Memory policies and legal constraints. Comparative perspective

Pr. Dr Geoffrey GRANDJEAN, Liège Université – Geoffrey.Grandjean@ulg.ac.be

Summary

Public authorities do not have a monopoly over memory constraints in the sense that they are not alone in promoting collective memories. However, the article suggests classifying the memory instruments in France and Belgium according to the degree of legal constraint (sanctioning, prescriptive and latent). This taxonomy offers a new understanding of the exercise of the legal constraints while identifying attempts made by public authorities to impose official memories.

Keywords

Memory laws, Constraint, Collective memories, Official memories, Competing memories, Law.

1. Introduction

The policy of memory, understood as being the "body of responses from public actors aimed at producing and imposing an official public memory on society amid the monopoly over public action instruments"[1], has existed throughout time. Over the last twenty years, France and Belgium have been affected by the adoption of many memory instruments, some of which have been categorised as "memory laws" by many historians and jurists.

However, public authorities do not benefit from the "monopoly over the memory constraint"[2]. Official memories[3] imposed by public authorities coexist with the collective memories cultivated by other groups. This coexistence of numerous collective memories may culminate in a form of competition amongst the victims[4], or perhaps more broadly in a form of memory competition since a "complex and sometimes painful competition between social groups

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[1] MICHEL Johann, *Gouverner les mémoires. Les politiques mémorielles en France*, Paris, Presses Universitaires de France, 2010, p. 16. To define the concept of the public action instrument, Johann MICHEL uses the definition provided by Pierre LASCOUMES and Patrick LE GALÈS, that is, "a provision both technical and social that organises social reports between the public authority and its recipients according to the representations and meanings they bear". LASCOUMES Pierre et LE GALÈS Patrick, *Gouverner par des instruments*, Paris, Presses de la Fondation nationale des sciences politiques, 2004, p. 13.

[2] MICHEL Johann, *Gouverner les mémoires. Les politiques mémorielles en France*, *op. cit.*, p. 5.

[3] "Official memory" is understood to include "all official representations of the past". This official memory comprises two important features. First, "it is an authorised memory, borne by a legitimate spokesperson from the group". Second, "it's a stage, a showcase for the country intended for both internal and external public". ROSOUX Valérie et VAN YPERSELE Laurence, "The Belgian national past : Between commemoration and silence", *Memory studies*, 2012, vol. 5, n° 1, pp. 45-57.

[4] The sociologist Jean-Michel CHAUMONT demonstrated that victims who contend that the holocaust was unique are opposed to any suffering that could be comparable, identical or worse. CHAUMONT Jean-Michel, *La concurrence des victimes. Génocide, identité, reconnaissance*, Paris, La Découverte, 2010, p. 163.

(amongst them or as regards an authority) to defend and promote the memory of certain historical facts"[5] could start to take shape.

France and Belgium are two European countries that demonstrate in this regard an effervescence of memory which has been very successful for several years. Moreover it is not uncommon for policy debates over issues of memory taking place in France to percolate into Belgian policy discussions. Despite the absence of monopoly over constraint on memory, French and Belgian public authorities have increased such memory instruments as criminal laws, resolutions, even memory laws "the grandiloquence of which is equalled only by the absence of normative force"[6], according to Patrick FRAISSEIX.

In a political system, one important issue is raised: since public authorities do not have a monopoly over memory constraints, how can they exercise constraints by adopting memory instruments?

Generally, the mobilisation of the memory of past events – particularly in memory instruments – is aimed at shaping, in various ways, the identity of a group, this possibly referring to a government or perhaps a nation. The memory contributes to the definition of a group; it contributes to the definition of the values of a group; it may be used to legitimise a group's actions, past, present or projected; and, finally, it mobilises the members of a social group to achieve a collective project – most often political – in the name of their shared identity[7]. In other words, the collective memory allows individuals to define themselves at once as individuals and as a group.

Beyond the identity dimensions, the memory instruments may be binding to the extent that they are an attempt to direct or prescribe the behaviours of the members of a political system. While the public authorities do not have a monopoly over the memory constraint, we formulate the hypothesis according to which they increase the adoption of memory instruments and play on the different aspects of the legal constraint to attempt to impose collective memories.

To confirm this hypothesis, memory instruments from two European countries – France and Belgium – have been selected. These two countries were chosen because of the similarity of public debates on a series of past events. French political life finds echoes in Belgium (especially in the French part). Moreover, only certain memory instruments fuel the proposed taxonomy. There are three reasons to explain this choice. First, it was decided to focus on the memory instruments adopted by the two States since the beginning of the 1990s because of the decisive moment[8] that was the adoption of the law of 13 July 1990 that made it an offence

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[5] GRANDJEAN Geoffrey, "Pluralité des mémoires collectives et dynamique concurrentielle", *in* GRANDJEAN Geoffrey et JAMIN Jérôme, *La concurrence mémorielle*, Paris, Armand Colin, coll. "Recherches", 2011, p. 13.

[6] FRAISSEIX Patrick, "Le Droit mémoriel", *Revue française de droit constitutionnel*, juillet 2006, n° 67, p. 483.

[7] KLEIN Olivier, LICATA Laurent, VAN DER LINDEN Nicolas, MERCY Aurélie et LUMINET Olivier, "A waffle-shaped model for how realistic dimensions of the Belgian conflict structure collective memories and stereotypes", *Memory studies*, 2012, vol. 5, n° 1, pp. 17-18.

