Memory Laws and Security

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Anna Wójcik Fr 5 Jan 2018 Fr 5 Jan 2018

Security concerns are rarely openly invoked for the justification or in the preambles of memory laws – laws endorsing certain narratives about the past, often aimed at strengthening the collective identity of a nation or community. However, the notion of 'security' is invoked in broader debates over the legal governance of collective memory. Sadly, ensuring security – a fundamental obligation as well as the prerogative of governments – often serves as an excuse to increase the state's grip on the freedoms of its citizens.

Preserving sovereignty in post-Soviet democracies

A significant number of memory laws adopted in Central and Eastern Europe aim for reconciliation with the period of domination of the Soviet Union, Stalinism, and the "real existing socialism". The function of some of the legislation adopted in Estonia, Latvia, Lithuania, and Ukraine – apart from commemorating victims and condemning past atrocities – is to manifest the state's sovereignty.

The official condemnations of the Soviet occupation and gross human rights violations – including deportations to the USSR or the systematic starvation of local populations, notably the Great Famine in Ukraine between 1932 and 1933 – play an important role in the political communication with Vladimir Putin's Russia. Russia has legally sanctioned imperial and nationalist narratives about its role in the Second World War (the so-called Great Patriotic War) and the subsequent defeat of Nazi Germany. In this narrative, there is no room for admitting Soviet crimes. In the context of the Russian hybrid war in Ukraine, Maria Mälksoo described memory laws as a strategic element of 'mnemonic security' for countries in the post-Soviet region. The multiplicity and diversity of memory laws adopted in the region may stem from a need for reinforcing fragile sovereignty with a solid legal foundation. Memory laws endorse distinct identities of 'small nations' because they normalize strong judgments about the past and distinguish historical – and contemporary – enemies and allies.

Solidifying national majority narratives

International communication between states is important for understanding the motivations behind the proposal for a new memory law in Poland– a bill that would punish with prison sentences and fines the use of the term 'Polish death camps' to designate the German Nazi concentration camps and death camps that operated on the occupied territory of Poland. The law's proponents argue that introducing the risk of criminal sanctions could help to eradicate 'defective memory codes'. According to the current Law and Justice government, the diplomatic and educational efforts of previous Polish administrations did not lead to satisfactory change in this regard. The proposal aims to eradicate statements inconsistent with the documented historical truth, and it is justified as a tool for fighting

against historical revisionism, which is in this case understood as intentionally or otherwise diminishing German responsibility for the Second World War atrocities while emphasizing Polish complicity in the Holocaust and other atrocities. The narrative of some Poles perpetuating and being complicit in WWII crimes is rebutted by many in Poland, and heroic and martyrologic narratives about Polish history and Poles in European history are preferred by the current right-wing government. From this perspective, national identity is secured and preserved only when a singular version of the past is shared at home and abroad.

Yet Poland is not the first, nor (probably) the last, country to introduce memory laws privileging a narrative which favours the majority population at the expense of minority perspectives. For example, the French 2005 memory law required schools to teach about the positive elements of French presence in occupied overseas territories. This law was later ruled unconstitutional and struck down. Similarly, the Israeli legislature attempted to strengthen Jewish ethnic identity in Israel through an array of regulations introduced after 2000, aimed at legally preventing Palestinians from mourning *Nakba*, the Israeli Independence Day established in 1948 and the day of Palestinian exodus.

Attempting to ban totalitarian ideologies

A different aspect of the connection between the legal regulation of memory and security issues emerges from an examination of bans on propagating totalitarian ideologies: fascism, Nazism, Stalinism, and communism. Keeping in mind the ease with which European societies and political systems followed the direction and leadership of authoritarian and totalitarian governments in the interwar period, postwar constitutionalists developed militant democracies with legal mechanisms which attempted to protect the new democracies from any internal dismantlement. These mechanisms include constitutional and criminal bans on the propagation of fascism and other totalitarian ideologies. The goal is to necessarily and proportionately limit the freedom of expression, including the freedom to disseminate research results, without infringing on the essence of this fundamental freedom. Therefore, in many countries, such as Poland, the propagation of totalitarian ideologies is banned, yet circulating content accompanied with critical commentary is exempted from criminal sanctions.

