The legal governance of historical memory and the rule of law

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Citation for published version (APA):
The Legal Governance of Historical Memory and the Rule of Law

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde commissie,
in het openbaar te verdedigen in de Agnietenkapel
op woensdag 21 oktober 2020, te 13.00 uur
door Marina Bán
geboren te Budapest
Promotiecommissie

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Faculteit der Rechtsgeleerdheid
# Table of Contents

Abbreviations .................................................................................................................. viii

Chapter 1 .......................................................................................................................... 9

General Introduction: States’ Treatment of Their Past and its Effect on the Rule of Law ...... 9

1.1 The Rise of the Legal Governance of Historical Memory ............................................. 10

1.2 The Crisis of the Rule of Law in Europe ....................................................................... 14

1.3 Missing Connection between the Legal Governance of Historical Memory and the Rule of Law ..................................................................................................................... 18

1.4 Research Question: The Effect of the Legal Governance of Historical Memory on the Rule of Law .............................................................................................................. 23

1.5 Claim: Nature and Extent of the Legal Governance of Historical Memory’s Effect on the Rule of Law .............................................................................................................. 24

1.6 Legal Governance of Historical Memory in the European Context ............................. 26

1.6.1. The Council of Europe and Its Influence through ECtHR Judgments ....................... 27

1.6.2 The European Union and its Memory Framework ....................................................... 33

1.7 National Case Studies .................................................................................................. 43

1.8 Thesis Structure .......................................................................................................... 45

Chapter 2 .......................................................................................................................... 46

Scope of Research: From Memory Laws to Legal Governance of Historical Memory ....... 46

2.1 The Origins of Memory Laws ....................................................................................... 47

2.2 Taxonomy of Memory Governance Sources .................................................................. 51

2.3 State Approaches to Memory Governance .................................................................... 53

2.3.1 The Self-Inculpatory Approach to Memory Governance ........................................ 54

2.3.1.1 Prohibiting Genocide Denialism: Germany .......................................................... 54

2.3.1.2 Transitional Justice: Spain .................................................................................. 57

2.3.2 The Self-Exculpatory Approach to Memory Governance ........................................ 59

2.3.2.1 Criminalizing Dissent: Poland ........................................................................... 59

2.3.2.2 Memory Wars and Mnemonic Security: Russia and Ukraine .............................. 60

2.4 Beyond Memory Laws: The Legal Governance of Historical Memory ....................... 64

Chapter 3 .......................................................................................................................... 67

Analytical Framework: The Rule of Law in Europe .......................................................... 67

3.1 The Rule of Law as Analytical Framework ................................................................... 68

3.2 Conceptions of the Rule of Law .................................................................................. 69

3.2.1 Formal v Substantive Conceptions ......................................................................... 70

3.2.2 The Role of States and International Organizations in Conceptualizing the Rule of Law ......................................................................................................................... 72

