

## Law out of History, History by Law

Katrin Antweiler

International Graduate Centre for the Study of Culture (Giessen)

Contact: [katrin.antweiler@gcsc.uni-giessen.de](mailto:katrin.antweiler@gcsc.uni-giessen.de)

### Abstract

The multi- and interdisciplinary volume *Law and Memory. Towards Legal Governance of History* provides a variety of case studies in both national and international contexts to display the complexity and specificity of disputed laws dealing with historic memory. Tracing back legislations addressing different concerns about history and memory, from the Treaty of Westphalia to the current-day laws of the European Union, this volume contributes to debates on the ways in which law might interfere with or contribute to history writing and the construction of memory. Important questions on potentially prescribed practices of memorialization as well as the (in)compatibility of legal involvement in the shaping of knowledge of ‚historical truth‘ are raised. Furthermore, it brings into conversation not only different viewpoints from History and International Law to Ethics, but also controversial issues on nationalism and the (dis)advantages of transnational legislations. While the volume successfully accomplishes its intent to fill a gap in the current research on memory laws, the analysis of practices of remembrance in the collected texts could have benefitted from integrating methods and theories from established concepts of the study of memory.

### How to cite:

Antweiler, Katrin: “Law out of History, History by Law [Review on: Belavusau, Uladzislau/ Gliszczyńska-Grabia, Aleksandra (ed.): *Law and Memory. Towards Legal Governance of History*. Cambridge: Cambridge University Press, 2017.]”. In: *KULT\_online* 55 (2018).

DOI: <https://doi.org/10.22029/ko.2018.205>



## Law out of History, History by Law

Katrin Antweiler

International Graduate Centre for the Study of Culture (Giessen)

Belavusau, Uladzislau/Gliszczynska-Grabia, Aleksandra (ed.): *Law and Memory. Towards Legal Governance of History*. Cambridge: Cambridge University Press, 2017. 448 pages, 95 GBP. ISBN: 9781316986172.

### Abstract:

The multi- and interdisciplinary volume *Law and Memory. Towards Legal Governance of History* provides a variety of case studies in both national and international contexts to display the complexity and specificity of disputed laws dealing with historic memory. Tracing back legislations addressing different concerns about history and memory, from the Treaty of Westphalia to the current-day laws of the European Union, this volume contributes to debates on the ways in which law might interfere with or contribute to history writing and the construction of memory. Important questions on potentially prescribed practices of memorialization as well as the (in)compatibility of legal involvement in the shaping of knowledge of ‚historical truth‘ are raised. Furthermore, it brings into conversation not only different viewpoints from History and International Law to Ethics, but also controversial issues on nationalism and the (dis)advantages of transnational legislations. While the volume successfully accomplishes its intent to fill a gap in the current research on memory laws, the analysis of practices of remembrance in the collected texts could have benefitted from integrating methods and theories from established concepts of the study of memory.

In February 2018, a controversy unfolded around the new so-called Polish “Holocaust Law”. According to this law, charges can be pressed against anyone who attributes “responsibility or co-responsibility to the Polish nation or state for crimes committed by the German Third Reich” (Pierre Hazan: „Poland Tries to Rewrite Holocaust History.“ JusticeInfo, 06.02.2018. <<https://www.justiceinfo.net/en/justice-reconciliation/36342-poland-tries-to-rewrite-history.html>>). Hence, this law turns certain expressions of 20th century history, e.g. suggesting a Polish complicity with the Nazis, into a criminal offense. Such legislation is a memory law par excellence and has brought to public attention how deeply the fields of Law and Memory are entangled. However, law is still mostly addressed by legal scholars,

whereas memory is ascribed either to the realm of psychology or the humanities. The editors of the reviewed volume, Belavusau and Gliszczynska-Grabia, introduce what they assert to be a controversial “new subject” to Comparative Law and Transitional Justice: *Memory Laws*. The book tries to coalesce different approaches by lawyers and non-lawyers alike in order to make visible the interplay of law and memory and fill what the editors identify as a “comparative gap” (p 3). They assembled 19 articles allocated to four thematic sections and an epilogue. First, memory laws within International Law are discussed, among other matters the work of International Criminal Tribunals. The second part targets the establishment of memory laws by the European Union, while part three consists of articles dealing with national versions of memory laws such as the Spanish legislation on the memory of Francoism. Section four looks at national perspectives beyond the EU, including Russia and Canada. All four parts combined synthesize the various aspects and concerns around memory laws and provide a broad insight into this topic at the crossroads of different academic disciplines.

