Israel Law Review **54**(3) 2021, pp 324–339. © The Author(s), 2021. Published by Cambridge University Press in association with the Faculty of Law, the Hebrew University of Jerusalem.
doi:10.1017/S0021223721000200

Memory Laws as a Misuse of Legislation

Eran Fish[*]

First published online on 27 September 2021

Memory laws are often accused of enforcing an inaccurate, manipulative or populist view of history. Some are also said to violate fundamental rights, in particular the right to free speech. These accusations are not entirely unjustified. Yet, a discussion of memory legislation that concentrates on these faults might be missing its mark. The main problem with memory legislation is not necessarily with the merits of any particular law. Rather, the determination of historical facts is not the kind of matter that should be entrusted to the legislator in the first place. The role of legislation is to make social cooperation possible despite substantial disagreement, but only when such social cooperation is indeed required. Disputes about historical facts, I argue, are not a coordination problem that requires a legislative solution. Still less can they justify legal coercion.

Keywords: memory laws, freedom of expression, legislation, right to truth, transitional justice

1. Introduction

Opponents of memory legislation argue that the state should not regulate historical truth. It is not for parliament, it is said, to stipulate what is historically true, how past events are to be remembered, or what is allowed to be said about them.[1] This objection gained momentum in response to France's memory legislation concerning the Atlantic slave trade, the Armenian genocide, and the country's colonial past.[2] It was voiced again following the rise of memory legislation in the last decade. Within the span of a few years new statutes regulating historical memory emerged in Eastern Europe, Israel and elsewhere. Russia has made it unlawful to 'spread intentionally false information about the Soviet Union's activities during World War II'.[3] The Ukrainian parliament passed four so-called 'decommunisation laws' which, inter alia, determine who should be honoured for the Ukrainian fight for independence and prevent the 'falsification' of Second World War history.[4] A much publicised Polish amendment – which has a lasting impact despite having been revised – had made it a criminal offence to attribute responsibility to Poland for

[*] Postdoctoral Fellow, Chair of Moral Philosophy at LMU, Munich (Germany); Adjunct Lecturer, Faculty of Law, University of Lucerne (Switzerland). I am grateful to the anonymous reviewers for excellent comments and objections, as well as to the organisers of and participants at the conference on 'Transitional Justice and the Crisis of Democracy'; eran.fish@doz.unilu.ch.

[1] See, eg, Liberté pour l'Histoire, 'Appel de Blois', as well as accompanying essays of the Liberté pour l'Histoire movement, https://web.archive.org/web/20081111031740/http://www.lph-asso.fr/actualites/42.html.

[2] Nikolay Koposov, 'Historians, Memory Laws, and the Politics of the Past' (2020) 4 *European Papers* 107, 108.

[3] Criminal Code of the Russian Federation (amended in 2014), art 354(1.

[4] Law 2558, Law on the Condemnation of the Communist and National-Socialist (Nazi) Totalitarian Regimes in Ukraine and the Ban on Propaganda of their Symbols (Ukraine); Law 2540, Law on Access to the Archives of Repressive Organs of the Communist Totalitarian Regime 1917–1991 (Ukraine); Law 2538-1, Law on the Legal Status and Commemoration of the Fighters for the Independence of Ukraine in the Twentieth Century (Ukraine); Law 2539, Law on the Perpetuation of Victory over Nazism in the Second World War 1939–1945 (Ukraine).

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

crimes committed on its soil.[5] During the same period in Israel, memory legislation was being used, among other things, to counter aspects of the Palestinian historical narrative.[6]

However, while the sentiment that there is something problematic about legislating history is shared by many – this author included – the explanation is somewhat elusive. Some critics point to the content of these laws. Recent memory statutes, for example, have been accused of revisionism or a manipulative use of historical facts.[7] A related objection is that parliament lacks the expertise to determine what is and is not historically correct.[8] However, while these are serious concerns, they do not fully explain what is uniquely problematic about memory laws. After all, legislators are not experts on banking, firearms and public health, and occasionally make wrong-headed and costly errors in these areas too. Yet, it is perfectly acceptable for such matters to be regulated by the legislature. What is it about history and memory then that renders them inappropriate subjects for legislation?

It is often suggested that the problem has to do with freedom of speech and historical research. Not only do people have a right to express their beliefs about the past, freedom is also thought to be the best way in which to protect historical truth: according to a familiar argument, the way to defeat false claims about history is by refuting them in a free and open debate rather than by trying to legislate them away.[9] However, this explanation is limited too. For one thing, there is a normative question to be asked as to whether restricting factual statements about the past is always and everywhere unjustified. As some commentators have pointed out, the hope that truth would prevail in a free and unregulated public debate may be overly optimistic in an age of rapidly circulating falsehoods.[10] Secondly, even if we grant that such constraints on speech and research are wrong, not all memory laws restrict speech. As discussed below, some memory laws that proved to be bitterly contested do not, in fact, criminalise speech at all. The concern regarding free speech therefore does not seem to explain all that is objectionable about memory legislation.

The purpose of this article is to put the finger on what is fundamentally wrong with memory legislation. As will be argued, the main problem is not necessarily with the particular merits of

[5] Act of 26 January 2018 amending Act on the Institute of National Remembrance: Commission for the Prosecution of Crimes against the Polish Nation, Act on War Graves and Graveyards, Act on Museums and Act on the Liability of Collective Entities for Punishable Offences. The amendment was revised later in that year: Act of 27 June 2018 amending the Law on the Institute of National Remembrance (Poland).

[6] Basic Law: Israel as the Nation State of the Jewish People, art 1(a); Amendment 40 to the Budget Foundations Law (2011) (Israel).

