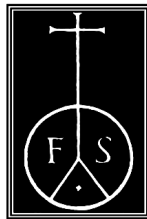


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OF EXPRESSION ABOUT THE PAST

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# Limits to the Freedom of Expression about the Past: An Introduction

Antoon De Baets

**ABSTRACT** · In this introduction, the topic of limits to the freedom of expression about the past is presented. Offering a menu of options, I attempt to give an impression of this complicated field revolving around the deceptively simple question: what can we say about the past? I briefly raise each of the topics of this Special Issue, explaining where they deliver an innovative contribution to this question.

**KEYWORDS** · Commemoration, Denial of crimes, Eternal regression, Freedom of opinion and expression, Framing, Hate speech, Limits to free expression, Limits of limits to free expression, Memory, Memory laws, Minimization of crimes, National security, Privacy, Public health, Public morals, Public order, Reputation, Seized archives, Tradition.

## I.

**T**HE Great Pandemic, as I prefer to call the present COVID-19 crisis, has inverted the usual order of things: first a conference, then a publication. Indeed, the present Special Issue was supposed to be the outcome of a round table organized with the support of the International Commission for the History and Theory of Historiography within the context of the 23<sup>rd</sup> International Congress of Historical Sciences in Poznań in August 2020. However, the congress was postponed twice – until August 2022 – and meanwhile the papers for that round table have been written and endlessly updated. What they lost in terms of feedback, they won in terms of reflection. The editors of this Journal then kindly offered their forum for this collection: when the apple is ripe, it should be harvested.

This Special Issue is the sequel of another Special Issue which in its turn was the outcome of a panel organized at the 21<sup>st</sup> International Congress of Historical Sciences in Amsterdam in August 2010. The collection of that round table was published in this Journal under the title “History and Human Rights”.<sup>1</sup> The contributions of a decade ago addressed and reflected the upsurge of interest in human rights and ethics. They epitomized ‘history’s moral turn’.<sup>2</sup> In comparison, the present Special Issue is more specific. It explores the limits to the freedom of expression about the past. Surprisingly, notwithstanding its obvious interest for anyone interested in the past, this has not been a widely studied subject. The questions of departure are simple, or rather, look simple: What can we say about the past? Everything? Or are there

<sup>1</sup> “History and Human Rights: Special Issue”, *Storia della Storiografia / History of Historiography*, 59-60 (2011): 43-149.

<sup>2</sup> The contributions were Antoon De Baets, “Introduction”; Toby Mendel, “Reflections on Media Self-regulation: Lessons for Historians”; Floribert Baudet, “Ranke and Files: History and the Military”; Bo Zhao, “Public Figures and Their Posthumous Reputation”; Hara Kouki, “Human Rights, the Cold War and Social Movements: The Story of an Encounter in the 1970s”; and Antoon De Baets, “Historical Imprescriptibility”.

limits to our free expression about the past? Which expression is allowed and which is not? Which expression is protected and which is not? How do we call expression that is not allowed or protected? Taboos? Censorship? Hate Speech? And most important of all, if the free expression about the past has limits, what are the limits to these limits?

In this digital era, individuals are pursuing their quest for identity and roots as passionately as ever. Polemics rage on internet platforms, spawning countless stories about the past. While some historical statements are made responsibly, others fabricate, falsify, plagiarize, or deny historical evidence. People mentioned in these statements or their relatives sue the authors with privacy or defamation claims. Governments impose secrecy on national security information or ban commemorations on public order grounds. States prescribe official narratives via memory laws and proscribe selected views under hate speech bans. These converging developments raise the question what the legal limits to our freedom of expression about the past are. Historians rarely acknowledge that the answer requires a balancing act between free expression and competing interests which may seriously affect their approaches.

