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Memory Laws in Europe: What Common Horizon Are We Journeying Towards?

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Notwithstanding the fact that European states had already approved laws pertaining to their past, by introducing days of commemoration for instance, the phenomenon known as “memory laws” that first surfaced in the 1990s in several European countries marks both transnational movement within the continent, an unprecedented Europeanisation of practices and interpretations related to the past, but also – in a seemingly contradictory manner – a strengthening of national identities, and even of nationalist tendencies in certain countries reacting to transnational processes.

A comparative analysis of Europe’s states reveals a broad range of memory laws which, beyond this categorisation, actually corresponds to parliamentary acts of a very distinct nature. Let us first point out that the concept of “memory law” emerged in France in December 2005 amidst controversy surrounding several historians’ condemnation of the French Parliament’s role in legislating on history. Said historians called for the abolition of

four laws via the press. Firstly, the Gayssot Law that imposes criminal sanctions on those who contest the existence of crimes against humanity as defined by the International Military Tribunal in Nuremberg (1990). Secondly, the law recognising the Armenian genocide (2001). Thirdly, the law relating to the recognition of slave trade and slavery as crimes against humanity (2001), and, fourthly, the law on the nation’s gratitude and the national contribution toward repatriated French citizens from North Africa (2005). Since 2005, the term “memory law” has been employed in international speech to refer much



1. Jean-Claude Gayssot, member of the French Communist Party (PCF) and was Minister of Transportation in the government of Lionel Jospin (1997-2002). He gave his name to the 1990 Gayssot Act repressing Holocaust denial and speech in favor of racial discrimination | Picture: La Depeche

more broadly to laws or resolutions adopted by national or supranational institutions, which govern the interpretation of historical events.

At European level, legislative acts concern very different subjects. They may relate to the interpretation of a historical event, the application of criminal sanctions against public statements on historical events, the establishment or modification of the status of war veterans (rights, reserved occupations and pensions), the reappraisal of the retirement pensions of those working in certain public services before the fall of communism, the establishment of material or symbolic reparations for victims of violence and sometimes for their descendants, the rehabilitation of political prisoners, the organisation of administrative purges, the setting up of commemorations, the naming of public places, the creation of memorials, the erection of monuments, the management of archives, the prompting of scientific research on a particular event, the introduction of historical events in school education, and so forth.

Besides this very wide variety, European memory laws can be classified into three groups from the legal standpoint. The first group brings together the laws and resolutions that are merely declaratory, which constitute the most numerous type of parliamentary acts in European countries. In this respect, Poland, for instance, has approximately 2,000 declaratory provisions on the past passed by Parliament since 1989 (20% of all resolutions passed by Polish members

2. Armenian genocide memorial in Yerevan. Each April 24, thousands of people walk to the genocide monument and lay flowers around the eternal flame, located in the centre of the monument | EURÓM



of Parliament), which first and foremost deal with commemorations. The second group comprises laws that prescribe relatively binding measures for States or their citizens such as compensation for victims and their families, the rehabilitation of political prisoners, the establishment of commemorations, the introduction of historical events in school education, etc. The third group corresponds to the laws that prohibit and impose criminal sanctions on certain statements in the public space vis-à-vis historical events: the denial of the Jewish and Armenian genocides, the denial of communist crimes or, conversely, as with the Russian law of 2014, the rendering of Soviet crimes committed during the Second World War. It is chiefly the expansion of these memory laws of a punitive nature that lends European laws their distinctiveness: most European countries (28 out of 47) have adopted provisions that impose sanctions on statements about the past, mainly the denial of the Jewish and Armenian genocides. In the case of the Jewish genocide, the 22 countries that have criminalised negationism are mostly European.

The last two groups of these laws have a normative character because they entail various rights and obligations for States and citizens. Declaratory laws, on the other hand, do not change citizens' legal status. However, from the point of view of representations of the past, these declaratory laws can be considered to generate norms.

To appreciate the uniqueness of these memory laws adopted in Europe, the legal traditions from which they originate as well as the contexts in which they were developed should be understood.

