



LEGISLATION, COLLECTIVE MEMORY AND HISTORY: WHEN THE FRENCH LEGISLATURE DEALS WITH THE PAST

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Memory generally leaves its imprint much deeper when it is made of violence and oppression: the more painful the historical condition, the more acute the experience of history

Didier Fassin 2008: 321

History must be illuminated by laws and laws by history
Montesquieu, *De l'Esprit des lois*, XXXI, II

I. INTRODUCTION

Since 1990 the French Parliament has adopted four statutes dealing with: the history and memory of the *Holocaust*, the *Negro Trade and Slavery*, *Colonization* and the *Armenian Genocide*, collectively known as the 'memorial laws'. Since then, and up until now, these legislative interventions have given rise to much engagement and debate on the part of historians,

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philosophers, sociologists and legal scholars in the French public arena. It is uncontroversial that 'the memorial laws' debate' will frame for some time the study of the relationship between French legislation and history.

This legislative phenomenon relies on a description of historical facts in legislative terms or on a condemnation of their denial. It manifests new ways of giving voice to memories of a traumatic or violent past, and fighting against racism and xenophobia. It also raises the issue of objectivity in history and the rising place of the concept of collective memory (Halbwachs 1992) in the definition of national identity. The different attempts to using legal technique as a means of readjusting knowledge about the past or to repair the wrongs of history (Garapon 2008) have been, however, severely condemned by many historians and lawyers who have acted with a rare energy and consensus.

Such reactions against this legislative phenomenon have fuelled the debate about a crisis of contemporary legislation more generally. In the terms of their opponents, such laws instrumentalize historical knowledge and interpret history in a distorting way (Frangi 2005: 257), they restrict freedom of expression and opinion (Vivant 2007), officialise historical truth and are a source of general criminalization of the past (Nora and Chandernagor 2008). The reader of petitions calling for an abrogation of memorial laws can sometimes be confused about the precise role of each of the contested statutes. Those petitions often take memorial laws as a whole and such amalgam is detrimental to a clear analysis of the interaction between legislation and history. If the four contested Acts can sometimes be legitimately discussed or criticized, this must be done with a clear understanding of the nature of each of the laws: while some of them create rights or new offences, some are only declarative and symbolic. The historians' mobilisation triggered an important debate. However there has sometimes been confusion about the precise nature and role of the four contested statutes. In order to understand the subtle issues raised by the French legislature's intervention in the field of history and memory, one must go beyond the apparent consensus of historians and question the obvious (Mongin 2006).

Taking into consideration the reflections this debate has led to and the repeated warnings against the incursion of law's reason in the field of historical science, this article argues for a deeper exploration of the function of legislation in the definition and the protection of historical truth. The understanding of the tension between law and history can be renewed by a reconsideration of the status of truth in both disciplines and by further reflection on the type of knowledge historians and jurists respectively develop. Such critical reflexivity, in turn, may lead to a richer analysis of the *memorial laws* themselves. The broader project from which this article is drawn explores the role of French legislation in the definition of historical truth and in the framing of the collective memory of a violent past.

After offering a brief overview of the controversy over memorial laws, this article analyses the relationship between law and history as it has developed in the literature of both disciplines, in France since 2005 and at the European level since 2008. Such a methodological approach shows that the anxiety of historians and their call for more autonomy between the two disciplines of law and history reveal a tension around the status of truth. This article aims to replace the question of historical objectivity with a broader analysis of the power struggles between actors over discourses about the past.

II. OVERVIEW OF THE MEMORIAL LAWS' DEBATE

The concept of 'memorial laws' (*lois mémorielles*) has been used to refer retrospectively to four statutes recently adopted by the French Parliament. This new generation of laws dealing with collective memory has drawn historians' attention and triggered a national debate on the role of the State in framing the collective memory of its citizens (Rémond 2006).