[8] The adoption of this law marks the decisive role the State now plays in drafting memory laws. ROBIN Régine, « La France et la concurrence des mémoires : l'impossibilité d'assumer le passé", *in* GRANDJEAN Geoffrey et JAMIN Jérôme, *La concurrence mémorielle*, *op. cit.*, p. 29.

to question the genocide of the Jewish people[9] (the so-called Gayssot Act). This Act was followed, a few years later by the adoption in Belgium of the Law of 23 March 1995 that made it an offence to deny, play down, justify or approve of the genocide committed by the German National Socialist regime during the World War II[10]. Second, an intense public debate could be observed, first in France, since 2005[11], following, in particular, the publication with nineteen signatories to the "Liberté pour l'histoire" petition[12] and the adoption of the Accoyer Report[13] and, second in Belgium, since the publication of, amongst other platforms, "Plethora of memories: when the State mingles with history"[14]. Third, the selected instruments target a variety of memories to guarantee the requirement of diversity in terms of qualitative research[15]: the memories of World War II, the genocide, colonialism and slavery.

2. The reductionist dichotomisation of memorial instruments

Research articles by jurists dealing with "memory legislation" or the "law of memory" tend to divide memory instruments into two broad categories depending on their normative scope. Thus, on the one hand, we will find memory instruments that create a legal norm in that they impose a series of laws or obligations[16]. Amongst these instruments, we find in particular, in the French legal system, the Gayssot Act, the law of 21 May 2001 recognising trafficking and slavery as crimes against humanity (the so-called Taubira's law)[17] and the law of 23 February 2005 on recognising the Nation and the national contribution of repatriated French nationals (the so-called Mekachera law)[18]. These laws are normative as they impose, prohibit or prescribe certain behaviour[19].

On the other hand, some memory instruments have a declarative intent, "the object of which, exclusive or main, is to commemorate or recognise the existence of a past event being limited to affirming the reality but without creating a legal norm"[20]. These instruments thus do not provide any mechanism to sanction, indemnify or issue a status of any kind. Amongst these instruments, we will find in particular, also in the French legal order, the Law of 29 January 2001, recognising the Armenian genocide of 1915[21]. According to Patrick FRAISSEIX, these

[9] Law no. 91-615 (Official Gazette of 14 July 1990).
[10] Belgian official journal of 30 March 1995.
[11] GARIBIAN Sévane, "La mémoire est-elle soluble dans le droit ? Des incertitudes nées de la décision n°2012-647 DC du Conseil constitutionnel français", *Droit et cultures*, 2013, vol. 66, n° 2, p. 35.
[12] "Liberté pour l'histoire", *Libération*, 13 décembre 2005.
[13] ASSEMBLEE NATIONALE, "Rapport d'information fait en application de l'article 145 du Règlement au nom de la mission d'information sur les questions mémorielles", 18 novembre 2008, n° 1262, 480 p.
[14] COLLECTIF D'HISTORIENS, "Pléthore de mémoire : quand l'État se mêle d'histoire", *Le Soir*, 25 janvier 2006.
[15] On the requirement of diversity, see PIRES Alvaro, "Échantillonnage et recherche qualitative : essai théorique et méthodologique", *in* POUPART Jean, DESLAURIERS Jean-Pierre, GROULX Lionel et LAPERRIERE Anne, *La recherche qualitative : enjeux épistémologiques et méthodologiques*, Montréal, Morin, 1997, p. 154.
[16] FOIRRY Anne-Chloé, "Lois mémorielles, normativité et liberté d'expression dans la jurisprudence du Conseil constitutionnel. Un équilibre complexe et des évolutions possibles", *Pouvoirs*, 2012, vol. 4, n° 143, p. 149.
[17] Law no. 2001-434 (Official Gazette of 23 May 2001).
[18] Law no. 2005-158 (Official Gazette of 24 February 2005).
[19] GARIBIAN Sévane, "Pour une lecture juridique des quatre lois 'mémorielle'", *Esprit*, février 2006, n° 2, p. 162.
[20] FRANGI Marc, "Les "lois mémorielles" : de l'expression de la volonté générale au législateur historien", *Revue de droit public, de la science politique en France et à l'étranger*, 2005, n°1, p. 245.
[21] Law no. 2001-70 (Official Gazette of 30 January 2001).

declarative memory instruments show a "normative failure" to the extent that these texts "look at the past without drawing any legal lessons for the present or the future"[22], as such do not fulfil the requirement of normativity.

Nonetheless, it should be noted that classifying French memory laws into one of these two categories is not unanimous. Thus, Robert BADINTER groups under the heading "memory laws" any legislation related to the 2001 Armenian genocide, Taubira's law and the Mekachera Law. In contrast, the Gayssot Act and the law of 10 July 2000 initiating a national memorial day in France for victims of racist and anti-Semitic crimes and tribute to the Just of France[23], for example, are not memory laws. The criterion for distinction is based on a statement of norms. While the first three Acts refer to history, the latter two do not and perhaps set down norms and limitations intended to defend the principle asserted in the preamble to the French Constitution, particularly as regards fighting racism and xenophobia[24]. If Robert BADINTER does not similarly categorise these different laws, he nevertheless does connect the criterion developed previously, namely, that of normativity.

