Memory Laws

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MEMORY LAWS

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This entry provides an ample and detailed analysis on the emerging phenomenon of memory laws. It outlines how these legal measures, the symbols of interaction between history and law, have developed in the last two centuries and how their scope have drastically expanded. It further reflects of the consequences of states' growing reliance on the legal governance of historical memory. First, by tying memory laws to their impact on different fundamental rights, then by demonstrating how the increasing breadth and potential misuse of these provisions appears in debates around constitutionalism, citizenship and the rule of law. Finally, the contribution highlights how this initially European phenomenon have captured increasing attention around the world and what its future may hold.

Keywords: memory laws, history, memory, law, constitutionalism, populism, democracy

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1. Introduction

The legal governance of historical memory has become one of the primal battlegrounds for competing historical ideologies and narratives. Although memory laws are extensive and expansive in scope, they all share one essential commonality: they are embroiled within the state's relationship with its past. The current terminology of memory laws originates from the French *lois*

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mémorielles (in literal translation, "memorial laws") and was devised by French historians who were protesting the increasing number of measures that forced them to consider the past through a specific lens. Under this label, memory laws were first publicly discussed in a December *Le Monde* magazine in 2005 (Garibian 2006: 158). While the terminology of memory laws is the result of the French developments of the early 2000s, the phenomenon itself—namely, regulating historical narratives, often with criminal punishment—had been present for over a decade before that. West Germany and Israel, in particular, have introduced prohibitions on the denial and minimization of the Holocaust in the mid to late 1980s. After the adoption of these initial legal provisions, the number of memory laws have grown exponentially. Most European states, as well as other countries outside the continent, have been inspired to introduce their own genocide denial prohibitions, not only concerning the Holocaust but also, for example, banning the denial of the crimes of communist regimes in Central and Eastern Europe, the Ukrainian Holodomor, and the genocide in Rwanda. Furthermore, a recent wave of memory laws (or legal bills in an attempt to convert them into memory laws), expanding well beyond genocide denialism have stirred up controversy in academia, in courts, and in the media as well. These include, for example, the debate around Hungary's Fundamental Law, adopted in 2011, and its outlining of a comprehensive, albeit contentious, historical narrative. In 2018, the Polish government's attempt to criminalize the "defamation of the Polish nation" has been interpreted as imposing a chilling effect on certain types of historical research regarding the Second World War. Finally, in the United States, the removal of Confederate monuments from public places, whether by law or by force, has generated passionate debates for several years.

Consequently, from the moment memory laws were identified as an academic and political subject, they have been wrapped in controversy and their mere existence sparked numerous contestations, especially among historians (Kahn 2014). They have been revealing the antagonistic relationship of these memory policies with independent historical research as well as the alleged aim of such laws to advance a politically motivated narrative. As the trend for adopting memory laws have transitioned into the twenty-first century, so did the debate around their potential subject and reach. This debate, in particular, covers topics such as a problematic standing of these laws vis-à-vis various human rights and the rule of law; their potential to stir up the "memory wars" among nations; the extent of the permissible state control over the past narratives as well as the reasoning behind political motivations to legislate on and influence official historical narratives all over the world.

2. Background

2.1 Historical Roots and Evolution

The societal urge to regulate remembrance via some degree of legal means or policies can be traced back thousands of years. In the ancient Roman Empire, the practice of *damnatio memoriae* was well established, serving to erase the different political figures from the memorization within society, if they were found guilty of different serious transgressions. Such had been the fate of several emperors, including, but not limited to, Caligula and Nero (Flower 1998: 156).

Despite the acknowledgment of ancient analogues in various socio-legal traditions, the modern forms of the legal governance of historical memory date back to the Treaty of Westphalia (1648). The Treaty captured the trope of oblivion pertinent to the emerging transnational law in the early modern period. As the Treaty obliged the forgetting of three decades of war on the continent, it manifested the imperative to forgive advancing the Christian idea of oblivion. Hence, the possibilities for collective public practices of remembrance and commemoration in the seventeenth century were essentially limited and focused on the duty to forget rather than on the duty to remember (Belavusau 2015: 538–9).

By the late eighteenth century, the French Revolution shed new light on the legal regulation of memory. In contrast to early modern Christian oblivion, French republicanism gave birth to civic rituals of remembrance prescribed through legal reforms (Bradford 2010: 43). Among those mnemonic novelties, the most visible were the introduction of a new calendar (*calendrier républicain français*) and museum reforms. Emblematic of revolutionary changes, the Louvre was opened in 1793, enabling free access to the former French royal art collection for all citizens. In fact, museums evolved from "cabinets of curiosity" into sites of glory and podiums of state achievements. This effectively transformed them into instruments of republican citizenship and social management, encouraging active political participation and offering a strong invitation to commemorate and remember the heroes and victims (Belavusau 2015: 539). These developments regarding historical memory became possible due to new forms of legal governance via legislative decrees of the post-revolutionary years. The invitation to remember was part of imagining a new community of national states that highlights heroism and willingness to sacrifice for the state. These collective virtues were later translated into the duties of the citizen under the republican citizenship paradigm (539).

In the footsteps of the French Revolution throughout the nineteenth century, history has been embraced by other states as the struggle of citizens for the glory of imagined civic communities. National history has played a strong didactic function in setting role models, prescribing mourning for victims and assigning a sense of guilt to all the rivals of a nation-state. In this regard, it is emblematic that the 1776 Declaration of Independence by the United States of America, for example, outright maintained that the "history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states" (Belavusau 2015: 540). Thus, prescription of collective memory via legal instruments has served as a means to legitimize the sociopolitical reality and to homogenize a group (Anderson 1983).