3.3 The Rule of Law in this Research ............................................................................... 76
4.3.3.2 Minority Protection and Non-Discrimination: French Citizenship ..................136
4.3.3.3 Equality before the Law and the Self-Inculpatory and Self-Exculpatory
Approaches .............................................................................................................138
4.3.4 Impartiality of the Judiciary ...........................................................................139
4.3.4.1 Judges as Arbiters of History ....................................................................139
4.3.4.2 Impartiality of the Judiciary and the Self-Inculpatory and Self-Exculpatory
Approaches .............................................................................................................142
4.3.5 Protection of Fundamental Rights ..................................................................142
4.3.5.1 Victims and Minorities’ Human Dignity: Prohibition of the Armenian
Genocide’s Denial .........................................................................................................143
4.3.5.2 Freedom of Expression and Freedom of Assembly: Holocaust Denial Bans ..145
4.3.5.3 Freedom of Research and Access to Archives .............................................146
4.3.5.4 Protection of Fundamental Rights and the Self-Inculpatory and Self-
Exculpatory Approaches ..........................................................................................147
4.4 Case Study Findings .........................................................................................148
4.4.1 The Legal Governance of Historical Memory in France vis-à-vis the Selected Rule
of Law Elements .........................................................................................................148
4.4.2 The Presence of the Self-Inculpatory and Self-Exculpatory Approaches in the
Analysis of the Elements ..........................................................................................149
4.4.3 Final Remarks ..................................................................................................150
Chapter 5 ..................................................................................................................152
Case Study 2: The Legal Governance of Historical Memory and the Rule of Law in Hungary
......................................................................................................................................152
5.1 Why Hungary? ....................................................................................................152
5.2 The Context around the Legal Governance of Historical Memory in Hungary ......155
5.2.1 Socio-Political Situation since the Democratic Transition .............................155
5.2.2 Controversial Issues regarding Hungarian Historical Memory .....................156
5.2.2.1 Trianon Treaty and War Atrocities ...............................................................156
5.2.2.2 Historical Symbols .......................................................................................160
5.2.3 Overview and Classification of Hungarian Memory Governance Sources ........162
5.2.3.1 Mnemonic Constitutionalism in Hungary ......................................................162
5.2.3.2 Memory Laws and Ostensibly Legal Measures .............................................166
5.2.4 The Legal Governance of Historical Memory in Hungary vis-à-vis the Standards of
the European Institutions .........................................................................................170
5.3 Rule of Law Analysis ..........................................................................................172
5.3.1 The Rule of Law in Hungary ...........................................................................172
5.3.2 Legality .............................................................................................................176
5.3.2.1 Legal Certainty: Tailoring Memory Laws to Political Situations ..................176
5.3.2.2 Arbitrariness in Establishing an Official Historical Narrative .....................178
5.3.2.2.1 Relevance of History in the Fundamental Law ................................................. 178
5.3.2.2.2 Relevance of History in Ostensibly Legal Measures: Changing Perceptions via Memorials and Political Rhetoric ................................................................. 179
5.3.2.3 History in Research, Museums and Education: Governmental Capture of Institutions .................................................................................................................. 181
5.3.2.4 Legality and the Self-Inculpatory and Self-Exculpatory Approaches .................. 184
5.3.3 Equality before the Law ......................................................................................... 185
5.3.3.1 General Equality: Codifying the Legacy of Communism: The Transitional Decrees and Article U of the Fundamental Law .............................................................. 185
5.3.3.2 Minority Protection and Non-Discrimination ...................................................... 186
5.3.3.2.1 The Legacy of the Trianon Treaty in Memory Laws ...................................... 186
5.3.3.2.2 The Treatment of Refugees and Bilateral Relations with a Historical Bias via Ostensibly Legal Measures ...................................................................................... 190
5.3.3.3 Equality before the Law and the Self-Inculpatory and Self-Exculpatory Approaches .................................................................................................................. 196
5.3.4 Impartiality of the Judiciary .................................................................................... 196
5.3.4.1 The Judiciary and Mnemonic Constitutionalism: The Achievements of the Historical Constitution in Article R of the Fundamental Law ................................................. 197
5.3.4.3 Impartiality of the Judiciary and the Self-Inculpatory and Self-Exculpatory Approaches .................................................................................................................. 198
5.3.5 Protection of Fundamental Rights .......................................................................... 199
5.3.5.1 Freedom of Expression and Assembly v Human Dignity of Victims: Prohibiting Genocide Denialism and Totalitarian Symbols ......................................................... 199
5.3.5.2 Freedom of Research: Access to Archives ........................................................ 204
5.3.5.3 Protection of Fundamental Rights and the Self-Inculpatory and Self-Exculpatory Approaches ........................................................................................................... 204
5.4 Case Study Findings ................................................................................................. 206
5.4.1 The Legal Governance of Historical Memory in Hungary vis-à-vis the Selected Rule of Law Elements .................................................................................................... 206
5.4.2 The Presence of the Self-Inculpatory and Self-Exculpatory Approaches in the Analysis of the Elements ......................................................................................... 208
5.4.3 Final Remarks ...................................................................................................... 208