In Belgium, the adoption of a series of memory instruments did not arouse the same keen interest in terms of debates on the normative scope of these political decisions. It should nonetheless be noted that some researchers – essentially historians – opposed by means of free rein in the press by denouncing increasing Parliamentary and Government interventions on the topic of history. Without genuinely calling into question the law of 23 March 1995 that made it an offence to deny, play down, justify or approve of the genocide committed by the German National Socialist regime during World War II, they mostly emphasised the need to open the archives by encouraging the State to be open, self-critical and transparent as regards its own sometimes troubled past[25].

The dichotomisation of the memory instruments on the basis of their normativity is reductionist. Thus, even if the public authorities do not have a monopoly over the memory constraint, they can play with the differentiated degrees of constraint to impose, as far as possible and using different means, an official collective memory. Max WEBER had moreover appropriately stated "that there are non-violent coercive means that act with equal, perhaps, as the case may be, greater power than the violent means"[26]. How can the public authorities exercise a constraint by adopting memory instruments?

To answer this question, several French and Belgian memory instruments have been examined based on the constraint exercised over the members of the political system. On the one hand, the constraint may be direct by sanctioning or prescribing certain behaviour. On the other, the constraint may be indirect or latent to the extent that a memory instrument is activated by the necessary combination with another decision from the public authorities.

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[22] FRAISSEIX Patrick, "Le Droit mémoriel", *op. cit.*, p. 492.
[23] Law no. 2000-644 (Official Gazette of 11 July 2000).
[24] BADINTER Robert, "Fin des lois mémorielles ?", *Le Débat*, 2012, vol. 4, n ° 171, p. 97.
[25] COLLECTIF D'HISTORIENS, "Pléthore de mémoire : quand l'État se mêle d'histoire", *op. cit.* ; RAXHON Philippe, "Décryptage d'un manifeste d'historiens", *La Libre Belgique*, 27 janvier 2006 and GOTOVITCH José, "Quatre questions sur un 'décryptage'", *La Libre Belgique*, 1er février 2006.
[26] WEBER Max, *Économie et société, tome I*, Paris, Plon, 1971, p. 326.

3. *The exercise of direct constraints*

The scope of memory instruments may directly guide the behaviour of members of a political system in two distinct ways. First, certain behaviour may be prohibited by instruments which criminally sanction them. Second, some behaviour may be prescribed without resorting to the mechanism that imposes criminal sanctions on the prohibited behaviour.

a. *The exercise of the sanctioning constraint*

The first category includes memory instruments that have a mechanism that criminally sanctions, providing a penalty imposed by a public authority on the perpetrator of a criminal offence. The aim of the application of this constraint is to prohibit certain behaviour. These instruments are very frequently preceded by recognition policies[27].

There are two similar instruments in France and Belgium. First, in France, Article 9 of the Gayssot Act amended the Law of 29 July 1881 on the freedom of the press by inserting Article 24 bis criminally penalising "those who contest […] the existence of one or more crimes against humanity as defined under Article 6 of the Charter of the International Military Tribunal annexed to the London Accord of 8 August 1945 and that were committed either by a person found guilty of such crimes by a French or an international court".

The Law of 23 January 2012 subsequently further amended the Law of 29 July 1881 and Article 24 ter was inserted, the objective of which was to combat denial of the existence of genocides acknowledged by the law (the so-called Boyer Law). This law imposed penalties "on anyone who outrageously denied or played down […] the existence of one or more crimes of genocide as defined under Article 211-1 of the criminal code and as such recognised by the Law of France." This law should be read together with the Law of 29 January 2001 recognising the Armenian genocide of 1915. It allowed from that time on combatting the denial of the Armenian genocide. The law was subjected to censorship by the Constitutional Council of 28 February 2012[28]. Two significant arguments supported the decision made by the Constitutional Council. First, such a legislative provision lacks normative scope[29]. Second, the constitutional judges deemed that it was not within the jurisdiction of the constitutional Council to provide a legal definition of acts that constitute the offence because "this situation

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[27] For France, see MICHEL Johann, *Gouverner les mémoires. Les politiques mémorielles en France*, *op. cit.* ; WIEVIORKA Annette, "Shoah : les étapes de la mémoire en France", *in* BLANCHARD Pascal and VEYRAT-MASSON Isabelle (dir.), *Les guerres de mémoires. La France et son histoire*, Paris, La Découverte, coll. "Poche", 2010, pp. 107-116 and MASSERET Olivier, "La reconnaissance par le parlement français du génocide arménien de 1915", *Vingtième Siècle. Revue d'histoire*, 2002, n° 73, pp. 139-155. For Belgium, see GRANDJEAN Geoffrey, "La répression du négationnisme en Belgique : de la réussite législative au blocage politique", *Droit et Société*, n° 77, 2011, pp. 137-160 and BOSLY Henri D., "La loi et la mémoire du crime : les dispositions législatives belges", *in* DANTI-JUAN Michel (dir.), *La mémoire et le crime*, Paris, Éditions Cujas, 2011, pp. 159-174.

[28] CONSEIL CONSTITUTIONNEL, Décision n° 2012-647 DC du 28 février 2012.

