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Law and the Politics of Memory

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Abstract
The chapter analyzes the interaction of law and the politics of historical memory, summarizing its genesis and evolution as well as outlining legal governance of historical memory nowadays, in particular by virtue of so-called memory laws. The analysis focuses on the ways politics of memory has infiltrated the settings of human rights via contemporary international and regional (in particular, European) law. It further unpacks the specific role of historical memory in national constitutional projects leading to a phenomenon of mnemonic constitutionalism. Finally, the chapter explores the role of memory laws as well as their various taxonomies in comparative law. The conclusions summarize major trends in recent academic literature on law and historical memory.

Key words
Legal governance of memory, memory laws, mnemonic constitutionalism, politics of memory, militant democracy, memocracy

1. Legal governance of memory: evolution and scope

In the 2000s, the academic fields of study beyond the politics of memory, such as law and society as well as comparative constitutional and criminal law, have been marked by the unprecedented blossoming of literature addressing controversial "memory laws" and court judgements concerning historical past (Belavusau and Gliszczyńska-Grabias , 2020a: 225-338). The heading of memory laws refers to various forms of legal measures governing history, including punitive measures against the denial of historical atrocities and bans on the use of totalitarian symbols of the past (Belavusau and Gliszczyńska-Grabias , 2017a: 1-26). A broader notion of memory laws also covers legal acts recognizing and commemorating historical events and figures, including laws establishing state holidays, celebrations, dates of mourning, street (re)naming, monument instalment in honor of historical figures, status of and access to historical archives and regulations regarding museums and school curricula on historical

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subjects. [1] It has, thus, become crucial to study the meeting point of law and historical memory, to answer such questions as whether a memory of past atrocities and sufferings can and must be protected via legal means (and if yes, should those measures be punitive or rather symbolic); whether the memory of Holocaust victims should be protected in a special legal way in comparison to other historical injustices; whether transitional democracies or postcolonial societies should resort to law (and if yes, how) in order to promote historical justice in portraying the past; and whether such laws run contrary to fundamental rights such as freedom of speech or the settings of the rule of law, to name but a few socio-legal dilemmas in this area.

The societal craving for regulating remembrance via a legal instrument or a state-forged policy traces back to deep Antiquity, exemplifying mostly a legal prescription to forget a certain figure (Fuglerud et all, 2021). A vivid example in this regard is a practice of *damnatio memoriae* (literally "condemnation of memory") established in Ancient Rome. This mnemonic method served to erase specific elites and emperors from the memorization pantheon within Roman society after serious transgressions, including by removing monuments of them. Caligula (12 – 41 AD) and Nero (37-68 AD) have faced this fate amongst several other emperors (Varner, 2004). However, legal governance of historical memory in a modern sense – affecting international relations – dates back to the Treaty of Westphalia (1648), which was one of the stepping-stones in the development of modern international law. The Treaty imposed an obligation of oblivion about all the injustice on each of the contracting states, marking the emergence of transnational law in the Early Modern period. As the Treaty prescribed the forgetting of three decades of war on the continent, it manifested the imperative to forgive, thus advancing the Christian idea of oblivion and pardon. The space for collective public practices of remembrance and commemoration in the 17th century was essentially limited and focused on the duty to forget (reminiscent of the ancient *damnatio memoriae*) rather than on the duty to remember (Belavusau, 2015: 538-539).

Yet only a century later, French revolutionists advanced an approach ostensibly opposite to the Westphalian model with its legal prescription to forget. Austerely rationalist Jacobins presented earlier institutions – the entirety of the *ancien régime* – as ignorant and antiquated. In contrast to medieval Christian oblivion (Brenner et al, 2013), the French Revolution (1789) paved the way for a model of *zealous remembrance*, which to this day, has been competing but also interweaved with the oblivion model. [2] More specifically, the revolution has fostered legal rituals of civic remembrance, comprehensive museum reforms (including state appropriation of church property) (McClellan, 1994) and the creation of republican state archives (Nora, 1989). The state modernized the very concepts of "past" and "future" through its new republican calendar (*calendrier républicain français*) and by decreeing a clock divided into 100 hours of 100 minutes. Twentieth-century revolutions would later replicate those simulacra of modernity, notoriously those of Kim II-Sung's North Korea and Pol Pot's Cambodia (McClellan, 1994). Throughout the 18th century, museums evolved from "cabinets of curiosity" towards the sites of glory and podiums of state achievements. Rather than displaying their collections in random order, museums gained a sense of organization and taxonomy. This effectively transformed museums and public collections from elite trifles into instruments of republican citizenship and social management, engineering national unity, or rather cultural homogeneity, along with encouraging active political participation and a strong invitation to commemorate and remember the heroes and victims (Bennet, 1995). That monumental invitation to remember through legal decrees was continuant for imagining a new community of national states that highlighted heroism and willingness to sacrifice one's life for the sake of state. Such chief collective virtues were later translated into the "duties of the citizen" under the republican