The crux is that freedom of expression as a right is universal but not absolute. It has its limits. And these limits also have their limits. The core international standards about free expression are set out clearly in international law. Article 19.2 of the International Covenant on Civil and Political Rights (ICCPR) tells us that freedom of expression includes the freedom to seek, receive and impart information and ideas. Article 19.3 of the ICCPR regulates the limits to this freedom in private and public areas: any restrictions must be provided by law and necessary for respecting the rights of others or the reputations of others, or for protecting national security, public order, public health, or public morals. Article 20 of the ICCPR complements this free-expression regime by requiring states to prohibit war propaganda and hate speech by law. Together, these standards have withstood the test of time. They help judges resolve conflicts between historians and third parties. If one were invited to compile a menu of issues and problems, it could be as follows:

- *Limits to free expression about the past to protect private interests*: the rights of others, particularly the right to privacy, the right to data protection and the right to be forgotten, including issues of posthumous privacy, internet archives and copyright; the right of all to history education; the right of others to a reputation, particularly the defamation and insult of public historical figures, of states and of national symbols, and issues of posthumous reputation.
- *Limits to free expression about the past to protect public interests*: national security, including state secrecy about past events; public order in relation to peaceful public commemorations and to activities of historical associations; public health and the censorship of information about past disasters, plagues, and diseases; public morals, including memory laws and restrictions in the name of 'tradition', 'custom', 'national pride', 'protection of memory' or 'insult to the fatherland'; the existence of secret laws and of surviving or dormant provisions of dictatorship-era laws in democracies.
- *Hate speech* related to history and the dead, including blasphemy and genocide denial, and war propaganda referring to past wars and atrocities.

Historians are bad predictors and when I wrote the phrase “public health and the censorship of information about past disasters, plagues, and diseases” in the first draft of the round table program proposal, in December 2016, I thought that this was the least attractive topic of all to study. More than four years later, one has become sadder and wiser. Seasoned democracy watchers such as Freedom House, the Economist Intelligence Unit, the International Institute for Democracy and Electoral Assistance, and the V-Dem Institute all converge in their thinking that the COVID-19 crisis contributes disproportionately to the backsliding of democracy.<sup>3</sup> Likewise, astute human rights observers such as the United Nations Special Rapporteur for Freedom of Opinion and Expression and the Centre for Law and Democracy have emphasized that the COVID-19 crisis tends to diminish freedom of expression worldwide.<sup>4</sup> Historians have surely encountered problems in their work leading to retaliation against them under the pretext of COVID-19 (ranging from harassment under the radar and blocked archival access to dismissal). In addition, it is a fact that historians that have been or still are in prison in the present crisis (e.g., Yuri Dmitriev in Russia or Maâti Monjib in Morocco) were or are at increased risk of COVID-19 infection.<sup>5</sup>

## II.

In fact, almost nobody predicted the Great Pandemic. Accordingly, none of the five contributions to this Special Issue, commissioned in 2019, touches public health as a limit to the freedom of expression. Rather, they deal with some of the other, equally important, limits. In my own contribution,<sup>6</sup> “Memory and Tradition as Limits to the Freedom of Expression about History”, I depart from the three concepts history, memory, and tradition. I ask what happens when issues of memory and tradition limit, trump, or swallow issues of history. Indeed, the interest in historical writing can be restricted by the interest in the memory of the dead or the interest in the tradi-

<sup>3</sup> See Freedom House, *Democracy under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom* (Washington DC: Freedom House, 2020); The Economist Intelligence Unit, *Democracy Index 2020: In Sickness and in Health?* (London: EIU, 2021); IDEA, *The Global State of Democracy in Focus: Special Brief (Taking Stock of Global Democratic Trends Before and During the COVID-19 Pandemic)* (Stockholm: IDEA, 2020); V-Dem Institute, *Autocratization Turns Viral: Democracy Report 2021* (Gothenburg: V-Dem Institute, 2021).