[29] ROUX Jérôme, "Le Conseil constitutionnel et le génocide arménien : de l'a-normativité à l'inconstitutionnalité de la loi", *Recueil Dalloz*, 2012, n° 15, pp. 987-992 ; MACAYA Ariana and VERPEAUX Michel, "Le législateur, l'histoire et le Conseil constitutionnel", *L'actualité juridique du droit administratif*, 2012, n° 25, pp. 1406-1411 and MASTOR Wanda and SORBARA Jean-Gabriel, "Réflexions sur le rôle du Parlement à la lumière de la décision du Conseil constitutionnel sur la contestation des génocides reconnus par la loi », *Revue française de droit administratif*, 2012, n° 3, pp. 507-519.

results in leaving to the legislator itself the task of defining the material and moral elements of the offence that lay at the foundation of the prosecution and not of determining the conditions of the offence. The legislator is thus transformed into judge 'of the facts that he considers genocide' [...]"[30].

Second, in Belgium, the law of 23 March 1995 on punishing denying, downplaying, justifying or approving genocide committed by the German National Socialist regime during World War II added a provision to the criminal code imposing a punishment "of imprisonment of eight days to one year and a fine of twenty-six to five thousand francs anyone […] denying, downplaying, seeking to justify or approve genocide committed by the German National Socialist regime during World War II"[31]. Since 2003, various legislative drafts or proposals were discussed within the federal Parliament in Belgium to expand the field of application of the law of 23 March 1995 and to punish in particular the denial of the Armenian genocide[32], starting debates[33] similar to those observed in France on the same subject. Nonetheless, no legal text was ultimately passed[34].

Apart from the Law of 23 January 2012, censored by the Constitutional Council, the French and Belgian Laws diverge on a fundamental point, that is, the political authority recognising genocide the repression of which has been punished. In the case of the Gayssot Act, legislator based himself on the judgement of an international court while in the case of the Belgian Law, the legislator recognised the historic fact the denial of which was repressed[35]. It may be noted in this respect that the Belgian Constitutional Court – formerly the Court of Arbitration – did not raise any objection with respect to this and justified the decision of the legislator by referring to the "criminal ideology that is hostile to democracy"[36] behind the words of revisionists.

In the long run, laws aimed at punishing revisionism bear witness to the exercise of a strong legal constraint that includes the criminal sanction, imposed in the event of a conviction

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[30] MATHIEU Bertrand, LE POURHIET Anne-Marie, MÉLIN-SOUCRAMANIEN Ferdinand, LEVADE Anne, PHILIPPE Xavier and ROUSSEAU Dominique, "Observations relatives à la loi visant à réprimer la contestation des génocides reconnus par la loi", *Constitutions*, 2012, n° 3, p. 393.

[31] It should be noted that, in the law, the concept of genocide includes the definition under Article 2 of the 9 December 1948 International Convention on the Prevention and Punishment of the Crime of Genocide.

[32] For a detailed analysis of the Belgian Parliamentary debates, see GRANDJEAN Geoffrey, "La reconnaissance des génocides et la répression du négationnisme", *Courrier hebdomadaire du CRISP*, 2016, n° 2304-2305, 85 p.

[33] GRANDJEAN Geoffrey et MACQ Hadrien, "Dynamiques mémorielles autour de la répression de la négation du génocide des Arméniens en Belgique et en France", *in* CHABOT Joceline, DOUCET Marie-Michèle, KASPARIAN Sylvia and THIBAULT Jean-François (dir.), *Le génocide des Arméniens. Représentations, traces, mémoires*, Québec, Presses de l'Université de Laval, 2017, pp. 151-170.

[34] GRANDJEAN Geoffrey, "La répression du négationnisme en Belgique : de la réussite législative au blocage politique", *op. cit.*

[35] For more significant developments in the competence of a political authority to recognise genocide, the denial of which can be punished, see GRANDJEAN Geoffrey, "Quelques réflexions sur les enjeux mémoriels autour de la répression du négationnisme en Belgique", *Revue de la Faculté de Droit de l'Université de Liège*, vol. 54, n° 4, 2009, pp. 575-586.

[36] COUR D'ARBITRAGE, Arrêt n° 45/96 du 12 juillet 1996, point B.7.10.

ordered by a judge[37]. This constraint by nature guides the behaviours of citizens in a given political system.

b. The exercise of prescriptive constraint

The second category of memory instruments groups those that have a mechanism for prescription, which aims at imposing an obligation not to resort to the mechanism of prohibition with criminal sanction. This prescription is based on injunctions of various types that could be illustrated by three French and Belgian memory instruments, the two French instruments illustrating, according to Luigi CAJANI, the political authority's attempt to control historical discourse[38]. These instruments are, yet again, very often preceded by recognition policies[39].

First, in France, the Taubira law translates the application of a prescription constraint to the extent that it Article 2 enjoins the competent authorities to give African trafficking and slavery "the place it deserves" in school programmes, amongst other issues. Patrick WEIL underlines the benign transgression of this law since "it is the task of the government and not of the Parliament to define the priorities of school programmes and research"[40]. It could be noted that the prescription imposed by this law is not normative in nature[41] since it does not impose a "positive" lesson of African trafficking and slavery, unlike the Mekachera Law.