Another far-reaching and monumental shift in the intersection of law and history occurred in the twentieth century, consequential to the atrocities of the two world wars as the emphasis strengthened on the duty to remember in favor of continuous forgetting. First, this shift manifested in the proliferation of national secular states, creating a mnemonic narrative of law that pervaded constitutional ideals of citizenship far beyond the Western world. The emblematic examples include Turkey imposing its cult of Atatürk through law (Ince 2012), or the Japanese censorship of military history (Hein and Selden 2000), or the Portuguese extension of citizenship to the descendants of the Sephardic Jews as an acknowledgment of the latter's suffering and exclusion (Belavusau 2015: 540–1). Second, in 1919, the Versailles treaties introduced transnational law to a myth of foundational guilt, which set the foundations of the duty to remember. Its truly universal effect emerged in the aftermath of the Second World War, through the subsequent criminal proceedings against Nazi figures and collaborationists, including the international military tribunal in Nuremberg in the late 1940s, the Israeli trials of Adolf Eichmann in 1961, and Ivan Demjanjuk from 1986 to 1988, as well as the French trial of Klaus Barbie in 1987.

These trials presented the new crime entering the field of international law, the crime of genocide, subsequently advancing the subject of the first memory laws—genocide denialism (Bazyler 2010: 45–58, de Baets 2009: 20–43). Denial, minimization, and gross trivialization of the annihilation of six million Jews has been criminalized by numerous states, either as hate speech (incitement to hatred or *Volksverhetzung*) or as a self-standing crime of genocide denial (Douzinas 2012: 273–89). Furthermore, in the late twentieth century, a number of criminal proceedings concerning genocide denialism drew on the duty to remember, even if the number of genocide denial bans

have not increased worldwide until the 1990s—thus, using hate speech, instead of genocide denialism as a headline for criminal prosecution. These most famously include the proceedings against James Keegstra in 1984 and Ernst Zündel in Canada in 1985 as well as the lengthy libel case against the American historian Deborah Lipstadt, brought by a Holocaust denier David Irving (Della Morte 2014: 427–40). Finally, the most prominent case of genocide denialism in international law is the 1996 decision of the UN Human Rights Committee, upholding the conviction of the French scholar Robert Faurisson (Belavusau 2015: 542).

2.2 Definitions and Classifications

Although the concept of *lois mémorielles* has migrated from France throughout Europe under the heading of memory laws (e.g., German *Erinnerungsgesetze*), the two terms cannot be completely equated. At the time of their inception in France, several provisions were labeled as *lois mémorielles*. Firstly, inspired by the German legislation in particular, the so-called *Gayssot law* introduced a prohibition on the contestation of crimes against humanity (Fronza 2017: 78). It should be mentioned that analogous laws on Holocaust denial mushroomed in the 1980s and 1990s in Europe, spreading beyond Germany and France all across the continent by the end of the millennium. Moreover, during Germany's presidency of the Council of the European Union in 2008, the prohibition on genocide denialism was introduced to EU law by virtue of the Framework Decision on xenophobic speech (Belavusau 2015: 549).

The second and third French laws established as *lois mémorielles* are declaratory rather than criminal in nature. The so-called *Arménie law* dealt with the Armenian genocide. The *Taubira law* (adopted in 2001 as well), recognized slavery and the transatlantic slave trade as constituting a crime against humanity (Garibian 2006: 161). Finally, the French set of *lois mémorielles* concluded with the so-called *Rapatrié law*, a now defunct law that required schools to teach about the positive aspects of French colonialism (especially in North Africa) (Garibian 2006: 158).

While the use of the French term is mostly restricted to the four original *lois mémorielles* (albeit with the occasional inclusion of other provisions), its English analogue of memory laws is used to describe much broader categories in academic literature. This includes, *inter alia*, prohibitions of Holocaust denial, legal acts recognizing and commemorating historical events and figures, decommunization laws (for example, provisions regarding street renaming), laws establishing state holidays, celebrations, decrees on monuments, status of and access to historical archives, as well

as regulations regarding museums and school curricula on historical subjects. The German term *Erinnerungsgesetz* carries a similar expansive meaning for memory laws (Assmann 1995: 65). Meanwhile in Spain, memory law (*ley de la memoria histórica*) often refers to a single legislative provision, the Historical Memory Law, which deals with the legacy of the Spanish Civil War and the dictatorship of General Francisco Franco (Belavusau and Gliszczyńska- Grabias 2017: xi).

However, regardless of the substance, all provisions categorized under the heading of memory law(s) "sanction a legitimate relationship to the past by regulating certain remembrances outside the accepted boundaries of political bargaining" (Mälksoo 2015: 7). The pioneers of the term in France compared memory laws to "Pandora's box," as they establish an official version of the truth that is guarded by the state as unquestionable (Nora 2006). Despite growing attention, there is no consensus on the specific scope of memory laws and providing an exact definition for this term has proven to be particularly difficult. Instead, they have been qualified as "legal aberrations"—"formulated to proclaim authoritative versions of some invariably sensitive history" (Heinze 2017: 417). The formulation that encapsulates the broadest nature of memory laws defines the term as "enshrin(ing) state-approved interpretations of historical events" (Belavusau and Gliszczyńska-Grabias 2017: 1).

Regarding their scope, Emanuela Fronza characterized the punitive—non-punitive distinction through motivation of memory laws by the invitation to remember versus the aim to punish negationist behavior (Fronza 2011: 156–9). Sévane Garibian has further expanded the definition by singling out laws with a normative function versus laws with a declarative function (Garibian 2006: 161–2). She defines laws with normative functions as prescribing some type of obligation regarding the historical event they concern, whether it involves punishment, such as in the case of a genocide denial prohibition, or, for example, a reform in education. In contrast, laws with declarative function simply intend to recognize historical events with no further requirements from individuals.

In contrast, Nikolay Koposov equated declarative memory laws to "memory laws of the periphery," whereas "hard core memory laws," in his interpretation, consist of genocide denial bans (Koposov 2017: 6). Among the memory laws in the periphery, he set a wide scope of provisions whose common theme is akin to "giving an official assessment of historical events." The scope of these laws can entail recognition of an event, national holidays, remembrance days,

commemoration ceremonies, street renaming, erecting monuments, organization of archives, regulation of history teaching, legislation on veterans, amnesty laws, rehabilitation of victims, laws providing compensation to victims of mass atrocities, lustration laws and legislation on the prohibition of symbols, political parties, and ideologies. In addition, while most scholars regard the creation of the first memory laws as dating from the late 1980s to the early 1990s, Koposov reached back to the beginning of the twentieth century, to locate their origin. In particular, he positioned the 1915 Declaration of the Entente concerning the massacre of the Armenians by the Ottoman Empire as Europe's first memory law. He further differentiated between the "anti-racist" and "anti-fascist" memory laws adopted from the 1950s to the 1970s (Koposov 2017: 7).

