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Self-inculpatory laws do not exist

Antoon De Baets argues that criminal states do not punish themselves.



The Memorial to the Murdered Jews of Europe, also known as the Holocaust Memorial in Berlin, designed by architect Peter Eisenman and engineer Buro Happold. (Creative Commons Attribution) Image link: <http://bit.ly/2PamAXA>

In “[Should Governments Butt out of History](#),” Eric Heinze writes that, whether we like it or not, states have duties to regulate the field of history. Aside from the fact that I do not know anybody who denies this, he convincingly argues his case. The foremost of these duties is legal: states should make laws that establish a framework for past-related activities – for the organization of history education or official commemorations, for example. The trouble is that many such laws have proven to be prone to abuse and often tend to stubbornly propagate one historical opinion over others and censor unwelcome alternatives. We therefore need a tool to decide when the state duty to regulate history by law is exercised responsibly. A dedicated team, led by Heinze, has therefore drafted a model “[Declaration on Law and Historical Memory](#),” a set of principles designed to evaluate whether a given state intervention into history matters is appropriate. The Declaration is logical, balanced, and concise, and although there is room for substantial improvement, it deserves the widest distribution. Appended to it are some [Explanatory Comments](#).

In trying to identify which legal approaches to the past are appropriate, both Heinze’s article and the Explanatory Comments to the model Declaration make a basic distinction between self-inculpatory and self-exculpatory states. Self-inculpatory states accept the blame for

crimes committed in their territory in the past whereas self-exculpatory states reject that blame and, if they are not only self-exculpatory but also inculpatory, put the blame on other states. As prime examples of past-related laws that emanate from self-inculpatory states Heinze mentions Holocaust denial laws; as prime examples of past-related laws that emanate from self-exculpatory states, Heinze names Turkey and China, states with laws that target critics of past state crimes. This distinction is problematic: whereas I can see that self-exculpatory and inculpatory laws exist, I do not think that self-inculpatory laws exist. Why?

The basic reason is this: a state that commits atrocity crimes is not a state that will decree self-inculpatory laws, such as laws that punish the denial of these atrocity crimes. This will *always* necessarily be *another* state. Criminal states do not punish themselves. In his famous critique of the United Nations Charter, published in 1951, Hans [Kelsen](#), saw this with a clear eye: “There can be little doubt that if a government, in violation of its international obligation, commits genocide, it will be inclined also to violate its obligation to punish the persons who in their capacity as organs of the state have committed the crime.”

Let us look at two prime examples, Germany and Spain. If there is one country in the world where a self-inculpatory law could exist, it would be Germany with its Holocaust denial law. But the thesis of self-inculpation does not hold on closer scrutiny. After World War II, the Allied Powers initiated large-scale denazification policies in occupied Germany, including the massive replacement of history textbooks. Later, East Germany considered itself a successor of the anti-Fascist struggle, not of Nazism, and the idea of self-inculpation was wholly absent here. West-Germany, in its turn, has systematically resisted easy assimilation with Nazi Germany for decades, despite the fact that a substantial part of its postwar political personnel made a career under the Nazi regime and despite the fact that it has shown much repentance over the years. When Willy Brandt did his iconic Kniefall in 1970 for the victims of the 1943 Warsaw ghetto uprising, he did so as the Chancellor of West Germany. And West Germany was a *successor* state – and not even a direct one – of the state that committed the crimes: the Third Reich. The latter was a criminal state that never apologized for its wrongdoings. Was the Holocaust denial law of 1985 self-inculpatory, then, as Heinze suggests? It was not.

And Spain? Spain adopted a Historical Memory Law when the Zapatero government was in power in 2007 to acknowledge the large-scale suffering of Republican victims of the Civil War and Francoist repression (largely between 1936 and 1952). Like Brandt’s West Germany, Zapatero’s Spain was a successor state – and not even a direct one – to the state that committed the crimes: Franco Spain. Although he grew old, Franco never showed remorse. Is the Historical Memory Law self-inculpatory? It is not.

The question arises to what extent, if any, a successor state can inherit the guilt of a perpetrator state and decree self-inculpatory laws. As early as 1947, Karl [Jaspers](#) warned that the notion of inheritability of guilt was a dangerous one. The state duties stipulated in article 2 of the [International Covenant on Civil and Political Rights](#), which obligate states to investigate and prosecute past crimes (according to [General Comment 31 of the United Nations Human Rights Committee](#)), do not require self-inculpation. Nor do the rules of state succession stipulated in the 1978 [Vienna Convention on Succession of States in respect of Treaties](#), regardless of whether the context is one of transitional justice or not. And the thesis of self-inculpation is even weaker in cases where the wrongdoing predecessor regimes were non-state governing entities.

According to the [Explanatory Comments](#), self-inculpatory laws pose “only a secondary threat” to free expression and are to be tolerated, whereas self-exculpatory laws are “dangerous,” pose “far more urgent threats” to free expression, and ought to be rejected. I can largely agree with this judgment as a very general indication, but on closer inspection I also note that the effectiveness of Holocaust denial laws (for Heinze the major example of self-inculpatory laws) has often been severely questioned (something Heinze also affirms) and that several, though not all, objectionable self-exculpatory laws contain a kernel of historical truth (something Heinze entirely glosses over). In my view, the decisive divide should not be between inculcation and exculpation but between opinion and hate speech: laws that prohibit historical opinions – including erroneous ones and even those that offend, shock, and disturb – are inappropriate. Only laws that prohibit historical opinions reaching the threshold of hate speech are appropriate. This distinction is prominent in articles 19 and 20 of the [International Covenant on Civil and Political Rights](#).

In theory, self-inculcation in states exists, but it then regards the crimes of these states themselves, never those of others. In practice, self-inculcation in criminal states has never been seen. Self-inculcation and criminal states exclude each other. Therefore, self-inculpatory laws do not exist.

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For a response from Eric Heinze, please see: [Self-inculpatory laws exist](#).

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