[7] Jonathan Freedland, 'Poland Can't Lay Its Holocaust Ghosts to Rest by Censoring Free Speech', *The Guardian*, 2 February 2018, https://www.theguardian.com/commentisfree/2018/feb/02/poland-holocaust-free-speech-nazi; Jeffrey Heller and Marcin Goettig, 'Israel and Poland Clash over Proposed Holocaust Law', *Reuters*, 28 January 2018, https://www.reuters.com/article/us-israel-poland/israel-and-poland-clash-over-proposed-holocaust-law-idUSKBN1FH0S3; Mark Edele, 'Fighting Russia's History Wars: Vladimir Putin and the Codification of World War II' (2017) 29 *History and Memory* 90, 106.

[8] René Rémond, 'History and the Law', June 2006, 6, https://www.diplomatie.gouv.fr/IMG/pdf/History_and_the_law.pdf.

[9] Timothy Garton Ash, 'The Freedom of Historical Debate is under Attack by the Memory Police', *The Guardian*, 16 October 2008, https://www.theguardian.com/commentisfree/2008/oct/16/humanrights.

[10] Frederick Schauer, 'Facts and the First Amendment' (2010) 57 *UCLA Law Review* 897, 898; Cass R Sunstein, 'Falsehoods and the First Amendment' (2020) 33 *Harvard Journal of Law & Technology* 388, 393.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

any particular memory law. Rather, what the legislation of memory is missing is the underlying justification that parliamentary law typically has. The function of legislation is not simply to turn any kind of social preference into law but to enable society to agree on necessary common rules when its members cannot agree on what these rules should be. In other words, the legislature is entrusted with lawmaking powers because such powers are needed. That – rather than the expertise of the legislators or the merits of the statutes they enact – is also the reason to respect parliamentary law and the authority of the legislature. However, memory legislation is not socially indispensable in the same way: the difference of views about the past is not a coordination problem that requires a legal solution, but is rather something that society should be able to tolerate. Accordingly, memory legislation makes use of the authority with which parliamentary law is associated for a purpose that does not justify the legislator's intervention.

The article will proceed as follows. In Section 2, I will survey some important examples of memory legislation from France, Eastern Europe and Israel, and distinguish these statutes from laws which they might resemble superficially. I will then discuss, in Sections 3 and 4, some of the objections that have been levelled against these memory laws in the literature: those that concern the content of the law, and those that object to the idea of memory legislation itself. In Section 5, I outline the central argument – namely that the basic flaw in the legislation of memory is in the way in which memory laws use, or rather misuse, parliamentary law.

2. MEMORY LEGISLATION: RECENT DEVELOPMENTS

This article is concerned with memory laws – that is, laws that advance or enforce a certain official narrative of past events. However, out of the various pieces of legislation that might fall under this headline, my interest is in those that seek to influence, rather than merely reflect, how the past is remembered: statutes that were legislated against the background of a disputed history, with the intention of lending official support to a particular account of the past.

As some commentators have pointed out, not all memory laws fit this description.[11] The prohibitions against Holocaust denial that emerged in the 1980s and 1990s[12] are sometimes classified as memory laws. Yet, as the historical events concerned are what the Strasbourg Court has labelled 'clearly established facts',[13] such statutes are not assumed to be an attempt to settle a serious controversy, or to suppress some bona fide challenge to the accepted version of history. Instead, bans on Holocaust denial are standardly understood as bans on hate speech – the denial

[11] Rob Kahn, 'Free Speech, Official History and Nationalist Politics: Toward a Typology of Objections to Memory Laws' (2019) 31 *Florida Journal of International Law* 33, 35 (according to Kahn, some memory-affecting prohibitions should not, in fact, be classified as memory laws at all); Aleksandra Gliszczyńska-Grabias, 'Law and Memory', *VerfBlog*, 4 January 2018, https://verfassungsblog.de/law-and-memory.

[12] eg, Germany: Strafgesetzbuch [StGB] [Penal Code] s 130(3); France: Law No. 90–615, 13 July 1990 (Gayssot Act); Austria: Law against National-Socialist Activities in Austria (Verbotsgesetz), as amended on 26 February 1992 (*Federal Gazette* 148/1992), s 3(h).

[13] ECtHR, *Garaudy v France* (Admissibility), App no 65831/01, 24 June 2003, 'The Law' para 1; ECtHR, *Witzsch v Germany* (Admissibility), App No 7485/03, 13 December 2005, 'The Law' para 1.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

being a form of coded antisemitism.[14] Of course, one might raise various questions concerning these laws as well: for example, whether every case of Holocaust denial amounts to an expression of hate, or whether hate speech, by Holocaust denial or otherwise, should be prohibited at all. Be that as it may, the point is that prohibitions against Holocaust denial concern hate speech, not memory per se.

During the past couple of decades, however, there has been an increase in a type of legislation that aims to shape directly the public perception of the past. Some of these statutes were met with more criticism than others. Some seek to foster recognition of certain historical episodes while others purport to deny them. Some take the form of a criminal prohibition, while others regulate the allocation of material or symbolic resources. However, they all share a defining characteristic, which is the use of legislation to shape views about the past and determine the historical record. This common feature raises important conceptual problems that apply, to some extent, to all these laws, despite their differences.

France, which enacted a series of such statutes in the early 2000s, may be considered a leader in this regard. A law of January 2001 recognised the Armenian genocide, while the so-called Taubira Act of the same year recognised the Atlantic slave trade as a crime against humanity.[15] In 2005, the controversial French Law on Colonialism required, inter alia, that the 'positive role' of French presence abroad be included in the school curriculum.[16] Following a public outcry, the latter provision was eventually repealed.[17] Historians protested both against the notion of legislating an official account of history, and against the fact that the 2005 law 'imposes an official lie' with regard to the scope of atrocities committed in the colonies.[18] However, the fact that the two memory laws of 2001 remain in force suggests that the latter objection has proved the more effective. The French legislator has not changed its mind on legislating history as such.

