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An Excessive Virtuous Identity: Europe Moves to Censor Historians

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Abstract

The paper describes the current process of approval of the EU framework decisions on combating racism and xenophobia, which involves a set of historical issues concerned with war crimes and crimes against humanity. The paper analyses this in the light of the French lois mémorielles and the many forms of political control of the interpretation of the past which are afoot in Europe, and which are generating a heated debate – particularly between historians, but also involving jurists and political scientists. The findings in this paper will be of relevance to upper secondary school and university.

During an informal meeting of the ministers of Justice and Home Affairs, which took place in Dresden at the beginning of January 2007 (when Germany held the presidency of the European Union), the German Minister of Justice, Brigitte Zypries[1], proposed to extend the legislation criminalizing the denial of genocides, notably the Holocaust, to all member States of the European Union (such laws already existed in Germany, Austria, Belgium and France)[2]. This initiative provoked a great deal of negative response: such as the reaction of the political commentator Timothy Garton Ash, writing in *The Guardian* on 18 January[3] that this initiative, however well-intentioned, "is very unwise… [and] it would further curtail free expression - at a time when that is under threat from many quarters". The German historian Eberhard Jäckel, in an interview on 1 February with Deutschlandradio[4] also asserted that the denial of the Holocaust was "a stupid thing to do" which did not need to be punished unless it incited hatred; and could be combated more effectively by information. In Italy a wide-ranging discussion took place in January, when the Italian Minister of Justice, Clemente Mastella, immediately followed his German counterpart in proposing a law criminalizing the denial of the Holocaust in Italy[5]. This initiative gave rise to a revolt among Italian historians[6]: in a single day, more than 200 scholars signed a petition[7] asserting that such a law was dangerous, useless and counterproductive: because it would provide the deniers with "the opportunity to present themselves as defenders of freedom of expression"; because in its efforts to impose historical truth, the State would expose this truth to the risk of losing all legitimacy and would undermine "confidence in the free confrontation of

[1] www.guardian.co.uk/farright/story/0,,1991298,00.html .
[2] This process started in 2001: for its history see http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=it&DosId=169885
[3] www.guardian.co.uk/Columnists/Column/0,,1992756,00.html
[4] www.dradio.de/dkultur/sendungen/kulturinterview/588968/
[5] www.giustizia.it/ministro/com-stampa/xv_leg/19.01.07.htm
[6] See the press review in www.sissco.it/ariadne/loader.php/it/www/sissco/dossiers/negazionismo/rassegna_stampa
[7] www.sissco.it/ariadne/loader.php/it/www/sissco/dossiers/negazionismo/appello/

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stances and in the free historiographical and intellectual research"; and because laws criminalizing incitement to violence, incitement to racial hatred, and the praising of crimes against humanity already exist in Italy. The petition concluded with the assertion that civil society alone was empowered to struggle against Holocaust denial by means of "a cultural fight, by ethics and by steadfast policy". In the face of such universal opposition and outrage, Mr. Mastella substantially modified his bill by eliminating all references to Holocaust denial and by imposing tougher penalties only upon those who "disseminate ideas of racial superiority"[8].

Minister Zypries' proposal, despite its failure in Italy, followed its course at the European level[9]: during the session of 19-20 April 2007, the Council of the European Union adopted a framework decision "on combating racism and xenophobia"[10], which applies not only to racist and xenophobic remarks and to the denial of the Holocaust, but also to issues of historical research.

This framework decision establishes that in all member States of the European Union the following actions must be punished with a period of 1 to 3 years imprisonment:

> Publicly inciting to violence or hatred, even by dissemination or distribution of tracts, pictures or other material, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.
>
> Publicly condoning, denying or grossly trivialising
>
> – crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and
>
> – crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin[11].

Discussion within the Council did not go without tensions, as we learn from newspapers' reviews of the event. A sharp contrast emerged between some States, such as France and Germany, who aimed at tough measures, and other States, such as Great Britain, Sweden and Denmark, who were more sensitive to the defence of freedom of expression[12]. A compromise was reached by the inclusion of the following clause, which may allow some States to restrict the range within which the new law must be enforced:

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[8] Cfr. www.giustizia.it/ministro/com-stampa/xv_leg/25.01.07.htm

[9] For documents concerning the public hearing of the European Parliament on 19 March 2007, see: www.europarl.europa.eu/meetdocs/2004_2009/organes/libe/libe_20070319_1500_hearing.htm#

[10] Council of the European Union, *8364/07 (Presse 77), Press release 2794th Council meeting Justice and Home Affairs, Luxembourg, 19-20 April 2007*, pp. 23 – 25 (www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/93741.pdf), pp. 23-25.