<sup>4</sup> See *Disease Pandemics and the Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/HRC/44/49) (23 April 2020); Access Info Europe and Centre for Law and Democracy – The Right to Information Rating, *COVID-19 Tracker* (23 September 2020), <https://www.rti-rating.org/covid-19-tracker/>. For the impact of COVID-19 on conflict zones, see the dedicated page at the International Committee of the Red Cross website: <https://www.icrc.org/en/what-we-do/covid-19-pandemic>; for the impact of COVID-19 on academic freedom, see Parliamentary Assembly of the Council of Europe (Committee on Culture, Science, Education and Media), *Threats to Academic Freedom and Autonomy of Higher Education Institutions in Europe: Report* (Rapporteur: Koloman Brenner) (Doc. 15167) (16 October 2020), §§ 76-83.

<sup>5</sup> For overviews of historians in prison, consult the *Annual Reports* of the Network of Concerned Historians at <http://www.concernedhistorians.org/content/ar.html>.

<sup>6</sup> Building in part on earlier work such as my “The Impact of the *Universal Declaration of Human Rights* on the Study of History”, *History and Theory*, 48, 1 (2009): 20-43; “The United Nations Human Rights Committee’s View of the Past”, *Law and Memory: Towards Legal Governance of History*, ed. by Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge: Cambridge University Press, 2017), 29-47; and “Laws Governing the Historian’s Free Expression”, *The Palgrave Handbook of State-Sponsored History After 1945*, ed. by Berber Bevernage and Nico Wouters (London: Palgrave-MacMillan, 2018), 39-67.

tion of the ancestors. I ask how that is possible in light of the fact that the official list of limits mentioned in the ICCPR – the rights or reputations of others, the protection of national security or of public order, or of public health or morals – does not mention memory and tradition. I discovered that in certain circumstances memory and tradition can be seen as avatars of some of these recognized interests, particularly ‘the rights or reputations of others’ for memory and ‘public morals’ for tradition. Such a reinterpretation of memory and tradition is sometimes justified, but more frequently it is abusively reframed. Once this reframing technique is understood, it is not difficult to connect the rich discourse about memory and tradition to the rich discourse about human rights. In so doing, the human rights approach to the past clarifies if and when the interests in history, memory, and tradition are justified. As such, it is a powerful illustration of what a human rights approach can contribute to history-related issues.

In “Negotiating the Delicate Boundary between History and Hate Speech”, Toby Mendel has tackled what is in my view the most difficult subject in the area of limits to the free expression about the past: the boundary between history and hate speech. At first sight, the difference is clear and simple: talking about the past is a genuine form of freedom of expression and therefore the general regime of limitations on freedom of expression in article 19.3 of the ICCPR is applicable to the subfield of history. Hate speech is another matter: although it is a form of expression, much doubt persists as to whether and when it is protected by the right to freedom of expression. Past-related hate speech has become more common. For example, during the 1994 genocide in Rwanda, many murders were inspired by distorted historical views. Radical Hutus believed that the Tutsis were foreigners in Rwanda, where they were supposed to have settled following their arrival from the Nilotic regions. Therefore, Tutsi bodies were systematically thrown into the Nyabarongo river, a tributary of the Nile, apparently to “send the Tutsis back to their place of origin” and to “make them return to Abyssinia”.<sup>7</sup>

The reach of states is far wider for hate speech than for freedom of expression in that its restriction is not optional but mandatory. According to the ICCPR, states have a duty to enact laws prohibiting hate speech. This means that, while all freedom of expression can be limited, hate speech statements should not only be limited but also prohibited by law. Mendel carefully unpacks the numerous complex issues this requirement raises. As the Executive Director of the Centre for Law and Democracy, he has been a veteran and prolific human rights lawyer for at least three decades. It is a well-known secret that he has been the mastermind and intellectual author of more than twenty annual Joint Declarations drafted by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.<sup>8</sup> Versed in

<sup>7</sup> International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu: Judgement* (Case No. ICTR 96-4-T) (2 September 1998), § 120 and note 54. See also De Baets, “Laws”, 58.