Second, the Mekachera Law demonstrates the application of this same constraint in its Article 4. On the one hand, this law suggested university research programmes give "the history and French presence overseas, particularly in North Africa, the place it deserves". On the other hand, the prescription is normative since the law only required, in particular, that the school programmes recognise "the *positive* role of French presence overseas, especially in North Africa". Such an article pushed Emmanuel CARTIER to describe this law as "historicide", to

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[37] On the role of Belgian judges in matters of punishing revisionism, see GRANDJEAN Geoffrey, "La répression du négationnisme en Belgique : de la réussite législative au blocage politique", *op. cit*.
[38] CAJANI Luigi, "L'histoire, les lois, les mémoires. Sur quelques conflits récents en Europe", *Revue française de pédagogie*, 2008, n° 165, p. 71.
[39] For France, see BANCEL Nicolas and BLANCHARD Pascal, "La colonisation : du débat sur la guerre d'Algérie au discours de Dakar", *in* BLANCHARD Pascal and VEYRAT-MASSON Isabelle (dir.), *Les guerres de mémoires. La France et son histoire*, *op. cit.*, pp. 137-154 ; VERGÈS Françoise, "Esclavage colonial : quelles mémoires ? quels héritages ? ", *in* BLANCHARD Pascal and VEYRAT-MASSON Isabelle (dir.), *Les guerres de mémoires. La France et son histoire*, *op. cit.*, pp. 155-164 and Jean Jean-Paul, "La mémoire du crime dans les deux lois de déclaration relatives au génocide des Arméniens et à l'esclavage", *in* DANTI-JUAN Michel (dir.), *La mémoire et le crime*, *op. cit.*, pp. 175-197. For Belgium, see LAGROU Pieter, "Victimes of Genocide and National Memory : Belgium, France, and the Netherlands 1946-1965", *Past & Present*, 1997, n° 154, pp. 181-222 ; RAXHON Philippe, *Le débat Lumumba : histoire d'une expertise*, Bruxelles, Labor, coll. "Liberté j'écris ton nom", 2002, 95 p. ; RAXHON Philippe, "La commission Lumumba", *in* DARD Olivier and LEFEUVRE Daniel (dir.), *L'Europe face à son passé colonial*, Paris, Riveneuve Éditions, 2008, pp. 319-345 and WOUTERS Nico et LUYTEN Dirk, "A Consensus of Differences. Transitional Justice and Belgium's Divided War Memories (1944-2012)", *in* WOUTERS Nico (éd.), *Transitional Justice and Memory in Europe (1945-2013)*, Cambridge, Intersentia, 2014, pp. 95-132.
[40] WEIL Patrick, "Politique de la mémoire : l'interdit et la commémoration", *Esprit*, 2007, n° 2, p. 142.
[41] *Ibid.*

the extent that it substitutes authentic history with an official interpretation of the past[42]. Nathalie MALLET-POUJOL saw here a "legislative neutron", since "it was not a case of '*recognition-qualification*', […] but rather of '*recognition-gratitude*', expressed as regards the victims"[43]. Following on the controversies related to this Article, the former Prime Minister, Dominique DE VILLEPIN, referred to the Constitutional Council on 25 January 2006 so that it could adjudicate on the legal nature of the second paragraph of Article 4. On 31 January 2006, this court recognised the regulatory nature of the paragraph, thus allowing the abrogation of the second paragraph of Article 4 by decree[44].

Third, in Belgium, the resolution of 11 February 2003 regarding establishing possible facts and responsibilities of the Belgian authorities in the persecution and the deportation of the Jewish peoples from Belgium during World War II was adopted by the Belgian Senate[45]. This resolution provided that the Centre for Historical Research and Documentation on War and Contemporary Society (CEGES) undertake research[46] on this topic with the objective "of obtaining, within two years, detailed knowledge of the facts and their context,[47] even if they were related to the pre- and post-war eras".

The result of this resolution was the adoption of the law of 8 May 2003 on conducting a research study on the persecution and the deportation of the Jewish peoples in Belgium during World War II[48]. Article 2 of this law provides CEGES with access to certain archives[49] for carrying out this research. Thus, the CEGES "may obtain from any public authority or any private law institution communication of all information or document that could be useful for completion, within two years, of a research study on any participation of Belgian authorities in identifying, persecution and deportation of the Jewish peoples in Belgium during World War II". In 2007, CEGES submitted its study to the Federal Government and this led to the

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[42] CARTIER Emmanuel, "Histoire et droit : rivalité ou complémentarité ?", *Revue française de droit constitutionnel*, juillet 2006, n° 67, p. 528.
[43] MALLET-POUJOL Nathalie, "Liberté d'opinion et droits de l'histoire : perspectives récentes", *LEGICOM*, 2015 ; vol. 1, n° 54, p. 47 [emphasis added].
[44] This paragraph was abrogated by Decree no. 2006-160 of 15 February 2006 (Official Gazette of 16 February 2006).
[45] SÉNAT DE BELGIQUE, *Doc. Parl.*, S.O. 2002-2003, 11 février 2003, n° 2 - 1311/4.
[46] For an overview of the *ad hoc* research carried out at CEGES regarding the aministration, see ROCHET Bénédicte et LUYTEN Dirk, "L'étude de l'administration publique en temps de guerre", *Pyramides*, 2005, n° 10, pp. 180-194.
[47] The resolution emphasises in particular one series of events: the relocation beginning 10 May 1940 of a large number of foreign Jewish citizens to France, the application of decrees from the occupying authority regarding the Jewish people, the creation of a register of Jewish people, the distribution and the wearing of the yellow star, the concentrations and deportations of Jewish peoples and the manner in which this possible involvement was accounted for during the post-war repression.
[48] Belgian Official Gazette of 2 June 2003.
[49] It may be noted that the French government allowed certain public archives related to World War II, including the archives related to the special courts established by the Vichy regime and by the provisional Government of the French Republic, to be freely consulted. See Decree of 24 December 2015 on opening archives related to World War II (Official Gazette of 27 December 2015). This decree is in line with the circular published in October 1997 by Lionel Jospin. WIEDER Thomas, "Le gouvernement facilite l'accès aux archives de Vichy", *Le Monde*, mercredi 30 décembre 2015, p. 8.

publication of two important pieces of work on the responsibility of Belgian authorities in the persecution of the Jewish peoples during World War II[50].