Over the long term, the proliferation of memory laws adopted in Europe in the late 20th century marks a difference in legal traditions specific to States, historically divided between civil law and common law. The common law tradition, which characterises the United Kingdom and the countries of its former colonies on different continents such as the United States, favours judicial decisions to establish the norm and regulate social relations. These countries are not familiar with the phenomenon of memory laws, or only on a very



3. Street sign in Seville showing the name change and clarifying that the old name has been eliminated in application of the Historical Memory Law | Kespito, CC BY-SA 3.0, Wikimedia Commons



4. International Holocaust Remembrance Day in Poland, January 2020 | Frankie Fouganthinmm, CC BY-SA 3.0, Wikimedia Commons

small scale. Memory laws passed by national parliaments in Europe are therefore part of a tradition of Roman civil law that is dominant in Europe, which favours legislative instruments to establish norms and thereby organise societies. Moreover, the tradition of free speech guaranteed by their constitution in English-speaking countries accounts for the absence of legislation condemning negationist discourse which, on the other hand, is present in most European countries that do not have this tradition.

Apart from these legacies, memory laws originate from three new contexts that arose at the same time in Europe in the late 20th century.

First, the anamnesis in Western Europe of the genocide of the Jews as a unique crime to which no statutory limitations apply. This crime became a focal point of the Western-European historical narrative of the 1990s, developed in the name of human rights and the defence of minorities. For the purposes of European identity, this prime focus of memory brought members of Parliament in several countries to legislate on the qualification of genocide by criminalising any denial. The Armenian genocide witnessed a similar course, having been recognised by law in many countries. Negationist discourse was subsequently criminalised in Greece, Croatia, Slovakia and Switzerland. However, in France, in 2012 and then in 2017, the Constitutional Court dismissed the motion each time for violating freedom of speech. This

recognition of genocide or the criminalisation of negationism by law constituted an instrument for European integration for countries wishing to join the EU. Poland, for example, then a candidate, was the first Central European country to pass a law in 1998 that criminalises Holocaust denial (Article 55). Conversely, the Turkish Parliament's passing of a decision in its bylaws in July 2017 that prohibits and imposes criminal sanctions on "insulting the history and the common past of the Turkish Nation" – which implicitly targets the Armenian genocide – reveals, among other facts, Turkey's desertion of the EU integration project since the 2010s.

The second context in the 1990s is the liberation of Eastern Europe countries from the former USSR that led to the law's criminalisation of their communist past in a process of transitional justice. In this period of democratisation and decommunisation, the adoption of memory laws by Eastern Europe's parliaments constituted an act of democratic sovereignty, breaking with the previous political regime. In some countries, this break was soon accompanied by the desire of members of parliament to go so far as to class this past as a criminal offence (see for example the Czech Republic's Law of April 1990 or Russia's Law of April 1991 classing Stalin's deportations of peoples as "acts of genocide").

Meanwhile, the postcolonial issue finally arose in the societies of the former European empires (France, Belgium and Germany) with legislative provisions made pertaining to the recognition of crimes and reparations for victims and their descendants. European institutions encouraged this reparations policy. Thus, the European Parliament Resolution of 26 March 2019 called on Member States to initiate reparations in the form of public apologies to people of African descent living in Europe and victims of injustice and crimes against humanity, to restitute artefacts stolen during the colonial period to their countries of origin, and to declassify their colonial archives.

Besides these three synchronous contexts, it is noted that memory laws bear witness to a new model of conflict resolution and political violence.

Despite the new legal categorisations (crimes against humanity and genocide) adopted in the aftermath of the Second World War, the policy of forgetting – and its legal corollary, amnesty – was the political model of resolution advocated by nation states until the 1980s. The emergence of memory laws pointed to a reversal of this model, at around the same time. The end of conflict or oppression was accompanied by a judicialisation and a memorialisation of the past classed as criminal, which the legal framework guarantees in the eyes of members of parliament and societies.

