The Remarkable Rise of 'Law and Historical Memory' in Europe: Theorizing Trends and Prospects in the Recent Literature

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DOI
10.1111/jols.12228

Publication date
2020

Document Version
Final published version

Published in
Journal of Law and Society

Review Article

The Remarkable Rise of 'Law and Historical Memory' in Europe: Theorizing Trends and Prospects in the Recent Literature

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DEFENDING NAZIS IN POSTWAR CZECHOSLOVAKIA: THE LIFE OF K. RESLER, DEFENCE COUNSEL EX OFFICIO OF K. H. FRANK by JAKUB DRÁPAL
(Prague: Karolinum Press, 2018, 200 pp., £19.00)

COMMUNISTS AND THEIR VICTIMS: THE QUEST FOR JUSTICE IN THE CZECH REPUBLIC by ROMAN DAVID
(Philadelphia, PA: University of Pennsylvania Press, 2018, 280 pp., £69.00)

I. MEMORY LAWS AND MEMORY LAWYERS

In recent years, the fields of law and society and of comparative constitutional and criminal law have been marked by the unprecedented blossoming of literature addressing controversial memory laws in Europe. Such legal developments have been unfolding nationalistic ways of shaping historical narratives as well as a vivid articulation of the role of the legal profession in the politics of memory.[1] This literature deserves special analysis, drawing

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The authors would like to thank Katharine Booth for her assistance on this piece.

1 The authors of this article have themselves recently edited a volume offering a normative framework for the conceptualization and study of memory laws and the

out the trends and prospects of this field, for several reasons. First, the rise of memory laws in Europe has signalled a broader shift towards a nationalist, anti-European discourse, marked by the fortification of populist movements and a greater interference with academic freedoms. Second, the recent memory politics in Europe and elsewhere has been largely driven by dystopian visions of a dark past, populated with unimpeachable heroes fighting for national independence and victims of atrocities perpetrated by cruel regimes imposed by foreign oppressors. Third, legal agents (legislators, prosecutors, judges, 'institutes of memory', human rights lawyers, and so on) have certified these simplistic narratives as legitimate and obligatory for social reproduction.

So, what are those memory laws that have featured in the academic literature on law and society in recent years? For the purposes of this article, we define memory laws as various forms of legal governance of history, including punitive measures against the denial of historical atrocities and bans prohibiting the use of totalitarian symbols of the past.[2] Our broad notion of memory laws also covers legal acts recognizing and commemorating historical events and figures, including laws establishing state holidays, celebrations, and dates of mourning, street (re)naming and monument instalment in honour of historical figures, status of and access to historical archives, and regulations regarding museums and school curricula on historical subjects.[3] Memory laws are not exclusively a modern phenomenon. Hardly any state can avoid a degree of memory governance when it comes to teaching history or commemorative practices, for instance. Likewise, memory laws are certainly not a new subject in academic literature. As demonstrated in previous studies, memory governance dates back to at least the French Revolution.[4] Punitive memory laws akin to the prohibition of genocide denialism appeared in the 1980s and 1990s and have spread from Germany to all over continental Europe. The German model gradually expanded from Holocaust denial laws *per se* to a wider prohibition of

role of lawyers in various jurisdictions, from Eastern Europe to South America, and in countries as diverse as Israel and Canada. See U. Belavusau and A. Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (2017).

2 For a detailed overview regarding the genesis, evolution, and definition of memory laws, see U. Belavusau and A. Gliszczyńska-Grabias, 'Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 1.

3 Some scholars have recently theorized even the cluster of 'crimes against history', exploring various ways in which history is censored and historians are silenced or outright killed for political reasons. See, in particular, A. De Baets, *Crimes against History* (2018).

