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Can law save memory? Rethinking the role of legal measures in collective denial, forgetting and remembrance

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This article tries to address the controversy around the progression of legal measures of national and supranational nature that aim to introduce norms of desired social conduct in relation to past events. For the last two decades we have been observers of an intensified and complicated dialogue between law and memory. This dialogue in several countries resulted in the introduction of measures intended to combat acts of revisionism, including the negation of crimes against humanity, in particular of the Holocaust, laws on the recognition of genocide, guidelines on the interpretation of slavery and colonialism, as well as in the establishment of days of remembrance. It has provoked a debate on the role that law should play in defining history and in shaping the narrative of collective memory. To whom does the history belong? What is the responsibility of a historian and of a legislator to people and communities? Are legal measures that impose what *needs to be remembered and* in what way *justifiable as reflections of values and norms of contemporary societies, or rather, by framing the past so that it responds to collective expectations of the present, they dangerously become measures of the same order as the behaviour they try to address?*

Revision, negation and recognition

Historical revisionism is a distortion of history and manipulation of facts so that they reinforce and advance a given interpretive historical view. This may include the manipulation of statistical data, forging documents or discrediting the existing ones as well as selective and biased interpretations and omissions. These are acts performed on the legacy of the past but at the same time determined by the present and directed towards the future. Although today the notion of revisionism connotes most often acts that involve crimes of the Second World War, with the extreme example being Holocaust denial, it was widely practiced throughout the entire 20th century and before. Authoritarian regimes eagerly followed the message of Plato's famous quote: 'those who tell the stories also hold the power' (Plato, *Republic*, after: Nash, 1996) and

sometimes used of legal means[1]. For example,'wrong books' burned in Nazi Germany and in Maoist China. Totalitarian governments introduced commemorative rites that helped to sustain idealised narratives of a nation's progress and strength (celebrations of the Great October Revolution, the Day of Victory over Fascism and International Worker's Day in countries under communist rule, or anniversaries of the seizure of power of the National Socialist Party in Germany and the Fascist Party in Italy) and to reinforce the cult of the leader (public celebration of birthdays). Commemorative ceremonies together with symbolic material objects (such as monuments and memorials) and censorship best served the purpose of cultivating myths of legitimacy and imposing the desired interpretation of the nation's past. Totalitarian propaganda referred not only to repetitive communication practices and rituals but also to deliberate selective management of historical data. The goal was to form a new national identity based on a shared past that was given ideologically coherent interpretation. What new regimes emerging from violent historical turmoil often left behind was an inglorious record of inconvenient facts that seriously challenged the official story of the 'new order', and thus needed to be erased. This particular form of revisionism that consists in denying the reality of war crimes or crimes against humanity is also sometimes called 'negationism'[2]. In the Soviet Union for example, historical books never gave any account of mass forced displacements of entire populations that changed the ethnic map of the empire nor of the Great Famine (Ukrainian: *Holodomor*) of 1930s in Ukraine, and falsely claimed that the 1940 Katyn massacre was carried out by Germans rather than by Soviets[3]. Soviet historiography, as an ideologically influenced methodological approach to history that served a specific political agenda, is subject to contemporary studies as an example of historical revisionism:

> "All in all, unprecedented terror must seem necessary to ideologically motivated attempts to transform society massively and speedily, against its natural possibilities. The accompanying falsifications took place, and on a barely credible scale, in every sphere. Real facts, real statistics, disappeared into the realm of fantasy. History, including the history of the Communist Party, or rather especially the history

1 There are some very early examples of state-supported historical revisionism. Nicole Loraux in *La Cité divisée: L'oublie dans la mémoire d'Athènes* (1997) analyses the politics of memory in Ancient Greece: in the period of restoration of democracy, following the dictatorship of the Thirty Tyrants, a law was established that prohibited any public commemoration of the grave crimes committed during the dictatorship; the Tyrants were also granted amnesty in 403 AD (Fronza, 2006, p. 610). Other examples used in this essay will refer to the history of the 20th century.