citizenship paradigm. History has been represented as the struggle of citizens for the glory of imagined civic communities, embraced by states (Benedict, 1991; Kochenov, 2019). Historical memory has thus played a strong didactic function in setting role models, prescribing mourning for victims and assigning a dichotomist sense of guilt to all the rivals of a nation state.

The French model of citizenship and memory regulation had infiltrated the language of law to the degree that the Treaty of Versailles (1919) stipulated a specific "War Guilt Clause", assigning full responsibility to Germany for all loss and damage incurred during World War I. [3] Far from Westphalian oblivion, Versailles constructed international law through a discourse of foundational guilt. Through the spread of national secular states and global colonialism, law's mnemonic narratives increasingly pervaded constitutional ideals of citizenship far beyond the Western world, as witnessed for example in post-Ottoman Turkey, with the cult of Atatürk (Ince, 2012), in post-imperial Japan, with censorship of militarist history (Hein and Selden, 2000) or even in modern-day Portugal, with granting of citizenship to the descendants of the Sephardic Jews as acknowledgement of the memory of medieval sufferings and exclusions (Stein, 2016).

However, the truly universalized "duty to remember" emerged in the aftermath of World War II through the subsequent criminal proceedings against Nazi figures and collaborationists, including the international military tribunal in Nuremberg in the late 1940s (Bazyler, 2010; De Baets, 2009a), the Israeli trials of Adolf Eichmann in 1961 (Arendt, 1994; Douzinas, 2012), and Ivan Demjanjuk from 1986 to 1988 (Teicholz, 1990) as well as the French trial of Klaus Barbie in 1987 (Morgan, 1987). These trials presented a new crime entering the field of international law, the crime of genocide, while subsequently advancing the subject of the first memory laws – genocide denialism (Belavusau and Gliszczyńska-Grabias, 2017a: 6-9). Negation, minimization, and gross trivialization of the annihilation of six million Jews has since then been criminalized by numerous states, either as hate speech (incitement to hatred or *Volksverhetzung*) or as a self-standing crime of genocide denial (Kahn, 2014; Belavusau, 2015: 538-539; Fronza, 2017). Furthermore, in the late 20th century, a number of criminal proceedings concerning genocide denialism drew on the duty to remember – even if the number of genocide denial bans had not increased worldwide until the 1990s – thus, using hate speech instead of genocide denialism as basis for criminal prosecution. These most famously include the proceedings against James Keegstra in 1984 and Ernst Zündel in 1985 in Canada as well as the lengthy libel case against the American historian Deborah Lipstadt, brought by a Holocaust denier David Irving (Della Morte, 2014: 427-440).

In the 20th century, the virtue-based mnemonical culture of legal regulation had clearly infiltrated the rhetoric and settings of international and European law (even in non-Western legal systems), leading to the emergence, as has been widely argued in literature, of the duty to remember (Fronza, 2017). Current epistemics of this duty to remember seen as a virtue of militant democracy (*streitbare* or *wehrhafte*) and its troubled relationship with the right to truth meets certain serious normative and practical challenges however when embodied in the form of memory laws (Mälksoo, 2021). The current terminology of memory laws stems from the French heading of *lois mémorielles* (literally "memorial laws") that has been advanced by French historians who mobilized in protesting against the expanding legal measures on regulating discourse about the past. Memory laws have been discussed seemingly for the first time under this label in the *Le Monde* magazine in December 2005 (Garibian, 2006: 158). Despite the terminology of memory laws being a product of the French debates in the early 2000s, the subject itself – namely, legal governance of history often paired with criminal

punishment – had appeared almost a decade before that. For instance, the Federal Republic of Germany and Israel have advanced punitive provisions against Holocaust denial in the mid to late 1980s. As the trend for adopting memory laws beyond pure Holocaust denial have transitioned into the 21st century, it has been accompanied by controversies regarding the subject and reach of such laws. The scholars and various critics of memory laws have addressed, amongst other issues, a problematic standing of these laws vis-à-vis various human rights and the rule of law, the capability of memory laws to fuel so-called "memory wars" amongst nations, the reach of state intrusion into past narratives as well as the inevitably biased political *raisons d'être* to legislate in this field which affects minorities and culpabilities of states (Koposov, 2017a; Belavusau and Gliszczyńska-Grabias, 2017b; Fronza, 2017).