4 U. Belavusau, 'Memory Laws and Freedom of Speech: Governance of History in European Law' in *Comparative Perspectives on the Fundamental Freedom of Expression*, ed. A. Koltay (2015) 537.

genocide denialism.[5] During Germany's presidency of the Council of Europe in 2008, such provisions were made secondary law of the European Union (EU) by virtue of the Framework Decision on xenophobic speech.[6]

On the surface, these dystopian visions of the past embedded through legal governance of history are compatible with democracy and are seen as a necessary step towards building an idealized – utopian – present and future. For example, the prohibition of Holocaust denialism and the commemoration of Nazi victims in continental Europe has for a long time been regarded as part of militant democracy – that is, a system of governance bent on preventing future atrocities by curtailing certain fundamental freedoms and reminding future generations of the horrors of the past.[7] However, in portraying the past as exclusively dystopian, the risk of idealizing the present political regime increases. Likewise, there is the danger of dehumanizing minorities for the sake of extolling the heroism and victimhood of particular nations fighting foreign oppressors, and of stirring up new international conflicts via 'memory wars'.[8] Finally, memory laws are a clear normative threat to democracy itself (a mnemonic threat), whereby historical memory is severely controlled and alternative readings of the past are censored.[9]

In this article, we take a closer look at the recent literature regarding the role of law and lawyers in the broader politics of history in Europe. The literature that we have selected, in particular, looks at the role of law and

5 *Volksverhetzung*, the German analogue of 'hate speech' terminology, is a criminal offence under Section 130 of the Criminal Code (*Strafgesetzbuch*) in Germany. Similar provisions about the incitement of group hatred have been enshrined in the majority of continental European criminal codes or via special statutes. In Germany, this criminal offence can lead to up to five years' imprisonment. For many years, Section 130 was interpreted as covering Holocaust denial. Special provisions on Holocaust denial were added in the 1990s, and there were later provisions on justifying or glorifying the Nazi government. Similar, self-standing (in other words, separate from 'hate speech') provisions on Holocaust denial exist today in various states, from Israel to France.

6 For a broader analysis, see: Belavusau, op. cit., n. 4; L. Cajani, 'Legislating History: The European Union and the Denial of International Crimes' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 129.

7 A. Sajó (ed.), *Militant Democracy* (2004); U. Belavusau, 'Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant' (2014) 47 *Israel Law Rev*. 27; M. Mälksoo, 'Decommunization in Times of War: Ukraine's Militant Democracy Problem' (2018) *Verfassungsblog: On Matters Constitutional*, at <https://verfassungsblog.de/decommunization-in-times-of-war-ukraines-militant-democracy-problem/>.

8 N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (2017); I. Nuzov, 'Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe' (2019) 19 *Human Rights Law Rev*. 231.

9 U. Belavusau, 'Final Thoughts on Mnemonic Constitutionalism' (2018) *Verfassungsblog: On Matters Constitutional*, at <https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/>; M. Bucholc, 'Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015' (2018) 1 *Hague J. of the Rule of Law* 85.

lawyers in framing central narratives and foundational myths of the European totalitarian past. The article consists of four parts. In this introductory section, we have outlined a general understanding of memory laws and legal engagements with the politics of memory. The second part zooms in on two recent monographs about law and lawyers affecting our understandings of the European totalitarian past, both from a Czech(oslovak) perspective: one by Jakub Drápal on the life of a lawyer from the Nazi epoch, and the other by Roman David on 'coming to terms' with the memory of communism. In the third part, we reflect on several recent major books on legal governance of historical memory, including those covering broader aspects of memory laws, memory wars, and genocide denial bans, as well as those looking into legal engagements with history from the perspective of transitional justice. In the fourth and final part, we offer our concluding remarks regarding the overarching trends emerging in this rapidly growing field of law and society and the potential direction of studies of memory laws and policies in the years to come.

II. THE ROLE OF LAW AND LAWYERS IN SHAPING THE MEMORY OF EUROPE'S TWO TOTALITARIAN REGIMES: THE CASE OF CZECHOSLOVAKIA

1. The ethos of the legal profession in times of historical turbulence

Defending Nazis in Postwar Czechoslovakia: The Life of K. Resler, Defence Counsel Ex Officio of K. H. Frank by Jakub Drápal is a record of heroism displayed not on a battlefield but in what may sometimes prove a more challenging and demanding setting: in a courtroom, defending one of the most prominent figures of the genocidal Nazi regime. It is also a gripping tale of how law and its practice and history intertwine, and of the many questions that to this day continue to crop up around this tangled knot. How are the perpetrators of the most brutal crimes to be judged and punished? Does the law have in its arsenal the right tools to address cases of this kind? How are we to gauge the culpability of individuals for crimes committed by regimes? And how should the jurisdiction of national courts be delegated to international criminal tribunals? Drápal provides an in-depth account of the personality, life, and professional career of Kamill Resler, and his book encourages a philosophical discussion of transitional justice with respect to law.