A brief presentation of the content of the four contested statutes is necessary to enter the heart of my argument. Firstly, the 13 July 1990 Act – known as the *Gayssot Act* – was passed by the French Parliament to criminalize the Denial of the Nazi Holocaust of European Jews, along with other crimes against humanity, as defined by the 1945 Nuremberg Tribunal. This

criminalization of Holocaust denial aimed to fight against a specific form of anti-Semitism. Secondly, an act was passed on 29 January 2001 to recognize the massacres of the Armenians in 1915. This act named the massacres as *genocide*, and thus officially integrated this historical fact in Humanity's collective memory. Then a third act – known as the *Taubira Act* – was passed on 21 May 2001 to recognize slavery and the Negro trades as a crime against humanity. It also required to give this page of history the place it deserves in the teaching of history: 'school curricula as well as history and social science programs will allocate to the Negro trade and Slavery the important place they deserve' (Act n° 2001-434 of 21 May 2001, art. 2). Finally, a 23 February 2005 Act *on the national contribution to the French repatriated settlers* prescribed in its original version to recognize *the positive role of the French presence* in former colonies, especially in North Africa. In the context of agitated debates about the meaning of French citizenship and belonging to the French Nation, this Act triggered much protest among historians (Liauzu et alii 2006). Some of its provisions were submitted to judicial review by the French Constitutional Council and were withdrawn from the original bill. Later, in 2005, a bill was presented to *criminalize the denial of the Armenian Genocide* as the *Gayssot Act* did for Holocaust denial, but this initiative was abandoned by the Government under diplomatic pressure.

In 2005 a major turn in the debate on memorial questions occurred and a large number of history teachers and researchers made appeals to the French Parliament to stop legislating the past. This wave of protest reached a peak with the adoption of the 2005 Act recognizing the positive role of colonisation and with the prosecution of Olivier Pétré-Grenouilleau. The latter – a specialist in the study of Negro trades (Pétré-Grenouilleau 2004) – asserted during an interview that the Negro trade was not genocide, because it did not aim at the extermination of a people. Whilst Pétré-Grenouilleau did not contest the qualification of the Negro Trade as a crime against humanity, an organization representing some overseas French citizens lodged a complaint against him on the ground of a violation of the Taubira Act. The Pétré-Grenouilleau affair and the legislative recognition of the positive role of colonisation constituted major steps in the escalation towards a "war of memories" (Stora 2007).

The detractors of memorial laws argued in favour of a clear distinction between the work of history and the moral demands of memory. An illustration of the particular form of collective

engagement led by the protests is shown in the “Appeal of the 19 Historians” published on 12 December 2005 (*‘Appel des 19 historiens’*, 12 December 2005, available in French on the website of *Liberté pour l’histoire*):

Concerned about the multiplication of political interventions in the evaluation of past events and about legal proceedings against historians and thinkers, we would like to remind the following principles:

History is not a religion. Historians do not accept any dogma, do not respect any proscription, do not know any taboos. They can be disturbing.

History is not morals. Historians do not have as a role to heighten or to condemn, they explain.

History is not a slave to current affairs. Historians do not view the past in reference to contemporary ideological patterns or today’s sensitivities.

History is not memory. Historians, in a scientific process, collect the memories of men, compare them, contrasting them with documents, objects, signs, and establish the facts. History takes memory into account, but does not consist merely of it.

History is not a legal object. In a free State, it is not the role of Parliament or the Judiciary to define historical truth. State policy – even driven by the best of intentions – is not policy of history. Violating these principles, successive legislative provisions – notably the 13 July 1990, the 29 January 2001, the 21 May 2001 and the 23 February 2005 Acts – have restrained the freedom of historians, have told them under sanction what they should research on and what they should find, have prescribed methods to them and set limits to their work. We ask for the abrogation of such legislative measures unworthy of a democratic regime.

This heated complaint is one of the multiple petitions circulated among historians and jurists, and which were relayed by the French press. Its 19 signatories thus contested the initiatives of the French Parliament which they considered created an *official truth*. These declarations of

State truths are often associated with the worst instances of totalitarianism, as remarkably illustrated by the metaphors of *Big Brother* and the *Ministry of Truth* in George Orwell's *Nineteen-Eighty Four* (Orwell, 2003). The anxiety of historians about the reduction of their autonomy should be taken seriously in terms of its political and methodological implications. But at the same time one can wonder whether a State might indeed have a legitimate role in shedding light on pages of history that have been minimised or repressed, and thus readjust knowledge about the past through such a powerful and symbolic instrument as legislation.