This chapter aims to analyze the interaction of law and the politics of historical memory, summarizing its genesis and evolution as well as outlining legal governance of historical memory nowadays, in particular by virtue of so-called memory laws. The analysis will further focus, first, on the ways politics of memory has infiltrated the settings of human rights via contemporary international and regional (in particular, European) law. Following this part, the chapter will then unpack the specific role of historical memory in national constitutional projects leading to a phenomenon of mnemonic constitutionalism. Finally, the chapter will explore the role of memory laws as well as their various taxonomies in comparative law. The conclusions will summarize major trends in recent academic literature on law and historical memory.

2. The politics of memory in international and European law of human rights

On 9 December 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide through General Assembly Resolution 260. [4] Not only did it stipulate the first international crime (i.e. the crime of genocide) with a retroactive effect, the subsequent prohibition on the Holocaust denial in various countries has set an arch-example of the contemporary legal regulation of memory. Denial, minimization and gross trivialization of the fact that six million Jews were annihilated by the Nazis has been criminalized by a number of Western democracies either as a form of hate speech (*Volksverhetzung*, or incitement to hatred) or a as a distinct crime of Holocaust (or broader, genocide) denial. [5] In this regard the most eminent precedent in international law is the 1996 decision of the UN Human Rights Committee which upheld the conviction of the French scholar Robert Faurisson for denial and trivialization of Holocaust. [6] The laws prescribing a ban on Holocaust denial have been followed by at least four – interlinked and not necessarily chronologically distinctive – streams of memory laws after World War II:

(1) The first stream encompasses attempts to retrospectively recognize atrocities and prohibit genocide negationism in an effort to mimic restrictions on Holocaust denials. The most discussed example of such memory laws are the attempts of legal recognition (in France, Switzerland, Slovakia and Greece) of the Armenian genocide, in which the Ottoman government exterminated approximately 1,5 million Armenians from their historic homeland within present-day Turkey. [7] Yet so far, the judiciary in France (2008) (*Décision du Conseil constitutionnel*, 2012) and the European Court of Human Rights (2013) (*Perinçek v Switzeland*, 2015) have been reversing the criminalization of Armenian genocide denial, finding it incompatible with the freedom of speech, in contrast to the prohibitions on Holocaust denial. Such a stance raises a question of the magnification of a certain hierarchy amongst genocides, with *Shoah* occupying a special place in the monumental legal doctrine of historic memory

(Belavusau, 2015). Similar questions have also been advanced with regard to specific-country attempts to enact memory laws, covering, *inter alia*, the prescription of positive or negative roles of French colonialism, [8] the recognition of *Holodomor* – a policy of mass starvation orchestrated by Bolsheviks during 1932-1933 resulting in 2,4 to 7 million victims – in the Ukraine, [9] and Asian controversies about laws on the commemoration of the Japanese military during World War II (Osiel, 1997; Vidal-Naquet, 1992).

(2) The second stream addresses the falls of the 20th-century dictatorships in the period after World War II and the legal prescriptions of historical commemoration in the subsequent democratic regimes. Such legal means cover both legislative and judicial impositions of truth about victims and condemnations of perpetrators. The most eminent European example in this group is the Law on Historic Memory in Spain (2007). [10] Likewise, this group covers rich legislative practices and jurisprudence by Latin American courts fixing various mechanisms of transitional justice while instrumentalizing the invitation and duty to remember via legal means (Campisi, 2014b; Garibian, 2014).

