



Understanding Genocide Denial Legislation: A Comparative Analysis

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Abstract

Several countries touched by the scourge of genocide have responded by criminalizing the denial of this fact. The motivations for outlawing genocide denial are varied and the legislation coverage differs from state to state. Some nations are quite narrow in what behavior is criminalized and others are much broader in their coverage of activity. Since a key function of the law is to provide adequate notice to individuals it is important to understand what behavior is prohibited and in which location it is forbidden. One state's illegal denial behavior may be legal in another country. The scope of denial legislation is often related to the rationale behind the law connecting intent and action. These laws may also serve as guides for other countries desiring to prohibit denial thus creating more continuity among international criminal laws. This article is an attempt to understand genocide denial legislation.

Keywords: Genocide, Genocide Denial, Negationism, Denial Legislation, Denialism.

Introduction

Genocide is often considered to be the worst of crimes that humanity can inflict on one another. But when thinking of the harm caused by genocide there is one aspect that is sometimes overlooked. A genocide survivor may find that they are re-victimized when they hear someone deny their experience. Genocide denial can have a drastic negative effect upon survivors and others touched by the crime of genocide.

There are multiple dangers attached to genocide denial. In many ways denial is an attempt to kill the truth (Charney, 2000). Denying the truth can have ripple effects including impunity for the perpetrators and lack of awareness to recognize the reemergence of threatening behavior (Charney, 2000). In fact, Gregory Stanton has made denial the final stage of genocide in his ten stages. Denial following genocide is one of the “surest indicators of further genocidal massacres” (Stanton, 2016).

Denial can take many forms. When genocide is negated, the victims of that genocide are also being rejected. They are denied their status as a victim. Doing so could make it easier for future re-victimization (Etlis, 2008). Victim denial can also have the effect of shifting blame from the perpetrators to the victims. If the victims deserved what happened to them, then they are not truly victims but instead instigators and agitators (Alvarez, 1997). When the Germans turned the Jews into the enemy, the Holocaust could take on the image of self-defense (Alvarez, 1997). When one is acting in self-defense, violence is

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not abhorred but condoned. If genocide denial leads to victim denial, the process of extermination could reignite (Stanton, 2016).

At its base level, genocide denial is lying. Lying can be harmful by contributing to a false consciousness (Nash-Marshall & Mahdessian, 2013). Genocide denial ignores facts, attempts to reduce responsibility, and encourage impunity (Smith, 2010). These types of behavior lay the path for future genocides to be committed. Denial is but one way to promote repetition of genocide. In this context, where denial can have such long-range negative consequences, many countries have proscribed denial with criminal penalties.

Denial Legislation

Criminalizing genocide denial is not a panacea for every country. Even those that do outlaw denial are faced with questions of balancing interests in free speech and dignity. Hate speech is treated differently around the world based on many factors (Etlis, 2008). The United States has few limitations on hate speech preferring to secure broad free speech protections. Countries like Germany and France though are more willing to proscribe hate speech as a violation of a person's human dignity (Brugger, 2002). The European Convention on Human Rights protects free speech but does carve out an exception for the "protection of the reputation or rights of others" (McGoldrick & O'Donnell, 2006, p. 467).

Within these understandings of free speech protection and respect for human dignity, twenty-one countries currently criminalize genocide denial. The majority of these countries are in Europe: Andorra, Austria, Belgium, Czech Republic, France, Germany, Hungary, Latvia Liechtenstein, Luxembourg, Macedonia, Malta, Poland, Romania, Portugal, Slovakia, Slovenia, and Switzerland. Most these countries also represent nations that were attacked and/or conquered by Hitler during the Second World War. This may provide special incentive for these countries to remember the Holocaust and crimes of the Nazi Socialist government. Only three non-European countries currently ban genocide denial: Colombia, Israel, and Rwanda. Again, these countries have had a deep and personal connection to genocide that might have spurred legislation on denial.

While the focus on these laws tends to concentrate on the act of denial, most of the laws on genocide denial are broader. Among the twenty-one nations there are very broad laws prohibiting many types of actions and laws that are more narrowly written. Several acts beyond simple denial are proscribed including minimizing genocide, justifying genocide, approving of genocide, and doubting genocide. Some laws are written as to cover only the World War II genocide of the Jews (herein referred to as the Holocaust), while other laws protect genocide in general, crimes against humanity, and war crimes. In addition to the acts forbidden by the legislation, there are multiple modes of communication covered. Most laws refer only to publicly made denials, but the method of communication can include writing, speech, publication, or other form of media such as images.