Nevertheless, by the end of 2008, levels of indignation increased and European historians mobilized against the *Framework Decision on Combating Racism and Xenophobia* adopted unanimously by the ministers of Justice of the 27 European Member States on 20 April 2007. An appeal made in the city of Blois in the name of *Liberté pour l'Histoire* ('Freedom for History') – an organization led by the French historian Pierre Nora who dedicated his work to the study of French national identity and memory (Nora, 1997) – called on 10 October 2008 for: “government authorities to recognize that, while they are responsible for the maintenance of the collective memory, they must not establish, by law and for the past, an official truth”. What was considered a growing assault on historical truth was seen to be stopping free debate and constituting an unacceptable constraint on historians' freedom of research ('*Appel de Blois*' 10 October 2008, available in English on the website of *Liberté pour l'histoire*). Despite the strong call for the abrogation of memorial laws (led by *Liberté pour l'histoire*), there have been strong internal divergences among commentators on which statutes should be abrogated and which could be maintained. While there was a consensus to declare the 2005 Act on the French presence overseas invalid, commentators did not seem to agree on the legal and political validity of the 3 other statutes. The Gayssot Act on genocide denial was notably considered as the source of all wrongs by its detractors, while it was considered as a necessary instrument to fight against antisemitism by its defenders.

It is interesting to observe this process of position-taking in sociological terms. The academic field indeed appears as a structured field where battles occur between specific powers and between actors adopting opposing strategies. This structure influences the process of position-taking in regard of intellectual and political debates (Bourdieu 1984b: 165). The mobilisation of

French academia during the memorial laws' debate illustrates this idea. While some historians and jurists have condemned memorial laws as a whole, numerous intellectuals have warned against the risk of a confusing condemnation of those statutes (*'Ne mélangeons pas tout'* 20 December 2005; Coquery-Vidrovitch and alii 2008).

III. ON THE ANTAGONISM BETWEEN LAW AND HISTORY

The following developments offer a descriptive approach of the academic rhetoric on the relationship between law and history as addressed during the memorial laws' debate. I will not address all of the numerous problems that the issue of memorial laws raises. Such an investigation would notably require the study of the role of schools in the transmission of historical heritage, the nature and functions of legislation in regard of constitutional and international norms, the legal and political risks created by the definition of past events in legal terms, the moral obligations to remember, the importance of 'bearing witness' (Blustein 2008: chap. 5 and 6), and the role of the State as an arbitrator of memorial conflicts (on these issues, refer to the Information Report on Memorial Questions, 2008). These questions are not the direct focus of this reflection on the political nature of methodologies. Instead, I focus on a few methodological issues that arise from this controversy. Among these methodological issues, I pay particular attention to the tension between law and history as it was analysed by some of the commentators.

The study of the relationship between law and history often takes the form of a comparison of legal and historical methodologies and often ends with a value judgement on the ability of history to analyse past events with objectivity rather than law. It is frequently encountered in legal and historical literatures that when dealing with the past, law's reason should be submitted to the ends of history. The problem, addressed in this way, favours the expression of views on the place the law should have regarding collective memory in general, rather than a study of the way legislation actually operates in specific cases.

Without trying to be exhaustive, one of the analyses of memorial laws by jurists consists in evaluating the effect of such laws under the prism of historical methodology. Such approaches denounce the manipulating and instrumentalising effect of memorial laws on both history and education (Fraissex 2006: 499). The officialization of mass atrocities that occurred in the past is criticized for distorting history. The legislative recognition of past events increases the proliferation of legislative norms, which is one of "*law's diseases*" (Bredin 2008) and which threatens the very principles of the *Etat de droit* (Robert 2006: 286).

Another frequently encountered approach consists in going past the rivalry of the legislature and historians to deal with past events and admitting that law and history are complementary. But again here, the analysis can be subject to an ultimate value judgement. Law can legitimately regulate history, but by naming past events in legislative terms, law becomes an "*instrument of teleological disturbance of the historical field*" (Cartier 2006: 521). The legislature went beyond its competence and attempted to substitute itself to historians (Appeal of Jurists against Memorial Laws, November 2006). Further, the French Parliament did not only write history, but described the French past in a way that is in line with repentance and therefore detrimental to the image of national history (Robert 2006: 281).

These different analyses oscillate between external and internal criticism of memorial laws. The temptation for an external evaluation of those laws is favoured by the attention historians' mobilisation has benefited from in the press and through national consultations by the French National Assembly (Information Report on Memorial Questions 2008). Legal readings of memorial questions are however not completely absent and shed light on the existence of an alternative to external approaches to memorial laws (Garibian 2006). Such an external approach – whether it is adopted by historians, sociologists or jurists themselves – often involves presuppositions about what law is and does. As pointed out before, many opponents to memorial laws argue that law cannot interfere with history without distorting it. The idea of a distortion of history presupposes the existence of a norm defining the substance of historical truth. Beside the fact that the identification of such a norm is uneasy, it has been demonstrated that what can be seen as a distortion from the point of view of historians can be considered as legitimate from the point of view of lawyers and vice versa. If historians sometime blame

jurists for distorting historical truth, jurists sometimes blame historians for their use of legal concepts (Osiel 2006 : 130-131 ; Troper 1992; Furet 1992).