(3) The third stream was triggered by the de-communization and collapse of the Soviet empire and is, therefore, geographically limited to the countries of Central and Eastern Europe and the ex-Soviet Union. The dilemma of so-called *Historikerstreit* is particularly emblematic for this group as historians long dispute the singularity of the *Shoah* and comparability of Nazi and Stalinist repressions (Geyer and Fitzpatrick, 2009). This diverse group covers judicial sagas on the Katyn massacre (the execution of Polish officers in the 1930s by the Soviets, which was attributed to the Nazi regime for a long time), [11] the constitutional revision of the national history in Hungary (Ország-Land, 2011), the recognition and prohibition of denial of the fact of the Soviet occupation of the Baltic states (Mälksoo, 2003) and the EU's resolutions recognizing and commemorating Stalinist repressions. [12]

(4) Finally, the fourth stream deals with genocides and other mass atrocities subsequent to the introduction of the crime of genocide in international law. This group is, to a large degree, intertwined with the second stream of "transitional" memory laws and is different from the third stream as it spreads geographically further than ex-Soviet Union and CEE. This group of judicial and legislative engagements with memory covers international criminal proceedings subsequent to crimes against humanity in Rwanda, [13] former Yugoslavia, [14] the spectacular trials of the former heads of the Khmer Rouge in Phnom Pench,15 and the barriers to the commemoration of the mass displacement of Palestinians ("Naqba" laws) in Israel (*Alumni of the Arab Orthodox High School in Haifa et al. v. The Minister of Finance et al., 2012)*.

The legal core of the position on Holocaust denial in the Council of Europe (CoE) stems from the Declaration of the Stockholm International Forum on the Holocaust (2000) where states agreed to institute educational programs and national commemorative initiatives. This Declaration was followed by the European Parliament Resolution on Remembrance of the Holocaust, Anti-Semitism and Racism (2005). In March 2007, the European Monitoring Centre on Racism and Xenophobia was reconstituted into the newly formed EU Agency for Fundamental Rights. The organization came up with the Working Definition of Anti-Semitism, intended as a road map for criminal justice tribunals. [16] The Working Definition identifies as manifestly anti-Semitic, in particular, acts of denying the fact, scope, mechanisms (for example, gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II.

The case law of the major court in the CoE system, the European Court of Human Rights, demonstrates a consensus that safeguards the protection of the margin of appreciation for Member States of the Council of Europe that see the Holocaust as a historical atrocity that cannot be questioned, denied or trivialized (Belavusau, 2015c: 538-539). In contrast, both in cases relating to denial of the Armenian genocide and the public displays of communist symbols, the Court has consistently upheld the primacy of the right to freedom of expression, for example in the cases of *Perinçek v. Switzerland* (2015) and *Vajnai v. Hungary* (2008). However, in one of its more recent judgments, the Court has started to grasp the academic criticism of its historical memory-related double standard in the case of *Rashkin v. Russia* (2021). The Court has also dealt with a number of judgments related to the legacy and reputation of national historical figures, for example in the cases of *Chauvy and others (2004)*, *Monnat (2006)* and *Fáber v Hungary* (2011). Furthermore, the Court had to assess to which degree historical truth is protected by the right to freedom of expression vis-à-vis the limits of historical research in cases such as *Lehideux and Isorni v France* (1998) and *Chauvy and others v France* (2004) (Lobba, 2015).

Apart from the Council of Europe, the European Union has been active in shaping politics of memory in Europe, mostly in its soft and secondary law. The Maastricht Treaty (1992) has reinforced the discourse of peace and the post-World War II trauma as a foundational myth for EU competencies in fundamental rights and the project of EU citizenship, both formalized since then as primary law (Joerges and Singh Ghaleigh, 2003; Smismans, 2010). Likewise, the soft law of the Union has shaped a strong legal invitation to remember through various resolutions of the European Parliament and Commission. [17] Those legal initiatives build on the rhetoric of the Holocaust as a mega-atrocity. They address the common memory of EU citizens as a new specific element of pan-European identity, whose symbolical core is founded on the ethical lessons of World War II. In fostering a European *demos*, EU institutions have been capitalizing on moral commitment to the past as a promise of a better future. Central to this vision of EU citizenship and its core values has been the Europe for Citizens Programme launched in December 2006 by Decision 1904/2006/EC of the European Parliament and of the Council. Later developments in EU law indicate the substantial evolution of the activist citizenship discourse on historic memory, from an invitation to remember towards a duty to remember (Fronza, 2006). This paradigm of memory-building straightforwardly outlaws denial, trivialization, and minimization of certain atrocities. Since the adoption of Framework Decision 2008/913/JHA, this second paradigm has become currently the most controversial in EU law and the politics of memory (Pech, 2009; Cajani, 2011).