[11] *Ivi*, p. 23.

[12] Cfr. Mariella Palazzolo, *Berlino: sanzioni comuni contro ogni negazionismo*, in "Il Riformista", 22 February 2007; Pier Paolo Pittau, *Negazionismi e razzismo diventano reati in tutta la Ue*, in "Il

> Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting [13].

Another problem was raised by some of the States that were once behind the "iron curtain", such as Estonia and Poland, who had requested the condemnation of all totalitarian States, including communist règimes. In this case also, a compromise was achieved in the following terms:

> The Framework Decision is limited to crimes committed on the grounds of race, color, religion, descent or national or ethnic origin. It does not cover crimes committed on other grounds, e.g. by totalitarian regimes. However, the Council deplores all of these crimes [14].
>
> …
>
> The Berlin declaration adopted on 25 March 2007 stated that "European integration shows that we have learnt the painful lessons of a history marked by bloody conflict". In that light the Commission will organize a public European hearing on crimes of genocide, crimes against humanity and war crimes committed by totalitarian regimes as well as those who publicly condone, deny, grossly distort or trivialize them, and emphasizes the need for appropriate redress of injustice and – if appropriate - submit a proposal for a framework decision on these crimes [15].

This framework decision is alarming in many respects. First of all, because it declares firmly that the denial of the Holocaust should be punished, this in itself is a very controversial stance. But what is even more troubling is that the decision makes reference to an indefinite number of historical events which might be regarded as war crimes, or as crimes against humanity, and in particular as genocides. Moreover, it is not clear which authorities have the right to indicate the historical events to which these juridical definitions ought to be applied. The framework declaration mentions two institutions: one is the International Criminal Court, which may only judge crimes perpetrated after 1 July 2002, when its Statute came into effect [16]; the other, the Tribunal of Nuremberg, has only judged crimes perpetrated during the Second World War. We should therefore assume that historical events going beyond the competence of these two courts will fall either within the jurisdiction of *ad hoc* international tribunals, such as those on ex-Jugoslavia and on Rwanda created by the UN Security Council in 1993 and 1994 respectively, or within the jurisdiction of national courts, or legislative bodies. Moreover, the "public European hearing" on crimes committed by totalitarian regimes – which is mentioned in the declaration and whose tasks are not defined – might produce a

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Messaggero", 20 April 2007¸ Enrico Brivio, *La Ue ha deciso: sono reati il razzismo e la xenofobia*, in "Il Sole 24 ore", 24 April 2007.

[13] Council of the European Union, *Press release 2794th Council meeting…*, p. 23.

[14] *Ivi*, p. 24.

[15] *Ivi*, p. 25.

[16] Cfr. *Rome Statute of the International Criminal Court*, art. 11.

list of historical events falling within the above mentioned crime labels. Last but not least, it is not clear which procedure should be followed in defining these crimes: should a sentence passed by a national tribunal automatically come into effect in all the member States of the European Union? Should the first judgment pronounced on a single historical event be the ultimate one, thus becoming an intangible historical truth? Or could it be revised by another court, belonging to the same or to a different State, thus creating a chaotic situation in the case of conflicting verdicts?

We should also remark that, while on one hand the definition of "apology" and "denial" is sufficiently clear, on the other hand the notion of "gross trivialization" is rather vague and may therefore produce uncertainties or abuses. This fear is confirmed by a comparison with other similar laws, such as the Belgian law, that mentions "denial, minimization, justification or approval": in this case the terms "minimization" and "justification" are interpreted by Belgian jurists as meaning that an event is justified or considered less serious in the light of a wider context, for example as a reaction to violence or danger[17].