The 2010s saw a rise in that kind of memory legislation in Eastern Europe, as a memory war broke out between Russia, Poland and the Ukraine. Ever since the demise of the Soviet Union, the Eastern bloc has been divided over the legacy and meaning of the role of the USSR in the Second World War.[19] Some Eastern countries enacted laws that prohibit the denial of both Nazi and communist crimes committed on their territories and against their respective populations.[20] Russia, in turn, has made considerable efforts to defend its own narrative of the Great

[14] *Garaudy* ibid ('There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history').
[15] Loi no 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915; Loi no 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité.
[16] Loi no. 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés, art 4.
[17] The Act was repealed by Decree no 2006-160 of 15 February 2006.
[18] Jon Henley, 'French Angry at Law to Teach Glory of Colonialism', *The Guardian*, 15 April 2005, https://www.theguardian.com/world/2005/apr/15/highereducation.artsandhumanities.
[19] Nikolay Koposov, 'Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia' (2021) 20 *East European Politics and Societies: and Cultures* 1, 8–9.
[20] eg, Lithuania's memory law of 2010, cited in Koposov, ibid 9.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

Patriotic War. In 2009, President Medvedev established a 'Historical Truth Commission officially called the Commission to Counteract Attempts at Falsifying History to Damage the Interests of Russia'.[21] The work of the commission has laid down the foundations for the much discussed Law against the Rehabilitation of Nazi Criminals of 2014. The law amends Article 354.1 of the Russian Penal Code, which now makes it a criminal offence, among other things, to 'spread intentionally false information about the Soviet Union's activities during World War II'. Under this law, statements to the effect that 'the Communists … actively collaborated with Germany in dividing Europe according to the Molotov-Ribbentrop Pact' and 'Communists and Germany jointly attacked Poland and started the Second World War on 1 September 1939!' have resulted in a criminal conviction.[22]

The Russian memory law not only reacted to developments in Eastern Europe. It also sparked new ones, not least in the form of other domestic memory laws. In 2015, Ukraine enacted a series of 'decommunisation laws', condemning the communist and national socialist regimes and prohibiting their symbols, honouring the fighters for Ukraine's independence, commemorating the victory of Nazism, and guaranteeing access to archives.[23] The historical narrative that these laws seek to draw is one that is manifestly independent of those of Ukraine's neighbours. Thus, for example, the Law on the Condemnation of Communist and National-Socialist Regimes highlights the distinct democratic identity of the state, 'striving to protect human rights and liberties' and to 'develop and strengthen the independent, democratic, constitutional state'. This democratic identity is contrasted with the '[c]ommunist totalitarian regime of 1917-1991', which is 'found criminal in Ukraine', along with the Nazi regime.[24] The decommunisation legislative project not only draws a line between the Ukrainian historical narrative and that of Russia, but also takes a stance on long-standing disputes with Poland. The Law on the Legal Status of Fighters, which offers an unusually detailed historical narrative within the actual text of the law, grants honours to members of the Ukrainian Nationalists and the Ukrainian Insurgent Army – groups claimed to be responsible for the mass killing of Poles and Jews.[25]

Partly in response to the Ukrainian legislation and partly as a reaction to other narratives, Poland adopted its highly controversial Amendment to the Act on the Institute of National Remembrance. In Article 2a, the Polish legislator took a contrasting stance to that of its Ukrainian counterpart:[26]

[21] See discussion in Kora Andrieu, 'An Unfinished Business: Transitional Justice and Democratization in Post-Soviet Russia' (2011) 5 *International Journal of Transitional Justice* 198, 213.

[22] For a translation from Russian see Gleb Bogush and Ilya Nuzov, 'Russia's Supreme Court Rewrites History of the Second World War', *EJIL: Talk*, 28 October 2016, https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war.

[23] See sources at n 4.

[24] Law 2558 (Ukraine) (n 4) art 2.

[25] Law 2538-1 (Ukraine) (n 4); according to art 1, '[t]he name of fighters for independence of Ukraine in the twentieth century shall be assigned to the persons who participated in all forms of political, armed and other collective and individual struggle'. The statute goes on to list those deserving the title, among them the Volyn Rebel (Insurgent) Army.

[26] Act of 27 June 2018 (Poland) (n 5). Article 2a was subsequently repealed by Poland's Constitutional Tribunal, which found the terms 'Ukrainian nationalists' and 'Eastern Small Poland [Małopolska Wschodnia]' to be

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

> Within the meaning of the Act, crimes committed by Ukrainian nationalists and members of Ukrainian units collaborating with the Third Reich constitute acts committed by Ukrainian nationalists between 1925 and 1950 which involved the use of violence, terror or other human rights violations against individuals or population groups. Participating in the extermination of the Jewish population and genocide of citizens of the Second Polish Republic in Volhynia and Eastern Malopolska [Lesser Poland] also constitute a crime committed by Ukrainian nationalists and members of Ukrainian units collaborating with the Third Reich.

However, the Polish law is better known for its Article 6, amending Article 55 of the 1998 Law on the Institute of National Remembrance, which aims to fend off accusations of Polish responsibility for atrocities taking place on its soil. According to that article:

> Whoever claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich … or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise grossly diminishes the responsibility of the true perpetrators of said crimes – shall be liable to a fine or imprisonment for up to 3 years.