Due to the gradually expanding interest in memory laws, it has been even suggested to broaden the academic field by advancing a new discipline on "law and memory," examining the specific issues memory laws present in the legal system (Heinze 2017: 432–3). Similarly to the diversity of academic definitions, the term "memory laws" in the public discourse possesses wildly different connotations. Journalists write about memory laws as tantamount to genocide denial bans, and nonacademic interest in memory laws in the media has only slowly begun to emerge due to the controversy around Poland's attempt to introduce the crime of "defamation of the Polish State and nation" in the context of the Second World War, in particular through a memory law of 2018 (Gliszczyńska-Grabias and Kozlowski 2017).

An initial distinction has been made between punitive and declarative memory laws on the basis of the four French *lois mémorielles*, centralizing the existence of criminal punishment in their differentiation. In addition, memory laws have been classified on a diachronic basis as well into four streams: (1) prohibitions of genocide denial, (2) laws concerning the "falls of twentieth 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: 543–5).

Recently, the punitive-declarative distinction has proven insufficient to describe the expanding list of memory laws because several provisions identified as memory laws do not fit into this category, as they achieve more than mere recognition but do not necessarily impose punishment. While others may seem declaratory on the surface, but ignite more serious controversies around the interpretation of historical events. For example, memory laws without a criminal core that postulate the innocence of a nation with regard to a historical atrocity and put the singular blame

on another nation. Even without a punitive measure involved, this type of legislation transcends the recognition effect and sets up ontological understandings for concerned societies. Eric Heinze has proposed to replace the term memory law with "laws affecting historical memory" to justify the broader scope of examination (Heinze 2017: 415). Under this category, he suggested to differentiate between nonregulatory memory laws (those laws that are purely declarative) and regulatory memory laws (laws "requir(ing) government action" either in a punitive or a non-punitive manner).

Heinze further distinguishes between self-inculpatory and self-exculpatory memory laws, on the basis of political motivations behind them (Heinze 2019). The self-inculpatory approach focuses on official narratives created by the state with the aim of conducting an honest reckoning of the past—which includes providing opportunities for open debates and assessing the state's own role in historical atrocities through historical expertise. Ideally, the self-inculpatory approach should avoid the politicization of historical narratives. In contrast, through the self-exculpatory approach, the state establishes official narratives that are often factually controversial. The extent of politicization of historical memory features prominently if the state embraces the self-exculpatory approach. On occasion, the official narratives are supported by the introduction of criminal sanctions against those who do not support it or possess diverging views from the state-approved version.

George Soroka and Felix Krawatczek also categorize memory laws based on the intentions and motivations of the state for the introduction of these measures. However, their distinction slightly differs from Heinze's. They differentiate between prescriptive and proscriptive memory laws. In their view, prescriptive memory laws "reflect an anxiety to preserve national values," whereas proscriptive memory laws "codify already existing societal taboos" (Soroka and Krawatczek 2019: 157–60). The Polish law of 2018 is cited as an example for the former, while prohibitions of Holocaust denial, for example, represent the latter group under such a distinction.

Antoon de Baets employed a classification of memory laws based on their impact on the work of historians, revealing limits on such work set by the public interest of the state or society, somewhat rejecting the categories based on political motivations. He positions memory laws under four headings: laws regulating the legacy of historical figures (whereas, in his categorization, memory laws can function as anti-defamation measures); laws regulating historical symbols—including flags, monuments, memorials, national anthems, street names—he regarded these memory laws as

"heritage laws"; measures regulating the legacy of historical figures through anniversaries and commemorations (in his categorization, these laws can also regulate public order); and historical events (e.g., genocide denial laws and some recognition laws). Despite his slightly different perspective on memory governance, de Baets also employed the punitive-declarative distinction in his categorization as he found memory laws with prohibitive nature (criminal sanctions) particularly problematic whereas memory laws with prescriptive, non-coercive nature are not as extensively criticized. De Baets's perspective is quite unique as it distinguished memory laws from genocide denial laws—in contrast to the majority of other scholars in this field. He claims that, while these two groups can overlap, they must be treated separately due to the distinctive link between genocide denialism and hate speech (De Baets 2018: 40).

In addition, quasi-memory laws are sometimes singled out in literature as a specific form, a collective of provisions, which, on the surface, do not contain historical references, but still affect dimensions pertaining to historical memory. Their closer examination, thus, reveals an impact of historical memory, especially in their drafting and implementation. While on the surface, quasi-memory laws proclaim no explicit bearing on historical memory—as they do not mention a historical event, a historical person, or anything history-related in their text—their application can prominently affect various aspects of human lives through exclusionary or inclusionary devices. To give an example, such quasi-memory laws cover regulations relating to citizenship (granting of citizenship to the historically prosecuted groups), public administration (for example, symbolic naming of public places), the judicial system (such as the Hungarian transformation of the judiciary on the basis of history), and minority protection (defining minorities on a historical basis, excluding certain groups) (Bán 2020: 52).

The most prominent of such quasi-memory laws are citizenship-related legal measures. These laws can be inspired by "correcting" historical wrongs, such as Portugal's and Spain's practice on granting citizenship to the descendants of expelled Sephardi Jews (Aragones 2018: 200–19) and Hungary's law on dual citizenship, developed specifically for the descendants of ethnic Hungarians who lived in territories belonging to Hungary before 1920 (Bán 2020; Belavusau 2020: 20).

Lastly, the numerous accounts in recent literature regarding the legal governance of historical memory provide the opportunity to summarize the many different types of mnemonic provisions under the monikers of *militant memocracy (or mnemocracy) and mnemonic constitutionalism*,

whose rise is particularly relevant in Central and Eastern Europe. In this regard, the heading of mnemonic constitutionalism refers to the increasing presence of historical narratives in national or regional/international constitutional or quasi-constitutional laws (Belavusau 2020). Likewise, the heading of militant memocracy describes a system in which the state "mobili(zes) power behind its sanctioned past narrative with an inclination to criminalise accounts of the past challenging a state's preferred self-identity" (Mälksoo 2021: 3).