In fact, the various instruments prescribe different behaviours, notably in education or research, but without resorting to sanctions in cases of non-compliance. The constraint does, however, exist because it governs the activity of certain actors, sometimes normatively, without obtaining their prior acceptance.

4. The exercise of latent indirect constraints

Alongside the memory instruments applying direct constraints that sanction or prescribe certain behaviours of the members of a political system, some instruments are activated by necessarily being combined with another decision of the public authorities. The application of the constraint is thus indirect and latent.

In this case, the memory instruments (in particular, resolutions adopted by legislative assemblies[51]) do not present, *a priori*, a binding mechanism of constraint as they are essentially limited to recognising the reality of a historical fact. Nonetheless, these instruments may be coupled with other decisions of public authorities and apply, in this instance, a more binding legal constraint. The combination of two or more memory instruments is necessary for the latent constraint to be applied. In future developments, memory instruments are combined with legal rules and perhaps with legal decisions.

Three instruments can be cited here. First, in France, the law of 29 January 2001 on the recognition of the Armenian genocide of 1915 contains just one Article which provides "France publicly recognises the Armenian genocide of 1915". This law is *prima facie* purely declarative, being limited to recognising the reality of a historical fact. According to Patrick FRAISSEIX, it is part of this declaratory memory law that is "a means to authenticate the tragedies to make them safer"[52]. Sévane GARIBIAN, in underscoring the declarative function, does "not see how one can wait for or ask a judge to apply such a legal text since it creates no obligation, prohibition or permission; no rule of law"[53]. Nonetheless, this author does not deny the symbolic scope:

> It is a legislative act with a declaration that, devoid of legal effect attached to a norm *per se*, embodies no less of a (symbolic) commitment of will: that of asserting or observing, solemnly, a pre-existing fact verified by historians[54].

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[50] VAN DOORSLAER Rudy, DEBRUYNE Emmanuel, SEBERECHTS Frank and WOUTERS Nico (dir.), *La Belgique docile. Les autorités belges et la persécution des Juifs en Belgique durant la Seconde Guerre mondiale*, Bruxelles, Luc Pire/CEGESOMA, 2 volumes, 1592 p.

[51] From 2008, the French legislative assemblies may henceforth adopt resolutions following the constitutional revision inserting Article 34-1 aimed at modernising the institutions of the French Fifth Republic. Law no. 2008-724 of 23 July 2008 aimint at modernising the institutions of the French Fifth Republic (Official Gazette of 24 July 2008).

[52] FRAISSEIX Patrick, "Le Droit mémoriel", *op. cit.*, p. 485.

[53] GARIBIAN Sévane, "Pour une lecture juridique des quatre lois 'mémorielle'", *op. cit.*, p. 163.

[54] *Ibid.*, p. 163.

Second, in Belgium, the resolution of 17 March 1998 on the genocide of the Armenians in Turkey in 1915, was adopted by the Belgian Senate[55]. In particular, based on "many studies devoted to the situation of the Armenian populations in Turkey at the beginning of the century", but also of "the resolution of the European Parliament of 18 June 1987 on 'a political solution to the Armenian issue'", and "the historical proof of the reality of the concerted and systematic massacres of the Armenians", the Belgian senators invited various public authorities (including the Turkish government) to work toward recognition of this genocide and at reconciliation between the Turkish and the Armenian peoples.[56] Like the law of 29 January 2001, this resolution is *prima facie* not binding as it does not sanction nor does it prescribe people of a political system from engaging in certain types of behaviour. It is not included in the Belgian legal order, added to which it was only adopted by one of the two federal chambers of Belgium.

Nonetheless, the symbolic weight of these memory instruments cannot be ignored. In this respect, many are political scientists who emphasise the symbolic meanings of the exercise of political power, as Georges BALANDIER underscoring that all power "may only apply to persons and things if it relies on symbolic means and imaginary as much as on the legitimate constraint. The accession to political power is at once for the strength of the institutions and the strength of symbols and images"[57]. By playing on the symbols and recognising the Armenian genocide, the public authorities act directly on the imaginary institution of the collective identities[58]. Resorting to the symbols is thus an issue of vital importance for power; they provide the tools to see and shape the unity of the group[59]. Nonetheless, it should not be forgotten, as Philippe BRAUD mentions, that if "the effectiveness of the symbolic is that much stronger that it generates the feeling of what is evidently shared", it is nonetheless still the case that "competition for imposing meaning may be very overwhelming, even intensely confrontational"[60]. Consequently, the memory instruments that aim at applying a latent constraint take part, through their symbolism, in the process of "competing memories"[61] and the "competing victims"[62].

