

Memorial over victims
of Communism, by Péterfy
Lágymányos, Budapest.

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The dilemma of memory laws

**To restore the dignity of victims
without feeding into ultra-nationalism** by **Cagla Demirel**

In their simplest form, memory laws are legal rules that govern selective and state-approved narratives regarding historical events. They can articulate descriptive, declaratory, or punitive legislation regarding nations' past. In this sense, legal governance of narratives and memory of past events can consist of punitive measures or other forms of legal acts such as official recognition and commemoration of historical events and figures. Contested narratives about a nation's past among minority and majority groups or injustices inflicted upon specific minority or ideology groups could be banned from the official memory through establishing and solidifying memory laws. In a broader sense, the memory laws could also be embedded in transitional justice processes and take the form of court decisions as components in settling the truth about the past and shaping memory and historical records.¹ Even though memory is cultural and contextual, it still is subject to contested relations between ethno-religious groups, nations, and nation-states and potentially used for political purposes. Legitimizing state-ap-

proved memories and criminalizing others in varying ways bring about "memory wars" over a shared past between governments and regions. Therefore, memory laws and memory politics are inevitably connected to each other, and the legislation of memory can be considered a piece of a greater mnemonic whole.

ALTHOUGH INITIAL memory laws were implemented against Holocaust denial by Germany in 1985 and Israel in 1986, governance of memory dates back as early as the French Revolution.² More intense discussions about punitive memory laws, as presented by Kaposov, were initiated by the Gayssot Law in France in 1990, banning the questioning and denial of the existence of crimes against humanity and the Holocaust.³ Initiation of these punitive memory laws can be considered a continuation of the Press Law of 1881 in France, which regulates press freedom and responsibilities by criminalizing offensive and defamatory language against an ethnic group, a nation, a race, or a religion. In the same line, early versions of memory laws aimed at pre-

“MANY POST-COMMUNIST COUNTRIES RANGING FROM BULGARIA TO UKRAINE TO MOLDOVA ADOPTED MEMORY LAWS THAT PROHIBIT THE JUSTIFICATION OF THE FORMER TOTALITARIAN COMMUNIST REGIME.”

venting insults against certain groups and offensive expressions regarding their past. Other countries having followed the trend, there has been a significant increase in regulating the writing of history by introducing memory laws, especially after the dissolution of the USSR. Most post-communist countries increasingly imported the concept of “memory laws” from Western European states that replicated laws on Holocaust memory. Similarly, laws against Holocaust denial subsequently spread into other contexts and led to the adaptation of laws on denial of other genocides, as can be seen in the recognition of Armenian genocide in declarative laws and parliamentary decisions or punitive prohibitions of its denial.⁴ Initiation of a criminal code against denial of the Holodomor famine in Ukraine was imitated in the same line.⁵ Further, in post-war Bosnia, history has been primarily constructed by the legislative power of the Office of High Representative (an outside intervener) as shown by the latest decision of the former High Representative banning denial of the Srebrenica genocide.⁶