When denial legislation is spoken of, it is not always clear what is actually prohibited by the state. Prosecutions for minimizing, justifying, or approving genocide are rare, but many countries retain the right and power to prosecute individuals for such behavior. Much denial occurs via writing or speech but other modes of communication may bring liability in one country but not another. Under the generally accepted notion of legality, a law must exist before a crime can occur and fair notice requires that a person know what conduct is forbidden before liability attaches.

When denial legislation is referred to as such, there is the possibility that many people will not understand the true extent of these laws. A full understanding of what conduct is prohibited, will likely reduce confusion. These laws can also serve as templates for other countries contemplating criminalizing genocide denial. How much behavior a country seeks to outlaw may depend on many things, but full comprehension of what has been criminalized elsewhere may be of use. There are five main actions that have been criminalized: denying, minimizing, justifying, approving, and doubting. There are four main areas that are protected: the Holocaust, genocide, crimes against humanity, and war crimes. In addition, there are five modes of communication covered: in public, writing, speech, publication, and other media.

1. Denying

Of course, denial of genocide is the most commonly cited action under these laws. To deny is to reject. In legal parlance, a denial is a rejection of an allegation of fact (Black, 1968). When evidence shows that genocide has occurred and that fact is denied, the deniers are simply engaged in lying (Nash-Marshall & Mahdessian, 2013). These lies have possible negative effects of negating victims and encouraging re-victimization (Smith, 2010). For these reasons, it seems proper to punish those who would lie about history and attempt to reignite genocidal behavior.

All countries but one with denial legislation lists the act of denial in the statute. Most countries list denial as the first action prohibited by the legislation. If the ordering of action is interpreted to be rank ordered, then it does appear that preventing denial is the main objective of most nations. The consensus among these twenty nations is that denying a historical fact like genocide is worthy of punishment. However, these countries disagree on what exactly cannot be denied. In general, there are four types of international crimes that are covered by these laws: these include the Holocaust specifically, genocide in general, crimes against humanity, and war crimes. When looking at genocide denial laws, it becomes clear that in many places it would be more accurate to call them Holocaust denial laws. Eleven of the twenty-one nations (52.3%) restrict their denial legislation solely to the Holocaust (see Table 1).

Therefore, these countries criminalize denial of the Holocaust but do not do so regarding other genocides. The clear majority of the countries restricting prohibition to the Holocaust were overrun by Hitler during the Second World War and had direct experience with the Holocaust. This may explain why they have limited their denial laws to cover only the Holocaust, but it also means that denying the genocide of the Armenians or Rwandans is perfectly legal and protected from prosecution.

Nine of the twenty-one nations with denial laws (42.8%) criminalize denying genocide in general not limited to the Holocaust (Table 1). Depending on the interpretation of Portugal's law, which is somewhat vague, this number of states prohibiting denial of genocide in general could rise to ten. Portugal's legislation criminalizes "denial of war crimes or against peace and humanity" (Lechholz-Zey, 2012). It seems feasible that most people would agree that genocide is a crime against humanity and therefore covered by Portugal's law. Though, Portugal is the only country which bans denial without using the word genocide. While some of these countries experienced first-hand the consequences of the Holocaust, they have decided to ban denial of any genocide not only the Holocaust. One possible explanation for this broader protection may be due to what behavior the

country is seeking to outlaw. In most cases, genocide denial is motivated by animus and hatred (Gorton, 2015). At least five of the countries outlawing genocide denial do so to prevent discrimination.

Table 1. States Criminalizing Denial

Holocaust	Genocide	Crimes against humanity	War crimes
Austria	Andorra	Austria (Nazi)	Czech Republic (Nazi)
Belgium	Hungary (Nazi)	Czech Republic (Nazi)	Germany (Nazi)
Czech Republic	Latvia	France (Nazi)	Latvia
France	Liechtenstein	Germany (Nazi)	Luxembourg (Nazi)
Germany	Macedonia	Israel (Nazi)	Macedonia
Israel	Malta	Latvia	Malta
Luxembourg	Portugal	Liechtenstein	Poland (Nazi)
Poland	Slovakia	Luxembourg (Nazi)	Portugal
Romania	Slovenia	Macedonia	Slovakia
Slovakia	Switzerland	Malta	Slovenia
Slovenia	Rwanda	Poland (Nazi)	
		Portugal	
		Slovakia	
		Slovenia	
		Switzerland	