The prohibition in its original version had made some exemptions where the attribution of responsibility was unintentional, or made 'in the course of the one's artistic or academic activity'. This, however, was not enough to reconcile the law's many critics in Israel and the United States and international organisations.[27] Following international pressure, Poland was eventually persuaded to soften the law, and the criminal sanction was lifted.[28]

In these examples from Eastern Europe memory legislation serves as a shield against external challenges to the national historical narrative. However, memory laws may well be used against challenges from within, as is the case in Israel. In 2011 the Knesset passed the so-called Nakba Law. This was an amendment to the Budgetary Foundations Law, which authorises the minister of finance to reduce monetary support for publicly funded institutions that, inter alia, mark the date of Israel's establishment as a day of mourning.[29] The purpose of this measure is probably not, as some might assume, security-oriented, or even a case of 'militant democracy': the amendment lists the negation of the state as Jewish and democratic, as well as incitement to racism, violence or terrorism, as *other* possible grounds for losing financial support. The fact that mourning Israel's Independence Day appears as a distinct ground for applying the law suggests, rather, that the actual aim is to protect certain symbols of the state from the competing narrative of the Nakba.

---

incompatible with the requirement of specificity: Uladzislau Belavusau, 'The Rise of Memory Laws in Poland' (2018) 29 *Security and Human Rights* 36, 48.

[27] Andrew Rettman, 'Polish Holocaust Law Threatens US and EU Ties', *EUobserver*, 7 February 2018, https://euobserver.com/foreign/140888; Heller and Goettig (n 7); Amnesty International, 'Poland: The Law on the Institute of National Remembrance Contravenes the Right to Freedom of Expression', 8 February 2018, Index no EUR 37/7858/2018, https://www.amnesty.org/en/documents/eur37/7858/2018/en.

[28] Act of 27 June 2018 (Poland) (n 5) *Journal of Laws of the Republic of Poland 2017*, item 1277.

[29] Amendment 40 to the Budgetary Foundations Law (2011).

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

During that same decade an attempt was made to win the contest of narratives at the constitutional level as well. The Basic Law: Israel as the Nation State of the Jewish People, passed in 2018, might not be a memory law in its conventional form, yet there are good reasons to view it as part of the effort to tackle certain challenges to the historical and national narrative. As an early draft bill from 2013 explains, the proposal's initiators sought to 'highlight the historical and traditional ties between the Jewish people and the land of Israel'.[30] Indeed, this declared purpose is manifest in Article 1(a), according to which '[t]he land of Israel is the historical homeland of the Jewish people'. While this is not a legal norm that entails a criminal or civil sanction, it imparts a legal status, rather exclusively, on the historical claims of one side of the conflict.[31]

3. THE PROBLEM WITH MEMORY LEGISLATION: THE CONTENT OR THE MEDIUM?

Unlike bans on hate speech that happen to have a bearing on historical memory, the statutes surveyed above are designed to shape the way in which historical events are remembered and engaged with. They address historical questions that are currently contested, whether from within or from outside their respective borders. They seek to shape the historical narrative, rather than merely reflect an already established version: to have an impact on public opinion, to fight what is taken to be false factual claims, and to give weight to a preferred version of the past. That is an ambitious legislative project. It has also been the subject of criticism.

Somewhat crudely, critics have raised two kinds of objection, though these occasionally conflate with each other. The first is that these laws are inappropriate for reasons that have to do with their content. The other is that it is not for the legislator to regulate historical memory at all.

Among the objections of the first type, the best known is the charge of historical revisionism. The allegation is that some of these laws defend a flatteringly selective picture of past events, and attempt to erase or play down the darker chapters in a nation's history: the injustice of colonialism in the case of the French law of 2005, events such as the Jedwabne massacre and other crimes against Jews in the Polish context, or the alleged participation of Ukrainian fighters for liberation in acts of mass violence.[32] A related content-based objection concerns the way in which some memory laws are being used. According to Nikolay Koposov, the recent memory legislation in Eastern Europe, unlike earlier anti-denialism prohibitions in the West, is designed to deflect responsibility for past atrocities onto others, instead of coming to terms with a troubled historical record.[33] On this view, memory laws are used as an instrument for amplifying nationalistic, self-centred narratives at the expense of the more universal values that guide anti-denialism

[30] Draft Bill 1550/19, Basic Law: Israel as the Nation State of the Jewish People (22 July 2013).
[31] In and of itself, declaring the land of Israel to be 'the historical homeland of the Jewish people' is fairly innocuous. Indeed, the ensuing controversy concerned other clauses. However, the basic law is significant not only for what it contains, but also for what it excludes. In this context, the inclusion of the Jewish people's historical ties to the land, to the exclusion of those claimed by the Palestinians, is not trivial.
[32] See Freedland (n 7); Ilya Nuzov, 'Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe' (2019) 19 *Human Rights Law Review* 231, 234.
[33] Koposov (n 19) 2.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

legislation. In a similar vein, Yifat Gutman has argued that the Russian law of 2014 and the Israeli Nakba Law are tools for delegitimising and silencing minority voices that counter the dominant national narrative.[34] Here, too, the objection is to an allegedly manipulative use of memory legislation.

Note that these objections do not rule out the possibility of an unobjectionable or even a desirable memory law. In principle, if the problem with a particular law is its false or biased content, the remedy may be a better law. Indeed, that seems to be the approach taken by the respective parties to the so-called memory wars in Eastern Europe. The Polish legislator, for example, did not object to Ukraine's historical legislation as such, but to the specific Ukrainian narrative being legislated. The Ukrainian legislator, in turn, seems to have taken issue with the Russian version of history, not with the legitimacy of Russia's memory legislation per se. In short, much of the resistance to the new memory legislation is not, in fact, directed at the legislation of history as such, but rather at the specific version of history being legislated.