Drápal paints a vivid and precise picture of the world in which Resler lived from his earliest years, with all of the circumstances and events that helped to shape his personality. One cannot shake the impression, however, that what really made Resler an exceptional attorney and defence counsel was his unique attitude, character, sense of morality, intellectual integrity, and profound personal dignity, and that everything he went through amplified these qualities and brought them to the fore.

Central to Resler's story, of course, is his defence of the notorious Nazi criminal Karl Hermann Frank, one of the most prominent Sudeten German Nazi officials in the Protectorate of Bohemia and Moravia prior to and during World War II (pp. 96–147). Attaining the rank of *Obergruppenführer*, Frank commanded the Nazi police apparatus in the Protectorate, including the Gestapo. After the war, Frank was tried, convicted, and executed. Comparing Frank's biography against Resler's makes for a powerful contrast, but it is only when we examine Resler's deportment towards Frank during his trial, after his sentencing, and immediately before his execution that we really come to appreciate the truly exceptional legal ethos of the hero of Drápal's book. Resler's case should also be analysed in the context of one of the foremost issues of transitional justice: the risk that efforts to bring those guilty of crimes to account morph into acts of revenge, flying in the face of all of the principles and values properly belonging in law and justice. This risk is particularly acute in the immediate aftermath of regime overthrows, when feelings of animosity and an urge to mete out penalties are at their strongest, even within the law enforcement community. To quote Drápal:

> Success in defence does not mean the client's acquittal, but ensuring that the trial proceeds fairly. In this case, K. H. Frank was sentenced according to the law and as a result of a fair trial. The arguments that Resler raised during the proceedings were related to all possible procedural and material flaws. After all, Resler realized that if Frank's conviction was to be seen as the result of a fair trial and not as an act of revenge, he needed to use all the tools the law made available to him. (p. 200)

Turning to more recent examples of situations of this kind, we cannot fail to recall the fate of Nicolae Ceaușescu and his wife, who were subjected to a lighting-speed, impromptu show trial and shot immediately thereafter. As Ion Iliescu, a former Romanian President, put it, the show trial and execution were 'quite shameful, but necessary' in order to end the state of near-anarchy that at that time gripped Romania.[10] Another example worth recalling – albeit much less drastic – is the Polish memory law, colloquially referred to as *ustawa dezubekizacyjna* (*anti-dezubekization law*), which significantly slashed pensions and benefits received by individuals who worked in the service of the totalitarian state from 22 July 1944 to 31 July 1990.[11] The

10 S. Demian, 'In Romania, Ceausescu's Death Haunts Christmas' (2009) *Globalpost*, at <https://www.pri.org/stories/2009-12-25/romania-ceausescus-death-haunts-christmas>. On the legal governance of history in Romania, see also C. Sebastian Cercel, 'Judging the Conducâtor: Fascism, Communism, and Legal Discontinuity in Post-War Romania' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 228.

11 Act of 16 December 2016 on Amendments to the Act on Retirement Benefits of Police, Internal Security Agency, Intelligence Agency, Military Counterintelligence, Military Intelligence, Central Anti-Corruption Office, Border Guard, Government Security Agency, State Fire Fighting Service and Prison Guards Personnel and Their Families (Polish Journal of Laws of 2016, item 2270).

law applies in principle to every such person, regardless of the nature and duration of their collaboration, and has already been challenged in the Polish common courts of law as violating the guarantee of legal security, among other principles.

In addition to Frank's trial, Drápal's book recounts Resler's eventful career prior to and during the Nazi occupation of his native Czechoslovakia, and later, when his country found itself ruled by a communist regime. What is immediately striking is Resler's consistent approach to the defendants that he represented: an unwavering focus on utilizing whatever circumstances were available to improve their – usually dramatic – lot. Before World War II, Resler was defence counsel in some of the most publicized political trials in the First Republic, such as that of Bedřich Kalda, a high-ranking official accused of embezzling state funds. Resler obtained a judgement partly in favour of his client but thereby landed himself in trouble as he was then himself accused of defaming government authorities. Fortunately, he was eventually acquitted of this charge (pp. 56–57).

