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Official memories and legal constraints: A classification of memory instruments in France and Belgium

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Abstract
Public authorities do not have a monopoly over memory constraint in the sense that they are not alone in promoting collective memories. However, the article suggests a classification of the memory instruments in France and Belgium according to the degree of legal constraint (sanctioning, prescriptive and latent). This classification offers a new understanding of the exercise of the legal constraints which are a way for the public authorities to offer specific accounts of certain past events.

Keywords
collective memories, constraint, law, memory competition, memory laws, official memories

Multiple memories and memory constraints

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' (Michel, 2010: 16), is not an emerging policy domain.[1] Over the last 20 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. These memory instruments imposed official memories. These are understood to include all official representations of the past. These official memories comprise two important features. First, they are authorised memories, presented by a legitimate spokesperson from the group. Second, they are stages, showcases for the country intended for both internal and external public (Rosoux and Van Ypersele, 2012: 45–57).

However, public authorities do not benefit from the 'monopoly over the memory constraint' (Michel, 2010: 5). Official memories imposed by public authorities coexist with the collective memories cultivated by other groups. In 1978, the French historian Pierre Nora identified the phenomenon of multiplication of collective memories based on the evolution of the fragmentation, the

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globalisation, the acceleration and the democratisation of our contemporary world. Consecutively, for him, 'history is written henceforth under pressure of the multiple memories' (Nora, 1978: 400). This coexistence of numerous collective memories may culminate in a form of competition among the victims. In this regard, it is worthwhile recalling that Jean-Michel Chaumont analysed the competition that could arise between victims who suffered genocide at the hands of the Nazis. In his work, he demonstrates that 'after the shame came a glorification of which one of the most tangible effects [was] a quick statutory ascent of the Holocaust survivors' (Chaumont, 2010: 93). After analysing the debate that arose in 1967 regarding the uniqueness of the Holocaust, he identified a perverse effect that flowed from this debate, that is, the phenomenon of competition between the victims (Chaumont, 2000: 167). He demonstrated that victims who contend that the holocaust was unique are opposed to any suffering that could be comparable, identical or worse (Chaumont, 2010: 163).

More broadly, the coexistence of numerous collective memories may culminate in a form of memory competition since a 'complex and sometimes painful competition between social groups (amongst them or regarding an authority) to defend and promote the memory of certain historical facts' (Grandjean, 2011b: 13) may exist. Some authors do not shrink from speaking of 'war of memories', specifically in the context of French politics (Stora and Leclère, 2007; Veyrat-Masson, 2010).

Beyond this memory competition, the mobilisation of the memory of past events – particularly in memory instruments – has four fundamental functions. First, the mobilisation of the memory of past events shapes, in various ways, the identity of a group (e.g. a government or a nation). This is the *identity function*. Indeed, memory contributes to the definition of a group and its values. It may be used to legitimise a group's actions, past, present or projected. Finally, it mobilises the members of a social group to achieve a collective project – most often political – in the name of their shared identity (Klein et al., 2012: 17–18). In other words, the collective memory allows individuals to define themselves at once as individuals and as a group. Second, mobilising the memory of past events fulfils a *transmission function*. Memory is mobilised to restore the history of individuals or of groups to pass on past events. Third, mobilising the memory of past events pursues a *revival function* since it brings the past to life; by reviving emotions, sensations or feelings that were experienced in the past. Fourth, mobilising the memory of past events is part of the *reflexivity function* since memory works on evaluating the past. It allows lessons to be drawn from past experiences and to adapt attitudes and behaviour in everyday life (Muxel, 2007). These various functions intertwine, according to Sarah Gensburger and Sandrine Lefranc (2017: 17–30), since the politics of memory give a preventive role by disseminating knowledge, attitudes, even emotions, to avoid repeating the tragedies of the past, to fight certain groups (like the far-right) and to allow national identification.

In a political system, one important issue is thus raised: since public authorities do not have a monopoly over memory constraints, how can they exercise constraints by adopting memory instruments? Bringing this question up is necessary as beyond the four above-mentioned functions, memory instruments may be binding in the sense that they are an attempt to direct or prescribe the behaviour of the members of a political system. By analysing how public authorities mobilise different forms of constraints, the main objective of this article is to identify the fundamental place of legal rules in affirming official memories. To do so, three forms of memorial constraints have been finally identified. First, the constraint can be sanctioning with mechanisms of criminal sanctions. Second, the constraint can be prescriptive with mechanisms of injunctions. Third, the constraint can be latent and indirect with binding mechanisms when coupled with other public instruments. These constraints allow public authorities to implement the exercise of a political power.