This new model was also enforced in countries that had handled their transition to democracy in a traditional manner. The case of Spain is a fine example of this turnaround. While the Law of 1977, promulgated following the end of the Franco dictatorship, was founded on a model of resolution that espoused forgetting and amnesty, twenty years later, it was condemned as a political act that denied the crimes and violated the victims of the Spanish Civil War and their descendants. The outcome of the social movement related to the "recovery of historical memory", the 2007 law related to the new method of pronouncing judicial decisions on violent pasts, affording attention to the recognition of and reparations for victims of political violence.

For the European countries which, in the late 20th century, were unacquainted with or had no experience of a transition to democracy or the end of war, legislative provisions were put in place according to the same memory paradigm: categorising certain pasts as criminal offences gave rise to recognition and reparations owed to victims of crimes.

The criminalisation of the past that would thus characterise European memory laws was accompanied by overturning the notion of disturbing public order. The order to forget the violence of the past traditionally led to a public absence, even a prohibition, of the memorialisation of crimes and victims, perceived as a threat to peace and public order and, by extension, to the continuation of the community. On the contrary, memory laws guarantee the public disclosure of crimes committed

in tribute to victims by punishing their denial as public order offences. This change is linked to a turning point in the narrative in democratic societies that goes from a collective indebtedness to the victorious heroes and fighters who ensured the continuation of the nation-state, to indebtedness towards the civilian victims who, for their part, guaranteed a rule of law, both for human rights and those of national minorities. The law's memorialisation of crimes and victims is therefore seen as an essential tool for the pacification of societies, the assertion of nation-states' democratic identity, and the education in tolerance and human rights of their citizens.

Another key feature of these memory laws is their supranational European expansion in a context in which memory has become, like in national spaces, a category of political action in its own right to symbolically build a European identity. However, the laws or resolutions pertaining to the past have been seen by the actors of European institutions as effective instruments to efficiently share a common narrative in Europe. These laws thus participated in a process of Europeanising national memories against the backdrop of Eastern Europe countries' accession to the European Union, and the pursuit of a common European memory. The matrix function of Second World War crimes in the building of the post-Soviet European narrative identity has formalised in these supranational legislative provisions that have evolved over the past thirty years.

Initially, memory laws demonstrated a division of the continent between East and West. On the one hand, a memory of the West was structured around the recognition of the genocide of the Jews that was led by European institutions (the Council of Europe, the European Court of Human Rights and the European Parliament) as an identity marker (see the Resolution of 3 July 1995 voted by the European Parliament calling on Member States to establish a "European Holocaust Remembrance Day"). On the other hand, a memory of the East has focused on the recent communist past and the crimes committed by the USSR against civilian populations during the Second World War. When many Eastern

European countries joined the EU in 2004 (Czech Republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovak Republic and Slovenia), these states had already approved, within the framework of a democratisation process, numerous memory laws that primarily concerned their communist past and the crimes perpetrated by the USSR against their populations. The European Parliament then asserted itself as a major player in the memory policies of East-West reconciliation, through



5. Memorial ceremony at the Raoul Wallenberg square with Holocaust survivors, 27 January 2013, | Frankie Fouganthin, Wikimedia Commons

6. August 23, 2009. Candles symbolically marked the 20 years of the Baltic Way | J. seduikis, CC BY-Sa 3.0, Wikimedia Commons





7. Military parade in Moscow dedicated to the 75th anniversary of the victory in the "Great Patriotic War", i.e. the east European theatre during World War II | Presidential Press and Information Office, Wikimedia Commons

resolutions on the past adopted for the sake of “good neighbourliness” and mutual recognition between the two regions of Europe to transcend this memory divide. The action of Eastern European members of the European Parliament (in particular those from the Baltic States) thus led a few years later to a memorial point of convergence regarding a dual recognition: that of the Nazi crimes perpetrated against the European Jewish populations and that of Soviet crimes committed against East European civilian populations. This convergence based on the premise of an equivalence of these crimes is recognised by several resolutions. In 2008, the European Parliament recognised the famine of 1932–1933 in Ukraine artificially caused by the USSR as a “crime against humanity”. Above all, the European resolution of 2009 establishes a European Day of Remembrance on 23 August recalling the German–Soviet Pact of 23 August 1939 that has become the inaugural and programmatic event of the double Nazi/Soviet crime committed against European civilians during the Second World War. This consensus reached based on an event presented as foundational to build a European collective memory is once again affirmed by the Resolution on the importance of European remembrance for the future of Europe, approved by a large majority of MEPs on 19 September 2019 (far right, right and centre–left). Some representatives of Western Europe (Spain and Italy in particular) then expressed their misgivings over equating Nazism and Stalinism, and historians and artists rallied together in Belgium to condemn this vision of history.