2 From the French term *le négationnisme* introduced by Henry Rousso in his 1991 book *The Vichy Syndrome* (Finkielkraut ed., 1998, p. 125).

3 For more information see: Ferro, M. (2003). *The Use and Abuse of History: Or How the Past Is Taught to Children*. London, New York: Routledge. Chapter 8: Aspects and variations of Soviet history and Chapter 10: History in profile: Poland.

of the Communist Party, was rewritten. Unpersons[4] disappeared from the official record. A new past, as well as new present, was imposed on the captive minds of the Soviet population, as was, of course, admitted when truth emerged in the late 1980s" (Robert Conquest, 2000, p. 101).

Holocaust denial is an extreme form of negationism and consists in either denying the fact that the genocide of Jews happened during World War II and was a deliberate act (negation of the existence of the Final Solution plan) or in minimizing its scale and number of the victims. Holocaust denial is commonly condemned as opposing historical facts and violating the dignity and memory of the victims. It is also sometimes referred to as the 'Auschwitz lie' (German *Auschwitzlüge*) after Thies Christophersen's 1974 brochure that disputed the existence of gas chambers at the Auschwitz concentration camp (Levy, 2005). It is considered to be an anti-semitic conspiracy theory that uses arguments contradicting the reality of the Holocaust to present it as mystification designed to advance the interest of Jews at the expense of other nations. The followers of these ideas refuse however to be called 'deniers' and demand to be called 'revisionist', equating themselves to historians who study and reinterpret orthodox views on evidence, motivations, and decision-making processes around historical events. They therefore demand to be seen as scholars or historiographers and claim the academic status of negationism. 'Revisionism' as a term can, in fact, be used to name the normal phase of evolution in academic practice where commonly accepted history is re-examined and updated with newly discovered, more accurate information and as such can be applied in the field of Holocaust studies. This re-examination can shed more light on issues such as the role of particular Nazi leaders, Jewish responses to the persecution and reaction of populations of occupied countries, as well as outside occupied Europe. In contrast, in the Holocaust denial the re-writing of history by minimizing, ignoring and denying facts does not expand but contradicts what has been established by mainstream historiography[5].

Legal measures that address today the question of protection of the collective memory are rooted in and derive from post-war legal, political and social developments that responded to the mass atrocities committed during the war and revealed in the Nuremberg Trials. This record of heinous crimes, unimaginable and yet committed by mankind, constituted a legacy that forced the decision-makers of the time to introduce adequate preventive measures so that 'it can never happen again'. These

4 A term from a fictional language called 'Newspeak' developed in George Orwell's novel *Nineteen Eighty-Fourth.* An 'unperson' is someone who has not only been killed by the state, but effectively erased ('vaporised') from existence: written out of existing books, photographs, and articles so that no trace of their existence could be found in the historical record. The idea is that such a person would be forgotten completely.

5 We can speak of a whole Holocaust denial movement that developed on both sides of the Atlantic Ocean after the end of World War II including the establishment of pseudo-scientific institutions such as the Institute for Historical Review or the Committee for Open Debate on the Holocaust. For more information see: Berlet, Lyons, *Right-Wing Populism in America: Too Close for Comfort*, New York: Guilford Press, 2000 or: *Poisoning the Web – Committee for Open Debate on the Holocaust*, Anti-Defamation League, 2008.

developments included, among others, the establishment of the legal definition of the crime of genocide and its subsequent penalization in international law. It was largely the effect of advocacy work performed by Raphael Lemkin, a Polish lawyer of Jewish descent who coined the term 'genocide' in 1944 (Lemkin, 1944, pp. 79-95) and continued to campaign internationally until in 1948 the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide that entered into force in 1951[6]. This was the beginning of the development of the system of international justice that enabled the international community to try war crimes in tribunals for former Yugoslavia, Rwanda and Cambodia[7], and finally led to the establishment of the permanent International Criminal Court in 2002[8]. These institutions were given a mandate that, from the beginning, went beyond the act of holding accountable and punishing the perpetrators. They were there to *educate* and *reconstruct,* even after a quarter of a century, the atrocities committed, as in the case of the Khmer Rouge trials:

> "The chief goal is to provide justice to the Cambodian people, those who died and those who survived. It is hoped that fair trials will ease the burden that weighs on the survivors. The trials are also for the new generation – to educate Cambodia's youth about the darkest chapter in our country's history (…). By supporting and learning about justice, we can all contribute to the reconstruction of our society." (The Extraordinary Chambers in the Courts of Cambodia, 2013).