The comparison between France and Belgium

To answer the main question, memory instruments from two European countries – France and Belgium – have been selected. These two European countries demonstrate an effervescence of memory which has been very successful for several years. Moreover, it is not uncommon for policy debates over memory issues taking place in France to percolate into Belgian policy discussions. Despite the absence of monopoly over the memory constraint, French and Belgian public authorities have increasingly adopted memory instruments, such as criminal laws, resolutions, even memory laws, 'the grandiloquence of which is equalled only by the absence of normative force', according to Patrick Fraisseix (2006: 483). More precisely, we decided to compare these two countries for four reasons.

First, these two States have *different institutional systems*. France is a highly centralised State that, since 1870, experienced several republican regimes, evolving from a parliamentary into a governmental paradigm in which the central government is henceforth solid and powerful (Roussellier, 2015: 11–12). Whereas Belgium is a regime in which the State was deliberately kept weak, and as a consequence, where centrifugal forces have, since the end of the 1960s, undermined the central State. Belgium has become a country that is fundamentally broken into two increasingly antagonistic components (Beaufays et al., 2009: 10). These institutional state evolutions directly test the development of the politics of memory. Indeed those include 'actions that, to act on society and its members and to transform them, involve recalling the past' (Gensburger and Lefranc, 2017: 15). Thus, does the comparative perspective reveal the exercise of different constraints in these two States by adopting memory instruments? An answer is given later.

Second, while these two States present different institutional systems, they bear witness to the *evolution of similar national memories* even if the contents of these memories are not the same. In this regard, the memories of Nazi genocide is fundamental in these two States. Pieter Lagrou compared French and Belgian national memories of Nazi genocide victims between 1945 and 1965. In a first time, he identified the presence, in the two States, of a national memory glorifying the Resistance as a precondition for post-war recovery. 'Yet, the patriotic memory of the camps denied the heterogeneity of Nazi persecution, commemorating the heroic few at the expense of the majority of victims, particularly the Jews' (Lagrou, 1997: 220). In a second time, from 1947, the Cold War changed some of the basic features of the politics of memory in France and in Belgium: 'The construction of national memories was reinforced by the construction of Cold War memories. The anti-Communists chose the concentration camp as the symbolic target of their campaigns' (Lagrou, 1997: 221). In the middle of the 1990s, the 'reversal' of the memory of Nazi persecution (i.e. the awareness of the specificity of the Jewish experience which had not permeated contemporary public opinion (Lagrou, 1997: 183)) became definitively 'the era of the witness' (Wieviorka, 2009: 171). Moreover, Sébastien Ledoux has showed that, by analysing the evolution of the 'memory duty' from 1972 to 1995, memory instruments focussed on the Nazi genocide. From 1995 to 2005, memory instruments also progressively concern other memories (e.g. Armenian genocide and slavery). Since 2005, the 'memory duty' has been more disseminated in the society (Ledoux, 2016). In Belgium, this kind of study does not exist. The comparison between France and Belgium in terms of memory instruments may thus confirm or not the similar evolution of national memory during these last years.

Third, if the national memories of these two States went through similar evolutions, *the contents nonetheless remain different*. Thus, in France, Johann Michel (2010) has put forward a theory on the succession of four memory regimes in France: the national unity memorial regime, the Holocaust victim memorial regime, the slave memorial regimes and the colonialist memorial regimes. In Belgium, Valérie Rosoux and Laurence Van Ypersele identified a partial federalisation of the national

narrative through the memory of World War I and of colonisation. While the memory of World War I could be considered a 'matrix of a confrontational memory', the memory of colonisation is a 'memory that is clearly more consensual' (Rosoux and Van Ypersele, 2012: 45–57).

Fourth, the *similarity of public debates* on a series of past events must be emphasised. There are echoes of French political life in Belgium's French-speaking region and these may have difficulty crossing the linguistic border that clearly separates the two larger communities.

While there are points of similarity and difference between these two States regarding their institutional and memorial features, it would be interesting to discover whether they resort to the same mechanisms of memorial constraints. This is the purpose of this article, by characterising the different memory constraints.