The elements of mnemocracy and broader mnemonic constitutionalism have been further classified into five clusters: (1) constitutional provisions prescribing certain understandings of the past and distributing guilt for past atrocities; (2) punitive measures of memory governance; (3) non-punitive measures of memory governance; (4) quasi-memory laws; and (5) judgments of national tribunals relating to the (legitimate) remembrance of the past (Belavusau 2020: 20; Mälksoo 2021: 16–18; Belavusau, Gliszczyńska-Grabias, and Mälksoo 2021: 98–9).

All five groups have been applied to secure a politically preferable version of the past and prescription of an ontological foundation of respective Central and Eastern European societies. Such foundation mirrors an idealised constitutional understanding of a transitional nation seeking to postulate its self-exculpation from the atrocities committed by the dystopian regimes of the twentieth 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 (Belavusau and Gliszczyńska-Grabias 2020a: 6–12).

3. Importance

3.1 Memory Laws and Human Rights

Both in political and academic circles, problems with memory laws were first characterized in terms of human rights. On the political level, the first European memory laws were represented by genocide denial bans, appearing in Germany and Israel in the 1980s, and in France in the 1990s. Such provisions were created with the intention to prosecute those attempting to deny or minimize the Holocaust. The European Union endorsed this notion of prohibiting genocide denialism in the late 1990s to 2000s, and the new member states joining the EU in the early 2000s have mimicked such German and French provisions into their own legal system (Belavusau 2015). In addition, the new members from Central and Eastern Europe further broadened the EU's rhetoric from protecting the victims of the Holocaust to a more general anti-totalitarian rhetoric to cover the

memory of the communist regimes within the pan-European supranational system of memory laws and narrative of human rights (Fronza 2006: 613–20).

In fact, the European institutions have played two different roles with respect to the creation of memory laws. On the one hand, they engage in memory self-governance by way of adopting their own memory laws and policies, via which they can project their own history understandings and can support their specific agenda in the creation of European historical memory. Both the Council of Europe and the EU espouse the view on European institutions as the defenders of human rights, the rule of law, and democracy on the continent, inspired by the narrative of learning from the atrocities of the Second World War. These expressions usually materialize in soft law measures and concentrate on areas that may be transnational, in need of unification or can aid in the institutions' own historical narrative. For example, the opening Parlamentarium in Brussels demonstrates the EU's intention to explain the evolution of its own institutions and support the necessity of its existence to ensure long-lasting peace on the continent (Della Sala 2016: 532).

On the other hand, the European institutions set examples by establishing standards for the production of memory laws intended for member state practice, encouraging the adoption of their viewpoints on the national level. This impetus can take form of both punitive and non-punitive measures, and can even be enforced, especially through the European Court of Human Rights. Both the Council of Europe and the EU introduced various punitive and soft law measures to influence the practices of the member states—ranging from those on genocide denial to history education.

Within the institutions of the EU, attention has been paid to the construction of a narrative that presents the EU as a product of a gradual progress from 1945 to 1990, connecting the economic cooperation-related development of the late 1940s and 1950s to the turn of the EU toward the triad of democracy, human rights, and the rule of law beginning in the 1990s (Leggewie 2009). The institutions of the EU (in particular, the Council, the Commission, and the Parliament) further strive for the establishment of common European memories and common European historical narratives, determining certain historical events, such as the Holocaust and the fall of the communist regimes, to carry utmost importance throughout the Union (Sierp and Wüstenberg 2015: 323).

The EU's institutions have established a memory framework by the 2010s. This memory framework consists of a "collection of policies resolutions and decisions […] that reflect and guide its moral and political attitude towards the past" (Milošević and Touquet 2018: 382). The memory framework incorporates the idea of European integration founded on the common heritage of democratic values of the member states. On the one hand, this framework streamlined an institutional historical narrative, a progressive timeline around the evolution of the European institutions from the Coal and Steel Community through the European Economic Committee to the European Union (Milošević and Touquet 2018: 382).

On the other hand, the EU's memory framework incorporated the forging of a common European memory—a collective of historical narrative repossessed from the national histories of the Member States (such as the French Revolution) and the transnational events on the continent (such as the Holocaust). In the progression of European memory, through their soft law institutions not only constructed the EU's own history and values, but repossesses particular aspects from the member states' history by claiming that certain events, such as the French Revolution, the First World War, the Second World War, and the Cold War transcend national boundaries, supporting the legitimacy of the EU's existence on the continent. This historical narrative, built on common foundations and values, encourages an outlook on a common European memory. The integration narrative warns against the reoccurrence of was on the continent, and identifies the only tool through which such war can be avoided—the initial economic phase of European integration must evolve into the inevitable political integration and finally, to a cultural Europeanization (Kreanzle and Mayr 2017: 2).

The judicial assessment of memory laws focused, in particular, on issues such as the necessity and impact of genocide denial bans and, subsequently, on the conflict between these punitive memory provisions with the right to freedom of expression. The human rights concerns have brought the legal governance of historical memory under scrutiny on the supranational level, both in the European Court of Human Rights and in EU law, as well as in the domestic contexts of several European states. As far as EU law is concerned, particular attention has been attributed to the 2008 Council Framework Decision on Racism and Xenophobia, which requires member states to introduce sweeping genocide denial bans, adding to the extensive number of resolutions by the European Parliament on historical issues, especially on the topic of the continent's totalitarian past (Milošević 2017: 5). The Court of Justice of the European Union does not have extensive case law on history-related topics. Therefore, the direction of EU policy regarding the legal governance of

historical memory has been mostly shaped by the European Parliament and the European Commission (Mälksoo 2018: 539–41).