<sup>8</sup> See *Joint Declarations of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression* (Vienna: OSCE Representative on Freedom of the Media, 2013), for the declarations between 1999 (which



the foundational rights for democracy, including access to information and freedom of expression, he has dealt with the hate speech problem repeatedly in the past.<sup>9</sup> Those who think that historical writing is far removed from disinformation<sup>10</sup> and hate speech should read his contribution to appreciate all the assessment criteria that demarcating the border zone between them entails. As in my own contribution, re-framing techniques play a central role here because past-related hate speech usually poses as genuine historical research.

Whereas Mendel approaches the limits to free expression from a human rights lawyer's perspective and I do so from a historian's viewpoint, Trudy Huskamp Peterson's contribution, "The Fate of Seized Archives: Retained, Returned, Destroyed", is written from the angle of the archivist looking at historical records, that is, at the infrastructure of historical writing. She rightly posits that the concealment and destruction of the raw materials with which history is written are limitations of the free expression about the past. Her study is unique: for the first time, the problem of what police do with documents seized from individuals and institutions is investigated from the archivist's perspective. Three final destinations of such documents are possible: they are returned to their owners, they are retained (and more often than not disappear into a limbo), or they are destroyed. Huskamp Peterson depicts the impressive variety of seizures and final destinations of records. Her study is also unique in another sense: due to her worldwide network of archivists, she has been able to probe the situation in a dozen countries. This gave her already unusually broad data collection an original twist, with which she has been able to draw some prudent comparative conclusions about the justifications for giving a particular destination to seized records.

The preoccupation of the International Council on Archives (ICA) with human rights dates back to at least the mid-1990s when it adopted a *Code of Ethics*.<sup>11</sup> It is no exaggeration to say that Huskamp Peterson is a pioneer of human rights awareness in the world of archivists, not least as the chair of the ICA Human Rights Working Group between its foundation in 2009 and 2016, as the editor of its monthly bulletin *News from the Section on Archives and Human Rights* (December 2009-present),<sup>12</sup>

was the first) and 2012 (Mendel's "History of the Joint Declarations" is on pages 9-12). For the declarations between 2010 and 2021 in Arabic, English, French, Russian, and Spanish, see the website of the Centre for Law and Democracy (<http://www.law-democracy.org/live/legal-work/standard-setting/>) and the OSCE website (<https://www.osce.org/fom/66176>).

<sup>9</sup> See, among others, his *Study on International Standards Relating to Incitement to Genocide or Racial Hatred – For the UN Special Advisor on the Prevention of Genocide* (April 2006), 78 pages; *Hate Speech Rules under International Law* (February 2010), 10 pages; *Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression* (March 2010), 23 pages; and *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights* (Halifax: CLD, 2012), 91 pages, at <https://rm.coe.int/16806f5bb3>.

<sup>10</sup> *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda* (3 March 2017), <https://www.law-democracy.org/live/legal-work/standard-setting/>; Centre for Law and Democracy, *Submission to UN Special Rapporteur for Freedom of Expression on an Annual Thematic Report on Disinformation* (March 2021), 30 pages.

<sup>11</sup> For the ICA *Code of Ethics* and related documents in various languages, see the website of the Network of Concerned Historians, <http://www.concernedhistorians.org/content/ethicarchi.html>.

<sup>12</sup> For the complete series of Newsletters of the Section on Archives and Human Rights, see <https://www.ica.org/en/sahr-newsletters>.

and as the author of numerous reports on the subject.<sup>13</sup> In comparison with this impressive ICA work, the International Committee of Historical Sciences is lagging behind: although awareness of human rights problems in the study of history and the plight of historians has been omnipresent in the historical profession for decades, it also stays largely subliminal: often at the back of the mind, seldom on the tip of the tongue.

One exception to this dimmed awareness may be memory laws: laws that prescribe or prohibit certain views of historical figures, symbols, dates and events.<sup>14</sup> Memory laws have puzzled historians over the years. They partially overlap with genocide denial laws and hate speech laws.<sup>15</sup> One of the foremost authorities on human rights, the United Nations Human Rights Committee, has been very critical of both genocide denial laws<sup>16</sup> and memory laws.<sup>17</sup> The reason is that such laws are problematic if they reject historical facts or historical opinions on the basis of their *content* alone and neglect factors such as intent, audience, circumstances, and context accompanying the expression of such content. The contributions of Luigi Cajani and Nikolay Koposov dissect this phenomenon in all its variations.