The comparison of certain memory instruments in these two States reveals the specificities of these instruments. Only certain memory instruments fuel the proposed classification in this article. There are three reasons to explain this choice. First, the adoption of the Law of 13 July 1990 punishing people who contest the genocide of Jewish people[2] (the so-called 'Gayssot Law') is an important moment for the study of the memory instruments. The adoption of this law marks the decisive role that the State plays now in drafting memory laws (Robin, 2011: 29). This Law 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 the genocide committed by the German National Socialist regime during World War II.[3] The adoption of these two laws certainly marks the 'reversal of the memory' of Nazi persecution (Lagrou, 1997: 183). Second, an intense public debate on official memory could be observed, on the one hand in France, since 2005 (Garibian, 2013: 35), specifically after the publication with 19 signatories to the 'Liberty for history' petition (*Libération*, 2005) and the adoption of the Accoyer Report[4] and, on the other hand in Belgium, since the publication of, among other platforms, 'Plethora of memories: when the State mingles with history', in the two main languages of Belgium (Collectif d'Historiens, 2006; Groep van 151 historici, 2006). Third, the selected instruments target a variety of memories to guarantee the requirement of diversity in terms of qualitative research (Pires, 1997: 154): the memories of World War II, the genocide, colonialism and slavery.

Regarding the official texts, we opted for a content analysis which is a qualitative method of analysis by which the importance of the content is determined by the judgement of the scientist (Burnham et al., 2004: 236). Concretely, we proceeded in four stages to carry out this analysis. First, we cut the materials in units of text by asking ourselves the following question: what is this unit about? Second, we have coded these units of text and we have constituted categories of analysis based on four characteristics: completeness, exclusivity, objectivity and relevance (Grawitz, 2001: 617). Thus, we were able to identify the lexical register used by the public authorities in the official texts. Third, we have grouped these categories by identifying the differentiated degrees of constraint. On the one hand, the constraint may be direct by sanctioning or prescribing a certain behaviour. On the other hand, the constraint may be indirect or latent to the extent that a memory instrument is activated when combined with another decision from public authorities. Fourth, we have selected the extracts for the redaction of this article.

The reductionist dichotomisation of memory instruments

Scientific literature on 'memory legislation' or the 'law of memory', especially in law, demonstrates the dialectical relationship between the construction of official memories (and, more broadly, culture and identity) and the creation of laws. On the one hand, some authors note that the law may institutionalise certain collective memories (Savelsberg and King, 2005). On the other hand, there are authors who note that laws may shape certain identities and certain cultures. These

laws are thus considered 'constitutive norms', which define the affiliation with a group (Mautner, 2011: 849). They constitute the means for forming a 'public awareness' about the past (Chainoglou et al., 2017). From a sociological perspective, several authors have detailed the importance of analysing this dialectical relationship between the laws and the memories (Savelsberg and King, 2007), in particular, from the perspective of international law (Hirsch, 2015). Next to purely legal public instruments, the public authorities may also shape collective memories, particularly through educational policies (Grandjean, 2014; Hirsch and Kacandes, 2004; Oeser, 2010).

Generally, many authors have observed that law is an especially powerful institution for the creation of collective memory because it involves highly effective rituals (Borneman, 1997; Durkheim, 1984; Nino, 1996) and its enforcement is backed by the coercive apparatus of states (Weber, 1971). In the study of interactions between the law and memory, Eric Heinze (2018) emphasises the importance of understanding the 'mechanisms by which governments exercise power to shape public consciousness'. In the framework of this article, we will focus on the manner in which the public authorities mobilise the law to offer collective memories. More specifically, we identify the different degrees of constraint used by public authorities to offer specific accounts of certain pasts.

In this respect, and generally speaking, many French-speaking jurists tend to divide memory instruments into two broad categories depending on their normative scope. The first category is composed of memory instruments that create a *legal norm* in that they impose a series of laws or obligations (Foirry, 2012: 149). Among these instruments, there are, in the French legal system, the Gayssot Law, the Law of 21 May 2001 recognising trafficking and slavery as crimes against humanity (the so-called Taubira's Law)[5] and the Law of 23 February 2005 on recognising the Nation and the national contribution of repatriated French nationals (the so-called Mekachera Law).[6] These laws are normative as they impose, prohibit or prescribe certain behaviour (Garibian, 2006: 162).