Third, the Mekachera law is a testament to the application of this same constraint. In fact, in the terms of its Article 1, the Nation "expresses its recognition to women and men who participated in the work carried out by France in the old French departments […] [and] recognises the suffering revealed and the sacrifices endured by the repatriated people, former members of additional and assimilated training, the missing and the civilian and military victims of events connected to the independence process of former departments and territories [...]". Through this law, it is observed that the legislator may seek to apply different

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[55] SÉNAT DE BELGIQUE, *Doc. Parl.*, S.O. 1997-1998, n° 1-736/3, 17 mars 1998, 2 p.
[56] *Ibid.*, p. 2.
[57] BALANDIER Georges, *Le détour. Pouvoir et modernité*, Paris, Fayard, coll. « L'espace du politique", 1985, p. 88.
[58] MICHEL Johann, *Gouverner les mémoires. Les politiques mémorielles en France*, *op. cit.*, p. 5.
[59] FORET François, *Légitimer l'Europe. Pouvoir et symbolique à l'ère de la gouvernance*, Paris, Presses de la Fondation nationale des sciences politiques, 2008, pp. 11-12.
[60] BRAUD Philippe, *Penser l'État*, Paris, Seuil, coll. "Points Essais", 2004, p. 77.
[61] GRANDJEAN Geoffrey, "Pluralité des mémoires collectives et dynamique concurrentielle", *op. cit.*, p. 13.
[62] CHAUMONT Jean-Michel, "Du culte des héros à la concurrence des victimes", *Criminologie*, vol. 33, n° 1, 2000, pp. 167-183.

constraints since it had previously been demonstrated that Article 4 illustrates the exercise of a prescriptive constraint. Article 1 is limited to recognising "the dramatic character of the events and of the offence committed by the French State"[63].

Thus, *prima facie*, these three instruments appear to have a purely declarative function. Nonetheless, combined with other instruments from public authorities, they may indicate the application of a more binding legal constraint. To be convinced of this, there are two combinations that could be used: that of the legislative standards and that of the judicial standards and decisions.

First, when the Boyer Law was adopted on 23 January 2012, it implicitly relied on the law of 29 January 2001. In other words, the latter became indirectly binding, through the imposition of a criminal sanction that flowed from another judgement. Without accounting for the judgement from the Constitutional Council that censured it, the Boyer Law did not have the same legal effects without the Law of 29 January 2001. This memory instrument indicates the application of a latent constraint since it may be used by the legislator to exercise, in this case, a disciplinary sanction.

Moreover, perhaps it explains the Constitutional Council's position when it underlines, in its decision criticising the Boyer Law, the unconstitutionality of a law that punishes the act of denying the existence and the legal characterisation of crimes that the legislator himself recognised and characterised as such. Certainly, it clearly positions itself on the attempt of the French legislator to allow the Law of 29 January 2001 to have more binding legal effects. The Constitutional Council's ruling is thus perhaps a way to limit the ambitions of the French legislator who seeks to transform the exercise of a latent constraint into a disciplinary constraint.

Second, the judges may make a latent constraint more binding by using legislative norms. Thomas HOCHMANN urges us to include the role judges play when he suggests that "the formulations have no other meaning than what the judge attributes to them [...]".[64] To define optimally the role of the judge, it should be specified that there is not merely the criminal process to guarantee the exercise and the constraint of a memory instrument. The civil process could also be used. In effect, "the absence of criminal sanction does not mean that there is no sanction in general. Most of the time, *civil* justice may take up the standard and sanction the offence of any simply prescribed rule on application of the victim of this offence. It can thus be done based on *civil liability*, for the wrongdoer's misconduct. For this, it is sufficient that the unlawfulness resulted in harm"[65]. Two examples illustrate how judges activate a latent constraint.

The first example relates to a judicial decision about the sentencing of Bernard LEWIS by the *Tribunal de Grande Instance de Paris* on 21 June 1995. Bernard LEWIS, historian, is a

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[63] CARTIER Emmanuel, "Histoire et droit : rivalité ou complémentarité ? ", *op. cit.*, p. 530.

[64] HOCHMANN Thomas, "Le problème des lois dites 'mémorielles' sera-t-il résolu par les résolutions ? La référence à l'article 34-1 de la Constitution dans le discours contemporain sur les relations entre le Parlement et l'histoire", *Droit et cultures*, 2013, vol. 66, n° 2 paragraphe 11.

[65] DE BÉCHILLON Denys, *qu'est-ce qu'une règle de Droit ?*, Paris, Odile Jacob, 1997, p. 84 [emphasis added].

specialist in the medieval Islamic world, in Ottoman and Kemalian Turkey and in contemporary Islamism. On 16 November 1993, an interview was devoted to him in the newspaper *Le Monde*. To the question "Why do the Turks still refuse to recognise Armenian genocide?", the American historian started his answer by stating "You mean recognising the Armenian version of this history?". Later in the interview, he continued by stating it was very doubtful that there had been a deliberate policy or decision to eradicate the Armenian nation systematically. Following the backlash that resulted from his interview, Bernard LEWIS explained his position in greater detail in an article published in the same newspaper on 1 January 1994. In it, he repeated his words by affirming that there was no serious evidence of a decision and a plan by the Ottoman government aimed at exterminating the Armenian nation. The *Forum des Associations arméniennes de France* thus decided to take the issue to court, with the support of the International League against Racism and Anti-Semitism (Ligue Internationale Contre le Racisme et l'Antisémitisme (LICRA)), basing its arguments on Article 1382 of the Civil Code, which is dedicated precisely to civil liability. In its decision rendered 21 June 1995[66], the *Tribunal de Grand Instance de Paris* (First Chamber) first underscored that it did not have the jurisdiction to define as genocide the massacres of the Armenians committed from 1915 to 1917. It then set about establishing the freedom of the historian while tempering it. In fact, according to the judges, if the historian has in this way "full discretion to call into question, as he sees fit, the testimonials given or existing ideas, however, it would not be possible to avoid the common rule connecting the legitimate exercise of a freedom with the requisite acceptance of a liability". The court thereupon pronounced the foundation of the responsibility of the historian, since he "assumes responsibility to the persons concerned when, by misrepresenting or falsifying, he presents as true allegations that are manifestly erroneous or omits, by gross negligence, events or opinions supported by adequately qualified persons and explained for the sake of precise information prohibits him to pass over them in silence". In these circumstances, when Bernard LEWIS answered the questions asked by the two journalists from Le Monde by stating: "You mean the Armenian version of this history?", the Court deemed that such a response lent credence to "the idea according to which the reality of the genocide would only result in the imagination of the Armenian peoples who were, in a manner of speaking the only ones to affirm the existence of a concerted plan implemented by order of the young Turkish government for the purpose of the extermination of the Armenian nation". The Court in particular based itself on the European Parliament's Resolution of 18 June 1987 on a political solution to the Armenian question[67] to render its judgement[68]. For these reasons, Bernard LEWIS was ordered to pay a token penalty of one franc to the two associations at the basis of the complaint.