Chapter 6 ..................................................................................................................... 211
Conclusions .................................................................................................................. 211
6.1 How Does Legal Governance of Historical Memory Affect the Rule of Law? ....... 212
6.2 The Legal Governance of Historical Memory and the Selected Rule of Law Elements in the Case Studies .............................................................................................. 215
6.2.1 Self-Inculpation and Self-Exculpation: Emerging Patterns and Tendencies from France and Hungary ......................................................................................... 215
6.2.2 Legality: Democratic Participation in Independent, Pluralist Debates about History ......................................................................................................................... 219
Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
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<tr>
<td>2008 FD</td>
<td>2008 Council Framework Decision on Combatting Certain Forms of Racism and Xenophobia by Means of Criminal Law</td>
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<td>CEE</td>
<td>Central and Eastern Europe</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<td>CoJ</td>
<td>European Court of Justice</td>
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<td>CoM</td>
<td>Committee of Ministers of the Council of Europe</td>
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<td>CvuH</td>
<td>Comité de vigilance face aux usages publics de l’histoire (Committee of Vigilance against the Public Uses of History)</td>
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<td>EC</td>
<td>European Commission</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUCFR</td>
<td>EU Charter of Fundamental Rights</td>
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<td>FN</td>
<td>Front National (National Front)</td>
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<td>HCC</td>
<td>Hungarian Constitutional Court</td>
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<tr>
<td>HoEH</td>
<td>House of European History</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>LpH</td>
<td>Liberté pour l’histoire (Freedom for History)</td>
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<tr>
<td>MdIF</td>
<td>Maison de la France (House of France)</td>
</tr>
<tr>
<td>MSZP</td>
<td>Magyar Szocialista Párt (Hungarian Socialist Party)</td>
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<tr>
<td>MEP</td>
<td>Member of European Parliament</td>
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<tr>
<td>PACE</td>
<td>Parliamentary Assembly of the Council of Europe</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UMP</td>
<td>Union de Mouvement Populaire (Union of Popular Movement)</td>
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<tr>
<td>UNHCR</td>
<td>United Nations Human Rights Committee</td>
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Chapter 1
General Introduction: States’ Treatment of Their Past and its Effect on the Rule of Law
1.1 The Rise of the Legal Governance of Historical Memory

As Prime Minister Viktor Orbán spoke these words in parliament during the conference ‘Dialogue and Identity’ (2015), the efforts of his government in transforming the official historical narrative of Hungary were already in full swing.² The statues on Kossuth Square, standing outside the Parliament building, had already been replaced. Just a stone’s throw away, at Szabadság Square, a monument commemorating the victims of Hungary’s German occupation depicted the state as an innocent angel, its suffering body snatched by the claws of the German eagle. Around the monument, small keepsakes and personal stories, left by relatives and activists, reminded of the death and suffering of Hungarian citizens in the hands of their own authorities, a theme conveniently ignored on the monument above. Szabadság Square houses various other memorials, among them a Soviet military memorial, a plaque planted by the far-right Jobbik party and a statue of Ronald Reagan. The square has become, to quote a Hungarian newspaper, a ‘Disneyland of memorials’ where, as the author sarcastically suggests, one could erect all the memorials one pleases dedicated to ‘our roots on the star Sirius, our dead cats or our favorite Marvel superheroes’.³ Hence, the following question therefore emerges: ‘why should we build serious memorials if we can have a meaningless abundance of them instead?’⁴

Yet, the questions around the abundance of commemorations and monuments cannot be confined exclusively to 21st century Hungary. In the late 1990s, French historian Pierre Nora coined the term ‘age of commemoration’.⁵ He attributed an ‘acceleration of history’ to the aftermath of the atrocious events of the 20th century, coupled with technological, social and economic changes. Nora showed the specific way Europeans had been constructing their historical memory as a form of therapy. This therapy was meant to ‘give stability and security by reinforcing group identity and constructing a line of continuity with the past.’⁶ Some monuments of Szabadság Square perfectly exemplify this practice of reinforcing identity and intended continuity with a selected narrative of the past. However, the square further provides

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This dissertation was written within the framework of the MELA (Memory Laws in European and Comparative Perspective) research consortium (financed by HERA (Humanities in the European Research Area) and the European Commission).