The second category is composed of memory instruments that have a *declarative intent*. In this case, their object, exclusive or main, is to commemorate or recognise the existence of a past event but without creating a legal norm (Frangi, 2005: 245). These instruments thus do not provide any mechanism to sanction, indemnity or issue a status of any kind. Among these instruments, we will find, in the French legal order, the Law of 29 January 2001, recognising the Armenian genocide of 1915.[7] According to Patrick Fraisseix (2006: 492), these declarative memory instruments show a 'normative failure' to the extent that they 'look at the past without drawing any legal lessons for the present or the future' and, 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. For example, 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 Law 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,[8] for example, are not memory laws. His criterion for distinction is based on a statement of norms. While the first three laws refer to history, the latter two do not and 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 (Badinter, 2012: 97). Thus, Robert Badinter does not similarly categorise these different laws, by using the criterion based on a statement of norms (normativity criterion).

In Belgium, the adoption of a series of memory instruments did not raise the same keen interest in terms of debates on the normative scope of these political decisions. It should nonetheless be noted that some intense debates occurred. Some scholars – essentially historians – used press articles to denounce the 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 regarding its own sometimes troubled past (Collectif d'Historiens, 2006; Gotovitch, 2006; Groep van 151 historici, 2006; Raxhon, 2006).

In this article, we argue that the dichotomisation of memory instruments on the basis of their normativity (legal norm vs declarative intent) is reductionist to understand the way by which public authorities try to propose official memories. Thus, even if public authorities do not have a monopoly over the memory constraint, they can play with differentiated degrees of constraint to propose, as far as possible and using different means, an official collective memory. As Max Weber (1971: 326) stated, 'there are non-violent coercive means that act with equal, perhaps, as the case may be, greater power than the violent means'. Then, how could public authorities exercise a constraint by adopting memory instruments? To be clear, in the framework of this article, we do not assess the consequences of the memory instruments adopted by public authorities. We only offer a classification of these instruments according to their degree of constraint.

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 (negative or positive). First, a certain behaviour may be prohibited by instruments, which sanction them on a criminal basis. Second, a behaviour may be prescribed without any behaviour being prohibited by criminal sanctions. Beyond the four functions played by the mobilisation of the memory of past events (identity function, transmission function, revival function and reflexivity function), the exercise of direct constraints shows that 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.

The exercise of the sanctioning constraint

The first category includes memory instruments that involve criminal sanctions, providing a penalty imposed by a public authority on the perpetrator of a criminal offence. The aim of this constraint is to prohibit certain behaviour. These instruments are very frequently preceded by recognition policies (for France, see Masseret, 2002; Michel, 2010; Wieviorka, 2010, and for Belgium, see Bosly, 2011; Grandjean, 2011a). There are two such instruments in France and Belgium.

First, in France, Article 9 of the Gayssot Law amended the Law of 29 July 1881 on the freedom of the press. It should be recalled that there are three main reasons to explain why the communist deputies tabled the act. First, these deputies noted the presence, if not the rise of racism and antisemitism. Second, they hoped to prevent duplication of genocides and of the most monstrous of crimes. Third, they observed the weakness in French Law in terms of the fight against racism.[9] After long debates, the act was adopted unanimously (for a summary, see Association française pour l'histoire de la justice et Commission nationale consultative des droits de l'homme, 2002). The Gayssot Law inserts 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 an 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). It should be noted that this article's proposal flows directly from the adoption of the Law of 21 January 2001 (see below), which led to strong Turkish lobbying (particularly diplomatic). Confronted with this lobbying, the Armenian associations in France emphasised the need to adopt a penalising mechanism comparable with the Gayssot Law (Duclert, 2013: 190). After failure of the two draft laws, one in October 2006 and the second in May 2011, a third draft law was submitted, which was fully supported by Nicolas Sarkozy (Union pour un Mouvement Populaire, hereafter UMP) while president of the Republic. Moreover, Armenian organisations, who had been calling for such a law since 2001, were broadly supported by many parliamentarians who were 'generally elected in constituencies of strong Armenian communities or themselves of Armenian descent' (Duclert, 2013: 191). Valérie Boyer (UMP), who authored the draft, was herself elected in Marseille and became vice-president of the French–Armenian friendship. Moreover, Geoffrey Grandjean and Hadrien Macq (2017: 165–166) have demonstrated that those elected (across all parties) who voted in favour of the Boyer Law are spread out along the Marseille–Lyon–Paris migratory axis where most of the Armenian communities in France are found. 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 combating the denial of the Armenian genocide. The law was subjected to censorship by the Constitutional Council of 28 February 2012.[10] Two significant arguments supported the decision made by the Constitutional Council. First, such a legislative provision lacks normative scope (Macaya and Verpeaux, 2012: 1406–1411; Mastor and Sorbara, 2012: 507–519; Roux, 2012: 987–992). 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 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' [. . .]. (Mathieu et al., 2012: 393)