Of course, Resler's most severe test came with the Nazi occupation of Czechoslovakia, at a time when a barrister's work was fraught with enormous risks and possible exposure to persecution. Still, Resler had no second thoughts about defending his discriminated Jewish compatriots (pp. 67–70). This aspect of Resler's career becomes doubly poignant when we read in Drápal's book that, '[o]f about 640 Jewish barristers practicing under the Bohemian Bar Association before the war, only 21 returned for the Association's first post-war general meeting on 17 June 1945' (p. 70). During the Nazi occupation, Resler also took part in proceedings that were drastically out of line with the principles of a fair trial. This is what he said about one such case in which the defendant was sentenced to die: 'I was present for many death sentences, but none that were given so carelessly as this. It was a murder I observed that day' (p. 81).

Despite his wartime experiences, when peace came, he displayed his usual commitment in defence of clients accused of collaborating with the Nazi regime, some of whom were indeed guilty. Resler was defence counsel in what was probably the most important case heard by the National Court in Prague, a special court established in June 1945 to judge a limited number of high-profile individuals. This was the case of Richard Bienert, the last Prime Minister of the Protectorate, accused of supporting the Nazi movement, approving foreign occupation, organizing forced labour in Germany, and helping to steal property from the Czechoslovak State. Bienert's life was spared despite strong pressure on the court by the Soviets to have him executed. At the trial, Resler took pains to emphasize the moral dilemma faced by officials who, even when in alliance with an enemy regime, did their best to serve the interests of their native land, and whose actions should not therefore be seen simply as treason. In so doing, he touched upon yet another profound dilemma faced by those assessing the most controversial attitudes and decisions taken in dire historical circumstances,

sometimes based on special regulations promulgated on the spur of the moment.

Drápal's book is a must-read not only for practising lawyers and law students, but also for scholars exploring memory laws and legal governance of history, as it is not just a biography of an exceptional human being who, having endured dramatic circumstances, nevertheless found in himself the resolve to do good in this world – for this is how we should describe Resler's professional career. What the book also brings is a much-needed exploration of the legal challenges and dilemmas faced by those attempting to deal with the consequences of historical events.

Another book to read on this subject is Michael Bazyler's *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*, winner of the 2016 National Jewish Book Award in the category of 'Holocaust' and advertised by its publishers as an analysis of 'the background of the Holocaust and genocide through the prism of the law'.[12] The high point of this book is Bazyler's profound analysis of the questions and dilemmas, mostly of a moral and ethical nature, with which Resler struggled and which concern criminal responsibility related to the Holocaust and other post-Holocaust atrocities, exploring also the responsibility (and guilt) of individuals: perpetrators, bystanders, order-givers, and, to use the phrase coined by Daniel Goldhagen, 'willing executioners'.[13]

2. Executors and victims in the legal quest for the memory of totalitarianism

Similar to Drápal's monograph, Roman David's book *Communists and Their Victims: The Quest for Justice in the Czech Republic* explores the ways in which Czechs have dealt with the splinters of the *passé totalitaire*. However, he narrates the legacy of the other totalitarian regime in Czechia, the communist regime. He finds that while some justice measures were effective in overcoming material and ideological division, others obstructed victims' healing and inhibited the rehabilitation of the regime executors. Identifying 'justice without reconciliation' as the primary factor hampering the process of overcoming the past in Czechia, David promotes a transformative theory of justice. In the preface to the book, he writes:

> [T]he annexation of Crimea is another motivation for writing this book. Continuing Russian interference in Ukraine and a growing Russian appetite to regain control of territories once under its occupation and influence expose the ideological vulnerability of Eastern Europe. Russian propaganda uses communism as a vehicle to attract supporters in the former Eastern bloc for

12 M. Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (2017).

13 D. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996).

> its territorial drives […]. Hence, dealing with the communist past successfully continues to be politically relevant. (p. x)