However, not many critics believe the content of the recent memory laws to be their only problem. According to a second type of objection, memory laws may be inappropriate even when they have the right content. The problem is thought to be with the very idea of memory legislation, or at least with punitive memory legislation. Thus, historians who protested against the untruthfulness of the 2005 memory law also objected to the legislation of history in more general terms. In their 'Appel de Blois', members of the Liberty for History movement argued that '[i]n a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions'.[35] According to this objection, even a law that defends a correct view of history could still exceed the legislator's authority.

Related objections have to do with legislators' and jurists' lack of necessary expertise and understanding to pronounce on history. Only historians, it was pointed out, can reasonably be trusted to appreciate the meaning of historical events, to tell historical truth from revisionism, and to assess the quality of historical research.[36] The legislature, even when its intentions are sincere, is unsuitable for the task. Still other critics take issue with punitive memory legislation specifically – again, regardless of its content. According to Emanuela Fronza, punitive memory laws depart from accepted standards of criminal law in that they '[prosecute] ideas and [punish] a type of offender rather than an actual offence'.[37] On that view, even when a criminalised statement is indeed false, there is a real concern that what is in fact being punished is a thought rather than a deed.

Now, it may well be the case that both kinds of objection are deserved: that the law should not regulate historical memory *and* that in a certain case the memory laws that were in fact legislated

[34] Yifat Gutman, 'Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?' (2016) 50 *Law & Society Review* 575, 598. Gutman argues, however, that this tool has proven counter-effective, as the law encouraged rather than suppressed public attention to the narrative that was intended to be sidelined.

[35] Liberté pour l'Histoire (n 1).

[36] Rémond (n 8) 6.

[37] Emanuela Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (TMC Asser Press 2018) 162.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

are wrong. Yet, in most contexts, it would seem to be appropriate to raise one of these objections or the other, but not both. When the legislator oversteps its mandate, it is normally this fact that calls for criticism, not the merits of the unauthorised piece of legislation. For example, if parliament were to adopt a 'Modesty Act' which determines a dress code for women, the appropriate objection would be that the legislator has no business interfering with such private matters, or that such a law is inherently discriminatory, and so on. It would be the wrong kind of criticism, surely, to point out that the law enforces an incorrect dress code for women. In fact, once we start quarrelling about which dress code should be sanctioned by law, we may already be granting that regulating clothing is in principle within the legislator's prerogative.

Similarly, one might hold that legislating history is inconsistent with freedom of speech or that the truth should be allowed to prevail in the marketplace of ideas. However, if that is so, the main resistance to such legislation cannot be that the *wrong* historical narrative was enacted. If historical facts should not be a subject for legislation, then even a law that enforces a fair and correct version of history should be objectionable. Indeed, I believe that while the problems with the content of some memory laws are real, concentrating on these local flaws may distract from what is a more fundamental problem with the legislation of history. However, as I will argue in a moment, that fundamental problem is not explained fully by referring to freedom of speech or the legislator's lack of expertise.

4. Memory Legislation and Free Speech

On the face of it, freedom of expression seems to be the most immediate reason to be concerned about memory legislation. At least as a matter of positive law, this worry is also well founded: protecting facts and historical narratives does not count as a valid justification for restricting speech on either side of the Atlantic, as well as under international treaties. According to Article 10 of the European Convention on Human Rights, freedom of expression may be limited in pursuit of such goals as national security, the prevention of crime and protecting people from other real harm.[38] None of the legitimate goals listed in the Convention includes the protection of factual truth – not to mention a disputed version thereof. The same holds with regard to Article 19 of the International Covenant on Civil and Political Rights.[39] As clarified by the Human Rights Committee, '[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression'.[40] The constitutional protection of speech in

[38] European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), art 10.

[39] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[40] Human Rights Committee, General Comment No 34 on Article 19 of the ICCPR (21 July 2011), UN Doc CCPR/C/GC/34, para 49. See discussion in Nuzov (n 32) 240. Articles 10(2) ECHR and 19(3)(a) ICCPR also list protection of the reputation of others among the valid justifications for restricting speech. However, the accepted meaning here is the protection of individual persons from libel or hate speech, rather than the good reputation of the state (see Human Rights Committee, ibid para 28).

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

the United States extends not only to expressions of opinion but also to statements of fact.[41] Even prohibitions of Holocaust denial, which, as we have seen, are aimed at tackling hate speech rather than regulating memory, are deemed inconsistent with the First Amendment.[42] Legislating historical truth, then – in particular, when such legislation is also punitive – appears incompatible with existing standards of freedom of speech. Importantly, that is the case whether the historical narrative being legislated happens to be true or false.

However, while the memory laws debate is often framed as an issue of freedom of speech, there are reasons to doubt that this is where the main problem lies. For one thing, not all memory laws that have attracted criticism affect freedom of speech to the same extent. For example, some memory laws, such as the two French statutes of 2001, do not directly limit expression by a criminal sanction. Other laws are more than merely declaratory, and yet they are not clearly incompatible with freedom of speech. For example, it is debatable whether the aforementioned Nakba Law, which threatens to deduct financial support from certain institutions, constitutes the violation of a right.[43] At the very least, the position of a law that deprives an institution of an incentive seems less clear than that of laws that impose a criminal sanction on individual persons. Conceivably, memory laws may be drafted so as to remain in compliance with freedom of expression, for example, by convincingly citing a legitimate aim and keeping the restriction proportionate. Intuitively, the fact that a memory law does not strictly violate the right to free speech does not remove every reservation we might have.