In contrast, the European Court of Human Rights (ECtHR) has produced a rather elaborated jurisprudence regarding various aspects of legal governance of historical memory. The debates in the ECtHR, in particular, concerned the treatment of historical events by the court, and the alleged double standard present between the court's views on the Holocaust versus other atrocities (Belavusau 2015: 546–8; Kamiński 2010: 9). The ECtHR has amassed extensive case law on the limits of restricting the right to freedom of expression regarding historical events, from three different perspectives based on its foundational legal instrument, the European Convention of Human Rights (ECHR). The first stream among these judgments covers the case law of the ECtHR on the historical truth, its protection under Article 10 of the ECHR (under the right to freedom of expression) and the limits of historical research. This block of cases features, in particular, *Lehideux and Isorni v. France* (1998), *Chauvy and others v. France* (2004), and *Monnat v. Switzerland* (2006), whereas the ECtHR had to determine to which degree historical truth is protected by the right to freedom of expression and determines the limits of historical research (Lobba 2015).

Secondly, the ECtHR has evaluated actual memory laws, such as prohibitions on the denial of the Holocaust as well as on the public display of communist symbols, in terms of their adherence to the fundamental rights protected by the ECHR. The second group of cases deal with the court's balancing of the right to freedom of expression and freedom of assembly with other rights, such as private life and the rights of others. These cases articulate the ECtHR's treatment of genocide denialism, the public display of totalitarian symbols, and the reputation of ancestors who had participated or had been the victim of historical atrocities. The court has produced extensive case law, in particular, on Holocaust denialism, employing a balancing exercise between the applicants' (who deny or trivialize this event) right to freedom of expression and Article 17 of the ECHR (the abuse of rights) (Kamiński 2010).

The ECtHR's current consensus safeguards the protection of the margin of appreciation for member states of the Council of Europe that see Holocaust as the historical atrocity that cannot be questioned, denied, or trivialized (Belavusau 2014). 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). Contrary to other human rights tribunals, such as the Inter-American Court of Human Rights (since cases such as *Velásquez Rodríguez v. Honduras*) and the Human Rights Committee of the United Nations (which proclaimed the right to truth an as an inalienable human right). In fact, the Inter-American Court has developed the right to truth and the right to memory, in relation to transitional justice. It has collected numerous cases on the creation and definition of the right to the truth, connecting it to the memory of victims of mass atrocities and enforced disappearances (Gliszczyńska-Grabias and Baranowska 2018). In the meantime, the European Court has not yet delved very deeply into such concepts.

The final type of cases pertain to the court's assessment of local historical events and national values. On these occasions, the ECtHR has been presented with the opportunity to define its own limits for interfering in national debates and designate its reliance on the opinions of national authorities. A number of such judgments related to the legacy and reputation of national historical figures, for example, in the cases of *Chauvy and others* (2004), *Monnat* (2006) as well as *Kenedi v Hungary* (2009) and *Fáber v Hungary* (2011).

3.2 State Approaches and Political Motivations

One of the most important current questions regarding memory laws relates to the different, frequently—if not always—politically motivated approaches states employ when drafting memory laws. Scholars have introduced a distinction based on the different state motivations and justifications, including Eric Heinze, whose conception of self-inculpatory and self-exculpatory memory laws have been mentioned previously.

Maria Mälksoo, built her analysis on a specific model to describe the behavior of states (Mälksoo 2019: 3). First, in the area of transitional justice, she distinguished between reflective and mnemonical security-oriented approaches toward the past. The reflective approach to transitional justice results in extensive cooperation and self-reflexivity in foreign policy—this way, historical conflict is not considered crucial in international relations. Whereas the mnemonical security-oriented approach culminates in confrontational, self-assertive foreign policy-related behavior, where decisions are influenced by perceived historical rights and wrongs. Mälksoo pointed out, that mnemonic security-related approach particularly produced a "militarization by means of punitive memory laws." Thus, her interpretation of the mnemonical security-related approach is

ultimately very similar to Heinze's characterization of self-exculpation by states. Both these distinctions, especially the identification of the self-exculpatory and the mnemonic security approaches, can be associated with the rule of law deterioration in various states.

The self-inculpatory (reflective) and self-exculpatory (mnemonical security-oriented) approaches have been conceived with opposing evaluations. The self-inculpatory approach has been praised for its positive outcome of admitting responsibility for historical atrocities whereas the self-exculpatory approach has been largely criticized in academic circles. The latter approach was accused of becoming a tool for an increasing governmental influence over the legal governance of historical memory that target those who oppose the official historical narratives. However, the idea that the self-inculpatory approach is exclusively positive and self-exculpatory approach is always negative, cannot withstand scrutiny because usage of either a self-inculpatory or a self-exculpatory approach can end with quite similar results.

Mälksoo has further expanded her theory, pointing out how states seek to strengthen, change, or establish their position on the scene of global memory politics. She differentiated between behaviors of *memory positionalism*, *mnemonical revisionism*, and *mnemonical self-emancipation*. She argues that several states, especially from the Central and Eastern European (CEE) region engage in such activities to gain and/or defend their position in the power politics of Europe in particular. For these CEE states, the legal governance of historical memory has become a tool to change the European memory status quo in their favor, for example, by either lobbying for the broader recognition of their historical experience or seeking to cement narratives favorable to them. Such efforts of *militant memocracy* are almost exclusively politically motivated, as the established historical narratives tend to be based on factually inaccurate conclusions and those who critically engage with them have been often prosecuted through the use of memory laws (Mälksoo 2021: 9–16).

For this reason, both the self-inculpatory and self-exculpatory approaches, and states' strengthening of militant mnemocracy can lead to aggravating consequences. While the self-inculpatory approach entails the intention of a reckoning with the past, its outcomes can vary. In some instances, the measures motivated by the self-inculpatory approach can either go too far or not far enough. The most prevalent examples of the self-inculpatory approach include the laws about solidarity recognition and genocide denial bans that target those questioning the existence or aspects of historical atrocities.

The self-exculpatory approach entails the creation of historical narratives that focus on a presumably glorious past, often to the detriment of factual accuracy. The use of the self-exculpatory approach can result in the punishment of those contradicting the official narrative. Such outcomes can be reached through different means, such as criminal provisions, lack of funding for independent historical research, or institutional takeovers of research institutes, schools, universities and museums. Memory laws with a self-exculpatory nature can frequently and arbitrarily change depending on political aims. While this practice has recently appeared extensively in Central and Eastern Europe, Western states have attempted to use this approach as well. For example, the controversial memory law placing French colonialism in a positive light is one such instance, which attempted to forward the state-approved narrative through the compulsory education system (the so-called *Rapatrié law*).