Thus, the theme of memory wars – central to the adoption of memory laws in Central and Eastern Europe (CEE) – appears to be equally foundational for David's theoretical studies, which examine the ability of justice measures to contribute to overcoming the legacy of human rights violations committed by the communist regime. He classifies measures of justice into the four categories: retributive, reparatory, revelatory, and reconciliatory. He further empirically examines both the effects of different justice measures on victims, communists, and society as a whole and the reception of transitional justice by these stakeholders. In his empirical examination, he uses a number of original interviews, focus-group sessions, surveys, and survey experiments conducted in Czechia between 1999 and 2015. Although David is clearly a sociologist in his methodology and outlook, his book should nonetheless be of particular interest to legal scholars, due to the way in which he complements his methodological lens with analysis of legislative acts, judgements, surveys, government reports, and other materials. In drawing his conclusions, based on these sources, David builds up a transformative theory of justice, in which the perpetrator and the victim are both expected to change: 'A justice measure that makes, or shows, perpetrators reformed and victims rehabilitated would likely be perceived as just. The perpetrator may be seen as less dangerous, victims as no longer victimized, and justice measures as effective' (p. 209). While it may be too late for any of the reconciliatory alternatives established by David to help to deal with the past in Czechia,[14] other countries, he notes, may learn from its experience and therefore avoid making the same mistakes (p. 208).

III. GOVERNING THE PAST VIA THE TOOLS OF LAW: NEW LITERATURE IN THE FIELD

Although scholars and practitioners ventured from studies of law to studies of memory of the past only relatively recently, the valuable scientific literature dealing with a variety of issues in the area of legal governance of history has come quickly and plentifully.[15] What this literature shows is just how varied in scope and form are reckonings with the past, and the legal tools designed to protect certain historical narratives. Thanks to these publications, we are in a better position to assess the risks that go with some memory

14 On this aspect in Czechia, see also J. Přibáň, 'Politics of Public Knowledge in Dealing with the Past: Post-Communist Experiences and Some Lessons from the Czech Republic' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 195.

15 Due to natural space constraints, only a handful of books published in the past three years were selected for this article out of the wealth of literature on the subject that has appeared over the past decade.

laws, and are better equipped to tackle some of the key dilemmas that we come up against: the extent of freedom of speech in the context of legal bans on negationism; the legitimacy of political vetting (*lustration*) instruments in post-communist countries when some 30 years have passed since the downfall of the communist regimes; and the efforts to whitewash problematic and sometimes shameful episodes in national history by politicians currently in power and bent on promoting their own, simplified, black-and-white historical narrative, drawing stark lines between good and bad, guilty and innocent, while ignoring the 'shades of grey' and all of the dilemmas indelibly etched in the history of World War II, and people's actions and choices at that time.

One would be hard pressed indeed to single out the most influential and gripping publications sitting at the juncture of law and history, but some recent books certainly deserve mention for providing truly valuable insights into memory laws in their diverse forms. Needless to say, the literature on memory laws deals with a great many subjects but certain principal themes are discernible, including genocide denialism and transitional justice *sensu largo*. As for publications dealing with memory laws as such, which introduced this concept to broader Anglophone studies in comparative constitutional law and politics of memory, two major books appeared within the space of a couple of weeks from Cambridge University Press: *Law and Memory: Towards Legal Governance of History*, a volume edited by two legal scholars, the authors of this review article, Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, and therefore omitted here[16]; and *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, an extraordinary monograph written by historian Nikolay Koposov.[17]

1. Memory laws for memory wars

Unsurprisingly, one of the most contested issues in the studies of legal governance of history is the quantification of memory laws. In his book, Koposov defines 'memory laws *per se*' as laws criminalizing certain statements about the past,[18] but there are also other approaches and other ways

16 Belavusau and Gliszczyńska-Grabias, op. cit., n. 1. The book has been widely reviewed. See, for instance: S. Roy, 'Never Any End to an Event: Review Article' (2018) 13 *J. of Comparative Law* 15; K. Antweiler, 'Law out of History, History by Law' (2018) 55 *Rev. J. for the Study of Culture* 1; F. Félix Krawatzek, 'Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.): *Law and Memory: Towards Legal Governance of History*' (2018) 45 *J. of Law and Society* 323; G. Soroka, '*Law and Memory: Towards Legal Governance of History* (Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias (eds)' (2020) 1–2 *Nationalities Papers* 1; K. Booth, '*Law and Memory: Towards Legal Governance of History* (Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias (eds)' (2019) 2 *Santander Art and Culture Law Rev*. 309; F. S. Benavides-Vanegas, 'Can Law Account for the Past? Law and the Road from Oblivion to Memory' (2020) 33 *International Journal for the Semiotics of Law* 1.