Secondly, positive law notwithstanding, one may ask whether freedom of speech should, normatively speaking, protect statements of fact as it protects opinion.[44] Canonical rationales for freedom of expression, such as the notion that the remedy for false speech is true speech, appear increasingly to be unpersuasive. The idea that factual truth should be allowed to prevail in an open and unregulated marketplace of ideas seems to rest on dubious empirical grounds.[45] The free exchange of ideas on the internet does little to hinder the spread of falsehoods or their acceptance in the general public. Arguably, the same applies to historical facts. One of the arguments made by the Liberty for History movement was that free historical research is the best way to combat lies and falsehoods.[46] However, the hope that rigorous academic research would somehow triumph over fast-circulating falsehoods online stands in need of evidence, and, for as

[41] *United States v Alvarez*, 567 US 708 (2012), concurring opinion of Justice Breyer, section IIA. It should be said, however, that in earlier cases the Court was rather reluctant to extend the First Amendment to false statements of fact: see, eg, *BE&K Constr Co v NLRB*, 536 US 516, 531 (2002); *Hustler Magazine, Inc v Falwell*, 485 US 46, 52 (1988); *Bill Johnson's Restaurants, Inc v NLRB*, 461 US 731, 743 (1983).

[42] James Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 81, 90.

[43] The threat to deduct funds might, arguably, end up limiting certain rights, at least indirectly. However, whether these freedoms would be violated depends on how the law is administered. While the law's original draft bill, which imposed a criminal sanction, was clearly at odds with freedom of expression, the impact of the Budgetary Foundations Law in its current form on that right remains to be seen: see HCJ 3429/11 *Graduates of the Arab Orthodox High School in Haifa v Minister of Finance* (5 January 2012), para 28.

[44] Schauer (n 10); Sunstein (n 10).

[45] Schauer (n 10) 911.

[46] Garton Ash (n 9).

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

long as disinformation keeps circulating, why shouldn't factual claims be regulated? After all, the desire to ban what is considered to be a falsehood is a strong one not only among nationalists or historical revisionists. The same wish is shared by their adversaries, as well as by scientists, doctors and, indeed, historians who tire of trying to persuade stubborn opponents.

An important argument for nevertheless granting protection to factual statements is that the state cannot be trusted with determining what is and what is not factually true: if the state or its legislator is given the power to prohibit what it considers false, it might end up prohibiting truth.[47] Arguably, the recent crop of memory legislation confirms precisely this worry. Even when the intent behind truth legislation is sincere, and the purpose is to protect truth and combat falsehoods, there is no particular reason to expect truth to be the one to prevail in the political process, and hence little hope for the legislative outcome to reflect historical facts accurately.

Yet, this argument, while compelling in many ways, does not do enough to explain what is specifically wrong about memory legislation. Legislators may certainly be mistaken or insincere about historical facts, but it is not unusual for them to be mistaken about many other important matters as well – matters about which they are trusted nevertheless to decide on a regular basis. A wrong statute concerning criminal law, public healthcare or gun control may have very grave consequences, and yet in these cases the fact that the law is wrong is thought to be a reason to change it, not to question the lawmaker's very authority to legislate on the subject. The fallibility of the legislature, in itself, does not render it unfit for making law. Why, then, shouldn't parliament legislate on history as it legislates on any other subject? Why should it be entrusted with the most serious matters of criminal and civil law, but not with historical facts?

5. Legislating Historical Truth: The Legislature's Prerogative or a Misuse of its Authority?

This question is not entirely theoretical. In the European Court of Human Rights (ECtHR) case of *Perinçek*, a point of division between the majority and dissenting opinions was whether disputes about historical truth are suitable for being settled in the legislature, particularly when freedom of speech is at stake. The case concerned statements made by a Turkish political activist, during a conference in Lausanne, to the effect that 'the allegations of the "Armenian genocide" are an international lie'. The activist, Doğu Perinçek, was convicted of 'racial discrimination' under Article 261*bis* §4 of the Swiss Penal Code.[48] Following an unsuccessful appeal to the Swiss Federal Court, the case made it to the ECtHR where the conviction was found to be unlawful both in the lower court and the Grand Chamber. According to the Court, the impugned statement did not amount to an incitement to hatred or intolerance, nor did the speaker express contempt toward victims of the 1915 events or Armenians at present. The restriction of speech was not

[47] John Stuart Mill, 'On Liberty' (1859) in David Bromwich and George Kateb (eds), *On Liberty (Rethinking the Western Tradition* (Yale University Press 2003) 73; see also Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204, 219.
[48] Schweizerisches Strafgesetzbuch, art 261*bis*.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

'necessary in a democratic society' as required by Article 10 of the ECHR, and Perinçek's conviction was thus held to have violated his freedom of expression.[49]

Importantly, one reason that prohibiting this kind of speech was considered 'not necessary' had to do with the fact that nothing links Switzerland to the temporally and geographically distant events that occurred during the Ottoman Empire: according to the majority opinion, the restriction could have been considered 'necessary' had the impugned statement amounted to an incitement to hatred or intolerance toward Armenians. However, as the place and time in which that statement was expressed were so far removed from the subject matter, the Court was not convinced that hatred or violence could plausibly follow. There was therefore no necessity for the Swiss legislator, the majority reasoned, to criminalise statements of this sort.[50] However, in an important partly dissenting opinion, Judge Nussberger argued that legislation that commemorates the victims of past atrocities, however distant, is a 'choice of society' which the Court has to accept:[51]

> Legislation expressing solidarity with victims of genocide and crimes against humanity must be possible everywhere, even if there are no direct links to the events or the victims, even if a long period of time has elapsed, and even if the legislation is not directly aimed at preventing conflicts. Each society must be free to settle the conflict between free and unrestricted debate on historical events and the personality rights of victims and their descendants in accordance with its vision of historical justice in the case of what is alleged to be a genocide.