Notably, in practice courts do not always agree on the definition of “totalitarian ideologies”. The summoned experts present conflicting qualifications of political movements, which can be situated on a rather wide spectrum between authoritarianism and totalitarianism. Thus, many post-communist countries – including Bulgaria, Estonia, Hungary, Latvia, and Poland – have attempted to detail the legal definition of “totalitarianism” to include beyond any doubt periods described as the “Soviet occupation”, “Stalinism”, “communism”, or the “real existing socialism”. The Polish constitution bans fascist, Nazi and communist parties (Article 13 of the 1997 Constitution of the Republic of Poland), and the penal code bans propagating fascism or other totalitarian regimes (Article 256 of the Penal Code). In 2016, the Law and Justice government passed two controversial memory laws, which introduced a new legal definition of “a totalitarian state”: the so-called act on the decommunization of street names in April 2016 and the so-called second ustawa dezubekizacyjna in December 2016, an amendment to a 2009 law which cuts the pensions and benefits of certain

categories of communist-era state employees. In the first blogpost of this symposium, Uladzislau Belavusau detailed the shortcomings and flaws of these de-communization laws in respect of ethnic minorities.

Restricting fundamental rights

In the context of exploring the impact of memory laws on relations between countries, national identity politics, power relations between majority and minority groups, or the protection they provide against the dismantlement of the democracy from the inside, one should bear in mind that these acts also, and perhaps above all, impact the scope of protection of the rights and freedoms of individuals. In other words, they have a direct effect on the legal situation of citizens.

Some memory laws are more likely to help than harm the protection of human rights and the shaping of attitudes against the wrongs committed in the past. For instance, the trend for reconciling with the period of Soviet domination in Central and Eastern Europe resulted in a number of rulings from domestic and international tribunals and bodies charged with the protection of human rights in cases concerning the responsibility of Soviet officers for crimes against civilian populations during World War II and in the years that followed.

However, decreeing one official version of history or particular valuations of certain trends in political thought always leaves room for abuse and can lead to significant restrictions of the freedom of expression. It is even worse if these laws are drafted in the spirit of resentment or in a hurry, or do not meet the high standards of good legislation; such instances tend to result in introducing blanket regulations that give the courts too much room for interpretation or provide politically appointed servants with excessive discretionary power, as has been the case with the two aforementioned Polish memory laws from 2016.

Complaints have also been voiced about the Hungarian bans on the propagation of the communist regime, including a ban on any use of communist symbols. These rules were invoked to condemn an activist of a registered political party who wore a red star – the symbol of the international workers' movement – on his lapel while giving a speech at a political gathering. In its judgment, the European Court of Human Rights in Strasbourg underlined the difference between laws fulfilling important social needs and those responding to the actual or alleged preferences of the public opinion. Thus, even the popularity of anti-communism – as well as any other political stance regarding the turbulent past of Hungarian society – was deemed insufficient ground for disproportionately limiting a citizen's political and social freedoms and rights. Similar arguments are now relied on in Poland by human rights lawyers, who criticize a number of solutions adopted due to the law cutting the pensions of communist-era state employees. The act cuts the pensions of entire categories of persons who were employed "in the service of the totalitarian state", working for a list of formations within a certain time period, without providing the reasons for individual cuts, and consequently de facto introducing a type of collective guilt and punishment. More than 1,000 individual complaints have already been brought to the Polish Ombudsman's office over the impact of this memory law on the rights of individuals in Poland.

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From these few examples, one can already infer that memory laws pose a serious risk of being detrimentally deployed in political struggles, for instance to assign clearly negative connotations to political adversaries, whether in inter-state relations or as regards domestic political parties. Politicians often profit from the “security” vs “rights and freedoms” dichotomy and introduce regulations that ensure their electoral success as well as increase the state’s grip over its citizens rather than increasing the protection of fundamental freedoms.

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