17 Koposov, op. cit., n. 8.

18 Id.

of defining legislation of this kind. According to Eric Heinze, for example, laws affecting historical memory do not have to explicitly disfavour other, competing narratives; they are instruments used by the state in the process of constructing, disseminating, promoting, and also ordering public knowledge about the past.[19] In turn, Marta Bucholc finds the specific characteristic that distinguishes memory laws not in the criminal sanctions attached to these laws but in the limitations to the freedom of expression of individuals, including the freedom to tell their personal stories and memories, which can prevent certain parts of historical narratives from circulating freely within societies, and thus delete the story told by those perceived by the governing powers as endangering the official version of the past.[20] These differences in perception of memory laws do nothing, however, to alter the nature of the impact that they have, and the often far-reaching consequences that they bring about, to which Koposov's book is largely devoted. These consequences include the risk of historical truth being falsified to suit the purposes of those in power or the actual perpetrators of crimes being absolved of their guilt, the consolidation of specific paradigms of memory (mainly through Holocaust denial bans), and the introduction of a new element into international relations, potentially aggravating what are already grave tensions between some countries.

Koposov masterfully narrates the evolution of the recent and accelerating proliferation of memory laws while focusing on the major geographical hotspots that exemplify central themes: the genesis of memory laws in essentially all Western European countries; those adopted in CEE, in particular Ukraine; and, finally, a specific emphasis on Russia, a country waging an entirely unique memory battle.

2. Negationism and genocide denial bans

Legal prohibitions on denying or diminishing the crimes of the Holocaust constitute the most common – if not indeed classical – memory laws. There is now largely a consensus that public expression of views falling into that category should be penalized, at least in the European legal space. Nonetheless, a number of controversies have recently emerged around this issue, as can be seen from the latest literature on the subject. These controversies concern fundamental questions, such as when punishing speech is argued to be inconsistent with human rights protection standards in the context of freedom of speech, but also more nuanced ones, such as the development of a hierarchy, as it were, of crimes that may not be lawfully negated. This was prompted by the 2015 judgement handed down by the Grand Chamber of the European Court of Human Rights (ECtHR) in the case

19 E. Heinze, 'Epilogue: Beyond "Memory Laws": Towards a General Theory of Law and Historical Discourse' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 413.

20 Bucholc, op. cit., n. 9.

of *Perinçek* v. *Switzerland* on penalizing negation of the Armenian genocide.[21] More problems arise when we try to decide how far into the past we can go in terms of identifying the crimes that should not be allowed by law to be negated or diminished. As the ECtHR pointed out in the *Perinçek* judgement, it has been now more than 100 years since the Armenians fell victim to genocide, and this fact should be seen as blunting the edge of the argument of legislators proposing legal bans on negating that particular crime. What we face here is one of the toughest ethical challenges to tackle, since quite soon 100 years will have passed since the Holocaust was perpetrated. What then? Will penalizing Holocaust deniers cease to make sense?

One scholar struggling with legal controversies of this nature – and also with a host of other moral, social, and historical controversies – is Emanuela Fronza, author of *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*.[22] This book brings a comprehensive discussion of the issues touched on above, also recounting the history of anti-negationist laws in Europe. Another author not shying away from tough questions is Roland Moerland. In *The Killing of Death: Denying the Genocide against the Tutsi*, he argues that penal laws advertised as an instrument of remedial justice protecting the memory of genocide victims have the potential to be misused in day-to-day political battles as a means of silencing debates, such as those on painful events in Rwanda's history.[23] One other academic publication on negationism, broadly construed, worthy of recommendation is the excellent *Holocaust and Genocide Denial: A Contextual Perspective* edited by Paul Behrens, Olaf Jensen, and Nicholas Terry, with contributions from authors whose expertise relates to the history of the Holocaust, genocide studies, international criminal law, and social anthropology.[24]