Shifting focus: From suffering to nationalism

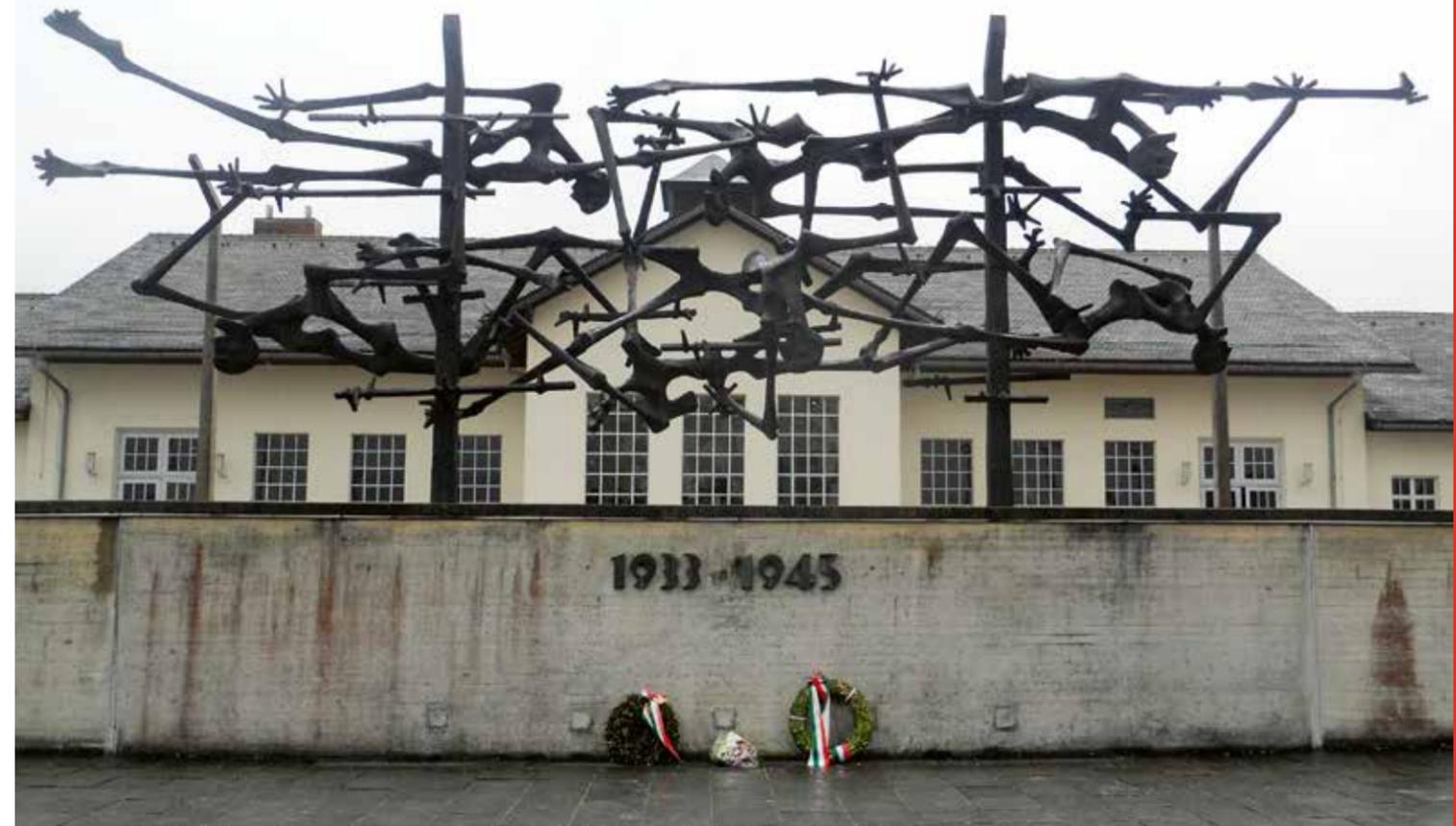
In most post-communist countries after the breakdown of the USSR, memory legislation often aimed at constructing an identity of suffering under Nazism and the totalitarian Soviet regime, which relativized itself according to a cosmopolitan understanding of victimhood⁷ centered on the Holocaust memory. Regulations of memory, in this sense, were considered an indicator of democratic transition and an entry ticket to the European Union. However, especially since the 2000s, there has been a significant shift in the instrumentalization of memory laws towards nationalism. More and more post-Soviet and post-communist states have utilized memory legislation to enforce certain parts and ways of remembering the past while censoring alternative interpretations. In this respect, current memory laws often stimulate within the context of nation-building projects and state valorization. For example, Maria Mälksoo defined memory as a “referent object of security” and associated the use of memory laws with the pursuit of securitization by nation-states.⁸ Thus, fixing memory laws, in general, seeks to secure historical narratives by excluding and even criminalizing alternative views. For example, contemporary Russia illustrates how a memory law (Article 354.1 to the Criminal Code of the Russian Federation adopted in 2014)⁹ is formulated to protect the state’s image according to security theory. It shows a way of creating a “state autobiography” or a sort of “grand narrative.” The 2020 Constitutional Amendment adopted in the Russian Federation included a clause on protecting a historical truth:¹⁰