3. The politics of memory in constitutional law

Politics of memory through foundational texts in various democracies, i.e. constitutions or constitutional laws, can be described through the concept of 'mnemonic constitutionalism' (Belavusau, 2020b). Mnemonic constitutionalism is a form of legal governance that encompasses, yet transcends pure measures against genocide denialism and statutory memory laws. The heading of constitutionalism replicates the idea that government can and should be limited in its powers and that its authority or legitimacy depends on its observation of these limitations (Waluchow, 2018; Belavusau, 2020b). Mnemonic constitutionalism, in this regard, places the authority and legitimacy of a state into the boundaries of a certain historical paradigm, whereas current and future attitudes and behaviors of state actors derive from and are limited by moral lessons of the past. Within mnemonic constitutionalism, the historical past becomes the foundation of collective identity prescribed by either the national constitution itself

or by legal provisions which traditionally shape the substructure of national constitutional law, such as citizenship laws or statutes shaping collective identities by virtue of imposing specific understandings of the historical past. Without consciously or explicitly identifying this area of law-making, and without necessarily changing the constitutional text itself, the new populist regimes in the 2000s-2010s perceived this invisible mnemonic constitution as a certain ontological foundation for their 'illiberal democracies' and as a basis for an entire governance of historical memory in order to justify their current political choices (Belavusau and Gliszczyńska-Grabias, 2021).

Yet various forms of mnemonic constitutionalism existed before the current epoch characterized by the decline in the rule of law. It certainly has not been uncommon for constitutional preambles, for example, to briefly narrate historical milestones of the history of a state, especially in the context of post-colonial or transitional democracies that distance themselves from their dependent or totalitarian past via new constitutional texts (Belov, 2020; Nyyssönen and Metsälä, 2019). [18] Likewise, certain liberal democratic regimes without a formal constitution can be characterized by a strong — albeit invisible — mnemonic constitution, as for example in Israel with its idea of a historic state and religious community attributed to a certain territory and fortified by a powerful 'Law of Return', that is a specific citizenship paradigm privileging Jews as welcome citizens of a 'reborn' state (Ernst, 2009).

Furthermore, the way citizenship – a central subject of constitutional texts – is distributed in many states is dependent on historical lineage (d'Oliveira, 2015; Harpaz, 2014; Gancher, 2014). From the way we teach history in schools to the way we impose national holidays, street names and monuments, [19] this mnemonic constitutionalism surrounds us from our childhood and shapes our identities through various legal measures, only a tiny fraction of which are actually criminal prohibitions. The majority of such regulations amount to the soft governance of memory. Yet the recent threat of mnemonic constitutionalism, which can be addressed as *memocracy* (or mnemocracy), manifests itself in the outright populist abuse of the historical narrative to justify a new regime that is hostile to the rule of law standards of equality, judicial independence and pluralism of opinions (Mälksoo, 2021). In this regard, Hungary, Poland, Russia and Ukraine stood out as vivid examples throughout the 2010s, even though the manifestations of their mnemonic constitutionalism and the subsequent populism around this legal governance of historical memory differ somewhat (Belavusau, 2020b; Belavusau, Gliszczyńska-Grabias and Mälksoo, 2021). The numerous accounts in recent literature on memory politics illustrate a growing density in the network of memory laws, policies, state commissions and Institutes of National Remembrance, leading to the effective rise of memocracy in CEE (Mälksoo, 2021; Belavusau and Gliszczyńska-Grabias, 2021).

The relevant legislation, adjudication and policies of memocracy could be classified into five clusters:

> a. constitutional provisions prescribing certain understandings of the past and distributing guilt for past atrocities;
> b. punitive measures of memory governance (e.g., imposing criminal responsibility for the denial of Nazi or communist crimes, or prescribing the 'correct' attribution of atrocities to a singular perpetrator);
> c. non-punitive measures of memory governance (e.g., memory laws and policies prescribing the re-naming of streets or the place of historical monuments);

d. quasi-memory laws (e.g., citizenship laws that permit naturalization based on historical belonging); and
e. judgments of national tribunals relating to the (legitimate) remembrance of the past.

While *stricto sensu* only the first group of this mnemocratic governance is based on constitutional provisions, all five elements (especially citizenship policies)[20] can be seen as part and parcel of mnemonic constitutionalism. All five groups have been applied to secure a politically preferable version of the past and a prescription of an ontological foundation of respective societies. Such foundation has been particularly suitable for the idealized constitutional understanding of a transitional nation seeking to postulate its self-exculpation from the atrocities committed by the dystopian regimes of the 20th century. Yet, such militant memory laws and policies are equally capable of eroding the foundational elements of liberal democracy, weakening constitutional orders and adding fuel to populist tendencies.