The international human rights regime and rule of law that aimed at protecting populations and preventing genocide were a part of the 'never again' pursuit. It developed in parallel with the reflection on the genesis and mechanisms of genocide. It was noted that there was an inherent element in all genocides – namely the denial, and

6 Lemkin's 1944 definition stated: "By ‚genocide' we mean the destruction of an ethnic group (…). Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups". Although Lemkin was present at Nuremberg Trials and successfully insisted that the word "genocide" be included in the indictment against Nazi leadership, "genocide" was not a legal crime until 1948 UN Convention. Article 2. of CPPCG defined 'genocide' as follows: "Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group". This definition was later repeated in UN Rome Statute of the International Criminal Court.

7 Respectively: International Criminal Tribunal for the former Yugoslavia, The International Criminal Tribunal for Rwanda, The Cambodia Tribunal (or Extraordinary Chambers in the Courts of Cambodia).

8 UN Rome Statute of the International Criminal Court, at: http://untreaty.un.org/cod/icc/general/overview.htm. Date of access 22.09.2013.

it needed to be taken into consideration if we wanted to comprehend its dynamics. Gregory H. Stanton, formerly of the US State Department and the founder of Genocide Watch, has listed denial as the final stage of genocide development:

> "Denial is the eighth stage that always follows a genocide[9]. It is among the surest indicators of further genocidal massacres. The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims" (Stanton, 1996, p. 6).

Denial is thus a defence mechanism of perpetrators hoping to avoid punishment in the face of the war crimes investigations pursued. But on the collective level denial is also a form of shared suppression, a characteristic of entire generations, induced in part by fear of exposing relatives and friends who were directly implicated, or of acknowledging witnessing scenes of genocide. It is a psychological mechanism that serves to avoid self-incrimination and feelings of guilt (Huttenbach, 2008, p. 306).

I believe that it is in the pursuit of overcoming the denial, understood as shared suppression, that one should see the intention as the primary driving force behind calls for an equal recognition of atrocities that were committed long before the legal and academic reflection on genocide took place. In the 1990s and 2000s a series of retroactive memory laws were adopted in several states in an attempt to come to terms with the painful past. More than 20 countries recognised the massacre of Armenians committed by the Ottoman Empire in 1915–1923 as genocide (National Armenian Institute, 2013). In 2001 it was recognised by France (Loi "Arménie" of 29 January 2001), and in the same year they passed a law recognizing the slave trade and slavery practised from the 15th century as crimes against humanity and requiring respective information be contained in history textbooks (Loi "Taubira" of 21 May 2001). In 2007, the Spanish Congress of Deputies adopted the Historical Memory Law (Spanish: *Ley de Memoria Histórica)* in which the state recognises victims on both sides of the Spanish Civil War of 1936-1939 and the subsequent dictatorship of General Francisco Franco, and gives rights to victims and their descendants.

At a similar time another two types of legal 'memory instruments' emerged in Europe. Firstly, remembrance days ('days that *invite* citizens to remember', Fronza, 2006, p. 609) were introduced in individual countries following the resolution adopted in 2005 by the United Nations General Assembly, which designated January 27 as Holocaust Remembrance Day (UN General Assembly Resolution 60/7, 2005). Secondly, a series of measures aimed at combatting revisionism was adopted by several countries (among them Germany, Poland, Hungary, Romania, France, Belgium, Spain,

9 Stanton's eight stages of genocide include: classification, symbolization, dehumanization, organization, polarization, reparation, extermination and denial.