In “Memory Laws before ‘Memory Laws’”, Nikolay Koposov had to resolve the old problem of eternal regression. Long ago, Ernst Nagel described the problem as follows:

[S]ince every causal condition for an event has its own causal conditions, the event is never properly explained unless the terms in the entire regressive (and theoretically endless) series of causal conditions are also explained. [...] But is violence being done to the truth by stopping at some arbitrary point in the regressive series?<sup>18</sup>

Nagel’s answer is a resounding ‘No’:

[O]nce the event to be accounted for is made reasonably definite, it is self-contradictory to maintain that a historian’s explanation of the event is objectively warranted only if he first

<sup>13</sup> See her “Proof”, *Archives and Human Rights*, ed. by Jens Boel, Perrine Canavaggio and Antonio González Quintana (London: Routledge, 2021), 83-112; *The Universal Declaration of Human Rights: An Archival Commentary* (2019), <https://www.ica.org/en/the-universal-declaration-of-human-rights-an-archival-commentary>; *Final Acts: A Guide to Preserving Records of Truth Commissions* (Baltimore, MD: Johns Hopkins University Press, 2005); *Temporary Courts, Permanent Records: Special Report* (Washington, DC: United States Institute of Peace, 2006); and *The Probative Value of Archival Documents* (Bern: Swisspeace, 2014). See also Valentina Cadelo and Trudy Huskamp Peterson, “Principle 14: Measures for the Conservation of Archives”; “Principle 15: Measures for Facilitating Access to Archives”; “Principle 17: Specific Measures Relating to Archives Containing Names”, *The United Nations Principles to Combat Impunity: A Commentary*, ed. by Frank Haldemann and Thomas Unger (Oxford: Oxford University Press, 2018), 163-180, 188-197.

<sup>14</sup> De Baets, “Laws”, 47.

<sup>15</sup> For the difference between defamation laws, insult laws, memory laws, blasphemy laws, genocide denial laws, and hate speech laws, see De Baets, “Laws”, 47-62.

<sup>16</sup> United Nations Human Rights Committee, *Communication No. 550/93: Faurisson v. France* (UN Doc. CCPR/C/58/D/550/1993) (16 December 1996), § 9.2-9.3, 9.5, 9.7, and concurring opinions by Nisuke Ando, Elizabeth Evatt, David Kretzmer, Eckart Klein, Cecilia Medina Quiroga, Rajsoomer Lallah, and Prafulachandra Bhagwati.

<sup>17</sup> United Nations Human Rights Committee, *General Comment 34* [Freedoms of opinion and expression] (UN Doc. CCPR/C/GC/34) (September 2011), § 49 (referring, inter alia, to the Faurisson case from note 16).

<sup>18</sup> Ernst Nagel, “Problems in the Logic of Historical Inquiry”, Nagel, *The Structure of Science: Problems in the Logic of Scientific Explanation* (or. ed. 1960; Indianapolis and Cambridge: Hackett, 1979), 547-606, here 578.

completes a series of explanations each term of which is an explanation for the data assumed in the previous one.<sup>19</sup>

Accordingly, for Koposov, the question was whether it makes any sense to do research into the prehistory of memory laws, which are largely a post-1985 phenomenon; the concept itself was coined in the 2000s. His incisive exposé shows that this is not only possible but also recommended, even indispensable. He has patiently reconstructed the tendency to mold history in a legal straitjacket since the French Revolution. Analyzing edicts and laws over two centuries and observing commemorations of heroes and victims, he points to mechanisms such as the condemnation of memory, and developments such as the pantheonization of heroes, the recognition of competing memories ('multimemorism'), and the rise of a victim-centered remembrance culture. Steeped in three cultures – Russian, European, and American – Koposov's broad and firm grasp of memory laws, evident from previous publications,<sup>20</sup> is particularly rewarding here.