Switzerland’s denial law is under the heading of racial discrimination. The law forbids denying genocide when done to demean or discriminate based on race, ethnicity, or religion (Lechtholz-Zey, 2012). Slovenia likewise outlaws denial when done to “provoke or stir up ethnic, racial, religious or other hatred” (Na’amat & Deutch, n.d.). Malta, Portugal, and Slovakia likewise prohibit denial when intended to discriminate or incite violence (Lechtholz-Zey, 2012). Macedonia prohibits genocide denial in general but increases the punishment if it is done to discriminate or incite violence (Na’amat & Deutch, n.d.). For denying genocide without intending to discriminate or incite violence the punishment is one to five years, but if done to discriminate then the punishment is at least four years (Na’amat & Deutch, n.d.).

The remaining countries criminalize denial of genocide even if not intended to discriminate or incite violence. While these countries seek to prohibit negation of genocide in general, there is the ever-present question of what qualifies as genocide. It does not appear that these nations have a limiting principle on what qualifies as genocide such as requiring a legal judgment of genocide. Statutory language includes “facts described as genocide,” “implemented genocide,” “stating or explaining that genocide is not genocide” (Na’amat & Deutch, n.d.; Lechtholz-Zey, 2012). What remains unclear under these laws is whether denying the Armenian genocide would qualify since there was never a legal determination but public and scholarly opinion favors the genocide label. A more difficult example might be the Native American population in the United States. Public and scholarly opinion is not quite as unified but many believe the eradication of this population to qualify as genocide. Whether these countries also outlaw denying the

Native American genocide is not obvious. Likely these nations will not face this question because these examples are farther removed from them personally than is the Holocaust or perhaps Srebrenica.

In addition to forbidding denial of the Holocaust or genocide in general, many states also criminalize the denial of crimes against humanity. Similar to the divide between countries that outlaw denying the Holocaust alone versus denying genocide in general, fifteen nations forbid denying crimes against humanity but seven of those countries limit the crimes against humanity to those committed by the Nazi regime. Those countries limiting the scope to Nazi crimes against humanity were all touched by those crimes (see Table 1).

The remaining eight nations forbid denying crimes against humanity in a broader sense. Many of these nations simply include crimes against humanity alongside genocide as acts that cannot be denied. Common language appears to refer to “genocide or other crimes against humanity” (Lechtholz-Zey, 2012). Slovakia makes specific reference to both crimes against humanity in general and those committed by the Nazi regime. To define what constitutes a crime against humanity, Slovakia considers anything that would satisfy the definition set forth by the International Criminal Court (Lechtholz-Zey, 2012). Malta forbids denying crimes against humanity when done to incite violence based on race, nationality, origin, or religion (Na’amat & Deutch, n.d.). By adding this limitation, the scope of Malta’s legislation becomes narrower than other countries. A specific intent must exist before Malta will criminalize denial which could act as a safeguard to those who fear government overreach.

The final commonality among the denial laws is that ten nations criminalize denying war crimes in addition to other acts. Of these countries, four limit the act to war crimes committed by the Nazi regime. Many times, war crimes follow crimes against humanity in the list of actions that cannot be denied. This makes sense when considering that many crimes against humanity are also war crimes. Crimes against humanity can of course be committed during peace time too; so, covering both crimes against humanity and war crimes ensure total coverage of violations against humanity.

Denial legislation is usually thought of as covering genocide or the Holocaust in particular, but in reality, these laws criminalize more than just genocide denial. Denying crimes against humanity and war crimes can result in the same penalty. Countries that limit their legislation to cover only Nazi-related crimes and genocide criminalize a small subset of behavior; nations that cover genocide in general as well as crimes against humanity and war crimes cover more behavior. For example, in Austria a person cannot deny the Holocaust or other Nazi-related crimes against humanity. This is probably because the purpose of the law is preventing the resurgence of Nazism. Conversely, in Liechtenstein a person is forbidden from denying any genocide or any crime against humanity. This prohibition covers a much broader scope of acts including the Armenian genocide, the Rwandan genocide, the massacres of Srebrenica and more.