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[66] TRIBUNAL DE GRANDE INSTANCE DE PARIS, *Décision RG 4 767/94 ASS/14.02.94*, 1ere Chambre, 21 juin 1995, 15 p.

[67] EUROPEAN PARLIAMENT, *Resolution of 18 June 1987 on a political solution to the Armenian question* (Official Journal of the European Communities of 20 July 1987, C 190, p. 119). For a detailed analysis of this resolution, see GRANDJEAN Geoffrey, *Les attitudes des parlementaires européens face au génocide arménien : D'une reconnaissance à une mise en balance*, Mémoire présenté en vue de l'obtention du grade de Master of Arts in European Political and Administrative Studies, College of Europe, juin 2008, 84 p.

[68] TRIBUNAL DE GRANDE INSTANCE DE PARIS, *Décision RG 4 767/94 ASS/14.02.94*, 1ere Chambre, 21 June 1995, pp. 13-14.

The second example relates to a legal decision about the words of a Belgian politician on the genocide of the Armenians. On 18 November 2004, Emir KIR (socialist party), filed a complaint for defamation against two independent journalists. He accused them of running a misinformation campaign, started before the regional elections of 13 June 2004 and subsequently pursued, aimed at giving the impression that, as regards the massacres and the deportation of which the Armenians were victims from 1915 to 1916 by the authorities of the Ottoman Empire, he would be a negationist and that he could, moreover, be assimilated by the extreme right. In other words, Emir KIR accused them of describing him as a negationist. The Court of First Instance in Brussels held Emir KIR's action was not founded to the extent that his position could in fact be found to be a denial of the genocide of the Armenians[69]. To arrive at this conclusion, the Court based itself, in particular, on the works of historians but also on the preliminary report of the sub-committee of human rights of the United Nations Organisation (WHITAKER Report) which mentioned the "Armenian genocide" as the "first genocide of the 20th century"[70].

As the outcome of these two judicial decisions, it can be observed that the judges may use resolutions, but more broadly memory instruments[71] that reflect the application of latent constraint, to render a decision. Thus, they give these instruments a binding power that merits being included in the analysis because they can indeed end up imposing an official memory and shaping the behaviour of a political system.

5. Conclusion

The objective of this contribution was to understand how public authorities can exercise a constraint by adopting memory instruments while they do not have a monopoly on the memory constraint. To do so, it was shown, first, that the constraint may be direct by imposing penalties (disciplinary constraint) or by prescribing certain behaviours (prescriptive constraint) and, second, that the constraint may be indirect (latent constraint) because a memory instrument is activated when necessarily combined with legislative norms or judicial decisions.

In exceeding the dichotomisation suggested by several legal experts who classify memory laws, and more broadly memory instruments, based on the absence of normativity, it was shown that the political authorities may resort to memory instruments characterised by a differentiated degree of constraint and attempt to impose one or more official memories. By playing both sides, the public authorities can in this way counterbalance the absence of a

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[69] TRIBUNAL DE PREMIÈRE INSTANCE DE BRUXELLES, *Décision n° 279/14/05*, 14e Chambre, 28 October 2005, p. 11 [emphasis added].

[70] TERNON Yves, *Du négationnisme. Mémoire et tabou*, Paris, Desclée de Brouwer, 1999, p. 31 and RACINE Jean-Baptiste, *Le génocide des Arméniens. Origine et permanence du crime contre l'humanité*, Paris, Dalloz, coll. "Regards sur la justice", 2006, p. 71.

[71] The PÉTRÉ-GRENOUILLEAU case may also be cited. In this case, the French historian Olivier PÉTRÉ-GRENOUILLEAU was accused by the Caribbean, Guyana and Réunion Collectives of trivialising the nature of crime against humanity which was recognised in the slave trade by Taubira's law. RÉMOND René, "L'Histoire et la Loi", Études, 2006/6, tome 404, pp. 764-765.

monopoly over the memory constraint and ensure a “normative framing of behaviour”,[72] shaping the identity constructs.

[72] CHEVALLIER Jacques, *L'État post-moderne*, Paris, Librairie Générale de Droit et de Jurisprudence, coll. “Droit et société”, third ed., 2008, p. 143.