This European decision follows the tracks of the so called *lois mémorielles* approved in France. The first was the *Loi Gayssot*, of 13 July 1990, which modified the 1881 press law by punishing with one year's imprisonment and a heavy fine (amounting today to 45 000 euros) the denial of the crimes against humanity mentioned in the already recalled article 6 of the 1945 charter of the International military tribunal. Then came the law approved on 29 January 2001, by which France recognized the Armenian genocide in the Ottoman Empire during the First World War, without introducing any penalties against those who deny it. On 21 May 2001, the *Loi Taubira* was approved, which defines as crimes against humanity both slave trade, in the Atlantic and Indian Oceans, and slavery itself, practiced from the 15th century onwards "in America, in the Caribbean region, in the Indian Ocean and in Europe against the African, Amerindian, Madagascan and Indian peoples"[18]. This law also prescribes that slave trade and slavery must be allowed "the position they deserve" both in school programmes and in historical research[19]. This law too does not introduce any penalties. The same is also true of the *Loi Mekachera*, on French colonialism, passed on 23 February 2005, which declares that "The Nation expresses her gratitude to women and men who participated in the activities carried out by France in the former French *départements* in Algeria, Morocco, Tunisia and Indochina and in the other territories previously under French sovereignty"[20]. As we already found in the *Loi Taubira*, article 4 of the *Loi Mekachera* decrees that the history of the French people overseas, and especially in Northern Africa, should be allowed the "position it deserves" in academic research; but then it goes much further, prescribing that school programmes should also recognize the "positive role" played by the French people in that context[21]. This latter clause raised a storm of protest from French historians, in the course of which, eventually, the former three *lois mémorielles* also came under attack. First of all, a petition entitled *Colonisation: non à l'enseignement*

[17] Cfr. Fronza, *Profili penalistici del negazionismo*, cit., p. 1050.
[18] *Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance, par la France, de la traite et de l'esclavage en tant que crime contre l'humanité,* art. 1.
[19] *Ivi*, art. 2.
[20] *Loi n° 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés*, art. 1.
[21] *Ivi*.

d'une histoire officielle, published by "Le Monde" on 25 March 2005, and whose first signatories were historians Claude Liauzu, Gilbert Meynier, Gérard Noiriel, Frédéric Régent, Trinh Van Thao and Lucette Valensi, demanded the repeal of the *Loi Mekachera*:

> This law must be urgently repealed because:
> - it enforces an official view of history, thus going against school neutrality and the respect towards freedom of thinking, which make the core of laicity
> - by reminding only the "positive role" of colonisation, it enforces an official falsehood about past crimes, about massacres and even genocides, about slavery, about racism.[22]

This petition was subscribed by 1001 people (thereafter promoters symbolically put an end to subscription) and raised a wide-ranging discussion, which turned even more fiery because of an incident that showed how dangerous this new set of laws may become. In September 2005, the *Collectif des Antillais, Guyanais, Réunionnais*, a society made up by French people living overseas, started a legal case against French historian Olivier Pétré-Grenouilleau, the author of an important study on African slave trade[23], on a charge of "denial of crime against humanity". This charge was based on an interview published on 12 June 2005 in the *Journal du Dimanche*, in which Pétré-Grenouilleau had claimed that slave trade could not be regarded as a case of genocide, criticizing the *Loi Taubira* precisely because, by defining slave trade as a crime against humanity, it suggested an inappropriate comparison with the Holocaust. Moreover, Patrick Karam, the president of the Collectif, announced that he would appeal to the competent authorities asking that Pétré-Grenouilleau should be suspended from academic teaching. With this legal case a relationship was established between the *Loi Taubira* and the *Loi Gayssot*.

The reaction of the academic world was very strong, and lead to an appeal entitled *Liberté pour l'histoire!*[24], published in "Libération" on 13 December 2005, whose first signatories were among the most prominent French historians: Jean-Pierre Azéma, Elisabeth Badinter, Jean-Jacques Becker, Françoise Chandernagor, Alain Decaux, Marc Ferro, Jacques Julliard, Jean Leclant, Pierre Milza, Pierre Nora, Mona Ozouf, Jean-Claude Perrot, Antoine Prost, René Rémond, Maurice Vaïsse, Jean-Pierre Vernant, Paul Veyne, Pierre Vidal-Naquet e Michel Winock. The appeal went far beyond the *Colonisation* petition, because it requested the abolition of all the *lois memorielles*, on the grounds that "in a free State, neither Parliament nor the judicial authorities are entitled to define historical truth". The appeal was indeed a real manifesto: it contained declarations of great theoretical value, challenging the

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[22] « Le Monde », 25 March 2005.

