

Should governments butt out of history?

Eric Heinze examines how states limit speech in order to control public awareness about the past.



States always use law to shape public understandings about the past. In [George Orwell's](#) chilling words, 'Who controls the past controls the future: who controls the present controls the past.' Some governments exercise that power wisely, acknowledging past wrongs and promoting robust dialogue. Others deploy it cynically, pandering to a constituency or targeting perceived rivals.

In Turkey, criminal and anti-terror laws have been used to clamp down on persons challenging official government denials of the Armenian genocide. Chinese law authorises penalties for people who 'insult or slander heroes and martyrs' of the nation. In several US states, school boards have sought to introduce textbooks downplaying the history of slavery and discrimination against minority groups. In recent years, research on law and historical memory has blossomed, with new generations of scholars emerging in post-fascist and post-totalitarian regimes, raising questions their ancestors could pose only at great risk.

One recent offshoot of that discipline is the [EU-funded](#), multi-state consortium [Memory Laws in European and Comparative Perspective](#) (MELA) founded to look beyond divergent national practices in order to detect recurring patterns. The project involves more than just theoretical

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enquiry. Some MELA members have been personally involved in national disputes. One pillar of the project has therefore been the drafting of a model 'Declaration on Law and Historical Memory', aimed at identifying and promoting principles of best state practice. The draft [text](#) and [commentary](#), appear on the MELA [website](#). The declaration builds a bridge between researchers and civil society actors engaged with human rights, inter-governmental as well as non-governmental.

The declaration has been drafted following precedents set by existing international documents, which include two customary sections. It opens with a preamble followed by a set of enumerated principles. The preamble proclaims the declaration's core values. It recalls victims of historical atrocities, stressing the importance of their memory while acknowledging that distinctions between victims and perpetrators are not politically neutral. The preamble underscores the centrality of free speech to ensuring credible deliberation and debate about the past, with an eye towards freedom of scholarly, media, and cultural activity. The enumerated principles, in turn, set forth norms challenging inappropriate state intervention – another controversial notion – into public discussion of history.

One typical obstacle in drafting the model declaration has been to formulate principles precise enough to evaluate state performance, yet broad enough to take varied state contexts into account. Consider a 'gut' response commonly heard among observers: 'Governments should butt out of history entirely. Leave history to the historians!' Sadly, the situation is not so simple. Law operates at many levels, far beyond 'thou shalt say X' or 'thou shalt not say Y'. For example, questions about what to teach in primary schools, about how textbooks are to be written, about varying curricula within state and private institutions, and about consequences for teachers who challenge official accounts, are all matters of government authority, indeed often formulated in crushing legal detail. Law works at that level not through the whirling drama of the courtroom trial, but through the banality of a 'chat' in the boss's office, a job promotion never obtained, a spouse suddenly out of work, a child mysteriously failing a class, and other random pricks and prods so ubiquitous as to create the normality of life.

When it comes to primary education there is no such thing as the law 'butting out'. If the law were to remain silent, it would still be intervening, namely, to flash a green light, allowing an unrestricted freedom for schools to teach whatever they liked, however they liked, regardless of evidence, perspective, or balance. To avoid that result the law must still intervene, but in a different way, namely, through affirmative regulation, which takes a dizzying array of forms from one state to another. Similar observations can be made about presentations of history – or the absence thereof – via state-operated or state-licensed media.

Another problem with 'the law should butt out!' argument is that states intervene in historical memory with a host of motives. For example, controversies have arisen in recent years around laws prohibiting Holocaust denial. Leaving aside debates about their ethics or utility, one feature of those laws is, to say the least, historically aberrant. States with histories of complicity often use

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such bans to self-inculpate: speakers are punished for denying the state's history of criminal conduct. The bans set limits on historical discussion, but, ironically, with the goal of instilling within their populations a critical attitude towards past state conduct.

Those bans differ markedly from the more typical sanctions. Turkey, China, and other states routinely exert legal and social controls to self-exculpate, that is, to punish or to discipline those who accuse the state of having committed human rights abuses. (To complicate matters further, there is a third class of bans, namely, where states use bans, at least by implication, to inculcate other states. For example, bans on Holocaust denial have been adopted by states that played no meaningful role in the crimes connected to it.)

How can a model declaration, proposing only a brief set of principles, deal with such conflicting patterns? Problems with the inculpatory approach are certainly acknowledged in the draft text, which urges states to maintain candid public discussion about both the merits and the pragmatics of laws such as Holocaust denial bans. However, the declaration's principles have been conceived with a stronger focus on state-exculpatory laws and policies, which have posed in the past, and continue to pose, far greater risks to civil society and to the preservation of historical memory. Even the most zealous free speech advocate must confess that punishing the denials of atrocities that states did commit, if a sin, is a minor one; punishing accusations of atrocities which states insist they didn't commit is altogether more sinister.

It is not the text's aim to resolve every controversy that may arise, nor to suggest that highly textured cultural sensitivities can be reduced to a tidy recitation of tersely worded norms. The model 'Declaration on Law and Historical Memory' nevertheless aims to promote closer attention to the single most important function that can ever be claimed for free speech: the ability of a people to examine itself.

Eric Heinze is professor of law and humanities at [Queen Mary University of London](#). Research for this article is based on a four-nation consortium [MELA](#) project funded by the European Union.

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