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 has been adopted. Two socialist deputies presented the act for three reasons (Grandjean, 2016: 21). First, these deputies noted that exclusion, hatred, racism and anti-semitism held a significant place in the Belgian public debate. Second, adopting a comparative approach, they drew strongly from the Gayssot Law. Third, a 'semantic influence from witnesses' may be observed to the extent that, through their testimonies, the survivors, their descendants or descendants of the victims bring history to life through their 'semantic authority' (Robin, 2003: 154). So as to achieve a 'very broad consensus' (Grandjean, 2016: 32), the field of application of the Law was changed during the parliamentary debates. Only 'gross' denial of the genocide of the Jews is involved. The Law was unanimously adopted by the members present. As the Gayssot Law, the Belgian Law 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'. 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. Following this Convention, genocide means

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; 5) forcibly transferring children of the group to another group.

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,[11] generating debates exactly similar to those observed in France on the same subject (Grandjean and Macq, 2017). Nonetheless, no legal text was ultimately passed (Grandjean, 2011a).

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 whose repression is punished. In the case of the Gayssot Law, the legislator based itself on the judgement of an international court while in the case of the Belgian Law, the legislator recognised the historic fact whose denial is repressed.[12] 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'[13] 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 ordered by a judge. In France and in Belgium, several court decisions are rendered. For example, between 1992 and 2000, 29 convictions were pronounced in France (Bourette, 2002). Between 1995 and 2012, 18 convictions were pronounced in Belgium (Grandjean, 2012). This constraint by nature may guide the behaviour of citizens in a given political system.

Finally, while the two States being compared have similarities and differences with respect to their institutions and official memories (see before), it is possible to observe that, as regards sanctioning constraint, the Gayssot Law and the Law of 23 March 1995 show political preoccupations similar that lead to a same way of penalising of holocaust denial.

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 can be illustrated by three French and Belgian memory instruments, the two French instruments illustrating, according to Luigi Cajani (2008: 71), the political authority's attempt to control historical discourse. These instruments are, yet again, very often preceded by recognition policies (for France, see Bancel and Blanchard, 2010; Jean, 2011; Vergès, 2010, and for Belgium, see Lagrou, 1997; Raxhon, 2002, 2008; Wouters and Luyten, 2014).

First, in France, the Taubira Law translates the application of a prescription constraint to the extent that its Article 2 *enjoins* the competent authorities to give African trafficking and slavery 'the place it deserves' in school programmes, among other issues. Tabling this act essentially resulted in the 're-emergence of the memory' of colonisation that took place in the 1990s (Chivallon, 2005). This movement was notably strengthened by the implementation of the UNESCO 'Slave Route' project, from 1994 while, in France, it was strengthened by the 150th anniversary in 1998 of the abolition of slavery (Michel, 2018: 103). It is worth noting the increasing demands to take into consideration organised groups that claim to be descendants of slaves as well as associations

from metropolitan France (Hourcade, 2013). The text was unanimously adopted.[14] Patrick Weil (2007: 142) 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'. It could be noted that the prescription imposed by this law is not normative in nature (Weil, 2007: 142) since it does not impose a 'positive' lesson of African trafficking and slavery, unlike the Mekachera Law.

Second, still in France, the Mekachera Law demonstrates the application of this prescriptive constraint in its Article 4. It should be recalled that adding this article to the law – and so of this prescriptive constraint – is the result of representatives of constituencies in the south of France where political actors considered the preponderance of the 'vote pieds-noirs' (i.e. French of Algerian origin and French of European ancestry living in French North Africa until independence) crucial during the municipal and general elections (Bertrand, 2006: 22). This article thus established a policy project restoring the memory of 'French Algeria' and of the 'martyrs' (Boilley, 2005). The addition of Article 4 would thus be a 'political manoeuvre' (in its technical sense) by the elected officials of the UMP, who had recently entered politics, to ensure partisan control of a group of political supporters by passing on claims of associations of 'rapatriés' (repatriated persons) or of 'harkis' (individuals who served in colonial Algeria in a paramilitary training) active in their constituencies (Liauzu and Manceron, 2006: 23–58) facing the perceived threat of the extreme right (Bertrand, 2006: 63). The adoption of the text caused a great deal of tension between political representatives and was not adopted unanimously (Bertrand, 2006). Article 4 offered a double objective in terms of prescriptive constraint. On the one hand, this law *suggested* that university research programmes gave 'the history and French presence overseas, particularly in North Africa, the place it deserves'. On the other hand, the prescription was 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 the extent that it substituted authentic history with an official interpretation of the past. Nathalie Mallet-Poujol (2015: 47) saw here a 'legislative neutron', since 'it was not a case of "*recognition-qualification*", [. . .] but rather of "*recognition-gratitude*", expressed as regards the victims' (emphasis added). 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.[15]