Article 67.1 of the constitution declares that the Russian Federation honors the memory of the defenders of the fatherland and ensures the defense of historical truth. Diminishing the significance of the heroism of the people in defense of the fatherland will not be permitted.

It is established by the constitution that Russia is the successor of the USSR. Accordingly, narratives emphasizing the Soviet role in World War II with a negative connotation - such as the Molotov-Ribbentrop Pact - or rhetoric that compares the Soviet invasion of Poland to the Nazi invasion are deemed offensive to Russia. Under the recent amendments, these are now criminal acts with legal consequences. Correspondingly, Russian laws of 2014 and 2020 criminalize claims about Soviet-Nazi collaboration, and Russia fails to distance the state image from the communist past.¹¹ The strong identification with the USSR seems to impede the potential for dealing with the past crimes if contemporary Russia does not distance itself from the communist past.

Similar formulations of memory laws that construct and re-construct nation-state identities and their grand narratives are also evident in post-communist space. However, countries apart from Russia differed in their framing of post-Soviet legacy. Many post-communist countries ranging from Bulgaria to Ukraine to Moldova adopted memory laws that prohibit the justification of the former totalitarian communist regime. The use of communist symbols and narratives associated with past regimes was banned within the same wave. For example, in Estonia, the narrative of Soviet occupation gained prominence to erase a widespread narrative that suggests Estonia’s voluntary integration with the Soviet Union. Similarly, in Ukraine, there has been a tendency to regulate the interpretation of the past from a nation-state perspective to condemn communist crimes. The memory law adopted in 2016 in Poland prohibited communist propaganda and penalized public pro-communist statements. Moreover, memory laws in Ukraine, the Czech Republic, Hungary, Latvia, Lithuania, and Poland all criminalize the denial of the totalitarian communist regimes, unlike the Russian criminal code (2014) that aims to protect the USSR’s image in WWII.

THE STRONG CONTRAST with Russia on this account has been reflected in a “memory war”, especially between Russia and former republics. For example, when the Soviet statue of Marshal Ivan Konev in Prague (which had been vandalized many times) was removed,¹² adoption of Article 243.4 Russian Criminal Code in the Russian constitution made it a punishable offense to damage war graves, monuments, or memorials dedicated to Russia’s military glory or the defense of the Russian fatherland - regard-



Memorial to the victims of the Holocaust, Dachau concentration camp.

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less of the location within or outside of the Russian Federation. Accordingly, similar legislative reactions via memory laws have also been ongoing between former Soviet republics. For example, Ukraine and Poland legislated controversial memory laws regarding the same historical events with varying interpretations (e.g., Volhynia “tragedy” for the former and Volhynia “massacre” for the latter). While Ukraine passed legislation to criminalize those who explicitly discredit the OUN and the ABN (so-called national Ukrainian heroes),¹³ Poland passed a declarative law to define the events committed by the very same “heroes” a genocide.¹⁴

Utilizing memory laws to condemn past crimes by the Soviet regime and emphasize how formerly communist countries suffered at the hands of the USSR indicated a clear break away from the Soviet legacy and fed into re-construction of a nation-state identity. However, especially from the early 2000s, the nation-building projects through regulation of historical narratives shifted towards cleaning the dark spots of nation-states’ pasts to solidify the pureness of the nation via memory laws. For example, a memory law was issued in Poland in 2018 that criminalized any public statement claiming that the Polish people and Poland were responsible for or complicit in Nazi crimes.