Austria and Portugal) in the form of criminal laws against Holocaust denial[10]. Their introduction was supported by the argument that Holocaust denial can inspire violence against Jews and as their experience in the post-World War II era suggests, their rights are best protected in open and tolerant democracies that actively prosecute all forms of racial and religious hatred, including hate speech (Whine, 2008). Indictments, detentions and international arrest warrants of some 'high-profile' Holocaust deniers followed and became subject of a heated debate[11].

Politics and the troubled relation with the past

In the above national and international legislature we observe a progression of measures aimed at introducing norms of desired social conduct in relation to past events and a tendency to invoke criminal laws to protect certain aspects of collective memory. While not questioning the reality of those events, it is also important to reflect on the nature of this phenomenon that has become a particular *signum temporis.* Why do we need to introduce days of remembrance of the victims of the Holocaust after more than 60 years that the Holocaust itself took place? Is it because the actual witnesses of these events pass away? Why do we *now* have a need to legally recognize inhumane acts from remote history as crimes against humanity and place them in the post-World War II legal framework ?

Whereas in the case of the days of remembrance the imposition remains limited to being only an occasion to pay tribute to testimonies and experience, and this tribute, although useful for the collective memory, remains 'incapable of imposing conscious choices in the present' (Fronza, 2008, p. 612). The criminalization of Holocaust denial becomes a much more problematic issue. Firstly, it calls for a reflection on the freedom of speech and legitimacy of punishing ideas, even (or: in particular) in the case of those that are abhorrent, absurd or simply untrue. According to Noam Chomsky, it is the essence of the freedom of expression to allow their expression. In 1981, in the essay 'His Right to Say It' he wrote:

> "It is elementary that freedom of expression (including academic freedom) is not to be restricted to views of which one approves, and that it is precisely in the case

10 For more information on legislation against Holocaust denial see: Bazyler, M. J. (2006). 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism', Yad Vashem or Fronza, E. (2006). 'The punishment of negationism: The difficult dialogue between law and memory', *Vermont Law Review*, Vol.30, 609.

11 In 2006 David Irving, the discredited historian and Nazi apologist, was sentenced by an Austrian court to three years in prison for denying the Holocaust and the gas chambers of Auschwitz (Traynor, 2006, 'Irving jailed for denying Holocaust', *The Guardian*). Another negationist and extreme-right publicist Siegfried Verbeke was arrested several times, including a 2005 arrest at Schiphol Airport in Amsterdam and subsequent extradition to Germany for trial (*Prison ferme pour deux négationnistes,* AFP, 19/06/2008).

of views that are almost universally despised and condemned that this right must be most vigorously defended".[12]

Secondly, it should be seen in a wider context of the general rise of national-populism and nationalist discourse in Europe, targeting representatives of ethnic and religious minorities, but also recent immigrants and refugees. The necessity to recur to the use of laws to combat revisionism is in a sense a failure of the society as a whole, a 'fast track' strategy, proving the weakness and inadequacy of social institutions, such as the system of education.

In the case of the days of remembrance and Holocaust denial bans it is in the discourse on the recognition of genocides or crimes against humanity that we deal with complex situations involving a variety of often conflicting interests, such as the search for the recognition of historical truth, dignity of affected communities and political agendas of states and parties. It is often due to long-lasting advocacy work of particular groups such as minority groups or diasporas that a particular historical event receives international recognition. This was for example the case of the Armenian genocide, where the recognition in the 1990s and 2000s by more than 20 states was the result of intense activity of Armenian diaspora, in particular in France and in the United States (Gregg, 2002, p. 5-9). For the same reasons Porajmos – the genocide of Roma people has not received such recognition; due to the lack of significant collective memory and documentation of the genocide among the Roma. This is a consequence both of their oral traditions and illiteracy, wide spread poverty, social inequalities and discrimination as well as the culturally determined reluctance among Roma themselves to acknowledge victimization. There have been no conditions for such activism to develop (Judah, 2011, Hancock, 2005).