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.[16] This resolution was preceded by the adoption of the Law of 20 December 2001 which created a Committee to compensate members of the Belgian Jewish community for property that was robbed from them or that they had to leave behind during World War II (Van Doorslaer, 2002). This Committee completed its work on 31 December 2007 after examining 5620 applications of which 88% resulted in compensation. The resolution of 11 February 2003 was proposed by the senators who represented each of the parties in the government majority. There are several reasons for the tabling of this text. First, the senators noted that the Jewish genocide occupies a central place in European memory, as is evidenced by many publications and cinematographic productions. Second, they noted the debates over State responsibility in Jewish persecution in France and Switzerland. Third, they emphasised that the Senate was responsible for contributing to a specific investigation into the persecutions suffered by the Jewish people in Belgium to maintain the memory of the genocide.[17] After having heard two historians (José Gotovitch and Rudi Van Doorslaer) and two representatives from the Union of deported Jewish persons of Belgium (Michel Eisenstorg and Judith

Kronfeld), the debates were relatively succinct and were closed with the unanimous vote on the resolution.[18] This resolution *provided* that the Centre for Historical Research and Documentation on War and Contemporary Society (CEGES) would undertake research[19] on this topic with the objective 'of obtaining, within two years, detailed knowledge of the facts and their context, even if they were related to the pre- and post-war eras'. 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.

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 people in Belgium during World War II,[20] also adopted unanimously. Article 2 of this law *provides* CEGES with access to certain archives[21] 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 publication of two important pieces of work on the responsibility of Belgian authorities in the persecution of the Jewish peoples during World War II (Van Doorslaer et al., 2007). The Belgian parliamentary initiative to commission an academic institution with a study of the responsibilities of the Belgian authorities in the persecution and the deportation of the Jewish peoples from Belgium during World War II can perhaps be seen as the means used to temper the debate on this past period. This passionate debate was in fact the result of the mixed feelings of shame and resentment present in Belgium (Flanders) regarding the collaboration, as stated in Olivier Luminet et al. (2012: 7):

> Shame was elicited in Flanders by the political collaboration with the occupiers during the two world wars. This feeling is still experienced today and leads to the avoidance of discussions about those times. However, simultaneously, there is an important level of resentment against the Belgian State as some Flemings believe that the collaborationists were too severely condemned after the two wars. These old feelings also have current outcomes.

The Belgian parliamentary initiative to commission an academic institution also illustrates perhaps the space left for non-state actors (such as historians). More research should be carried out to identify this process. It appears that federal public authorities prefer to rely on a scientific and historical reading of the past more than offering an official memory.

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 the instruments govern the activity of certain actors, sometimes normatively, without obtaining their prior acceptance. Thus, rather than sanctioning a behaviour, the public authorities invite certain actors, in exchange for financing, to work on certain past facts. These actors could then become dependent on funding made available by the authorities.

Finally, while the two States being compared have similarities and differences with respect to their institutions and official memories, it is possible to observe that, in terms of prescriptive constraint, the Taubira and Mekachera Laws in France and the resolution of 11 February 2003 and the Law of 8 May 2003 in Belgium put the responsibility of the two States for past events directly into

question. This does not prevent these States from offering official memories or from referring to a historical and scientific reading, through prescriptive instruments, especially in the case of the Mekachera Law where the responsibility of the French State was counterbalanced by the temporary recognition of the positive role of French presence overseas.

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 public authorities. The application of the constraint is thus indirect and latent.

In this case, memory instruments (in particular, resolutions adopted by legislative assemblies[22]) 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 with judicial decisions.