The search for a good methodological positioning is not only a matter of rigour and scientific coherence, it also has a political dimension. The ultimate choice between possible approaches might indeed be consistent with a choice between different concepts of moral philosophy. This is illustrated by the opposition made between law and history's approaches to time. History is said to have the *natural* approach to "*real time*", while legal methodology has a "*constructed*", "*artificial*" and "*teleological*" approach to time (Thomas 1998: 27). This division can be analysed as an argument to legitimize the prevalence of historical methodology over legal methodology. But as Yan Thomas pointed out, the controversy is more about "*two institutional constructions of memory*" (Thomas 1998: 27) In the first construction, memory is prohibited and must be repressed (Nora 1997); in the second memory is essential and must be transmitted. The invocation of science as an argument to justify the prevalence of history over law is a mean to mask the political nature of the choice between these two institutional constructions of memory (Thomas 1998: 27). One could wonder with Yan Thomas, 'whether the competition between law and history's treatments of a same fact is such that it prevents their association' (Thomas 1998: 18). While the attention of commentators has focused on the tension between law and history, it seems important to analyse in a reflexive manner the way historians and lawyers crystallize social reality in their own way and depict it in their own particular language.

IV. ON TRUTH AND ITS STATUS IN LAW AND HISTORY: BETWEEN SCIENCE AND DOGMA

Whilst the relationship between law and history can be analysed as a relationship between two disciplines, institutions, fields, it can also be analysed as a relation to the State. The officialization of historical truth by the French legislature raises important methodological and epistemological issues. The necessity to fight against denial is commonly shared by historians (Vidal-Naquet 1992; Lipstadt 1993). But scholars disagree on the means to efficiently combat

this specific form of racism. They especially have dissenting views about the use of legislation as an instrument to regulate memory of past events (Douglas 2001). The memorial laws' debate has created anxiety about the description of the past in legislative terms, which is considered as part of a growing assault of law on history as both a knowledge and a discipline (Nora and Chandernagor 2008).

One could however legitimately wonder whether truth means the same to historians and to jurists. Does it have the same status in both disciplines? If there is anything such as a historical truth, is that truth discovered scientifically or constructed by those who have the power to write history? Elements of reflection on this issue are offered in the analysis of memorial laws by the British scholar Timothy Garton Ash, although he argues in favour of a separation of the political sphere and of the scientific sphere which defines historical truth. Garton Ash asserted that

the historian's equivalent of a natural scientist's experiment is to test the evidence against all possible hypotheses, however extreme, and then submit his most convincing interpretation for criticism by professional colleagues and for public debate. This is how we get as near as one ever can to truth about the past (Garton Ash 2008).

Real or *natural* truth as discovered or observed by scientists is opposed to *declared* truth as established by way of statutes. The banality and obviousness of this opposition must however be questioned. Contemporary epistemology of history teaches us that the objectivity of historical research is relative. Raymond Aron indeed considered, in his *Introduction to the Philosophy of History*, that no 'such thing as a historical reality exists ready made, so that science merely has to reproduce it faithfully' (Aron 1938: 120). But although this idea is now commonly shared within academic circles, especially among postmodernists, numerous reactions to the French memorial laws show that the awareness some commentators have of their own social role and political engagement is either unconsciously limited, or intentionally denied for the purpose of their argumentation in the public arena.

The *respect due to historical science* is invoked as a meta-norm to justify an exclusion of the legislature from the definition of collective memory. The invocation of such a superior order of things is frequent in academic rhetoric, whether legal, political or historical. And the issue is not so much that scholars believe in the existence of – or refer to – this transcendental order where the ends of history should prevail over other principles and objectives, but rather ‘the conditions and the forms of the introduction of an argument characterized by its irrational nature in the rhetoric’ (De Béchillon 2002: 60). The use of such a rhetorical argument stops further discussion and operates as a brutal halt to further negotiation of a legitimate space for legislation. Different actors seem to operate in the structured field of commemorating and transmitting historical heritage. Battles for hegemonic discursive authority and for the monopoly over representation of past events in the present occur between those actors. The promotion of a certain representation of the past by the French legislature appears as a competing strategy which threatens the “scientific capital” (Bourdieu 2001: 123) of historians. The existence of this power struggle should be taken into account when analysing the diagnostic historians or jurists operate on the validity of laws about the past.