³ András Földes: Disneyland épült a Szabadság téren. In: <https://index.hu/belfold/2014/08/20/disneyland_eupult_a_szabadsag_teren_vigye_ki_a_sajat_szobrat> accessed 15 June 2020
⁴ Ibid
⁵ P. Nora (ed) Les Lieux de Mémoire, Volume III, Gallimard, 1997. Pierre Nora’s writings, especially, his edited encompassing volumes of Les Lieux de Mémoire (Places of Memory) can be regarded as foundational for the emerging examination of the politics of memory and states’ treatment of their past. Nora and his peers, such as François Hartog, initiated this debate in the French context in the 1990s, pioneering the study of historical memory in Europe.
evidence of the ‘mnemonic chaos’ engulfing Hungary. While the replacement of monuments stands as a visible indicator of the national transformation of historical memory, through them appear glimpses of a dangerously self-exculpatory perception of the state’s role in historical events.

Although monuments stand as symbols to such attitudes, the appearance of increasing politicization and instrumentalization of the legal governance of historical memory bears particularly prominent and serious consequences in the democratic life of states. First, the official, government-sanctioned narratives, created through memory laws, either intentionally or unintentionally, can contain factually inaccurate or scientifically questionable elements. The definition of official narratives can lead to the introduction of criminal sanctions to enforce them – thus jeopardizing the work and life of those researching sensitive historical questions. Therefore, the instrumentalization of historical memory can gradually reinforce censorship and suppress dissent on questions related to history, threatening, primarily, freedom of expression and open, public debates.

The effects of such criminal laws can be seen at three distinct levels: individual, group and institutional. As for the first, memory laws can endanger the free expression of individuals such as researchers, educators and journalists who may lose their jobs, be fined or even jailed for their disagreement with official narratives. Second, these laws can lead to the establishment of exclusionary measures – for example, as targeting groups. For instance, legal definitions of minorities that incorporate historical criteria could lead to their exclusion from rights such as language use, access to justice and equality before the law. Third, factual inaccuracies in official narratives further contribute to the whitewashing of institutional and national history – for example, through the instrumentalization of historical narratives in the populist rhetoric. While this trend may not have a direct impact on various groups, it remains a reminder of states’ dubious treatment of their past.

The impact that the instrumentalization of historical memory via legal measures can currently be witnessed throughout Europe. Continuing with the Hungarian example, for instance, the adoption and implementation of Hungary’s new constitution vividly highlights a number of such issues. The parliament adopted this constitution, the Fundamental Law (Alaptörvény), in April 2011, and the text entered into force in January 2012. Unlike other constitutional documents, the preamble of the Fundamental Law deeply engages with official historical narratives. It contains references to the Middle Ages, World War II, and the communist regime, among others.7 The commitment to the creation of official historical narratives has become increasingly pronounced with each of its subsequent amendments.8 The attitude to historical memory employed in the Fundamental Law testifies to various problems. For instance, such an extensive attention to history is quite unprecedented for a document that is simultaneously safeguarding the rule of law.9 Moreover, the selective narratives contained in the Fundamental Law enforce a rather simplified and self-exculpatory version of Hungarian history, which can be questioned from the perspective of historical research.

The Hungarian developments testify to a recent pan-European trend regarding memory-related legal reforms that cloak pervasive measures. Various states of Central and Eastern

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7 For further reference, see the National Avowal in the preamble of the Fundamental Law. For a detailed analysis, see Horkay Hörcher Ferenc: A Nemzeti Hitvallásról. In: Jakab András és Körösényi András (szerk.): Alkotmányozás Magyarországon és máshol: Politikatudományi és alkotmányjogi megközelítések, Budapest, 2012, MTATKPTI.
8 The fifth amendment introduced Article U of the Fundamental Law, entirely dedicated to condemnation of the communist regime. The seventh modifies Article R to include ‘the duty of state organs to protect national identity and Christian culture’.
Europe, for instance, have been criticized for the adoption of memory laws that establish questionable official narratives and criminalized dissent. In 2014, Russia has introduced its notorious provision on the ‘Rehabilitation of Nazism’, which penalizes the dissemination of false information about the role of the Soviet Union in WWII. This law helps to spread the narrative of denial of Soviet atrocities in WWII and threatens the freedom of those who disagree. On the same year, the government of Ukraine introduced its package of so-called decommunization laws, four legal provisions outlining various declarative and punitive measures meant to redefine the state’s communist legacy. These laws glorify the Ukrainian Nationalists, whose controversial legacy is associated to their alleged cooperation with Nazi Germany and their participation in WWII atrocities, despite having fought against the Soviet occupation. Furthermore, the Ukrainian laws’ zealous intent on purging the remnants of communism, severely impairs the right to free expression.