The rule of law backsliding in Central and Eastern Europe (CEE) in particular, has occurred hand-in-hand with the rise of nationalist memory politics and so-called 'memory wars' in CEE (Koposov, 2017a; Nuzov, 2019; Belavusau, Gliszczyńska-Grabias and Mälksoo, 2021). Both Hungary and Russia have within 10 years introduced new constitutional projects with a strong focus on historical memory. While only the Hungarian case can be attributed to the introduction of the new Basic Law, the Russian pathway opted for constitutional amendment. In both countries, these constitutional processes were accomplished by means of referenda and have been intertwined with an explicitly populist "commemorative law-making" (Belavusau, 2020b). In Poland and Ukraine, a very similar law-making which prescribes "ontological historical narratives" – even without changing constitutional texts *per se* – have started throughout the 2010s (Bucholc, 2018; Belavusau and Gliszczyńska-Grabias, 2021b).

4. The manifold politics of memory laws and their various types

Memory laws can be broadly classified by their genesis, political context and purpose, geographic distribution and legal character. An initial distinction has been made between punitive and declarative memory laws on the basis of the four French *lois mémorielles*, the existence of criminal punishment being central to their differentiation (Garibian, 2006). Memory laws have also been classified into four streams on a diachronic basis: (1) prohibitions of genocide denial, (2) laws concerning the 'falls of 20th-century dictatorships', (3) decommunization laws and (4) laws 'deal(ing) with genocide and other mass atrocities subsequent to the introduction of the crime of genocide in international law' (Belavusau, 2015: 543-45). Eric Heinze (2017) has proposed to replace the term memory law with 'laws affecting historical memory' to justify the broader scope of examination. He suggested to differentiate between non-regulatory memory laws (those laws that are purely declarative) and regulatory memory laws (those laws 'requir(ing) government action' either in a punitive or a non-punitive manner). Heinze further distinguished between *self-inculpatory* and *self-exculpatory* memory laws on the basis of the political motivations behind them (Heinze, 2019). The self-inculpatory approach focuses on official narratives created by the state with the aim of conducting a genuine reckoning of the past, which includes providing opportunities for open debates and assessing the state's own role in historical atrocities through historical expertise. In contrast, through the self-exculpatory approach, the state establishes official narratives that are often factually controversial. Other scholars categorize memory laws based on intentions, differentiating between prescriptive and proscriptive memory laws. Under this paradigm, similar to Heinze's version, prescriptive memory laws "reflect an anxiety to preserve national values", whereas

proscriptive memory laws "codify already existing societal taboos" (Soroka and Krawatzek, 2019).

During the 1980s and 1990s, and 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, addressing questions about the past and its "lessons" for a hopefully more emancipated and tolerant future. In contrast, since the 2000s, 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 Russian propaganda in particular. (Wójcik and Belavusau, 2019). The legal rehabilitation of Stalinism along with the white-washing of Soviet expansionism during that period was the central theme of this propaganda (2017b). 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, which increasingly contradicts 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 (Hahn, 2017). Thus, one of the major findings in recent literature is that despite the birth of the terminology and major modes of legal governance of history in Western Europe, the current epicenter of memory laws is situated in Central and Eastern Europe (Belavusau and Gliszczyńska-Grabias, 2020a). 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 (Heinze, 2018). In contrast, the recent – self-exculpatory – wave of CEE memory laws should be considered foremost in light of memory wars, whereby a number of countries in the region have advanced their ontological security by promulgating legislation that fortifies simplistic binary narratives (Mälksoo, 2015). 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 20th-century histories.

Furthermore, the subject of colonialism has been receiving more and more weight in socio-legal studies regarding legal governance of historical memory. In particular in the United States of America, the public debates have highlighted the role of race in the re-evaluation and legal governance of history: examples include the public outcry against Confederate symbols and monuments as well as calls for reassessing the historical past of the country with a particular emphasis on the still overlooked history and consequences of slavery in mainstream history education (Lixinski, 2019; Belavusau, 2022).