[23] Olivier Pétré-Grenouilleau, *Les traites négrières. Essai d'histoire globale*, Editions Gallimard, Paris 2004. In 2005 this volume won the Prix du Sénat du livre d'histoire.

[24] Files on the *lois mémoriellese*, and on the appeals and debates concerning them, may be found on the following websites: www.histoire.presse.fr/html/liberteHistoire.jsp and www.ldh-toulon.net/spip.php?rubrique49 ; see also: René Rémond, *Quand l'État se mêle de l'histoire* , Paris, Stock, 2006; Tzvetan Todorov, *L'Esprit des Lumières*, Editions Robert Laffont, Paris 2006); and the file *L'État et ses mémoires*, in "Regards sur l'actualité", n. 325, La documentation française, November 2006.

subordinate position that these laws tend to assign to historical research in its relationship with political power.

> History is not a religion. Historians accept no dogma, respect no prohibition, ignore every taboo... Historical truth is different from morals. The historian'a task is not to extol or to blame, but to explain. History is not the slave of current issues... History is not memory. History is not a juridical issue. In a free state, neither the Parliament nor the judicial courts have the right to define historical truth. State policy, even with best case will, is not history policy. These laws restrict historians' freedom, they tell them – on pain of punishment - what they have to look for and to find, they enforce them the correct methods to use and put them limits. We call for the abrogation of these laws, which are unworthy of a democratic government.

This appeal also met with widespread consensus: by 10 January 2006 it had already been signed by 444 people, among whom were Elie Barnavi, Saul Friedländer, Jacques Le Goff and Emmanuel Leroy Ladurie. There was also some criticism, however, against this outright refusal of all the *lois mémorielles.* Indeed, a few days time after the publication of the *Liberté pour l'histoire* appeal, the Comité de Vigilance face aux Usages publics de l'Histoire, in confirming its request for the abolition of article 4 of the Loi Mekachera, contained in the appeal *Nous n'appliquerons pas la loi du 23 février*, launched by Claude Liauzu, Gilbert Meynier and Sylvie Thénault[25], also criticized the signatories of the *Liberté pour l'histoire!* appeal:

> Critical thinking about the past does not rest with historians only… Scientific knowledge of history and political assessment of past events are both necessary in a democratic society, but they should not be confused. It is not for the historian to shape the collective memory of the past. Political authorities have the right to pronounce on this matter in order to avoid the **drift of Negationism** and to express the awareness, no matter how much delayed, of the crimes of slavery or colonialism … ; they do not, however, have the right to pronounce on historical research or teaching[26].

These arguments were aimed at defending the *Loi Gayssot* and the *Loi Taubira* - the latter was indeed regarded as an admission of guilt uttered by the State itself – but they did not actually refuse the fundamental principle expressed in the *Liberté pour l'histoire!* appeal, i.e. the freedom of historical research from political power. The difference only lay in the assessment of the effects that such laws might have on this freedom.

This mobilization of the French academic world was not entirely unsuccessful: indeed, the second clause of article 4 of the *Loi Mekachera*, concerning school teaching, was abolished on the initiative of Jacques Chirac, the President of the Republic, at the

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[25] Published in "l'Humanité", 21 December 2005.

[26] Michel Giraud, Gérard Noiriel, Nicolas Offenstadt, Michèle Riot-Sarcey, *Vigilance sur les usages publics de l'histoire!*, in "l'Humanité", 21 December 2005.

end of January 2006, after the Conseil constitutionnel had declared that French laws could not contain a prescription of that kind[27]. Moreover, on February 4th the Collectif des Antillais, Guyanais, Réunionnais, confronted with these protests, withdrew its legal action against Pétré-Grénouilleau. However, not only are the other *lois mémorielles* still in force, but in April 2006 socialist MP Didier Migaud presented a new bill on Armenian genocide to the Assemblée nationale, based on the 2001 law and introducing the same penalty established in the *Loi Gayssot*. This confirms the general trend towards criminalization, which is also visible in the European framework decision.

Migaud's bill has already been approved by the Assemblée on its first reading on 12 October 2006[28], causing new discussions on the *lois mémorielles* and the growth of the movement against these laws with the intervention of a large group of French jurists, who on 26 November 2006 launched an appeal for the abrogation of all the *lois mémorielles*, regarding them as anti-constitutional[29].

