# Responsibility

for negation of

international crimes

edited by

Patrycja Grzebyk

# Table of Contents

## Introduction 13

	,			
AGNIESZKA	RIENO	$\cap$ 7 V K	- MICC	ΔΙΔ

## The Causes and Consequences of Negationism 19

Causes 20

Consequences 24

## CHARIS PAPACHARALAMBOUS

## **Incrimination of Negationism:**

## Doctrinal and Law-Philosophical Implications 3

- 1. Introduction 31
- 2. Criminal Law Theory 32
- 3. Law-philosophical implications 35
  - 3.1. On criminal law meta-theory 35
  - 3.2. Theorizing on ethics and justice 37

### PIERGIUSEPPE PARISI

# The Obligation to Criminalise Historical Denialism in a Multilevel Human Rights System 41

Introduction 41

- Does general international law provide for an obligation to criminalise denialism? 42
  - 1.1. Freedom of speech and possible limitations under international human rights law 42
  - 1.2. The case law of the UN Human Rights Committee

### 6 · Table of Contents

- 2. Regional Level 46
  - 2.1. European Union 47
  - 2.2. Council of Europe 49
- 3. Conclusion: The role of criminal law 52

#### MARCIN GÓRSKI

The Art of Negationism. Balancing Freedom of Artistic Expression and the Right to Truth? 55

IRENEUSZ C. KAMIŃSKI

# Debates over History and the European Convention on Human Rights 69

- 1. Introduction 69
- 2. Denial speech cases 72
- 3. Speech regarding the events of World War II (other than denial speech) 76
- 4. Concluding remarks 82

## ALEKSANDRA GLISZCZYŃSKA-GRABIAS

# The Jurisprudence of the European Court of Human Rights in the Area of Europe's Totalitarian Past – Selected Examples 85

- 1. Introductory remarks 85
- 2. ECtHR on the Fascist and Nazi past 86
- 3. Was Stalin as Bad as Hitler?Was communism as evil as Nazism? 88
- 4. Concluding remarks 91

## ALEKSANDRA MĘŻYKOWSKA

History Distortion Cases – Protection of Personal Rights of Victims of Denied Crimes in the Jurisprudence of the European Court of Human Rights 93

#### ALEXANDER TSESIS

## Genocide Censorship and Genocide Denial

Contrasting genocide censorship and genocide denial laws 107 Polish victimhood, perpetration, & negation Comparative analysis of genocide denial and genocide censorship laws 113 Conclusions 117 Acknowledgement 119

ŁUKASZ POHL

KONRAD BURDZIAK

Holocaust Denial and the Polish Penal Law -**Legal Considerations** 123

## BOGUSŁAW LACKOROŃSKI

Safeguarding the Good Repute of the Polish State and Nation (Art. 530-53q of the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation) 139

- 1. Introductory notes
- 2. Scope of reference legal regime for the protection of the good repute of the Republic of Poland and the Polish Nation
- 3. The subject and extent of protection under Art. 530 of the IPN Act 143
- 4. Active and passive standing to assert the right of protection of the good repute of the Republic of Poland and the Polish Nation 147
- 5. Local jurisdiction of Polish courts and jurisdiction in cases regarding protection of the good repute of the Republic of Poland and the Polish Nation
  - 5.1. Domestic jurisdiction in regard of entities domiciled, habitually resident or with a registered office in Poland 152

#### 8 · Table of Contents

- 5.2. Basis for determining jurisdiction in defending the good repute of the Republic of Poland and the Polish Nation against entities domiciled, habitually resident or with a registered office outside of Poland 153
- 6. Outline of conflict-of-law rules Art. 53q of the IPN Act 159
- 7. Summary 161

### KLAUS BACHMANN

# Civil Law and the Amendment of German and Polish Memory Laws 167

- 1. Civil law and the ban on Holocaust denial in Germany 168
- Civil law and the Polish IPN law amendments 173
  Conclusions 176