Three instruments can be cited here. The first two instruments relate to the recognition of the Armenian genocide. If the reasons for the progressive politicisation of this recognition in France (Duclert, 2013) and Belgium have already been studied, in particular by the more or less strong presence of Turkish and Armenian communities (Grandjean and Macq, 2017), the nature of the adopted instruments has not yet been analysed. First, in France, the Law of 29 January 2001 on the recognition of the Armenian genocide of 1915 only contains one article which declares that '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 (2006: 485), it is part of this declaratory memory law that is 'a means to authenticate the tragedies to make them safer'. Sévane Garibian (2006), 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'. 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. (Garibian, 2006: 163)

Second, in Belgium, the resolution of 26 March 1998 on the genocide of the Armenians in Turkey in 1915, was adopted by the Belgian Senate, in plenary assembly (49 votes in favour and 9 abstentions[23]). In particular, based on 'many studies devoted to the situation of the Armenian populations in Turkey at the beginning of the century' and 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 towards recognition of this genocide and at reconciliation between the Turkish and the Armenian peoples.[24] 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, as it was adopted only by one of the two federal chambers of Belgium. It should be noted, however, that on 23 July 2015, a resolution commemorating the 100th anniversary of the Armenian genocide was adopted in the House of Representatives in plenary assembly (124 votes in favour and 8 abstentions[25]). This resolution among others *called out* the federal

government to (1) participate in the commemoration of the centenary of the Armenian genocide, (2) recognise that current Turkey is not responsible for the tragedy experienced by the Armenians and (3) consider recent statements by the Turkish President, Recept Tayyip Erdogan, as a positive step forward.[26] This resolution presents differences from the Senate resolution of 26 March 1998 (for an analysis, see Grandjean, 2016: 69–78).

If these instruments are prima facie not binding, the symbolic scope of these memory instruments cannot be ignored. In this respect, many political scientists emphasise the symbolic meanings of the exercise of political power. Georges Balandier (1985: 88), for example, underscores 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.

By playing on the symbols and recognising the Armenian genocide, the public authorities act directly on the imaginary institution of the collective identities (Michel, 2010: 5). 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 (Foret, 2008: 11–12). Nonetheless, it should not be forgotten, as Philippe Braud (2004: 77) 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'. Consequently, the memory instruments that aim at applying a latent constraint take part, through their symbolism, in the process of 'competing memories' (Grandjean, 2011b: 13) and the 'competing victims' (Chaumont, 2000).

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 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' (Cartier, 2006: 528).

Thus, prima facie, these different 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 (see before). In other words, the latter became indirectly binding, through the imposition of a criminal sanction that flowed from another decision. 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 criminal sanction.

Moreover, it perhaps explains the Constitutional Council's position when it underlined, in its decision criticising the Boyer Law, the unconstitutionality of a law that punished the act of denying the existence and the legal characterisation of crimes that the legislator himself recognised and characterised as such. Certainly, it clearly positioned 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 was thus perhaps a way to limit the ambitions of the French legislator who sought to transform the exercise of a latent constraint into a sanctioning constraint.

Second, the judges may make a latent constraint more binding by using legislative norms. Thomas Hochmann (2013) appeals to include the role judges play when he suggests that 'the formulations have no other meaning than what the judge attributes to them [. . .]'. To define optimally the role of the judge, it should be specified that the criminal process is not the only one that can guarantee the exercise and the constraint of a memory instrument. The civil process could also be used. Indeed,

> 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. (De Béchillon, 1997: 84)

Two examples illustrate how judges activate a latent constraint into a more direct constraint.

The first example is related 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 specialist of 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 that 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,[27] 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[28] to render its judgement.[29] 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.

The second example relates to a judicial 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 regarded as a member of the extreme right. Specifically, articles written by the two journalists state that Emir Kir participated in several negationist 'demonstrations' or 'walks' in the region of Brussels. 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.[30] 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' (Racine, 2006: 71; Ternon, 1999: 71).

As the outcome of these two judicial decisions, it can be observed that the judges may use resolutions, but more broadly memory instruments[31] 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.

Finally, while the two States being compared have similarities and differences with respect to their institutions and official memories, it is possible to observe that, in terms of latent constraint, the public authorities from these two States allow declarations to have binding effects, through legislative standards and judicial decisions.

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 (sanctionating 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 propose one or more official memories. By playing both sides, the public authorities can in this way counterbalance the absence of a monopoly over the memory constraint and ensure a 'normative framing of behavior' (Chevallier, 2008: 143), shaping the construction of identities, which is one of the functions of the mobilisation of the memory of past events.