Note that the kind of memory legislation which, according to Judge Nussberger, 'must be possible everywhere', is just the one with which this article is concerned: namely memory legislation that seeks to determine the historical record directly, rather than merely affects memory as a side-effect. On this view, a society's view of historical justice is not only a proper object for legislation, but also a possible justification for limiting speech. Moreover, while Judge Nussberger's opinion concerns the case of denying genocide, the reasoning may also apply to the legislation of other 'visions of historical justice'.

Indeed, the notion that memory legislation deserves to be accepted as a choice of society may seem quite natural: we generally respect society's choices, expressed through parliament, on taxes, healthcare, criminal procedure and innumerable other matters. What is more, these social choices are mostly respected even by those who think they are wrong. It may seem only reasonable that society should have the same choice when it comes to deciding how the past is to be commemorated, and that this choice should be met with a similar level of respect. However, this line of reasoning requires a second look.

Society's choices, as channelled through its elected representatives, are often authoritative, but that is not always the case. To see this, we should reflect on the reasons we have for

[49] ECtHR, *Perinçek v Switzerland*, App no 27510/08, 15 October 2015, para 224.
[50] ibid para 244.
[51] ibid, dissenting opinion of Judge Nussberger (citing ECtHR, *SAS v France*, App no 43835/11, 1 July 2014, para 153. The 'choice of society' in that case was 'whether or not it should be permitted to wear the full-face veil in public places').

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

respecting the 'choices of society' in the first place: why, that is, do the choices of a society or its representatives merit any kind of respect at all, whether with regard to history or otherwise? After all, the 'choices of society' do not seem all that impressive in practice. A small, sometimes accidental majority of legislators is all it takes for a bill to become law, regardless of whether it is just or not, wise or foolish. Legislators have no clear expertise on matters on which they pass laws. Other branches of government, as well as other institutions, seem better qualified, professionally, to find the right solution for social problems.[52] There is nothing obvious about leaving important questions to be decided by the legislature, and accepting those decisions as authoritative.

What explains the fact that parliamentary law does merit respect nonetheless has to do not so much with the merits of the statutes enacted, or the value of society's choices as such, but rather with the fact that legislation is *needed*. What makes it valuable (when it is valuable) is a combination of two facts of social life. One is that we need certain common rules to enable minimal social cooperation. We need to decide one way or another what kind of behaviour is to be permissible among people, what basic rights should each of us have, how healthcare should be funded, what tax policy should be in place, how to punish convicted offenders, and much more.[53] The other is that there is a persistent, widespread and seemingly intractable social disagreement about what these common rules should be.[54] We need to live side by side with fellow citizens with whom we are unlikely to share common values and beliefs, let alone reach a consensus on any of the matters that comprise that social coexistence. Legislation offers a pragmatic and peaceful way out of this social conundrum. Substantive agreement may not be feasible, but we can do the next best thing: to have our disputes voted on in parliament, and respect whatever the result turns out to be.

As Jeremy Waldron has argued, what is perceived to be its major shortcoming is in fact what renders legislation particularly useful. Legislation serves as a substitute, as it were, for having to win the argument on the merits. As the substantive questions are on what we are unable to agree, it is an advantage of legislation that laws are enacted not on the basis of their merit, but according to some mechanical though fair procedure – a procedure that is able to resolve coordination problems without having to pronounce on which side of the dispute is right.[55]

At the same time, voting in parliament is not only pragmatic. Unlike some other conceivable solutions for our coordination problems, such as tossing a coin, counting votes is a way of paying respect to the distribution of views in society.[56] The legislative process is built on the premise that everyone counts, and equally so. No one is required to agree with anybody else's view – a fact that is another example of respect in its own right[57] – but everyone is expected to acknowledge

[52] Jeremy Waldron, 'Legislation, Authority, and Voting' (1996) 84 *Georgetown Law Journal* 2185.
[53] See discussion in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 50–51.
[54] To Rawls, disagreement is 'not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy': John Rawls, 'The Domain of the Political and Overlapping Consensus' (1989) 64 *NYU Law Review* 233, 234–5.
[55] Waldron (n 52) 2213.
[56] ibid 2186. I am grateful to the anonymous reviewer for pressing me on this point.
[57] ibid 2209.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

the fact that this other view counts as much as one's own. The respect for a law that won a majority of votes is thus a way of respecting the votes that were counted.

If these brief remarks are correct, then there is a good reason why the legislature, fallible though it is, should be trusted nevertheless with the task of creating rules for society on so many serious matters. That reason lies in the social necessity of the legislative process. We cannot afford not to resolve our social disagreements about how public resources are to be used and financed, what does and does not count as 'assault' or how it should be sentenced, and so forth. As long as we need to coordinate our affairs in some way, we are collectively better off doing it by relying on parliamentary law than we are by deciding, individually, what is best to do.

However, the considerations that make legislation needed and worthy of respect in general also explain why some laws, or some 'choices of society', might not merit the same regard (even if they are valuable in some other way). First, legislation is of value in the sense just discussed only for as long as it is more important to have a certain matter settled, fairly and pragmatically, than it is to have it settled *correctly*. For example, there is a prima facie justification for having even a misguided or unjust tax law in place: such a law is a solution, however imperfect, for a real coordination problem. It would be better if this law were changed, of course. However, for as long as there is a need for a functioning tax law, and in the absence of a consensus, society is better off relying on an incorrect law in guiding its common affairs than it would be without a law at all. The same, however, does not apply to every social disagreement. In some cases it may be better to leave the social disagreement unresolved than to resolve it incorrectly.