All this shows that this kind of legislation entails serious risks for the freedom of research and of teaching - for professional historians as well as for school teachers and journalists. These laws originated in the just and vital struggle against racism but, through a conceptual distortion, they have come to deal with questions that should only concern historical research. Indeed, the denial of the Holocaust is punished because it is regarded, for its own sake, as an expression of anti-Semitism, and this means that it represents a particular case of the more general offence of racism. However, starting from this case, legislators moved on to punish the interpretation of other historical events, as if these supposedly wrong interpretations should entail the offence of racism, or should necessarily affect the sense of honour or the sensibility of those lobbies or associations that regard these events as part of their historical identity. The *lois mémorielles* have shown that there is no chronological limit to these claims. For example, in May 2007 about ten members of the French Assemblée nationale put forward a bill aimed at the acknowledgement of the Vendean genocide during the French Revolution[30], and recently Anthony Grayling, a British philosopher, claimed that the air raids carried out by the Allied forces against German and Japanese cities during the Second World War were crimes against humanity[31]. These arguments are open to question and should be freely discussed, as many others, without any kind of constraint imposed either by lobbies or by political authorities. The latter may, of course, choose what kind of public use of history is suitable for to their agendas, organize commemorations or take similar initiatives in order to communicate their vision of the past, but they should in no way interfere with the work of historians, who must be free to approve or criticize them.

The French *lois mémorielles* and the European framework decision highlight two converging trends, that are emerging and that reinforce one another: on one side,

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[27] Béatrice Gurrey, Jean-Baptiste de Montvalon, *Colonisation: Chirac évite un débat au Parlement*, in "Le Monde", 27 January 2006.

[28] A report of the session may be consulted in www.assemblee-nationale.fr/12/cri/2006-2007/20070012.asp . The law must now be examined and approved by the Sénat.

[29] http://www.communautarisme.net/Appel-de-juristes-contre-les-lois-memorielles_a854.html?PHPSESSID=149a1101828e4b9b3544827b9440f846 .

[30] Cfr. www.assemblee-nationale.fr/12/propositions/pion3754.asp

[31] Anthony Grayling, *Among the Dead Cities: Was the Allied Bombing of Civilians in WWII a Necessity or a Crime?*, Bloomsbury publishing, London 2006.

there are the claims put forward by lobbies and associations (such as, in France, the French people of Armenian origin, the blacks and the *pied noirs*), that seek to gain control of that part of history they deem relevant for developing their own identity, thus engaging in what we might rightly define as "wars upon collective memory"; and on the other side there is the tendency of many States to become obsessed with the assertion of "virtue", as was remarked by Pierre Nora in his recent speech at the Académie française, in which in fact he quoted both the *Loi Gayssot* and the *Loi Taubira*[32].

This European framework decision raised negative reactions among historians at an international level. In particular, the General Assembly of the Comité International des Sciences Historiques (CISH)/International Committee of Historical Sciences (ICHS), that met in Beijing on 17 September 2007, approved a motion expressing great alarm for this possible intrusion of the law into the field of historical research, and inviting all affiliated organizations to thoroughly discuss the matter with their members; moreover, the issue will be at the core of a special session of the next international congress of historical sciences, which will meet in Amsterdam in 2010[33]. Only a few days earlier than the Beijing meeting, the American Historical Association issued a communication concerning this framework decision, stating that any scientific research may only be assessed by experts belonging to the same research field. Therefore, if a historian should distort his evidence, the only measures to be taken against him, by colleagues specialized in the same field, should be the exclusion from academic posts and, in extreme cases, from publications. "If any other body, especially a body with the right to initiate legal proceedings and impose penalties, seeks to influence the course of historical research, the result will inevitably be intimidation of scholars and distortion of their findings"[34].

The framework decision was discussed and approved by the EU Parliament on 29 November and this foreshadows its final approval by the European Council, after which the decision will come into effect. There were therefore no signs of a reappraisal: historians' criticism have not even been taken into account. Therefore, a very difficult phase in the always sensitive relationship between historians and politicians in Europe is ahead.

[32] Cfr. www.academie-francaise.fr/immortels/discours_SPA/nora_2006.html .
[33] Cfr. www.cish.org .
[34] Cfr. www.historians.org/Perspectives/issues/2007/0711/0711int3.cfm .