3. Mechanisms of transitional justice

Another key issue regarding legal governance of history pertains to the use of memory laws as instruments of transitional justice. While transitional justice *per se* is the subject of voluminous literature and the concept has in a sense become a permanent addition to the canon of legal terms, elements of memory laws were given prominence in discussions concerning transitional justice only as research into these legal methods of dealing with the past gained momentum. Two extremely valuable publications are worthy of mention

21 European Court of Human Rights, *Perinçek* v. *Switzerland*, Application No. 27510/08, Judgement of 15 October 2015 (Grand Chamber). For annotation of the case, see U. Belavusau, 'Introductory Note to Perinçek versus Switzerland (European Court of Human Rights)' (2016) 55 *International Legal Materials* 627.

22 E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (2018).

23 R. Moerland, *The Killing of Death: Denying the Genocide against the Tutsi* (2016).

24 P. Behrens et al. (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (2018).

here: Dustin N. Sharp's *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History* and *Truth Commissions: Memory, Power, and Legitimacy* by Onur Bakiner.[25] Sharp delivers a critical appraisal of many of the original assumptions underlying the concept of transitional justice, looking at its development to date through a multifaceted prism of justice and processes of transition from times of criminal excess and regime rule. This in-depth analysis is of great help to other scholars dealing with memory laws, legal governance of history, and memory of the past in their search for answers to questions about the significance of memory laws in transition processes. Meanwhile, Bakiner's book deals with truth commissions, one of the best-established practical mechanisms of transitional justice, which, however, are nowadays increasingly being abandoned in favour of memory laws designed to establish historical truth by decree, as it were, thus avoiding what can often be very painful public confrontations with brutal crimes and their perpetrators.

IV. CONCLUSIONS: TRENDS AND PROSPECTS IN THE STUDIES OF MEMORY LAWS IN EUROPE

Recent European literature on memory laws agrees that, despite the multiple forms of such laws (punitive and declarative, constitutional and administrative, legislative and judicial, and so on), there has been a sharp increase in their adoption in Europe. Furthermore, their mushrooming in CEE has been intertwined with a marked decline of rule of law in the region. 'Illiberal democracies'[26] are particularly eager to revert to populist identity formation under the guise of memory politics, mainstreaming nationalist historiography while marginalizing and, at times, suppressing alternative historical memories of minorities.[27] Likewise, the controversial decision of the ECtHR in *Perinçek* v. *Switzerland*[28] has recently sparked unprecedented attention to invoking law in the context of historical memory and various

25 D. N. Sharp, *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History* (2018); O. Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (2016).

26 See 'Voted Out: Is Liberal Constitutionalism Becoming a Minority Position?' (2016) *Verfassungsblog: On Matters Constitutional*, at <https://verfassungsblog.de/category/themen/voted-out-is-liberal-constitutionalism-becoming-a-minority-position-debates/>.

27 U. Belavusau and A. Wójcik, 'La criminalisation de l'expression historique en Pologne: la loi mémorielle de 2018' (2018) 40 *Archives de politique criminelle* 175. See also G. Soroka and F. Krawatzek, 'Nationalism, Democracy and Memory Laws' (2019) 30 *J. of Democracy* 157; G. Hálmai, 'Memory Politics in Hungary: Political Justice without Rule of Law' (2018) *Verfassungsblog: On Matters Constitutional*, at <https://verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/>.