The selected instruments mobilised to identify the memory constraints respect the requirement of diversity in terms of qualitative research. France and Belgium were compared because these two States have similarities and differences in terms of institutions and official memories: different institutional systems, similar evolutions of national memories, divergent content of national memories and similar public discussions about a number of past events. Nonetheless, through the three types of constraints identified in the framework of this article, it can be seen that there is a connection between the manners in which these two States offered the official memories. First, in terms of sanctioning constraint, the Gayssot Law and the Law of 23 March 1995 show similar political preoccupations that lead to a same penalising of holocaust denial. Second, in terms of prescriptive constraint, the Taubira and Mekachera Laws in France and the resolution of 11 February 2003 and the Law of 8 May 2003 in Belgium put the responsibility of the two States for past events directly into question. This does not prevent these States from offering official memories or from referring to a historical and scientific reading, in particular, to take the heat out of certain debates. Third, in terms of latent constraints, the public authorities from these two States allow declarations to have binding effects through legislative standards and judicial decisions. The comparative perspective thus reveals the exercise of the same three constraints in these two States.

Finally, this article demonstrates the fundamental place occupied by the legal rules (through three kinds of constraints) in the possibility of offering official narratives of the past. The memory instruments that were analysed in the context of this article present the same memorial constraint mechanisms. From the identification of these mechanisms that are far from being neutral, it would be appropriate from now on to identify their concrete consequences on the attitudes and behaviour of the members of society.

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Notes

1. To define the concept of the public action instrument, Johann Michel uses the definition provided by Pierre Lascoumes and Patrick Le Galès (2004: 13), 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'.
2. Law no. 91-615 (Official Gazette of 14 July 1990).
3. Belgian official journal of 30 March 1995.
4. Assemblée 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 November 2008, no. 1262, 480 p.
5. Law no. 2001-434 (Official Gazette of 23 May 2001).
6. Law no. 2005-158 (Official Gazette of 24 February 2005).
7. Law no. 2001-70 (Official Gazette of 30 January 2001).
8. Law no. 2000-644 (Official Gazette of 11 July 2000).
9. Assemblée nationale, *Documents parlementaires*, IX^e^ législature, 15 Juny 1988, no. 43.

10. Conseil constitutionnel, Décision no. 2012-647 DC of 28 February 2012.
11. For a detailed analysis of the Belgian parliamentary debates, see Grandjean (2016).
12. For more significant developments in the competence of a political authority to recognise genocide, the denial of which can be punished, see Grandjean (2009).
13. Cour d'arbitrage, Arrêt n° 45/96 of 12 July 1996, point B.7.10.
14. Assemblée nationale, *Documents parlementaires*, 18 February 2001, no. 15 and Sénat, *Doc. Parl.*, 10 May 2001.
15. This paragraph was abrogated by Decree no. 2006-160 of 15 February 2006 (Official Gazette of 16 February 2006).
16. Sénat de Belgique, *Documents parlementaires*, S.O. 2002-2003, 11 February 2003, no. 2 - 1311/4.
17. Sénat de Belgique, *Documents parlementaires*, S.O. 2002-2003, 16 October 2002, no. 2 - 1311/1.
18. Sénat de Belgique, *Documents parlementaires*, S.O. 2002-2003, 11 February 2003, no. 2 - 1311/3.
19. For an overview of the ad hoc research carried out at CEGES regarding the administration, see Rochet and Luyten (2005).
20. Belgian Official Gazette of 2 June 2003.
21. 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, see Wieder (2015).
22. 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 aiming at modernising the institutions of the French Fifth Republic (Official Gazette of 24 July 2008).
23. Sénat de Belgique, *Annales parlementaires*, S.O. 1997-1998, no. 1-175 et 1-176, 26 March 1998, p. 5189.
24. Sénat de Belgique, *Documents parlementaires*, S.O. 1997-1998, no. 1-736/3, 17 March 1998, p. 2.
25. Chambre des Représentants de Belgique, Séance plénière, *Compte rendu integral*, S.O. 2014–2015, no. 69, 23 July 2015, p. 85.
26. Chambre des Représentants de Belgique, *Résolution relative à la commemoration du centenaire du genocide arménien*, Texte adopté en séance plénière, no. 1207/9, 23 July 2015, p. 5–6.
27. Tribunal de Grande Instance de Paris, *Décision RG 4 767/94 ASS/14.02.94*, 1ere Chambre, 21 June 1995, 15 p.
28. 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 (2008).
29. Tribunal de Grande Instance de Paris, *Décision RG 4 767/94 ASS/14.02.94*, 1ere Chambre, 21 June 1995, pp. 13–14.
30. Tribunal de Première Instance de Bruxelles, *Décision no. 279/14/05*, 14e Chambre, 28 October 2005, p. 11 (emphasis added).
31. 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. See Rémond (2006: 764–765).

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