2. Minimizing

Some countries have decided to go beyond simply criminalizing denial of genocide and include acts such as minimizing genocide. Minimizing genocide would reduce the importance of the act. This belittling of such an event could potentially cause damage to survivors and victims of genocide by diminishing their status. Dismissing or negating

victimhood to these survivors could serve as the first step toward re-victimization (Etlis, 2008). Many nations purport that their rationale for genocide denial legislation is an act of humanity by recognizing the suffering of others and to prevent reoccurrence (Weitz, 2008).

Fewer nations though have extended their denial legislation to cover minimization. Only twelve countries criminalize minimizing genocide (Table 2). Though, again there appears a split between those nations that cover the Holocaust and those covering other acts of genocide. Six countries forbid minimizing the Holocaust; six prohibit minimized genocide in general. Two of these nations have vaguely worded statutes in relation to whether they cover only the Holocaust or genocide in general which clearly also cover the Holocaust.

Table 2. States Criminalizing Minimization

Holocaust	Genocide	Crimes against humanity	War crimes
Austria	Hungary	Austria (Nazi)	Germany (Nazi)
Belgium	(Nazi)	Germany (Nazi)	Luxembourg (Nazi)
Germany	Liechtenstein	Israel (Nazi)	Macedonia
Israel	Macedonia	Liechtenstein	Slovakia
Luxembourg	Slovakia	Luxembourg (Nazi)	Slovenia
Slovakia	Slovenia	Macedonia	
Slovenia	Switzerland	Slovakia	
	Rwanda	Slovenia	
		Switzerland	

A case of minimizing genocide comes from Canada after Ernst Zundel published a booklet entitled “Did six million really die?” The book stated that there was no evidence to support the claim that six million Jews had died during the Second World War (R v. Zundel, 1992). This incendiary language questions the number of victims of the Holocaust in a disparaging way. Canada does not have a genocide denial law but Zundel was charged with spreading false news (R v. Zundel, 1992). His conviction was overturned on free speech grounds on appeal but his actions are those of someone who would minimizing the Holocaust by denying victimhood.

Of the twelve nations that criminalize minimizing genocide, nine further prohibit minimizing crimes against humanity. Only five countries criminalize minimizing war crimes. Again, some countries limit their laws to cover only Nazi-related crimes against humanity and war crimes. Austria and Israel prohibit minimizing Nazi crimes against humanity but not war crimes. Germany and Luxembourg criminalize minimizing Nazi crimes against humanity and Nazi war crimes. The remaining countries criminalize minimizing crimes against humanity and war crimes in general.

3. Justifying

Some countries have included in their denial legislation the act of justifying genocide. Perhaps somewhat contradictory in order to justify an action that action must first be recognized as occurring. So, to justify genocide is to recognize genocide occurred but claim the act was defensible or sanctioned by law (Black, 1968). By forbidding the

justification of genocide the state has moved beyond fear of denial to touch upon an area where the genocide itself is acknowledged but attempts are made to claim the act was proper or justifiable at the time.

Table 3. States Criminalizing Justification

Holocaust	Genocide	Crimes against humanity	War crimes
Austria Belgium Czech Republic France Luxembourg Slovakia	Andorra Colombia Liechtenstein Macedonia Rwanda Switzerland	Austria (Nazi) Czech Republic (Nazi) France (Nazi) Liechtenstein Luxembourg (Nazi) Macedonia Switzerland	Czech Republic (Nazi) Luxembourg (Nazi) Macedonia

As an example, while the Turkish government officially denies the 1915 Armenian genocide, other scholars acknowledge the acts but claim that they were justified by Armenian resistance (Lewy, 2005). Similarly, while there have been attempts to deny the Rwandan genocide, there have been justification attempts as well. These include shifting blame from the government to the RPF forces and an attempt to claim the acts were done in self-defense (Herman and Peterson, 2010). These actions come near denial but could also be seen as a form of justification since it must be acknowledged that the massacres occurred before an explanation can be offered.

In terms of criminalizing justification, only twelve nations have decided to prohibit the justification of the Holocaust or genocide in general. Six countries touched by the Second World War have criminalized justifying genocide. Another six countries have banned the justification of genocide in general, which would include the Holocaust as well, including Andorra, Colombia, Liechtenstein, Macedonia, Rwanda, and Switzerland.

