the ECHR in the case of *M’Bala M’Bala v. France*. Dieudonné relied on Articles 7 & 10 of the European Convention on Human Rights to fight his case, arguing that his conviction had breached Articles 7 and 10 of the Convention. The ECHR found that any remark directed against the Convention’s underlying values is removed from the protection of Article 10 by Article 17.

This case indicates that France does not treat the Holocaust as just a historical event, but rather a legally protected truth. Denial or mockery of it is not just considered socially unacceptable, it becomes a legal violation and a threat to democratic order. The reasoning of ECHR is also key, under the ECHR free speech is protected, but with restrictions mentioned under Article 17. This means that free speech cannot be absolutely exercised in contravention of other values such as dignity and equality. Unlike in the US, where immediate violence is not necessary for something to be considered harmful. In this case, the harm included antisemitism and undermining Holocaust memory. Hence, in Europe (under ECHR), hate speech protection is preventative, not reactive- they intervene before the hate speech leads to actual physical violence. These points help to prevent historical revisionism and revival of harmful ideals, but when the State decides what version of history is protected, it also risks creating a chilling effect, and this is where the tension arises.

Both Germany and France criminalize Holocaust denial and justify it by stating protection of democracy and dignity. Moreover, they are both supported by Article 17 of the ECHR. However, they differ in their foundation and their purposes. Germany’s model is rooted in a constitutional commitment to a militant democracy, while France’s approach is more legislative and memorialist. This is because the German law is rooted in Basic Law (Grundgesetz), especially Article 1. So, laws like Section 130 of the German Criminal Code are extensions of constitutional values. France, on the other hand, is legislative with its basis in statutes like Gayssot Act 1990. This means that their parliament decides which historical truths require protection. It seems as if Germany uses memory to protect the future (prevent the return of Nazism) and France uses it to define the past. They also differ in how far the law extends. While Germany confines its intervention to the specific historical context of National Socialism, France adopts a broader legislative approach that shapes multiple dimensions of historical memory, intensifying concerns about State authority over historical truth.

When it comes to protecting dignity and democracy, Germany’s approach tends to follow a more balanced path. Rooted in Basic Law, sections like 130 and 86 of the German Criminal Code reveal its commitment towards preventing the rise of National Socialism and protecting the dignity of victims. On the other hand, leaving the interpretation of historical truths to the State parliament in France, raises concerns on State control over information and whether the statutes passed are in line with democratic principles. Therefore, while both models emerge from the same root idea of protecting dignity, Germany’s

³⁷ *M’Bala M’Bala v. France*, App. No. 25239/13, European Court of Human Rights, Decision of 20 October 2015, para. 5.

framework tends to be more democratically sustainable because of its focus on preventing threats to democracy, while France more directly regulates historical truth and dissent.

Liberal Non- Intervention: The United States of America

Freedom of speech is a foundational cornerstone of American democracy. It was upheld by the Founding Fathers as an essential feature of a healthy democracy. President George Washington remarked that if freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.³⁸

Hence, the USA adopts a very different approach from that of Germany and France. It takes a more maximalist approach towards freedom of speech and has no Holocaust denial laws. The 1st amendment in the US constitution prohibits viewpoint-based restriction on freedom of speech,³⁹ exemplifying their belief that truth emerges from open discourse, not regulation. Two cases illustrate the commitment to this idea. In the *Brandenburg v. Ohio* case of 1969, Clarence Brandenburg (Ku Klux Klan leader) was convicted under Ohio State law for promoting violence during a rally. The US Supreme Court overturned his conviction, holding that citizens in the US can legally express violent, hateful and offensive ideas freely.⁴⁰ They can only be punished if their speech intends to provoke others into committing violence or breaking the law immediately and is likely to cause such action right away. This kind of judgement ensures that the US protects all kinds of speech, no matter how offensive or hateful, unless it crosses the line to immediate incitement of violence. In the *Nationalist party of America v. Village of Skokie* case, the Supreme Court protected the right of a neo-Nazi group to march through an area which was resided by many Holocaust survivors. When the group applied for a permit to march, the Skokie Board of Commissioners passed an ordinance requiring marchers to post a \$350,000 insurance bond. The Board later passed an ordinance banning distribution of printed materials that promote hatred of groups of people or marching in military style uniforms. The Nazi group argued that these three laws were unconstitutional violations of the First Amendment. The case eventually went to the Supreme Court, which ruled that the Nazi Party could not be prohibited from marching peacefully.⁴¹ This contrasts greatly with the German approach, where protecting the memory of the Holocaust and dignity of its survivors' overrides guarantees freedom of speech. [66] or glorification as an attack on dignity, but the US sees the regulation of it as a greater threat to democracy more than anything else.

³⁸ David J. Kramer, "When Speech Is Free, Democracy Works," *George W. Bush Presidential Center*, <https://www.bushcenter.org/publications/when-speech-is-free-democracy-works>.