The most recent intrusion of the state in the realm of historical memory has occurred in Poland. In February 2018, the Polish government introduced and quickly adopted a proposal on the amendment of the law on the Polish Institute on National Remembrance criminalizing the ‘insult and defamation of the Polish State and Nation’. The prohibition generated intense debate due to the interpretation of its objective. The Polish government claimed that the law merely serves to eliminate the use of the term ‘Polish death camps’ from the public discourse.

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10 Law 374-FZ and 375-FZ of 29 April 2014
11 The Ukrainian de-communization laws of 2015 are the following:
Law 317-VIII On condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols;
Law 314-VIII On the legal status and honoring the memory of fighters for Ukraine’s independence in the twentieth century;
Law 315-VIII On perpetuation of the victory over Nazism in the Second World War of 1939-1945;
Law 316-VIII On access to archives of repressive bodies of the totalitarian communist regime, 1917-1991
For detailed analysis of the Ukrainian laws, see Lina Klymenko, ‘Cutting the Umbilical Cord: The Narrative of the National Past and Future in Ukrainian De-communization Policy’ in Belavusau and Gliszczyńska-Grabias (eds), Law and Memory (n 10)
12 Yuliya Yurchak, Reclaiming the Past, Confronting the Past: OUN–UPA Memory Politics and Nation Building in Ukraine (1991–2016) in: Julie Fedor et al. (eds), War and Memory in Russia, Ukraine and Belarus (Palgrave, 2017);
14 The 2018 amendment on the Polish Institute of National Remembrance is the following:
Druk nr 806 Rządowy projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej (State Project of the Law Amending the Statute of the Institute of National Remembrance)
For a detailed analysis of the Polish memory laws, see Uladzislau Belavusau and Anna Wójcik, La criminalisation de l’expression historique en Pologne: La loi mémorielle de 2018, Archives de politique criminelle vol. 40, p. 175-188 (2018)
15 Aleksandra Gliszczyńska-Grabias, ‘Calling Murders by Their Names as Criminal Offence – a Risk of Statutory Negationism in Poland’ (Verfassungsblog, 1 February 2018)

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The use of ‘Polish death camps’ is considered erroneous and sensitive in Poland as the Nazi concentration camps on the country’s territory were established by Germans and not Poles. Nonetheless, according to the interpretation of several Polish and international scholars, as well as diplomatic officials in Israel and the United States, the provision rather targets those who approach the role and responsibility of Polish citizens in WWII atrocities, some of which are well-documented.\footnote{Ibid}

Sadly, the laws introduced in Hungary, Poland, Russia and Ukraine, reveal the tensions of governmental engagement with the legal governance of historical memory with the rule of law. They establish questionable official narratives from the perspective of factual accuracy. The preamble of the Hungarian Fundamental Law, for instance, contains aggravating statements about several historical events, for example, on lack of responsibility of Hungarian authorities in WWII atrocities.\footnote{Preamble and Article U of the Hungarian Fundamental Law (25 April 2011)} The Russian memory law, for its part, refuses to acknowledge the atrocities carried out by the Red Army during WWII.\footnote{Nikolay Koposov, Une loi pour faire la guerre: la Russie et sa mémoire, Le Débat vol. 4 n° 181 p. 103-115 (2014)} The Ukrainian legal package glorifies the deeply controversial group of Ukrainian Nationalists. Finally, the Polish law assumes the complete innocence of Polish citizens, turning a blind eye to their participation in atrocities. In sum, some of these provisions threaten dissenters with criminal punishment, thus silencing any voices—be they historians, journalists or concerned citizens—refusing to conform to the official narratives or seeking to reveal their historical inaccuracy. In light of these considerations, this dissertation aims to (1) examine the increase and transformation of the legal governance of historical memory, as instrumentalized by those in power and to (2) assess their impact on the rule of law in Europe.