Self-exculpatory memory laws exert more control over narratives and contain stronger integration-based language premised on national sentiment. As governmental control over the legal governance of historical memory increases, so does the risk of state capture. Consequently, its effect on the rule of law will expand and the legal governance of historical memory will more likely contribute to the deterioration of the rule of law. The language and rhetoric of populist and nationalist governments also increases the number of self-exculpatory, controlling memory laws. Finally, the use of historical memory as both a shield and a sword in international relations and the assertion of prestige on the international political scene against neighboring states or supranational institutions continues to materialize in Central-Eastern Europe, resulting in a number of memory wars and mnemonic securitization (Belavusau, Gliszczyńska-Grabias, and Mälksoo 2021; Koposov 2017).

The most profound difference between the self-inculpatory and self-exculpatory approaches pertains to their aim. Self-inculpation arises from public debates that reinforce and recognize thoroughly researched historical events. Consequently, even if the self-inculpatory approach is overused, it is usually invoked to protect minorities and facilitate a public reckoning of traumatic historical experiences. In contrast, the self-exculpatory approach involves the construction of an official historical narrative of the state. Within the approach of self-exculpation, governments often refer to the nation instead of the state, introducing measures to include and exclude groups from the national community on the basis of historical traditions and the myths of national identity. Accordingly, the self-exculpatory approach sustains an image of a nation, projecting how the

state's history is to be perceived by the public and what it entails to belong to its imagined community (Bán 2020: 217–18).

Finally, even though such examination of memory laws are on the rise, particularly in the context of Central and Eastern Europe, it has to be mentioned, however, that these categorizations based on political motivations are not universally embraced (for an alternative examination, see De Baets 2018).

3.3 Mnemonic Constitutionalism and Citizenship

While memory laws—as a specific phenomenon in criminal law—emerged in the Western European context almost three decades ago, the recent wave of memory laws in Central and Eastern Europe transcend criminal legislation and have acquired a constitutional significance. Such developments have been theorized under the heading of *mnemonic constitutionalism*, and bring memory laws into debates around the rule of law crisis in the EU (Belavusau 2020; Belavusau and Gliszczyńska-Grabias 2021). Without consciously or explicitly identifying this area of lawmaking, and without necessarily changing the constitutional text itself, the new populist regimes in Central and Eastern Europe clearly perceive their invisible mnemonic constitution as a "certain ontological foundation for their 'illiberal democracies' and as a basis for an entire governance of historical memory" (Belavusau 2020: 18). Although the idea of mnemonic constitutionalism has emerged from the Central and Eastern European context, particularly inspired by the Hungarian Fundamental Law, various other post-2010 constitutional documents outside Europe highlight similar tendencies. In the aftermath of the Arab Spring, the new constitutions of Egypt and Tunisia similarly engage in the creation of an expansive national historical narrative (Scott 2021). Although the specifics are much different from the Hungarian Fundamental Law, the history-ridden nature of their respective constitutional preambles is quite similar.

Within mnemonic constitutionalism, the historical past "becomes the foundation of a collective identity prescribed by the national constitution itself. Legal provisions which traditionally shape the substructure of national constitutional law, such as citizenship laws or other statutes, become tools to create collective identities by imposing specific understandings of the historical past" (Belavusau and Gliszczyńska-Grabias 2021: 1235). Various forms of mnemonic constitutionalism have existed before the current decade, characterized by the deterioration of the rule of law. It certainly has not been uncommon for constitutional preambles, for example, to mention milestones

throughout the state's history, especially in the context of postcolonial or transitional democracies, to distance themselves from their dependent or totalitarian pasts. These initial references in constitutional preambles serve to "highlight historical events, canonize an interpretation of the past as the basis of the whole legal and political system" (Nyyssönen and Metsälä 2019: 323).

In contrast, the populist politics of memory that articulates itself in mnemonic constitutionalism reaches far beyond short historical references. It transcends regular constitutional practices and can be defined as a "constitutionalism (that) encompasses, yet transcends pure measures against genocide denialism and declarative memory laws" (Belavusau 2018). It theorizes the thorough incorporation of history into the constitutional project. The threat of mnemonic constitutionalism manifests itself in the political overuse of history. It necessitates selecting an official historical narrative of the state, which if chosen for political reasons, results in far-reaching consequences. As the foundation of the legal system, a "mnemonic" constitution provides a basis for an entire regime of memory laws. Their codified narratives subsequently serve as the justification for nonlegal developments as well (such as policy decisions and rhetoric).

The memory laws of the 1990s in France, Germany, and elsewhere in Western Europe, in hindsight, can be both embraced and criticized. Their justification, especially with regard to the criminalization of Holocaust denial, was strongly embedded into the concept of militant democracy, that is, an ethical political outlook that a liberal democracy should be capable of defending itself even to the detriment of freedom of speech, assembly and other fundamental rights (Belavusau, 2014: 27–61; Sajó 2004: 27). It was, thus, a dignity-based concept that guided legislators in that era, leading to the adoption of self-inculpatory memory laws (Heinze 2018: 1). Central to this concept is the dignity of Holocaust victims. The recent wave of mnemonic constitutionalism in Central and Eastern Europe, to the contrary, fortifies a victimhood of national states and majority nations. Such—in contrast, self-exculpatory—memory laws serve as both a shield and sword in the context of memory wars unfolding in the region.