³⁹ "First Amendment," *Constitution Annotated*, Library of Congress, <https://constitution.congress.gov/constitution/amendment-1/>.

⁴⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁴¹ "Skokie and Brandenburg," *Bill of Rights Institute*, <https://billofrightsinstitute.org/e-lessons/skokie-and-brandenburg/>.

Within such a framework, the State abstains from dictating historical truths, relying on the 'marketplace of ideas'.⁴² Hence, this model prioritizes legitimacy over correctness, keeping the law neutral. However, this neutrality creates its own tension, the State risks enabling the distortion of collective memory, particularly in contexts involving mass violence or genocide.

Identity- Based Regulation: Poland

Poland offers a very distinct model, one that seeks to preserve national narrative rather than protect dignity or shape historical truths. Poland's 2018 amendment to the Act on the Institute of National Remembrance states that anybody who claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich shall be liable to a fine or imprisonment for up to 3 years. Hence, anybody claiming that Poland was involved in Nazi crimes would face retribution. The law aimed to defend Poland's reputation, protect historical truth, and prevent defamation of the Polish nation's name. Today, nobody can be arrested/jailed under this law, but individuals/the Polish State can still sue for defamation. Thus, it is no longer a crime, but rather a civil wrong due to major backlash regarding concerns around freedom of speech, chilling effect on Holocaust research, and international pressure.⁴³ Unlike Germany's trauma-driven regulation, Poland's law aimed to protect national reputation, rather than individual dignity.

The Polish framework therefore exemplifies that laws that regulate collective memory work differently in different societies. The German framework aims to protect the dignity of vulnerable communities, along with the French framework (with a few exceptions), while the Polish nation aims to protect their own image. The backlash faced due to the Polish law exemplifies the central tension being explored i.e., when the State uses such laws to infringe upon freedom of speech, it faces resistance due to it risking the restriction of academic inquiry, historical debate, or criticism of the nation. This proves that the legitimacy of collective memory laws depends not only on whether they protect victims, but also on whether they can do so without unduly limiting open discourse.

These examples therefore demonstrate that memory laws exist on a spectrum. At one end lies the American model, that prioritises absolute freedom of speech, and at the other end lies the more interventionist nations that want to protect vulnerable communities and true narratives. The approach that Germany adopts is primarily aimed at protecting victims, preventing resurgence of extremist ideologies, and preserving the accurate memory of an atrocity. In contrast, Poland's 2018 legislation shows how such legislation can be used to protect national reputation and promote a preferred historical narrative. France occupies a more ambiguous position. While it criminalises Holocaust denial in the name of truth and dignity, the 2005 law attempted to require recognition of the 'positive role' of French colonialism. This inconsistency suggests that memory laws are not always neutral instruments of historical preservation.

⁴² "Marketplace of Ideas," *The First Amendment Encyclopedia*,
<https://firstamendment.mtsu.edu/article/marketplace-of-ideas/>.

⁴³ "The President Signed the Amendment of the Act on the Institute of National Remembrance," Office of the President of the Republic of Poland, February 6, 2018,
<https://www.president.pl/archives/andrzej-duda/news/the-president-signed-the-amendment-of-the-act-on-the-institute-of-national-remembrance.36635>.

FREEDOM OF SPEECH V REGULATION: INTERNATIONAL LEGAL FRAMEWORK AND JURISPRUDENCE

The regulation of collective memory and hate speech lies at a crucial intersection: a clash between the democratic fundamentals of freedom of speech and the protection of dignity.

Looking at it from an international perspective, freedom of speech is codified in Article 19 of the United Nations Declaration of Human Rights (UDHR)⁴⁴ and reinforced through Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR states that everyone shall have the right to hold opinions without interference. However, this provision is subject to certain restrictions under Article 19(3) of the ICCPR, which include respect of the rights or reputations of others and/ or for the protection of national security or of public order, or of public health or morals.⁴⁵ Article 10 of the ECHR also protects freedom of speech, but, again, this freedom could be curbed on account of certain restrictions that can be prescribed by law in order to protect interests of national security, territorial integrity or public safety, and for the prevention of crime and disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁶

Hence, these international instruments protect freedom of speech but at the same time permit certain restrictions on this right by recognising the fact that speech possesses both democratic and destructive value. This two-pronged approach reveals that, historically, harmful movements and ideologies have emerged despite free speech. The rise of Fascism and Nazism in Europe displayed how unregulated propaganda and hate speech could be used as tools to spread mass hatred. As a result, international frameworks, post-World War II, rejected the idea that freedom of speech should be absolute. The United Nations was created after World War II with the main aim of preventing such huge atrocious wars from occurring again. Accepting that freedom of speech cannot be absolute was a result of this.