1.2 The Crisis of the Rule of Law in Europe

Simultaneously to the surge of memory laws in Europe in the 2010s, the continent has been engulfed in a crisis of the rule of law as well. Particularly, Hungary and Poland have singled out by scholars and institutions for their rule of law decline. The Polish memory law of 2018 has been even regarded as turning point in the general decline of democracy and rule of law in Poland.\(^\text{19}\) The crisis of the rule of law advanced to such an alarming level in these countries that the European institutions have finally taken certain steps to combat their deterioration.

Therefore, the rule of law plays a crucial role in this thesis as the analytical framework to describe the instrumentalization of history via law as an overlooked aspect of the current crisis, which is connected to the threat to liberal democracies emerging in some EU Member States and caused by the rise of populist rhetoric and authoritarian tendencies in Hungary and Poland.\(^\text{20}\) In Hungary, the backsliding started in 2010, with the ascension of Fidesz and its obtainance of a supermajority in parliament, which was quickly followed by a constitutional reform and thereafter, a slow but steady capture of the democratic system.\(^\text{21}\) In Poland, the backsliding started with the ascension of PiS (PiS - Prawo i sprawiedliwość – Law and Justice Party) to power in 2015. While a constitutional reform has yet to take place in Poland, the government of PiS has attacked the country’s judiciary, including the constitutional court.\(^\text{22}\)

In the last decade, the tools with which European institutions monitor the rule of law in Member States has proved to be slow and ineffective. It seems as if the strict standards the Union requires from (and enforces on) candidate states are less effective with countries that have already acceded to the Union.\(^\text{23}\) At the time of writing, ‘rule of law backsliding’ has become an academic term of art in the context of this region. At the outset of the crisis, the TEU provides two different paths for the Union to regulate deviant Member States: first, for practical and concrete violations, the Commission can initiate

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\(^\text{21}\) Detailed discussion on the democratic decline in Hungary will be discussed in Chapter 5.


\(^\text{23}\) Several terms have been proposed to describe these developments: ‘constitutional capture’, ‘decline of democracy’, ‘rise of populism’.

infringement proceedings.\textsuperscript{24} Second, in case the risk of serious and persistent breach is incurred by a Member State regarding the EU’s foundational values, including the rule of law (Article 2 TEU), Article 7 TEU can be triggered, resulting, in the most far-reaching scenario, in the suspension of the Member State’s voting rights in the European Council.\textsuperscript{25} Although infringement proceedings are frequently used (against Hungary and Poland as well),\textsuperscript{26} the institutions have not resorted to Article 7 TEU until recently.

In the words of Dimitry Kochenov, the EU’s treatment of the rule of law crisis has been an ‘epic fail’ as both of the aforementioned options proved to be inadequate to deal with backsliding states.\textsuperscript{27} The 2012 Tavares Report on the situation of fundamental rights: standards and practices in Hungary signal dangerous tendencies such as the restriction of freedom of expression by gaining governmental control over the media, yet no measures were taken to address the situation.\textsuperscript{28} By December 2014, a new Rule of Law Framework had been activated to address the situation in Poland. However, the same has not occurred in the case of Hungary and reactions have been much slower.\textsuperscript{29}

In January 2016, the European Commission employed its Rule of Law Framework in an attempt to mitigate the damage done to the judiciary in particular, and initiated a dialogue with Poland, where the government’s capture of the judiciary had progressed to an alarming level, before considering to activate Article 7 TEU.\textsuperscript{30} In August 2018, the Commission appealed to the Court of Justice of the European Union to challenge the Law and Justice Party’s judicial reforms.\textsuperscript{31} In a similar vein, Hungarian constitutional reform has been running parallel to the deterioration of the rule of law in the country. On 12 September 2018, the European Commission appealed to the Court of Justice of the European Union to challenge the Law and Justice Party’s judicial reforms.\textsuperscript{32}