Secondly and relatedly, even when a law is correct in principle, not every choice of society is a necessary solution for a pressing coordination problem. In some contexts, social disagreement can simply be tolerated, however grudgingly, without requiring a decision at all. In such a case employing the legislative machinery to resolve the dispute in favour of one of the parties would be an abuse of that instrument. It would make use of parliamentary law, with the social importance and moral value with which it is invested, for a purpose that has little to do with the reasons that make legislation valuable. The problem becomes particularly acute when fundamental rights are at stake: a social preference is not enough in itself to justify the restriction of a right, even if that preference is added to society's law books. In addition to winning a vote, it is expected that the vote in question be a necessary one in the first place.

With this in mind, let us go back to memory legislation. Can memory laws plausibly appeal to the kind of social indispensability that justifies other pieces of legislation?

It may be argued that preserving memory is not only a preference or a choice of society, but also an obligation that the state has towards its public. The basis for that alleged duty is what is known as the *right to truth*: namely the right of individuals and collectives to learn the facts about human rights violations.[58] While the origin of that right is in the claim of individuals and families to obtain information regarding the fate of their relatives, it is commonly accepted that it also has

[58] Grażyna Baranowska and Aleksandra Gliszczyńska-Grabias, '"Right to Truth" and Memory Laws: General Rules and Practical Implications' (2018) 47 *Polish Political Science Yearbook* 97, 100.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

a collective application.[59] The state, it is said, has a corresponding duty to protect such information and make it available. In the words of the UN Commission on Human Rights, measures need to be taken with the aim of 'preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments'.[60] As some commentators have pointed out, memory legislation could be one such measure.[61] Relatedly, a recurring theme in the literature on transitional justice is the value of, and indeed the need for a *shared* historical truth.[62] According to a common idea, reconciliation in the aftermath of social unrest requires a shared chronology of historical events, which can function as a common ground. Taken together with the right to truth, there seems to be a prima facie case both for protecting the memory of the past and for doing so in a collective and uniform way.

However, even if we grant that a social right to truth exists, there are strong reasons for doubting that legislation is the right way to realise it. The relatively simple reason for this is that, as argued earlier, legislation is useful and adequate when it is more important to reach agreement on a common rule than to have the *right* rule, but in the case of historical truth it makes all the difference whether what is claimed to be a fact is indeed so. There may be value in having common tax rules that were accepted in the appropriate way, even when these rules happen to be wrong, but there is rather little value in legislating a false account of history, however fair the parliamentary procedures with which it has been adopted. A shared truth is valuable only if it is indeed true, rather than merely accepted by the majority.

However, that is not the only or even the main problem. The great advantage of legislation, as has been shown, is in enabling common rules while respecting disagreement about what is right, wrong, true or false. The idea is not to resolve substantive disputes: in any event parliament is not equipped with the necessary expertise to judge which of the competing views is correct. Quite the contrary, it is a virtue of the legislative process that it can produce rules that are binding on everyone and yet respectful of their differences. The outcome of a vote does not relieve those on the winning side of the need to acknowledge that other views are still there (and, moreover, that those other views may even prove to be correct); nor are those who have lost required to revise their convictions. While it is expected that the law be complied with, that is a compliance that comes along with a healthy awareness that not everyone agrees, and that the rules are no more than a respectful social compromise. The motivation behind memory laws, however, runs counter to this tolerant spirit. Their purpose is ultimately to decide the substantive disagreement, to determine what is correct or false, and to change minds to suit the views of the majority.

[59] In its individual form the right to truth is grounded in art 32 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3.

[60] UN Commission on Human Rights, Promotion and Protection of Human Rights: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (8 February 2005), UN Doc E/CN.4/2005/102/Add.1, Principle 3.

[61] Baranowska and Gliszczyńska-Grabias (n 58) 100–01.

[62] eg, Louis Kriesberg, 'Reconciliation: Aspects, Growth, and Sequences' (2007) 12 *International Journal of Peace Studies* 1, 3–4.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press

6. CONCLUDING REMARKS

Memory laws might be guilty of revisionism or populism. They may also restrict freedom of speech or impose criminal sanctions, though not all of them do. Yet, a discussion of memory legislation that concentrates on these faults might be missing its mark. When the primary issue becomes the fairness of historical accuracy of this or that memory law, the implication is that the memory laws being criticised are conventional pieces of legislation: as though historical facts are just another subject matter on which parliament votes regularly – like healthcare or tariffs – and that this particular vote merely produced the wrong result. The real problem, however, is that the determination of historical facts is not the kind of matter we have a reason to entrust to the legislator in the first place. The memory laws I have surveyed are not a required social compromise. In repressing some versions of history and lending support to others, the respective legislators do not facilitate any social cooperation that would have been impossible otherwise. The rationale behind the exercise of legislative powers – namely enabling social coordination despite disagreement – is absent in this case. Criticising the legislator for legislating the wrong history gives the false impression that legislating history per se is a legitimate and proper use of legislative powers.

For the same reason, memory legislation is something to be concerned about even when it does not impose a criminal sanction or restrict speech. Of course, memory laws are of more concern when such measures are employed. However, even seemingly benign laws, which regulate the allocation of funds or create a declaratory norm, may have a real impact on the way in which history is remembered, lending the expressive weight and authority of the law to a preferred historical narrative.[63] This authority was not given to the legislator for the purpose of changing opinions and fostering its favourite consensus. Quite the contrary, legislation is best understood as the instrument of a society that tolerates differences of view, and so it should remain.

[63] See Eric Heinze, '"Beyond "Memory Laws": Towards a General Theory of Law and Historical Discourse' in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press 2017) 413, s 2.

https://doi.org/10.1017/S0021223721000200 Published online by Cambridge University Press