The contribution of Luigi Cajani, "History in the Dock: The Legal Approach to the Denial of Historical Crimes", can be read in conjunction with the previous article. To his credit, Cajani is one of the historians most consistently paying attention to the use of memory laws and genocide denial laws to regulate history over the years. He did so particularly in the run-up and in the wake of the famous Framework Decision on Combating Racism and Xenophobia of the European Union in 2008.<sup>21</sup> He was the initiator of a discussion about this major legal initiative in the General Assembly of the International Committee of Historical Sciences (ICHS), which adopted the following motion in September 2007:

1. ICHS is deeply concerned with this complex matter of the possible intrusion of the power of the law into historical research. 2. ICHS urges all its members to examine more closely this question and initiate discussion among their own members. 3. ICHS proposes to set up a special session in Amsterdam in 2010, on the theme 'Historical research, ethics and law'.<sup>22</sup>

The special session of 2010 mandated by this motion was one of the highlights of the 21<sup>st</sup> International Congress of Historical Sciences in Amsterdam. Presided over by Cajani, it heard reports by Pierre Nora, Jörn Rüsen, Antonis Liakos, and Paolo Pezzino. With indomitable energy, Cajani himself has published about the subject for many years.<sup>23</sup> His present contribution carefully unpacks the concepts of denial and

<sup>19</sup> Nagel, "Problems", 579.

<sup>20</sup> See his *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2017); and "Defending Stalinism by Means of Criminal Law: Russia, 1995-2014", *Law and Memory*, ed. by Belavusau and Gliszczyńska-Grabias, 293-309.

<sup>21</sup> European Union, "Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law", *Official Journal of the European Union* (2008): L328/55-L328/58.

<sup>22</sup> General Assembly of the International Committee of Historical Sciences held at the Chinese Academy of Social Sciences in Beijing (17-18 September 2007), point 6, <https://www.cish.org/wp-content/uploads/2015/09/EN-Assembly-Beijing-sept2007.pdf>.

<sup>23</sup> See his "Legislating History: The European Union and the Denial of International Crimes", *Law and Memory*, ed. by Belavusau and Gliszczyńska-Grabias, 129-147; "Criminal Laws on History: The Case of the European Union", *Historein*, 11 (2011): 19-48; "Diritto penale e libertà dello storico", *Riparare Risarcire Ricordare: Un dialogo tra storici e giuristi*, ed. by Giorgio Resta and Vincenzo Zeno-Zencovich (Naples: Editoriale Scientifica, 2012), 371-410; and "La legge italiana sul negazionismo", *Italia contemporanea*, 284 (2017): 101-122.

minimization of historical crimes, always examining the finer nuances in the wording of memory laws and the dangers they hide for genuine historical work. The denial of corroborated historical crimes is a complicated matter because the question is which aspect of the crime is being denied: Its size? Its intentionality? Its unique traits? Cajani demonstrates that the minimization of historical crimes is even more problematic. In my view, his multi-faceted analysis of the minimization of atrocity crimes is an unprecedented attempt to scientifically map this difficult concept.

### III.

In times in which the freedom of expression about past events has proliferated, including fake news about history, it is imperative for historians and indeed anyone committed to study the past to have a clear view of the limits to the freedom of expression about past events and in particular of the limits to these limits. The right to freedom of expression, prominently figuring in the ICCPR, offers strong protection for historical writing. Although universal, the freedom of expression about the past is not absolute. Not only does it have well-defined limits, it also comes with 'special duties and responsibilities'. For professional historians, trusted because of their expertise, this 'special duty' means that they should write and teach history responsibly, that is, accurately and sincerely.<sup>24</sup>

1 May 2021

<sup>24</sup> Antoon De Baets, "The Abuse of History", *Bloomsbury History: Theory & Method* (New York and London: Bloomsbury, 2021), <https://www.bloomsbury.com/us/discover/bloomsbury-digital-resources/products/bloomsbury-history-theory-method/>.

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