### MATTHIAS FAHRNER

# Back to the Roots – the Obligation(s) to Punish Negationism in Germany 179

- A. Introduction 179
- B. Criminal Offences of Negationism in Germany 180
- C. International Legal Obligation(s) 182
- D. The European Union 183
- E. Constitutional obligations 185
  - I. Constitutional starting points 186
  - II. Violation by negationism 189
  - III. Obligation to punish 189
- F. Conclusions 191

### VERONIKA BÍLKOVÁ

## The Punishment of Negationism - the Czech Experience 195

- 1. Legislative history of par. 405 of the Czech Criminal Code 196
- 2. Case-law related to par. 405 of the Czech Criminal Code 197
- 3. Analysis of par. 405 of the Czech Criminal Code 199
  - 3.1. The right to freedom of expression 200
  - 3.2. The principle of legality (nullum crimen sine lege) 202
- 4. Concluding remarks 205

### TAMÁS HOFFMANN

# The Punishment of Negationism in Hungarian Criminal Law – Theory and Practice 207

- I. Introduction 207
- II. The legislative history of the legal regulation of denial of authoritarian crimes in Hungarian criminal law 207
  - II.1. The criminalization of the public denial of the Holocaust 208
  - II.2. The criminalization of the public denial of the crimes of national socialist and communist regimes 210
- III. Constitutional Court Decision no. 16/2013 212
- IV. The crime of the public denial of the crimes of national socialist and communist regimes in judicial practice 214
- V. Conclusions 216

#### ANDRII NEKOLIAK

## Regulating Memory through Responsibility for Historical Denialism: The Case of Unempowered Norms in Ukraine 219

## NEDŽAD SMAILAGIĆ

## Negationism and Atrocity Crimes Committed in the Former Yugoslavia: Criminal Law and Transitional Justice Considerations 225

- 1. Introduction 225
- 2. Towards International Law on Prohibition of Negationism 228
- Criminal law prohibition of negationism in the former Yugoslavia: comparative overview and assessment 233
  - 3.1. Full compliance with the 2008 Framework Decision 234
  - 3.2. Partial compliance with the 2008 Framework Decision 236
  - 3.3. North Macedonia and Kosovo 239
  - 3.4. Comparative assessment 240
- 4. Narrowing the space for negationism:Some transitional justice policy considerations 241
- 5. Conclusions 244

### GRAŻYNA BARANOWSKA

## Penalizing Statements about the Past in Turkey 249

- 1. Introduction 249
- 2. Art. 301 and its role in criminalizing statements about the past 251
- Statements about the past penalized under other criminal provisions 254
- 4. Conclusions 256

### DIMITRIOS KAGIAROS

### VASSILIS P. TZEVELEKOS

# The Importance of State Practice in the Shaping of International Standards Pertaining to the Clash between Free Speech and the Banning of Negationism:

## The Contribution of the Greek Legal Order 259

- 1. Encounters between law and history 259
- 2. The movement towards the prohibition and criminalisation of negationism, the absence of clearly established criteria for that purpose and the tension with freedom of expression 263
- 3. Resolving the tension between freedom of expression and the banning of negationism: a matter of law or rather a value judgment? 269
- 4. Why state practice on the banning of historical negationism matters and what can the Greek legal order teach us? 277
  - 4.1. Lack of consensus within Europe and the potential of state practice from a theoretical point of view 278
  - 4.2. Lessons from the criminalisation of negationism within the Greek legal order 280
- 5. Conclusions 286

### ATHANASIOS CHOULIARAS

# Criminalizing Negationism in Greece: Legislative Choices and Judicial Application 291

- 1. Introduction 291
- 2. The political justification of the punishment of negationism 292
- 3. The prerequisites and limits of punishment of negationism in the European public order 295
- 4. Conclusions 300

## BARTŁOMIEJ KRZAN

Report on the First Day of the International Scientific Conference "The Punishment of Negationism Memory Law – International Crimes and the Problem of the Denial" 301

## KAROLINA WIERCZYŃSKA

The Punishment of Negationism in the Experience of Central, Eastern and Southern European States. Summary of the Second Day of the Conference 305

Biographical Notes 313