In Africa, Rwanda has offered the most vivid example of mimicking the Holocaust denial legislation through the politically controversial provision on genocide denial regarding the extermination of Tutsis in 1994 (Uwizeyimana, 2014). In contrast, countries of Latin America have developed relevant legislation and jurisprudence regarding the right to truth and the right to memory. In particular, the Inter-American Court of Human Rights has delivered substantive case law on historical memory on those aspects. The treatment of historical memory by Central and South American states highlights issues such as amnesty laws, the rights of missing and disappeared persons and the obligation of states regarding the legacy of mass violations of human rights (Campisi, 2014).

In East Asia, the socio-legal debates on memory have been largely focused on the military role of Japan during World War II in the region, whereas the official Japanese narrative has been heavily contested in South Korea, China and Taiwan. This has, in particular, resulted in regional memory wars, comparable to CEE, in which the recognition of the suffering of comfort women, who were abused by Japanese soldiers during World War II, is demanded (Zarakol, 2010). Thus, legal governance of historical memory and memory wars, along with other debates on memory laws, cannot be regarded exclusively as a European subject.

5. Conclusions

Recent literature on memory laws demonstrates that along with the rise of multiple forms of such laws (punitive and declarative, constitutional and administrative, legislative and judicial and so on), there has also been a sharp increase in their adoption worldwiede (Belavusau and Gliszczyńska-Grabias, 2020a). Furthermore, their mushrooming in a specific region of Europe, Central and Eastern Europe, has been intertwined with a marked decline of the rule of law. "Illiberal democracies" [21] 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 (Belavusau and Wójcik, 2018).

First, the rise of memory laws (especially in Europe) has signaled a broader shift towards a nationalist, and anti-European in the EU countries, discourse marked by the fortification of populist movements and a greater interference with academic freedom. Second, the recent memory politics in Europe and elsewhere have 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 (be it Nazis in Germany, communists in the CEE or colonizers in the USA). 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.

On the surface, these dystopian visions of the past embedded through legal governance of history are compatible with democracy and have even been seen as necessary 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, i.e. a system of governance bent on preventing future atrocities by curtailing certain fundamental freedoms and reminding future generations of the horrors of the past (Sajó and Holmes, 2004; Mälksoo, 2018). However, in portraying the past as exclusively dystopian, the risk of idealizing the present political regime increases. Likewise, there is a 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" (Koposov, 2017a; Belavusau, Gliszczyńska-Grabias and Mälksoo, 2021). Finally, memory laws constitute a clear normative threat to democracy itself, whereby historical memory is severely controlled and alternative readings of the past are censored (Mälksoo, 2021).

It is fair to predict that future scholarship in the field of law and society, along with broader discussions on the politics of memory focusing on the legal governance of historical memory, 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 and in the settings of

genocide denialism wider than the Holocaust), to a broader perspective regarding democracy and rule of law, as well as assessing legal regulation of memory against the yardsticks of international law of cultural heritage. The recent literature on memory laws also indicates tendencies to place these laws against rising nationalism and populism, critical race theory and by assessing their self-inculpatory and self-exculpatory elements into the broader paradigm of "responsible history" (De Baets, 2009b). It remains crucial to explore various defenses and critiques for the legal (non-)engagement with historical memory, from the right to truth to the protection against disinformation and mnemonic propaganda.

Endnotes

1 Some scholars have recently theorized even about the existence of a 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, De Baets A (2018) *Crimes against History*. Routledge.

2 Even in France itself, this competition between zealous remembrance and oblivion was present through much of the 19th and 20th centuries. For a most vivid episode of the post-Napoleonic restoration of monarchies and propagated politics of forgetting in France and the Netherlands, see *inter alia*, Lok MM (2014) "Un oubli total du passé"? The Political and Social Construction of Silence in Restoration Europe (1813-1830) *History & Memory* 26(2): 40-75.

3 Article 231 of the Treaty of Versailles. This provision sets up later articles in the Reparations part of the Treaty. Germany was required to conduct war crimes proceedings against the Kaiser and other leaders for waging an aggressive war, which largely resulted in acquittals and were widely perceived as a sham, even in Germany. See Henig RB (1995) *Versailles and After, 1919–1933*. London and New York: Routledge.

4 The notion of genocide was first introduced in the essay of Raphael Lemkin, 'The Crime of Barbarity', see J. T. Fussel, *Comprehensive Bibliography: Writings of Raphael Lemkin*, available at www.preventgenocide.org/lemkin/bibliography.htm; See also Filipa Vrdoljak A (2009) Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law. *European Journal of International Law* 20(4): 1163-1194.