In the introduction to the book, memory laws are cogently defined as directed towards “historical truth” and memorialization processes, consequently linking practices of commemoration not only to the social but also to the legal spheres of society. Looking at the history of memory laws helps one understand one mode of these laws still present today, that which honors and upholds an active re-collection of past events. The editors then combine the birth of the nation-state, hence attempts at creating a national identity, with the development of state authorized accounts of the past. The new and convincing take is their focus on legal means: “Prescription of collective memory via legal instruments has served as a means to legitimize socio-political reality and to homogenize a group” (p. 5). Moreover, the editors emphasize that laws are often based on certain historic narratives and construct narratives of citizenship simultaneously. It is this correlation of law and (collective) memory, in particular, that is discussed from different angles in many of the contributions.

While the introduction as well as the article by Luigi Cajani on “Legislating History” give the impression that laws are merely affected by publicly authorized versions of history and not the other way around, Marina Aksenova takes a different stance. Aksenova, in her article on the International Criminal Tribunals and their “role” in “Shaping historical accounts of Genocide” (p. 48), speaks of “judicial history writing” and a “narrative-setting-function” of Criminal Law (p. 52). This incoherence throughout the book is at times puzzling, especially from a memory studies point of view, which assumes the mutual impact of different spheres of society on on another. It is mainly the volume’s first article, Antoon de Baets’ analysis of the views on history and memory as can be found in the United Nations Human Rights Committee, that considers such mutuality by looking at the Committee’s perspective on time as underlying their comments on history and memory. Mentioning the importance of concepts of time for history-writing is often scarce, thus particularly noticeable. Also noteworthy with regard

to an innovative theoretical approach is the article by C. S. Cercel, who employs Giorgio Agamben's theory of the State of Exception in order to grapple with the "ontological tenets of law" (p. 229).

Several other articles examine the European Union's legislation on memory, emphasizing a development from "invitation to remember towards duty to remember" (p. 11). Here, the focus lies on the legally enforced "duty", such as the law against the denial of the Holocaust, which is linked to a global spread of memory laws aiming for, amongst others, a promotion of a sense of collective remorse. Additionally, some articles discuss whether memory laws are merely about establishing one "right" version of the past or instead aimed at ensuring victims' dignity. The editors as well as Patricia Naftali in her article on the "Right to Truth" are doubtful of a "legal prescription of historical truth" (p. 9). This is also posed as a question of legitimacy for such laws: the authors make a case for the protection of dignity, but position themselves against censoring, thus juxtapose a "free market of historical ideas" (p. 11) and restrictive memory laws.

Throughout the articles, four trends of memory laws since WWII are identified, not all restrictive in nature. The first are laws granting belated recognition of atrocities such as genocides. One example is the acknowledgment of the genocide of the Armenians, which is featured prominently within the volume. Among others in this matter, Paolo Lobba presents the case of *Perinçek vs. Switzerland* before the European Court of Human Rights. This contentious issue is additionally discussed by two more contributors: Robert A. Kahn and Luigi Cajani. From different angles they all critically address the special treatment of the Holocaust before European and International Law, it being the only genocide for which denial is a criminal offense because – as according to the jurisdiction of the European Court of Human Rights – its denial "is incompatible with democracy and human rights" (p. 115). Making visible the moral underpinning of such laws is a crucial point for the overlapping domains of law and memory and enriching discussions on the forms and functions of historical memory.