Alongside European policy on the past is making the contesting of various crimes punishable as criminal offences. By its Framework Decision 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, the Council of Europe called on EU member states to “take the necessary measures” to penalise “publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes” defined by the International Criminal Court, which also criminalises the denial of the Armenian genocide.

However, the entire body of European legislative provisions to establish a common memory are coming up against national/regional resistance. National parliaments refuse to integrate the 2008 Framework Decision into their penal code. The commemorations of 23 August symbolising the double Nazi/Soviet crime are still mostly observed in Eastern European states (primarily the Baltic states). Conversely, the memory of the Holocaust is still predominant in Western Europe with limited presence in the East (see for example the Museum of Genocide Victims in Riga in Lithuania that devotes only one room to the Jewish victims with the largest part of the museum presenting Soviet crimes). The peculiarities of Western and Eastern memorials have not been obliterated with the laws and resolutions approved by MEPs over the past fifteen years.

Lastly, Europe’s memorialisation of the double “Nazi/Soviet” crime and the criminalisation of negationism by means of supranational legislative provisions have, in turn, borne effects on national parliaments. For several years now, some countries have witnessed a national reappropriation of the past that tends to dismiss these European supranational acts in the name of the defence of national sovereignty. Through the adoption of new laws, they defend a national narrative exalting patriotic pride and penalise any public reference to state or national crimes. This is illustrated by the law passed in 2014 by Russia defending the “Great Patriotic War” by criminalising the rendering of Stalinist crimes (2014) and that was approved in Poland in January 2018 to protect “the reputation of the Republic of Poland and the Polish Nation” by penalising those who deny “Ukrainian crimes” or those who publicly attribute the responsibility or co-responsibility for different crimes to the Polish Nation or the Polish State.

The national reaction during the 2010s thus heightened the polysemic nature of European memory laws that cannot be presented solely as vehicles of democratisation or of strengthening the rule of law around the protection of minorities. Some of them constitute acts of national sovereignty around the tribute to the motherland’s heroes and martyrs, which are established precisely against

the supranational memory regulations prescribed by European institutions. The penalisation by law of certain statements about the past deemed to be contrary to national interests thus becomes the *modus operandi* of certain States that still claim to be democratic on the international scene, but which seek to legally eradicate any conflict of historical interpretation in their public space.

Such an evolution provides additional arguments to those who were fast to criticise the adoption of memory laws in different countries considering that they established official regulations pertaining to the past, claiming that it was not within the purview of politics to recount history, and that these laws limited freedom of speech and democratic debate by penalising statements contesting the existence of crimes that should instead be fought with scientific arguments.

These laws can be subject to another criticism, driven in a number of cases by a necessity to identify with Europe or recognise victims rather than historical knowledge of the past. The European resolutions of 2009 and 2019 on 23 August 1939, interpreted as the triggering event behind the perpetration of the Nazi/Stalinist double crime of the Second World War, is a striking illustration thereof. Legislative acts on Europe’s past adopted over the past thirty years can rightly be considered democratic progress as they take minorities and civilian victims in the context of wars, persecution or oppression into account. But attention must also be paid to the effects of victimisation, competition and the instrumentalisation of history that these legislative provisions can produce. These laws have shaped, through norms, a common horizon for reparations for historical trauma that has focused Europe’s narrative identity on an endless criminalisation of its past. Either way, they challenge the identity that Europe wishes to lend itself, as well as Europeans’ relationship with this identity.