A state's official position in relation to the past can become an important factor in international relations, especially when it becomes part of the conditionality policy of international bodies and institutions towards their members or membership candidates. For example, the recognition by Serbia of the country's role in the 1995 Srebrenica massacre of Bosnian Muslim men and boys has become an important postulate on the part of the European Union, as a necessary condition for durable reconciliation and peacekeeping effect in the Balkans (Zimonjić, McDonald-Gibson, 2013). The issue of Armenian genocide became a highly politicized matter in countries that have strong political and economic ties with Turkey and have decided not to put a relationship, which is at the same time crucial and fragile, at stake for the sake of recognizing the Armenian genocide (National Armenian Institute, 2013). Similarly, it is politically very difficult to recognise the role in committed atrocities of a particular group or institution that is given great publicity. For example, the Roman Catholic Church's role in the 1994 Rwandan genocide remains an unexplained matter twenty

12 The conflict between 'denial bans' and freedom of speech is mainly a European issue. It is not subject to debate in the United States, where the First Amendment protects the freedoms of speech, press and association, and even the most heinous ideas are given an equal status on the 'free marketplace of ideas'. Thus, in America hate speech is also 'protected speech'.

years after the fact, and is characterised by the silence of Catholic hierarchy combined with the public reluctance to investigate the matter (Ndahiro, 2005).

The development of postmodern theories has also been an important factor influencing the project of memory laws. While viewing history as a narrative, postmodern schools of thought, such as postcolonial studies, proposed a search for alternative visions of history (a 'view from the periphery') through the deconstruction of the dominant progress-driven, First World-dominated vision of the past. In the same sense, philosopher Paul Ricœur (1981) has underlined the need for a 'decolonization of memory', a liberalisation of mentality that has been itself colonized during the imperial age. This intellectual shift became a fertile ground for opening public debate over the interpretation of the history of British colonisation in North America and Australia and its impact on the fate of their native populations (ex. Lewy, 2004, *Were American Indians the Victims of Genocide?*). It is visible also in the shift of French official history policy, with the 1999 recognition of the Algerian war of independence (1954-1962) as an actual 'war', previously qualified as a 'public order operation'. But this shift itself became again a political bone of contention and provoked counteraction. After having adopted the law recognising slavery and the slave trade as crimes against humanity, France in 2005 passed an act on colonialism (Loi "Rapatriés" of 25 february 2005) in which the French nation expresses 'her gratitude to women and men who participated in the activities carried out by France in the former French departments in Algeria, Morocco, Tunisia and Indochina and in the other territories previously under French sovereignty'. In the controversial Article 4., legislation demands that teachers and textbooks 'acknowledge and recognize in particular the positive role of the French presence abroad, especially in North Africa'. The law was cancelled in 2006 after mass protests in French schools and a refusal on the part of the Algerian head of state to sign the envisioned 'friendly treaty' with France (Agence France Presse, 2005).

Freedom of history or the burden of conscience

It was probably because of the intensity of the process of codification of memory that the grassroots movement against memory laws started in France. In 2005 several hundred French historians and other intellectuals signed an appeal to protest against recent legal developments in their country in the field of memorial matters. They expressed concerns over the politics of memory being practiced intensively in the French National Assembly, the inflation of *lois mémorielles* (memory laws) and the threat they might pose to the intellectual independence of historians:

> "History is not a religion. Historians accept no dogma, respect no prohibition, ignore every taboo.
>
> Historical truth is different from morals. The historian's task is not to extol or to blame, but to explain.
>
> History is not the slave of current issues.

History is not memory.

History is not a juridical issue. In a free state, neither the Parliament nor the judicial courts have the right to define historical truth. State policy, even with best case will, is not history policy" (2005 *Liberté pour l'Histoire* Appeal).