Despite the development occurring in Central and Eastern Europe, certain liberal democratic regimes (including those beyond Europe) without a formal constitution can also 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: 564–602). Furthermore, the way citizenship—a central subject of

constitutional texts—is distributed in many states is dependent on historical lineage (Jessurun d'Oliveira 2015: 13–29). From the way history is taught in schools to the way national holidays, street names, and monuments are imposed, this mnemonic constitutionalism surrounds citizens and shapes national identities through various legal measures, only a tiny fraction of which are actually criminal prohibitions (Belavusau and Gliszczyńska-Grabias 2020b). The majority of such regulations amount to the soft governance of memory. Yet the threat of mnemonic constitutionalism, and the threat of mnemocracy, manifests itself in the outright populist abuse of the historical narrative to justify a new regime that is hostile to several rule of law standards, including equality and judicial independence (Mälksoo 2021). Hungary and Russia stand as the most prevalent examples, even though the manifestations of this mnemonic constitutionalism and the subsequent populism around this legal governance of historical memory somewhat differ in the two countries (Belavusau 2021).

Both Hungary and Russia have introduced new constitutional projects with a strong focus on historical memory in the last decade. While the Hungarian case can be attributed to the introduction of the new Fundamental 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 explicitly populist *commemorative lawmaking* (Bucholc 2018: 85–110; Belavusau 2021: 16). 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 2012). Mnemonic constitutionalism in this regard places the authority and legitimacy of a state into the boundaries of a certain historical paradigm, as current and future attitudes and behaviors of state actors derive from and are limited by moral lessons of the past.

3.4 Memory Laws and the Rule of Law

The rule of law has only been sporadically examined within scholarly debate on memory laws. Several memory laws reference the rule of law as an abstract ideal, a desirable benchmark in a healthy democratic society. In the aftermath of the democratic transitions of Central and Eastern Europe, Martin Krygier assessed how the legacy of communist regimes may affect state efforts to transform to a rule of law-based legal system (Krygier 1990: 640). Krygier found that Central and Eastern European states manifested an institutional optimism as well as a cultural pessimism toward the rule of law. These states fight to create a constitutional system through institutional reform to strengthen the rule of law, while simultaneously exhibiting a cultural aversion—based

on the belief that human rights and the rule of law are inventions of the West, and thus are ultimately unattainable (Krygier 1996: 26).

Spurred on by the rule of law crisis of the 2010s, the analysis of memory wars, mnemonic constitutionalism and securitization gradually started to turn toward the rule of law. By examining rule of law backsliding in Hungary and Poland, scholars pointed to specific memory laws as indicators or elements of this backsliding. Notably, the Polish treatment of the past has been connected to the degrading treatment of the Belarusian and Ukrainian minorities (Belavusau 2017). Such studies have identified how various Polish memory laws adversely affect national minorities and therefore indicate a democratic decline. They further claim that the growing incidence of memory laws correlates with the deterioration of the rule of law in Central and Eastern Europe. In particular, Marta Bucholc, examining the deterioration of democracy in Poland, has advanced an explanation of how commemorative lawmaking presents a potential threat to the rule of law (Bucholc 2018: 105).

In addition, the rise of mnemonic constitutionalism and memory wars in Central and Eastern Europe to the detriment of the rule of law is equally exemplified by how Vladimir Putin has justified his 2020 constitutional project via a plea toward historical memory and the historical truth. In June 2020, Putin stressed that voting for amendments to the Russian Constitution was tantamount to "preserving the memory of their ancestors and expressing respect for the defenders of the Fatherland" (Nuzov 2020). Somewhat similar to Hungary and Poland, the recent wave of Russian mnemonic constitutionalism disguised broader amendments that contravene rule of law standards, for example, the nullification of presidential terms and the expansion of presidential powers (the right to initiate the dismissal of judges of the Constitutional Court). However, this Russian example of mnemonic constitutionalism has broader implications for the entire area of memory governance in Central and Eastern Europe and will undoubtedly deepen existing divisions and disputes. As demonstrated by Nikolay Koposov, countries such as Czechia, Hungary, Latvia, Lithuania, and Poland criminalized communist crimes as a reaction to the Russian developments, and also as a result of memory wars with Moscow (Koposov 2020: 107). The 2020 amendments to the Russian Constitution mimic the 2011 constitutional amendments implemented by the Hungarian government, which relate to the historical continuity of a "thousand-year" statehood and references the Christianity, reminiscent of the Hungarian constitutional avowal (Könczöl 2017: 246–2).

In recent years, mnemonic constitutionalism particularly has been used, on the one hand, as a sword of democratic backsliding and, on the other, as a shield in the emerging memory wars in Central and Eastern Europe (Belavusau et al. 2021: 2). It is indisputable that the entanglement of memory and history in authoritarian-leaning countries is an attractive tool not only for controlling social moods but also for influencing the entire legal and political space (Belavusau 2018: 39). The trend of mixing memory, history, and politics can also be understood as another step toward the dismantling of European integration, evident in the Hungarian and Polish examples. This overt disregard and violation of European laws is accompanied by a departure from efforts to consolidate the European *demos* (Weiler 1995: 219–58). This EU *demos* builds its community values on various historical memories but it nevertheless seeks to overcome differences, animosities and wounds from the past. Memory laws encompass legal, political, historical, sociological, linguistic, economic, and even artistic aspects, which merit comparative study. The continuous exploration of mnemonic constitutionalism and its nexus to the rule of law and democratic standards, embracing and transcending memory laws, leaves plenty to consider for further research and critical exploration.

The emerging relationship between the legal governance of historical memory and the rule of law exposes the conflict between, on the one hand, the traditional, somewhat nationalistic values of identity and community building and, on the other hand, the modern obligations of adhering to democratic values, including the rule of law. In fact, satisfactory fulfilment of the rule of law by states requires less involvement in the legal governance of historical memory with a self-inculpatory, critical perspective because upholding and codifying national and historical values often works to the detriment of this essential democratic benchmark.

4. Future

Although memory laws may seem as if they emerged out of thin air in the 1980s and 1990s, in Germany, Israel, and France, they are not exclusively a modern phenomenon. Most, if not all, states practice a certain degree of memory governance, particularly regarding teaching history or commemorative practices, for instance, and states have been active for decades, if not centuries, in shaping remembrance in the eyes of their populace.