All throughout the book, memory laws that deal with past atrocities of a nation state are understood as a sign of "maturity". However, it might be worth bearing in mind the works of Elazar Barkan (*The Guilt of Nations. Restitution and Negotiating Historical Injustice*. New York City 2000) or Wendy Brown (*Regulating Aversion. Tolerance in the Age of Identity and Empire*. Princeton 2008), who pointed out how facing "the guilt of nations" has become a moral obligation within international politics, thus a means of governance. One might cynically ask if, nowadays, the ways in which a nation addresses its past failures have become more important than not committing atrocities in the first place.

The other presented trends of memory laws are those that ensure a peaceful transformation within states, thus belonging to the field of Transitional Justice. Although postcolonial scholars frequently

criticize the human rights project's universal claims (cf. Sylvia Winter: „No Humans Involved: An Open Letter to My Colleagues.“ In: *Forum N.H.I. Knowledge for the 21st Century* 1.1 (1994), pp. 42-73), such condemnation is not considered within this volume. Instead, supranational courts are viewed as a “consensus” on certain “values agreed upon internationally” (p.51). The third depicted current deals with (Post-)Soviet myths while the fourth one is concerned with genocide prevention rooted in International Law. The broad range of articles addresses features of those four trends, yet none of them gives a clear-cut definition of an understanding of memory laws. Only the epilogue by Eric Heinze provides a very systematic account of memory laws and the ways they function, an explanation that would have been more useful at the beginning of the book.

To conclude, this book provides thorough analyses of a topic relevant for both Law and Memory Studies. Rich in case studies, the essays give the reader a deeper understanding of aspects most vital to the discussion of memory laws. Although the title includes “Memory” as equal to “Law”, the volume mostly assembles contributions by scholars from spheres of Legal Studies rather than by memory scholars. Hence, the engagement with collective memory as an important and ever disputed feature of societies lacks comprehensiveness which might have prevented the impression of memory having been put in second place; more a ‘product’ of law than mutually substantial to the featured cases. The book nonetheless provides important emphasis and an overdue acknowledgment of the relevance of disciplinary cooperation engendering conversation between the two fields of Law and Memory.

**German Abstract:**

**Erinnerung per Gesetz**

Der transdisziplinäre Sammelband *Law and Memory. Towards Legal Governance of History* besteht aus insgesamt 19 Artikel zu nationalen und transnationalen Gesetzgebungen rund um kollektive gesellschaftliche Erinnerung. Verschiedene Rechtsprechungen zu Geschichte und Erinnerung werden kritisch diskutiert und somit ein innovativer Beitrag zu der Frage geleistet, in wie fern Gesetze zu Geschichtsschreibung und Gedächtniskonstruktion beitragen, ebenso wie diese regulieren können. Es werden sowohl Fragen nach Wissensproduktion durch Recht als auch nach der Bedeutung transnationaler Vorgaben von Erinnerungspraktiken, wie beispielsweise durch die EU, gestellt und somit überzeugend eine Verknüpfung zweier Themenfelder – Recht und kollektive Erinnerung – unternommen, die bisher noch selten zu finden ist. Eben diese Forschungslücke wollen die beiden Herausgeber\*innen mit dem Band füllen, was zwar auch gelingt, jedoch trotz großer Interdisziplinarität noch umfassender hätte erfolgen können, wären Methodiken und Erkenntnisse aus dem Feld der Memory Studies stärker einbezogen worden.

---

Katrin Antweiler

International Graduate Centre for the Study of Culture (Giessen)

Contact: [katrin.antweiler@gcsc.uni-giessen.de](mailto:katrin.antweiler@gcsc.uni-giessen.de)

**How to cite:**

Antweiler, Katrin: “Law out of History, History by Law [Review on: Belavusau, Uladzislau/ Gliszczyńska-Grabia, Aleksandra (ed.): *Law and Memory. Towards Legal Governance of History*. Cambridge: Cambridge University Press, 2017.]”. In: *KULT\_online* 55 (2018).

DOI: <https://doi.org/10.22029/ko.2018.205>