The developments mentioned above, which increasingly incited the silencing and censoring nature of memory laws, raised the problem of freedom of speech. In countries like Poland and Ukraine, any narrative that touches upon the nation-state’s compliance with the Nazi regime during World War II led to the criminalization of statements about the past. As the grow-

ing scholarly debate about these prohibitions showed, the new trend of memory laws violates freedom of expression. It also challenges the democratic elements within post-communist Eastern European countries instead of what was expected from their initial formulations (e.g. strengthening democracy and protecting victims’ dignity).

A SIMILAR DISCUSSION about freedom of speech has been ongoing concerning Holocaust or genocide denial in general. Yet this legislation is often considered a safeguard for protecting victims’ dignity. In contrast, the new trend of memory laws only strives to conceal dark spots in the history of nations that might identify them as perpetrators or complicit actors rather than victims within specific periods of history. These developments have a significant impact on scholars and historians. For example, as shown by reactions against Grzegorz Rossolinski-Liebe’s research on Stepan Bandera in Ukraine, the controversies around Jan Tomasz Gross and his book *Neighbours*, and legal disputes around Jan Grabowski and Barbara Engelkind in Poland,¹⁵ enforcing memory laws challenges and stigmatizes scholars; and in some cases, they are even framed as traitors or enemies of the nation.¹⁶

For the time being, the main problem with memory laws derives from the tension between the right of freedom of speech and the prohibition of abuse of the very same right. As many verdicts by the European Court of Human Rights (ECtHR) established, references to Nazism or the use of Nazi symbols are outside the boundaries of freedom of speech because they include notions of incitement to violence, or they pose a threat to public

order or the rights and reputations of others by distorting the established historical facts. However, the same ECtHR issued decisions stating that prohibiting the denial of Armenian genocide¹⁷ or banning the use of communist symbols are a breach of Article 10 of the European Convention of Human Rights (ECHR),¹⁸ which promotes the protection of freedom of expression. These decisions arguably implied that historical events and crimes other than Holocaust must be open to debate and criticism. It puts the Holocaust victims at the epicenter of the victimhood debate. And every victim group worldwide inevitably compares their victim status, rightfulness, and innocence with victims of Nazis, and perpetrators are also relativized accordingly. As the above-mentioned verdicts by ECtHR indicate there is an ambivalence when it comes to other genocides and historical crimes against humanity in other places.

IN CONCLUSION, the legal aspect of cementing selective memories can act out within a broad range of areas. It can be declarative or punitive, national or transnational. It can feed into nationalism or cosmopolitan humanitarianism. In most post-communist countries, 30 years after the fall of the USSR, the use of memory laws centered around the autobiographic narratives of nation-states. Most of the post-communist countries securitize the nation-state via legislating memory by silencing alternative voices and marginalizing other perspectives and narratives, by purifying their history to repair national self-esteem and their national image in world politics. Memory laws perilously become a foreign policy tool at the hands of authoritarian regimes. This problematic political function of memory laws has been fueling the “memory war” between contemporary Russia and former Soviet and communist republics especially for the last two decades. And current Russian aggression against Ukraine is a breakthrough in the memory laws debate because it would be fair to say we are entering a new era in which adopting memory laws is not only problematic regarding the right to freedom of expression. Instead, at the opposite end of the spectrum, a nation-state’s (Ukraine) right to exist is problematized by an aggressor state (Russia) based on history. Thus, inter-state war is (re)defined as a punitive mechanism against how the past is remembered.

On the one hand, free and open debates about the past are still crucial principles according to ECHR, unless they pose distortions of historical facts or offenses to the victims or incite violence. On the other hand, “the memory war” took an extreme form and transitioned from a rhetorical or legal ground to a physical one as can be seen in Putin’s firm reference to the de-communization of Ukraine as one of the causes in his speech declaring war against Ukraine.¹⁹ Thus, the question still stands: How to produce memory laws to restore the dignity of victims without feeding into ultra-nationalism, while the international community still cannot prevent wars making new victims. ❌

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