5 *Volksverhetzung* constitutes a criminal offense under Section 130 of the Criminal Code (*Strafgesetzbuch*) in Germany. Similar provisions about incitement of group hatred have been enshrined in most of continental European criminal codes. In Germany, in can result in up to five years' imprisonment. For many years that criminal clause was interpreted as covering Holocaust denial, while in the 1990s special provisions on Holocaust denial as well as those justifying or glorifying the Nazi government were added. Similar self-standing (i.e. separate from "hate speech") provisions on Holocaust denial exist these days in various countries, from Israel to France.

6 View of the United Nations Human Rights Committee in Case *Faurisson v. France* (550/1993) 1996.

7 For statistics of legal and declarative recognition, see the web-resource: http://www.armenian-genocide.org/recognition_countries.html

8 Loi n. 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés, Journal officiel, 24 février 2005.

9 Ukrainian law no. 376-V of 28 November 2006, Vidomosti Verkhovnoi Rady Ukrajiny, 2006. No 50, 504.

10 *La Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura [Ley de Memoria Histórica],* 31 October 2007.

11 See EctHR case, *Janowiec* v. *Russia* (Appl. No. 55508/07 and 29520/09), Judgment (Grand Chamber) 21 October 2013.

12 Declaration of the European Parliament on the Proclamation of 23 August as European Day of Remembrance of Victims of Stalinism and Nazism.

13 International Criminal Tribunal for Rwanda, established in 1994.

14 International Criminal Tribunal for former Yugoslavia, established in 1993.

15 The Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Khmer Rouge Tribunal, is a tribunal established to try the most senior responsible members of the Khmer Rouge for crimes perpetrated during the Cambodian genocide.

16 The document states as follows: 'Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities.' This 'working definition' was adopted in 2005 by the EUMC, now called the European Union Agency for Fundamental Rights (FRA) and disseminated on its website and to its national monitors. Units of the Organization for Security and Co-operation in Europe (OSCE) concerned with combatting anti-Semitism also employ the definition.

17 E.g. European Parliament Resolution of 23 October 2008 on the Commemoration of the *Holodomor*, the Ukraine artificial Famine (1932-1933), *Official Journal of the European Union*, 21 January 2010, C 15 E/78; European Parliament Resolution of 2 April 2009 on European Conscience and Totalitarianism; Resolution on the Remembrance of the Holocaust, Anti-Semitism and Racism 2005; Resolution on a Political Solution of the Armenian Question, Doc A2-33/87.

18 According to the authors, constitutional preambles often "highlight[s] historical events, canonise[s] an interpretation of the past as the basis of the whole legal and political system".

19 The 2020 wave of "Black Lives Matter" in the USA and Europe, for example, has manifested in a controversial monument iconoclasm demanding the re-visitation of certain historical understandings in public space. See Zannier L (2020), OSCE High Commissioner on National Minorities, Open Letter on Symbols in Public Spaces. In OSCE. Available at: https://www.osce.org/hcnm/455041. For a critique of this iconoclastic demands in the context of legal governance of history and protection of cultural heritage, see Belavusau U (2022) On Ephemeral Memory Politics, Conservationist International Law and (In-)alienable Value of Art in Lixinski's 'Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice' (Cambridge 2021). *Jerusalem Review of Legal Studies* (forthcoming in 2022).

20 In Hungarian context, see, for example, 2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról. This law grants a fast-track access to citizenship to those with Hungarian ancestry, especially aimed at Hungarian minorities living in the Trianon territories. For a wider analysis of how citizenship laws often perform the function of quasi-memory laws, in particular in Hungary, France, Spain, Portugal and Ukraine, see the doctoral dissertation by Marina Bán, Historical Memory and the Rule of Law in France and Hungary (University of Amsterdam, 2020) [on file with author]. See also Joppke C (2019) The Instrumental Turn of Citizenship, in Journal of Ethnic and Migration Studies, p. 858-878. Likewise, in the Russian context, see Nescheim C, Duma Votes 302- 0 to Pass Russia's Historic Dual Citizenship Law in Record Time, Investment Migration Insider, 20 April 2020, available

at: https://www.imidaily.com/editors-picks/duma-votes-302-0-to-pass-russias-historic-dualcitizenship-law-in-record-time/. More widely, see also Eric Lohr, Russian Citizenship, Harvard University Press, 2012.

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

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