It further must be mentioned that while the terminology and initial debates around memory laws originated from Europe, events of the last few years all over the world have made it clear that the

assessment and reconsideration of official and established historical narratives, in particular, regarding the subject of colonialism is an upcoming reckoning the world at large will have to face. Therefore, memory laws have recently garnered more attention worldwide, even in countries that previously resisted an active legal governance of historical memory. In the United States the public debates have delved into the role of race in the re-evaluation and legal governance of history: examples include the public outcry against Confederate symbols and monuments and calls for reassessing the historical past of the country, with particular care toward the—as yet—overlooked history and consequences of slavery in mainstream history education (Lixinski 2018: 2–5).

Countries in Latin America have not enacted prohibitions on genocide denialism, but have instead incorporated the aspects regarding historical memory into their approach toward transitional justice via the right to truth and the right to memory (Campisi 2014: 63). The Inter-American Court of Human Rights has particularly generated significant case law on historical memory in this respect. The treatment of historical memory by Central and South American states brings up 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: 63).

The debate around the legal governance of historical memory, although somewhat different from its European analogue, has been equally heated in a number of Asian countries. Although traditional memory laws have not been introduced in Japan, for example, in the area of history education, significant criticism has been pointed to the state, at the efforts and attempt to whitewash the Japanese atrocities of the Second World War. In contrast, the responsibility-shirking official Japanese narrative is heavily contested in South Korea, resulting in a memory war between the two states regarding reparations and recognizing the suffering of comfort women, abused by Japanese soldiers during the Second World War. Regulation of historical memory has thus become an emerging topic of debate in the states of East Asia, in particular (Zarakol 2010: 5–6).

In Africa, Rwanda provides the most pertinent example. The legacy of the Rwandan genocide and its regulation remained a sensitive issue. While on the international level, remembrance of the Rwandan genocide has gained some recognition, inside the country these events have often been shrouded by controversy (Longman 2017: 37–42). Although the country has introduced a traditional ban on the genocide denial, this provision has been criticized as a tool in political

censorship and in the prosecution of the opposition instead of an instrument of a genuine reckoning with the past (Uwizeyimana 2014: 2372).

In recent European academia, scholars have further considered the difference between memory laws in Western Europe versus Central and Eastern Europe, specifically focusing on the frequent occurrence of memory wars and mnemonic securitization in the latter region (Belavusau, Gliszczyńska-Grabias, and Mälksoo 2021; Koposov 2017: 50). Memory wars and militant memocracy can be traced through the adoption of new memory laws in the context of bilateral conflicts as memory wars describes opposing views on the legacy of the same event between two states whereas mnemonic securitization entails the defense of a particular national narrative on the international scene (Mälksoo 2021: 2). The prolific emergence of memory laws and mnemonic securitization has led scholars to identify and coin the even more expansive idea of "mnemonic constitutionalism" in Central and Eastern Europe, theorizing that the legal governance of historical memory has been elevated to the constitutional level (Belavusau 2018).

Thus, future directions on the academic and political debate around memory laws may take several forms. On the one hand, it is clear that the focus on the impact and consequences of introducing these laws have shifted. Debates are no longer only concerned with the influence of memory laws on civil and political rights, such as the right to freedom of expression. Instead, the legal provisions are evaluated, for example, through the lens of economic and social rights as well. In addition, the most recent developments from Central and Eastern Europe have prompted scholars to examine memory laws in relation to the rule of law, to consider the role of these laws and policies in debates around constitutionalism and examine their effects on other concepts, such as citizenship and democracy.

On the other hand, the intense debate around historical narratives regarding race, ethnicity, and immigration highlight the worldwide attention to evaluation of the remaining colonial structures in the global memory regime. This way, in states where traditional memory laws, such as genocide denial prohibitions, do not exist, scholars, politicians as well as civil movements still equally engage with the reexamination of the past. This happens in two areas in particular: the reevaluation of public displays of historical narratives, such as symbols or monuments, and the systemic reconsideration of history education, to shed light more thoroughly on non-mainstream narratives, mostly involving experiences of different minority groups.

5. Conclusion

In the twenty-first century, the fields of law and society as well as comparative constitutional and criminal law have been marked by an unprecedented blossoming of literature addressing controversial memory laws in Europe. These developments have revealed the nationalistic ways of shaping historical narratives and have vividly articulated the role of the legal profession in the politics of memory. This literature deserves a special analysis that draws out the trends and prospects of this field for several reasons (Belavusau and Gliszczyńska-Grabias 2020b). First, the rise of memory laws in Europe has signaled a broader shift toward a nationalist, anti-European discourse, marked by the fortification of populist movements and greater interference with academic freedoms. Second, the recent memory politics in Europe and elsewhere in the world 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. Third, legal agents (legislators, prosecutors, judges, different institutes of memory, human rights lawyers, and so on) have certified these narratives as legitimate and obligatory for social reproduction.

The legal governance of historical memory has further become a tool of rule of law deterioration in Central and Eastern Europe. Its traditional Western European focus on the duty to remember has often been put aside in favor of selective remembrance or intentional forgetting. Furthermore, the rise of memory laws in constitutional discourse gives the opportunity to oppose and reject democratic values. The over-instrumentalization of memory laws and ostensibly legal measures, especially with a self-exculpatory approach, leads to a "legal mis-governance of memory" and its eventual capture of historical memory can easily become the empowering tool of a xenophobic majority. The legal mis-governance of memory occurs when the rule of law is adversely affected, thus threatening democratic participation, access to justice, and resulting in the intrusion of judges in political debates and the lack of proper balancing between fundamental rights.

Outside Europe, however, historical debate continues to be relevant in different legal directions. Firstly, the self-inculpatory mandate of the right to memory in Latin America is on the rise. Secondly, the year 2020 particularly brought a reckoning with the past of old empires founded on slavery and colonialism. Although legal measures occur less frequently in these countries, civil movements, such as Black Lives Matter, demand the reevaluation of historical narratives in countries such as Australia, Canada, and the United States (as well as some European states, such

as the United Kingdom, France, the Netherlands, and Germany). While Central and Eastern Europe falls deeper into the self-exculpatory narratives shaped by nationalist populist governments, elsewhere activists suggest dealing with the colonial past in a self-inculpatory manner challenging what they address as "white," "male-dominated" narratives of national and international histories.

Further Reading and Online Resources

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