The association *Liberté pour l'Histoire* ("Freedom for History") was consequently founded by the signatories under the chairmanship of Prof. René Rémond to support the principle of non-intervention of the state in historical matters. They demanded the withdrawal of legislation on Holocaust denial and Armenian genocide, as well as of the law condemning slavery as a crime against humanity claiming that such legislation undermines their research work. *Liberté pour l'Histoire* has thus set itself the task of 'winning acknowledgment for the scientific aspect of historical research and teaching and the task of defending historians' freedom of expression against political intervention and ideological pressures of all kinds and from all sources' (2005 *Liberté pour l'Histoire* Appeal). They later appeared on the international stage in April 2007 to protest against a proposal for a framework-decision by the Council of the European Union; a proposal condemning in all EU member states the 'public defense, denial or crude trivialising of genocide, crimes against humanity and war crimes' in the name of the fight against racism and anti-Semitism (Chandernagor, 2008).

On both sides of the memory laws controversy there are arguments that should be given particular attention. On one hand it is indisputable that in the matters concerned here there can be no 'pact of forgetting' without justice and compensation. It is understandable that after having been so profoundly affected by the horrors of the last century humanity is in pursuit of measures that could prevent them from reoccurring. Recognizing that the most tragic events are part of our history is necessary to reclaim the dignity of persons belonging to groups that were victims of genocide and other crimes. But on the other hand, there is a limit to measures that should be undertaken for that purpose. Laws that were elaborated in the aftermath of World War II resulted from the experience of humanity at that particular moment of history and from the lesson that had been learned from it; it is therefore a misuse to apply them to other contexts and other events. Pierre Nora (2008) makes an interesting point when he warns against the 'boundless retroactivity of the law' and systematic 'victimization' of the past:

"History is nothing but one long series of crimes against humanity. But since the authors of these crimes are dead, these laws neither can nor could do anything except pursue, in the civil or the criminal courts, the historians who study these periods and the teachers who teach them, by accusing them of complicity in genocide or complicity in crimes against humanity(…). [We must not] apply directly to all past events a judgment founded only on present-day values and standards, as if these values and standards did not themselves have a history but had existed for all eternity. Today we believe absolutely in the supremacy of individual human rights; this is probably just as well in some respects, but these rights themselves have a long history".

When on the basis of existing criminal codes living perpetrators are held accountable and punished if found guilty and victims are granted compensation, is it still legitimate to interfere in processes of social remembrance and forgetting?

> "Criminal laws serve to demarcate the fundamental values of society. The law and the penalties constitute techniques of protecting what society considers worthy of being collectively protected. In this context, the question arises: should 'collective memory' be considered a protected interest?" (Fronza, 2008, p. 610).

It is not an easy task to separate Holocaust denial from racism, discrimination or xenophobia and acts that incite to violence; as present revisionist behaviour can be explicitly or implicitly directed towards the future, by drawing racist, discriminatory and xenophobic conclusions from a distorted version of history. But the denial itself should not be seen as a criminal offence considering that law is not there to set moral boundaries; a clear distinction between ethics and law is necessary, as 'immorality should never be raised as the sole justification for the coercive intervention of the state in the life of its citizens' (Fronza, 2008, p. 621-622)

The problem with memory laws lies in the fact that what we deal here with is a confusion of orders: law enters the space of memory and tries to introduce the logic of crime and punishment that seems incompatible with the nature of human memory itself. When we analyse the question of law being capable of protecting the memory of past events, in particular those of the most disturbing character, we should also pose ourselves the question of whether the law *should* really respond to such expectations. History is the matter of facts and data, memory – of collective and individual experience, law – of order and punishment. And there should be as little interference between them as possible. Re-writing of history must be based on historical method: supported with historical evidence, testimonies and data; some things are not a matter of belief, political views or lobbying. In mature democracies the goal of combating racism and xenophobia should be accomplished through the 'long route' (Fronza, 2008) of improving the quality of dialogue and the quality of education, bearing in mind that legal measures are not ready-made solutions to unsettling social phenomena but rather measures of last resort.

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