Of note here is the inclusion of two non-European countries in Rwanda and Colombia. Rwandan law forbids justifying genocide which it defines as any act that would glorify, support, or legitimize genocide (Rwanda law N° 84/2013, Article 5). The Rwandan law was re-written to be more explicit in what actions were prohibited including the restriction that the act be deliberate and committed in public (Jansen, 2014). In the case of Colombia, the only South American nation with denial legislation, the law's language is somewhat ambiguous and difficult to interpret. However, the act of justification is clearly mentioned: "Whosoever, by any means spreads ideas or doctrines which cause or promote genocide or anti-Semitism or justify or claim to rehabilitate regimes or institutions espousing practices leading thereto shall be punished" (Colombia Penal Code, Article 102).

This somewhat vague law does not address denial directly which is why Colombia does not appear as a country that prohibits denial. Perhaps the rehabilitation claim could be stretched to cover denial, but it is not clear that that was the intent of the law. But the prohibition on justification does seem to apply to regimes and those who commit

genocide. This would appear to closely mirror other states attempts to rein in justification of these horrible acts.

In regard to what acts other than genocide are protected against justification, the list is narrow. Of the seven nations that forbid justification of crimes against humanity or war crimes, four countries limit the covered crimes to those committed by the Nazi regime. While seven countries protect crimes against humanity only three cover war crimes. The Czech Republic and Luxembourg which cover both crimes against humanity and war crimes limit this to acts committed by the Nazi regime. Only Macedonia covers all crimes against humanity and war crimes.

4. Approving

Only ten states criminalize the approval of genocide. Again though, to approve of genocide, it must be at least acknowledged to have occurred. Approval implies sanction, confirmation, or consent to an action (Black, 1968). Approval also seems to relate to justification by stating that genocide occurred but it was a “good” thing to happen. There could be times when approval and denial go hand in hand as well. One could acknowledge the death of the target population without labeling it genocide and then proceed to approve of the actions.

Table 4. States Criminalizing Approval

Holocaust	Genocide	Crimes against humanity	War crimes
Austria Belgium Czech Republic Germany Israel Slovenia	Latvia Macedonia Malta Slovenia	Austria (Nazi) Czech Republic (Nazi) Germany (Nazi) Israel (Nazi) Latvia Macedonia Malta Slovenia	Czech Republic (Nazi) Germany (Nazi) Latvia Macedonia Malta Slovenia

Turkey serves as an apt example again. Some Turkish diplomats acknowledge that Armenians died during the displacement but claim that it was a proper way of dealing with disloyal community members (Lewy, 2010; Guroian, 1986). Another example concerns the twisted logic of Holocaust deniers who may be forced to acknowledge massacres happened but attempt to give them the gloss of legitimacy. Austin App acknowledged the massacres at Lidice but claimed they were committed against political assassins which would be lawful (Lipstadt, 1994). This type of claim also borders on justification especially for App who rested on American law to support his claim (Lipstadt, 1994). Actions that cross more than one type of behavior, like justifying and approving, allow for broader prosecutions since the state could show either justification or approval occurred. For those states that have chosen to cover one type of behavior—justification—but not another—approval—could still see prosecutions if the behavior could reasonably fit more than one category.

In addition to approval of genocide, eight states criminalize approval of crimes against humanity. Half of those nations limited their coverage to crimes against humanity committed by the Nazi regime. Six countries extend their coverage to prohibit approval of war crimes, with two countries limiting it to Nazi war crimes.

5. *Doubting*

A bare three countries criminalize the doubting of genocide. Doubting these offenses implies that there is an “absence of a settled opinion or conviction” (Black, 1968: 579). A doubt also implies that a person could be persuaded or convinced of a fact with evidence. This may be why so few nations criminalize doubting genocide since there is still a chance of the individual recognizing their error with education instead of punishment. All countries prohibiting doubting limit the scope to the Holocaust and Nazi-related crimes against humanity and war crimes. The extent of information and data about these crimes is so great that it is difficult to believe that someone could still doubt their occurrence which may be why these nations have chosen to criminalize doubting since it would fly in the face of established knowledge.

Table 5. States Criminalizing Doubt

Holocaust	Genocide	Crimes against humanity	War crimes
Czech Republic Luxembourg	Hungary (Nazi)	Czech Republic (Nazi) Luxembourg (Nazi)	Czech Republic (Nazi) Luxembourg (Nazi)

In addition to the multiple actions that many states criminalize in their genocide denial laws most nations have formalized the way denial (or the other acts) could occur. Most of these manners concern the way in which the act is carried out so that others may learn of the denial. These manners include in writing, speech, publication, or other media format. The other important aspect to most denial legislation is that it occurs in public. So, a state may have broad coverage in terms of acts criminalized, but then narrow the scope by focusing on only certain manners of communication. These decisions will affect who and what behavior is brought into the legal realm.