28 *Perinçek* v. *Switzerland*, op. cit., n. 21.

inevitable hierarchies between the memory of the Holocaust and other genocides.[29]

During the 1980s and 1990s, and even partially in the early 2000s, legislative memory provisions and historical trials in Europe and elsewhere were largely a matter of targeting revisionist and denialist narratives about the Shoah, the Armenian genocide, colonial atrocities, and so on, raising painful questions about the past and its lessons for a hopefully more emancipated and tolerant future. In contrast, since the 2000s, and especially since 2010, memory laws have been increasingly converted into instruments ensuring mnemonic security and supposedly counteracting disinformation in a number of countries in CEE, to fortify their sovereignty in light of, in particular, Russian propaganda.[30] The legal rehabilitation of Stalinism,[31] along with the white-washing of Soviet expansionism during that period, has been well described by Koposov.[32] Putin's Russia has adopted a dangerous rhetoric, stirring up (post-)Soviet imperialism to cover up military interventions in the region via a peculiar vindication of communism – increasingly contradictory in light of its parallel rehabilitation of the 'good tsar' killed by the Bolsheviks and the revival of religious Orthodox obscurantism, once successfully suppressed by the same communists.[33] Thus, one of the major findings of the recent literature is that – despite the birth of the terminology and major modes of legal governance of history in Western Europe – the current epicentre of memory laws is situated in CEE. Moreover, since the 2000s a different type of memory legislation has been taking shape. The earlier – self-inculpatory – memory laws had the naïve yet noble purpose of defending historical truth and the dignity of Holocaust victims.[34] The recent – self-exculpatory – wave of CEE memory laws should be considered in light of memory wars, whereby a number of countries in the region have advanced their ontological security by promulgating legislation that fortifies

29 See P. Lobba, '"Testing the Uniqueness": Denial of Holocaust vs. Denial of Other Crimes before the European Court of Human Rights' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 109; S. Garibian, 'On the Breaking of Consensus: The Perinçek Case, the Armenian Genocide and International Criminal Law' in *Denialism and Human Rights*, eds J. Willems et al. (2016) 235.

30 See U. Belavusau, 'The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation?' (2019) 29 *Security and Human Rights* 1; A. Wójcik and U. Belavusau, 'Posponer los cambios de nombre de las calles tras la transición de la democracia: lecciones legales de Polonia' in *Diez años de leyes y políticas de memoria (2007–2017)*, eds J. Guixé et al. (2019) 27.

31 See N. Koposov, 'Defending Stalinism by Means of Criminal Law: Russia, 1995–2014' in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczyńska-Grabias (2017) 293.

32 Koposov, op. cit., n. 8. See also Nuzov, op. cit., n. 8.

33 G. M. Hahn, 'Putin, Stalin, Orthodoxy, and Russian Traditionalism' (2017), at <https://gordonhahn.com/2017/08/28/putin-stalin-orthodoxy-and-russian-traditionalism/>.

34 E. Heinze, 'Theorizing Law and Historical Memory: Denialism and the Pre-Conditions of Human Rights' (2018) 13 *J. of Comparative Law* 43.

simplistic binary narratives.[35] Such dichotomous narratives usually portray selected nations as victims *par excellence* of gross atrocities. These narratives prevent the nations from reflecting critically on their own twentieth-century histories. The acceleration of dystopian memory politics goes hand in hand with the deterioration of democratic standards in the CEE region. In particular, Hungary and Poland stand accused of democratic backsliding by the EU institutions.[36] Furthermore, concerned with the idealized visions of the Stalinist past being reanimated in Russia along with the uncritical view of Soviet atrocities in the ex-communist bloc, the Baltic states, Poland, and Ukraine have been provoked to legislate in defence of certain simplistic historical narratives.

It is, therefore, fair to predict that future scholarship in this field of law and society, dealing with legal governance of historical memory in Europe, will move from assessing memory laws exclusively in light of their compatibility with human rights, such as freedom of speech (especially in the post-colonial context of Western European countries and genocide denialism wider than the Holocaust), to a broader perspective regarding democracy and rule of law (especially in the CEE region). The literature on memory laws in Europe will further position these laws against rising nationalism and populism, assessing their self-inculpatory and self-exculpatory elements, and into the broader paradigm of 'responsible history'.[37] This paradigm will have to carefully explore various defences and critiques for the legal engagement with historical memory, from the right to truth to protection against disinformation and mnemonic propaganda.

35 M. Mälksoo, 'Memory Should Be Defended: Beyond the Politics of Mnemonical Security' (2015) 15 *Security and Dialogue* 653.

36 C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the EU* (2016); W. Sadurski, *Poland's Constitutional Breakdown* (2019).

37 A. De Baets, *Responsible History* (2009).