The most important finding is that these international frameworks do not provide a definitive answer to the debate on memory laws. They simply establish a framework under which states may decide and create their own interpretations. ICCPR and ECHR both identify the freedom of speech as integral, but neither

⁴⁴ Universal Declaration of Human Rights, art. 19, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁴⁵ International Covenant on Civil and Political Rights, arts. 19–20, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 10, https://www.echr.coe.int/documents/d/echr/convention_ENG.

accept it as absolute. They both explicitly mention specific conditions under which the State may regulate speech. This flexibility explains that different democracies can adapt to whichever approach they deem fit. So, when Germany and France try to justify regulatory laws, they cite that it is permissible under international law. Other international tools serve to further deepen this ambiguity. States are required by Article 20(2) of the ICCPR to forbid any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁴⁷ In a similar vein, states are required by the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination to denounce and oppose racist propaganda.⁴⁸ The legal foundation for prohibitions on hate speech and denial of genocide is strengthened by these clauses. Nevertheless, neither document expressly mandates that states enact memory laws or specifies how historical atrocities need to be commemorated. Rather, they provide democracies a great deal of discretion.

CONCLUSION

The paper set out to answer two interconnected questions: How do legal frameworks in different democracies regulate collective memory of past violence, and what tensions arise between such regulation and constitutional guarantees of freedom of expression? And, Why are there such distinct national patterns in the regulation of memory and which approach balances freedom of speech and expression with regulation better?

The comparative analysis of the paper shows us that democracies regulate collective memory through substantially different legal mechanisms, ranging from criminalisation of Holocaust denial and hate speech to comparatively strong protection of historical and political expression. The reasons behind such differences have been highlighted in their history and inherent constitutional principles. While the first amendment of the US Constitution adopts an almost absolutist approach to freedom of speech, Germany's constitution that highlights a 'militant democracy' adopts a more regulatory approach, which arose from its Nazi past as displayed.

Ultimately, freedom of speech is a fundamental pillar of a democratic society, however, this freedom cannot be mistaken to be absolute. History reveals that such absolutism and non-suppression of dangerous expressions have led to mass murders, distortion of collective memory, and atrocious genocides. Consequently, certain reasonable regulations on speech are morally (as presented by Karl Popper and JS Mill) and legally (as seen in the ECHR, ICCPR, and UDHR) justified, revealing the tension between such regulation and constitutional guarantees of freedom of expression.

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 10, https://www.echr.coe.int/documents/d/echr/convention_ENG.

⁴⁸ International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

However, the legitimacy of this regulation depends on its scope and purpose. Such laws should only be tolerated when they have a defined purpose that serves to make a more peaceful society and when they are proportionate. The real danger in memory laws lies when they move from preventing hatred to monopolizing history and information itself. Open discourse and free scholarly debate should be encouraged with minimum restriction. But, if certain regulatory rules need to be in place to prevent mass hatred, they should exist, ensuring that they exhibit the least amount of intervention possible. This distinction can be exemplified through the example of Germany and Poland discussed above. Germany's restrictions on Holocaust denial and Nazi symbols are widely regarded as legitimate because they are rooted in Germany's direct historical responsibility for the atrocities of Nazism and arise from their constitutional values in German Basic Law. On the other hand, Poland's 2018 amendment to the Act on the Institute of National Remembrance showcases how memory laws and regulation of expression can become tools of political nationalism and not tools of democratic protection, protecting national pride rather than the dignity of victims. This shows that Germany's approach towards memory laws and regulation better balances freedom and regulation.

Therefore, the question is not whether these laws should exist, it is where democratic societies should draw the line. Carefully limited regulation that exists solely to protect democracy, and individual dignity is the way forward. A democratic society must remain capable of defending itself against harmful revisionism and incitement, while simultaneously resisting the temptation to transform historical memory into a rigid instrument of State power.

LIMITATIONS & FUTURE RESEARCH

The paper has analysed four democratic countries and analysed their approaches regarding freedom of speech and memory laws. Hence, the research cannot represent the full range of approaches adopted by democracies globally. Further, the paper focuses largely on formal legal frameworks, not accounting for confounding factors such as media, education, museums, culture, and political rhetoric which continue to shape collective memory. The research is primarily based on comparative legal analysis and existing scholarly literature. Consequently, the paper is equipped to analyse these legal justifications and principles rather than their actual social effect on the citizens of the country. The enactment of legal statutes does not necessarily guarantee that public attitudes change, antisemitism (or other forms of prejudice) is reduced, or a shared understanding of the past is successfully created.

Thus, these limitations provide several directions for future research. Future studies could expand the scope of this paper to democracies beyond Europe and North America, perhaps studying memory law legislation in Asia, Africa, South America, and Australia. Their distinct colonial past and involvement in conflicts would add another perspective to this area of research. Another possible avenue of research could be studying the interaction of memory laws with non-legal mechanisms like media, culture, education, and political beliefs, providing a more comprehensive understanding of whether state

regulation of expression and historic discourse actually strengthens democratic principles or risks transforming collective memory into an instrument of political control.

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