Critical analysis of law’s and history’s hermeneutics and reflexive questioning of the status of truth in both disciplines enable an exploration of new ways of thinking about memorial laws. In his *Memory, history and forgetting*, Ricoeur invites a reflection on interpretation in history alongside the study of the limits of historiography (Ricoeur 2000: 438), showing that the discourse of history oscillates between “scientific explanation” and “lying fiction” (Ricoeur 2000: 246). As the political nature of the judgment on the desirability of declaring historical truth through legislation is identified, it seems necessary to think about the “conditions of production of truth” by historians and in the institutional context of the State (Orford 2006: 852). The suspension of this political judgement gives space to think about the type of intellectual process at work in legislating the past and in describing it scientifically. While uses of history by public authorities appear as a threat on the liberal and democratic foundations of the French State, the social role and civic responsibilities of historians must be clarified as they operate in an environment where the boundaries between the academic space of historical science and the public space of debate have become unclear (Jeanneney, 2008).

Against the idea that legislative form is not appropriate to naming past events because of the prescriptive nature of legal language, it is important to remind ourselves of two important ideas that legal theorists are usually well aware of. Firstly, a legislative text must not be confused with a legislative norm. It is thus possible to recognize a declarative function to legislation in addition to its acknowledged normative function. Both functions should be clearly differentiated when analysing memorial laws (Garibian 2005: 4-7). Secondly, as Olivier Cayla has made clear, 'one of the most central activity of jurists consist in simply giving a name to things and characterizing them legally' (Cayla 1993: 3), which implies that law's truth has a legitimate place beside other discourses aiming at describing or explaining things such as history (Thomas 2002: 1425-1428). The "pure" establishment of an official truth by a democratic State questions the very basis on which it relies, but the issue is slightly different when a State only recognizes a reality that has been established by historians in order to 'fight against the ideology of denial' (Garibian 2005: 12). Declaring and protecting historical truth can indeed enable to exit authoritarianism, to fight against racism, to exit violence or to reconcile members of a community after mass atrocities (Lefranc 2002). By remembering this, one can bring a useful contribution to the understanding of what legislation does to reality and thus allow for more critical reflexivity in legal scholarship and in history.

V. CONCLUSION

If it is not the role of legislation to write history, neither is the role of historians to claim a 'monopoly over memory' (Coquery-Vidrovitch and *alii* 2008). Legislation can play a substantive role in the definition of collective memory. Whether it is desirable on a political level is another issue. It seems to me that a State can legitimately use legislation as a means to outline the collective memory of its citizens. The difficulty of doing so and the potential risks it creates have been rightly pointed out by the contestation of historians, but their observations do not exhaust the debate. This controversy also gives an opportunity to rethink the form of the State and its democratic and liberal foundations. It was argued in this paper that a deeper understanding of the role of the State in framing collective memory requires both more self-reflexivity in historical and legal scholarships and a dialogue between both disciplines. It is clear

when looking at the French case that there is division amongst historians and jurists concerning the opportunity for the legislature to deal with the troubled past. Acknowledging the plurality of possible representations of the past, rather than repressing them, allows for a treatment of such complexity. The dilemma posed by pluralism in a democratic society faced with divergent memories of a same violent past is indeed a challenge. But since the State is asked to arbitrate conflicts about the interpretation of the troubled past, recognizing the power of the State (and therefore of the legislature) to deal with the past is necessary, notably by reviving the concept of *sovereignty*. Finally, multiple approaches can shed light in an interesting way on memorial laws, including historians' emphatic criticism of those Acts. But it is important to recognize the contribution of the knowledge developed by jurists – whether from the point of view of *legal history* or from the point of view of *legal science* – and to analyse law in law's terms, otherwise there is a risk of masking the complexity of the debate, which is detrimental to the understanding of the works of both law and history.

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Comité de vigilance face aux usages publics de l'histoire (Vigilance Committee on the public Uses of History) : <http://cvuh.free.fr/>

Liberté pour l'histoire (this website gives access to most of the historians and jurists' petitions referred to in this article): <http://www.lph-asso.fr/>