6. *Publicly*

Patrick Devlin and H.L.A. Hart engaged in a debate in the 1960s over whether criminal behavior had to occur in public or could also occur in private. Devlin strongly believed that private conduct could violate the law and morals of society (Devlin, 1977). Hart disavowed this position and aligned more closely to John Stuart Mill and his harm principle. Mill’s argument was that society should only be concerned with behavior that poses a direct harm to others (Mill, 1981). Most nations have followed the harm principle by requiring behavior to occur in public before criminal liability attaches.

Of course, certain behavior is always criminal whether occurring in public or private such as homicide or sexual assault. But in those cases, an individual has been directly harmed by the conduct even if it occurs in private. The requirement of denial occurring in public would seem to assure that someone has been harmed by the conduct thus

requiring legal intervention. There would likely be few occurrences where denial in private would directly harm another.

A clear majority of the states criminalizing denial require the act to be done in public. Twenty of the states with denial legislation restrict coverage to publicly occurring acts. The only exceptions appear to be Israel and Colombia. Israel covers denial occurring in writing, by word of mouth, or publication but nowhere in the law is it required that these acts occur in public (Lechtholz-Zey, 2012). Assumedly a publication or act in writing would most likely be public, but the law would also conceivably cover speech in private situations. A parallel example can be seen in a case from the United States revolving around speech in public and private.

In 2005, the United States Congress passed the Stolen Valor Act which made it a criminal act to falsely claim to have won a military medal. Xavier Alvarez claimed to have won the Congressional Medal of Honor at a public meeting (U.S. v. Alvarez, 2012). As a result, he was convicted of violating the Stolen Valor Act. Alvarez then challenged the law as a violation of free speech. In finding the law unconstitutional, the Court mentioned that there was no distinction made between public and private speech (U.S. v. Alvarez, 2012). If left intact, the law could have penalized speech that occurred within one's own home without proof of harm. Israel's denial law appears to work the same way where denial can be punished whether it be done in public or private.

This broad coverage would concern those who see denial legislation as a restriction of free speech. Both Amnesty International and Human Rights Watch have criticized Rwanda's genocide denial law based on the fear of inappropriate prosecution (Uwizeyimana, 2014). In response, Rwanda amended the law to include that acts must be done in public (Uwizeyimana, 2014). For those countries considering denial legislation, the requirement of a public act may assuage some concerns over the reach of the government in private conduct.

Colombia's law also does not state that acts must be done in public. Though as mentioned above Colombia's law is relatively vague and interpretation is important. Colombia criminalizes spreading ideas or doctrines by any means (Colombia penal code, Article 102). There is a possible interpretation available here that would seem to apply to publicly done acts. To spread usually means to make widely known (Merriam-Webster, n.d.). Making something widely known would imply that it was or became public. Antonyms associated with spread include suppressing or concealing which more closely mirror private than public conduct. Though to avoid ambiguity, the statutory language should be clear without resort to verbal gymnastics.

The remaining countries with denial legislation clearly and unambiguously require that the act be done in public. Many states begin their denial law with language stating "whoever publicly" and then continue to define the crime in detail. Eight countries begin with the "whoever publicly" language including Germany, Hungary, Liechtenstein, Malta, Poland, Slovakia, Slovenia, and Switzerland (Lechtholz-Zey, 2012). The other countries explicitly state in the law that the act must be in public before liability attaches.

7. Modes of Communication

Beyond requiring that the act be done in public, before criminal liability applies, many states explicitly cover only certain modes of communication. The most popular forms of communication include writing or speech. Though, other countries include publications and other forms of media like images. An individual may face prosecution in one nation

for acts of writing but not face penalties in another country. While the attempt is probably to cover as many forms of communication as possible, the legislation can be muddled when trying to explain what acts are prohibited and what acts are not.

