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Instruments adopted to deal with the legacy of repressive past

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**EPP Hearing on the Commission's Report The memory of crimes
committed by totalitarian regimes in Europe**

Brussels, 19 October 2011

How states deal with the legacies of the past?

- Common issue for most of the EU states (totalitarian, authoritarian, dictatorship, repressive regimes in the past)
- Large *divergence* in the way EU Member States have approached and dealt with the past
- Divergence is due to:
 - Specific historic circumstances and political (democratic) decisions: example, the 1977 Amnesty Law in Spain
 - Availability of a large panoply of instruments for the general purpose of “justice” towards the past

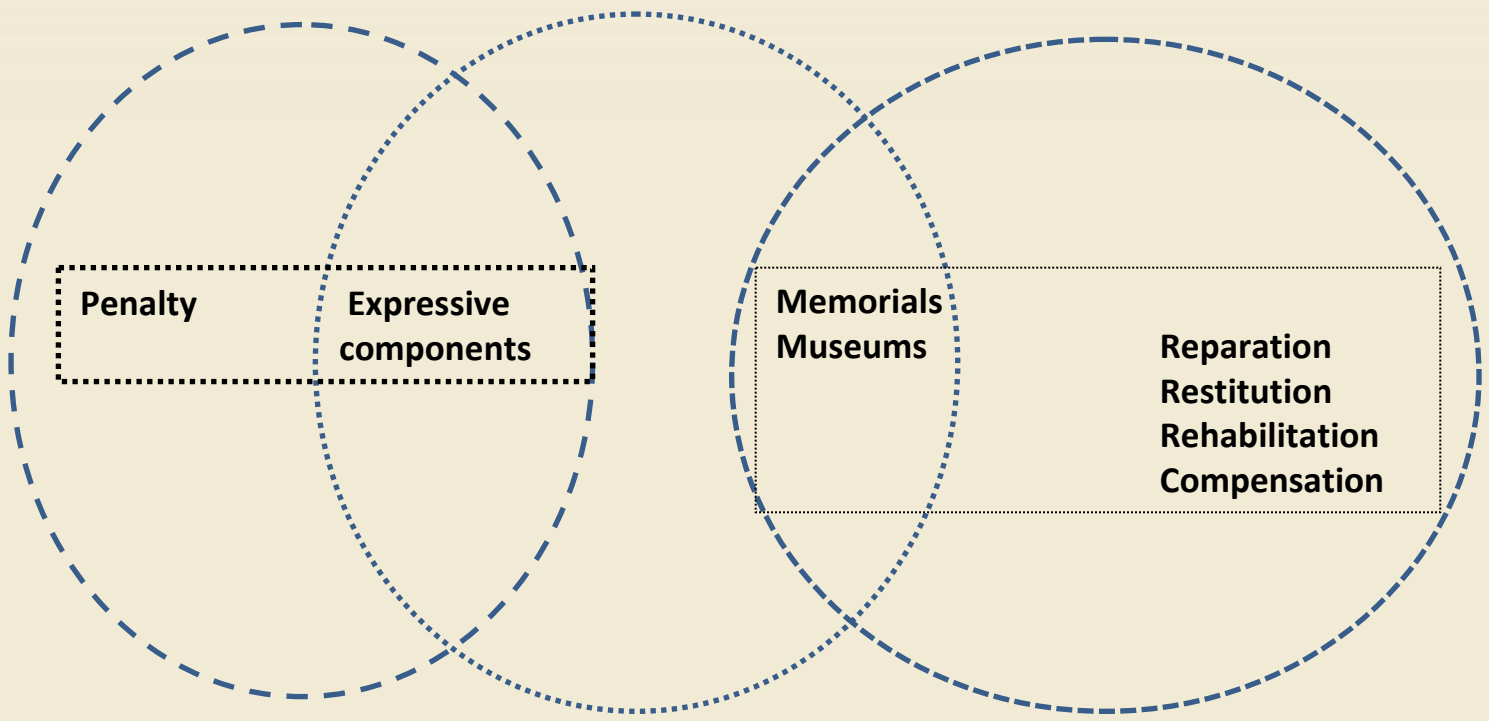
A non exhaustive repertoire

- Compensations
- Criminalization of apology/denial
- Memorialization
- Opening of archives
- Rehabilitation
- Reparation
- Restitution of property
- Trials (criminal, administrative sanctions....)
- Truth commissions and inquiry commissions
- Vetting
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**Criminal Justice
(Retributive)**

**Justice as
Recognition**

**Justice for victims
(Restorative)**



The elements of criminal justice for dealing with the past

- Trials, criminal justice. Crime typification and penalties attached (genocide, crimes against humanity and war crimes)
- Administrative sanctions
- Prohibition of symbols
- Criminalization of denial

Denial of crimes under art. 83 TFEU

- The meaning of criminal law
 - Effective punitive dimension (retributive justice)
 - Expressive dimension (values): example, death penalty (justice as recognition)
- Basis for inclusion under article 83TFEU:
 - a. the need to combat them on a common basis: **if the EU is presented as a community of citizens** sharing same values, then, a case can be constructed in favour of an eventual future of coverage of crimes committed by repressive regimes addressing groups currently not included within the traditional definition and its criteria
 - B. caveats:
 - The definition of the crimes/groups cannot be particularistic (i.e. tailored to suit specific country circumstances) but general and generalizable
 - In the context of the former caveat, thought must be given to the following: totalitarian communist regimes are not an specific European phenomena and, hence, a coherent consideration of criminalization must envisage its extension beyond European continent borders. Are we prepared to do that?
 - Eventual legislation must accomodate diverging and different domestic constitutional settlements between denial and **protection of fundamental rights** (case: SCC on denial of holocaust)

Summarising conclusion

- There may be room to make claims in favour of legislation regulating denial at the EU level under article 83 TFEU if a **strong expressive dimension** of the eventual piece of legislation is emphasised.
- This means that the specific punitive dimension remains a national domestic issue