Table 6. States Criminalized Modes of Communication

Publicly	Writing	Speech	Publication	Other media
Andorra	Belgium	Austria	Austria	Andorra
Austria	Czech	Belgium	France	Austria
Belgium	Republic	Czech	Israel	Belgium
Czech	Germany	Republic	Luxembourg	Czech
Republic	Israel	Israel	Macedonia	Republic
France	Liechtenstein	Liechtenstein		Liechtenstein
Germany	Luxembourg	Luxembourg		Luxembourg
Hungary	Macedonia	Macedonia		Macedonia
Latvia	Portugal	Switzerland		Portugal
Liechtenstein	Switzerland			Switzerland
Luxembourg				
Macedonia				
Malta				
Poland				
Portugal				
Romania				
Rwanda				
Slovakia				
Slovenia				
Switzerland				

Legally, vagueness is a problem because it means the law is susceptible to not being understood (Black, 1968). This could lead to a legal challenge under the void for vagueness doctrine. Void for vagueness occurs when the law is written such that people “of common intelligence must necessarily guess at its meaning and differ as to its application” (Robinson, 2005, p. 356). As new forms of communication and technology emerge there could be challenges to whether “an information system” is clear enough to the public and the police as to whether liability should attach. The solution may be that it is clear enough, but the challenge itself would raise concern and uncertainty.

Other countries have tackled the issue of what modes of communication to cover differently. In Luxembourg, the law lists several types of communication that are prohibited: “speeches, shouts or threats made in public locales or at public meetings, whether through writing, printed matter, drawings, prints, symbols, pictures or any other aid to written, spoken or visual material . . . or by any audiovisual communication” (Luxembourg penal code, Article 457(3)). While listing several specific forms of communication, the ending phrase “any audiovisual communication” may again be an attempt to cover currently unknown forms of media that could emerge later. Though, another concern could emerge with use of the term audiovisual. Audiovisual usually

means that there is a relation to both hearing *and* sight. Would a song qualify as audiovisual if there is no involvement of sight? The issue seems minor but a legal argument could be made to undermine the law's intent.

Israel has a narrower scope than Austria, Macedonia, or Luxembourg. Israel prohibits action where “a person who, in writing or by word of mouth, publishes any statement” (Lechtholz-Zey, 2012). This language appears to cover only speech and writing that have been published. Many other forms of communication would not appear to be covered such as images or symbols. This is in contrast to many European countries that have denial laws explicitly to prevent the reemergence of socialism. Germany has banned the swastika in an attempt to prevent the rise of National Socialism. Whether a swastika would be prohibited by Israel's denial law is less clear. The symbol itself is not writing or word of mouth. The law requires publishing any statement, most statements occur via writing or speech. A swastika would be a statement via visual image which may not be prohibited by the plain language of the statute.

Perhaps to avoid misinterpretation of what actions are or are not prohibited, Andorra and Colombia have language that simply states denial committed by “any means” is forbidden (Andorra penal code, Article 457-458; Colombia penal code, Article 102). This would seem to broaden coverage without resorting to a long list of prohibited modes of communication. An argument could be made that “any means” covers images and gestures in addition to speech and writing. The other side of this coin would be those countries that do not mention any specific form of communication. Five countries simply ban denial occurring in public without delving into what form of communication the denial must take. Romania very succinctly states that “Denial of the Holocaust in public” is a criminal act (Romania emergency ordinance No. 31, Article 6). Rwanda punishes any act of denial, minimization, or justification “committed in public” (Rwanda law N° 84/2013). The same is true of Poland, Slovakia, and Slovenia who punish anyone who acts publicly without referral to specific modes of communication. By not listing specific forms of communication punished, these countries avoid having to change the list when confronted with new technology. By simply requiring the act to be done in public, they are likely to cover myriad modalities.

Discussion

In 1988, President Reagan said that “facts are stupid things” (Gey, 2008, p. 1). More recently, President Trump claimed that millions of illegal aliens voted in the 2016 election without any evidence to support his claim. When challenged about the claim on National Public Radio, a Trump surrogate said, “There's no such thing, unfortunately, anymore as facts” (Huppke, 2016). When high-ranking politicians can claim that facts are stupid or simply don't exist, the protection of history and of memory rises in importance. Genocide denial legislation is one way to protect facts from false accusations and repetition of horrendous acts of cruelty against humankind.

If an event the magnitude of the Holocaust can be denied in its entirety it is not much of a stretch to deny the intentions and motivations of the perpetrators (Charney, 2000). Once those intentions have been relegated to falsehood or denied outright, a path to reoccurrence emerges. It should not be forgotten that words have power. Words can have the effects of bullets (Salomon, 2007). The Genocide Convention recognizes this fact by criminalizing the public incitement to genocide as a separate, punishable offense (Salomon, 2007). If words can have this great power and effect then it is reasonable to

prohibit genocide denial because denial could lead to the re-emergence of the crime in future generations.

There are other reasons to criminalize denial as well including protection of human dignity and limiting the scope of hate speech (Tsesis, 2009). Whatever the reason for passing denial legislation, any state concerned with doing so should consider the purpose of the law and the scope. As has been seen, some countries are rather narrow in what actions are prohibited while others are much broader in coverage. Any nation looking to pass such legislation needs to assess both what actions are forbidden (denial, minimization, etc.) and what forms of communication are covered (writing, speech, etc.).

Next a country needs to decide what forms of communication are covered by the law. A primary concern of most of the existing denial laws is that the act be done in public. This ensures that private conversations or actions within private homes are not interfered with by the government. For civil liberties purposes, this distinction is very important as the invasion of the home and private sphere by the government can indicate a repressive regime. But then the types of communication must be considered because there are myriad ways to deny genocide and countries vary on what they currently prohibit.

Denial occurring via speech and writing appear to be the most commonly covered actions. Currently, eleven countries prohibit denial via writing or publication; eight countries prohibit denial via speech. The eight countries that criminalize denial via speech also do so for denial via writing/publication. In addition, nine countries prohibit communication via other forms of media like images or symbols. One country, Andorra, prohibits denial via “any means” thereby seemingly covering speech, writing, images, symbols, and perhaps more.

Eight countries do not elaborate on what forms of communication are prohibited. These countries tend to use broad language that could be interpreted to cover many types of communication. Five nations (Hungary, Latvia, Poland, Romania, and Rwanda) criminalize anyone who denies publicly. These broad scope laws would seem to cover writing, speech, images, symbols, and more. Though without specificity these laws could be considered vague because an individual may not know if their behavior is illegal or not by reading the law. The remaining three countries that do not list what types of communication are prohibited do add an element to their laws which acts as a hurdle for prosecution. Malta, Slovakia, and Slovenia criminalize public denial that would incite violence or hatred of a group based on race, ethnicity, religion, or nationality. This appears to tie the purpose of their denial legislation to prevention of violence and hatred that occurs via any form of communication.

What the statutes of Malta, Slovakia, and Slovenia show, in addition to having broad scope coverage of communication, is that denial legislation can be used as a counter to racial discrimination. At least three other countries use their denial laws to counteract discrimination. Macedonia punishes genocide denial with imprisonment from one to five years. However, if the denial is committed with the intention of discriminating because of race, nationality, ethnicity, or religion, the minimum punishment is four years. Portugal criminalizes denial when done with “intent to encourage or incite to racial or religious discrimination” (Lechtholz-Zey, 2012)

Switzerland criminalizes genocide denial when it discriminates against an individual based on race, ethnicity, or religion.

Conclusion

For whatever reason and for whatever rationale, genocide denial is a blatant lie with the potential to cause serious effects. Many times, denial is simply a precursor to bigotry and hatred. Denial also attempts to change the role of victim and perpetrator. The victims and survivors may be denied the status as victim. Denial of victim is a technique of neutralization that often permits individuals to continue to victimize others because they actively deny that there is a victim (Alvarez, 1997). If on an individual level, denial of victim can assuage perpetrators feelings enough to commit crime, then genocide denial may serve as an early indicator of genocide reprisal.

Two other techniques of neutralization involve denial: denial of responsibility and denial of injury. Genocide denial often involves denial of responsibility (Turkey) or denial of injury (no Jews or fewer than 6 million were killed). By criminalizing denial, states have decided that lying has such negative consequences that it should be prevented by the force of law. A country may choose to go narrow in coverage like Romania: “Denial of the Holocaust in public, or to the effects thereof is punishable by imprisonment from 6 months to 5 years and the loss of certain rights” (Romania emergency ordinance no. 31, Article 6). Or a country may choose to go broad in coverage like Liechtenstein: “Whoever publicly denies, coarsely trivializes, or tries to justify genocide or other crimes against humanity via word, writing, pictures, electronically transmitted signs, gestures, violent acts or by other means shall be punished with imprisonment for up to two years” (Liechtenstein penal code, Article 283).

No matter how a state chooses to criminalize denial, the message is the same: public denial of historical fact will not be accepted. The side benefits of such laws include protection of the victims, protection of memory, and ideally prevention of future atrocities.

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