\textsuperscript{24} On infringement proceedings, see for example: Laurence W Gormley, ‘Infringement Proceedings’ in András Jakab and Dimitry Kochenov (eds) The Enforcement of EU Laws and Values: Ensuring Member States Compliance (OUP 2017)

\textsuperscript{25} According to Article 7 of the Treaty on the European Union (TEU), on the proposal of the Parliament or the Commission, the Council (with a 4/5 majority) first needs to determine if there is a risk of breach of Article 2 values is real. Once this happened, the actual breach is decided by the Council unanimously.

\textsuperscript{26} Against Hungary, for example, current infringement proceedings are underway for sabotaging the migrant quota proposal, the targeting of local NGOs by law and the targeting of Central European University. See the list of proceedings here: <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=1&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=HU&title=&submit=Search> accessed 15 June 2020


\textsuperscript{28} Report on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)) (25 June 2013)

\textsuperscript{29} The evolution of the Polish situation involves: The European Commission initiated a dialogue with Poland in 2015. On 1 June 2016, the Commission issued an opinion on the rule of law in Poland followed by, on 27 July 2016, recommendations to address its deterioration. A second set of recommendation were issued on 21 December 2016, and a third on 26 July 2017. Due to the lack of addressing these recommendations, on 20 December 2017, on the proposal of the Commission, the Council adopted its decision about the existence of a clear risk of rule of law violation, thus triggering TEU Article 7.


Attempting to contain the Polish rule of law deterioration the European Parliament voted on the threat of a persistent breach of the Union’s fundamental values in December 2017, starting the Article 7 TEU procedure.\footnote{The Article 7 procedure against Hungary was triggered on 12 September 2018 by the European Parliament Dutch MEP Judith Sargentini presented a damning report on Hungary in spring 2018, which was accepted by the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament in June 2018 which the Parliament voted on in September, finally triggering, for the first time, Article 7 (1).} In the Hungarian case, despite the fact that the backsliding has been happening longer, the Parliament triggered Article 7 TEU in September 2018. Since then, the procedures against most countries moved slowly through the Council without progressing much, although some Member States like the Netherlands and Finland pushed to move the process forward. Even so, the EU’s answer to the rule of law backsliding moves very slowly.\footnote{Infringement proceedings are too weak to combat systemic problems since the Commission, which possesses the power to initiate them, has to connect them to practical shortcomings and cannot direct them towards systemic problems. Whereas the procedure outlined in Article 7 TEU has proven to be slow and difficult to trigger, as it entails a two-step process: first, the Parliament has to establish the ‘clear risk of a serious breach’ of the values contained in Article 2 TEU. Once the Parliament has made its decision, the Council can determine a ‘serious and persistent breach’, which needs to be agreed on a unanimous vote. In the instant cases, Hungary and Poland formed an alliance, agreeing to defend each other if the proceeding ever reach a vote in the Council. See also: Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11European Constitutional Law Review 512.; Dimitry Kochenov and Laurent Pech, ‘Better Late than Never: On the European Commission’s Rule of Law Framework and its First Activation’ (2016) 54 Journal of Common Market Studies 5.} Unfortunately, among the established tools to combat rule of law deterioration, none have proved to be particularly effective.\footnote{The European Commission issued, in April 2019 a communication to the Council and the Parliament titled ‘Further strengthening the Rule of Law within the Union State of play and possible next steps’ (3 April 2019 COM(2019) 163 final). The documents specify the importance of the rule of law as (1) a founding value of the EU, (2) a concept reflecting the common identity and common constitutional traditions of the Union, (3) a basis of the Member States’ democratic system, (4) a central concept in the realization of the EU’s Area of Freedom, Security and Justice and internal market, (5) a basis of the mutual trust holding the Union together. In order to strengthen the rule of law in the EU, the Commission identified the need to promote rule of law standards in the Member States (such standards have been articulated in the Commission’s 2014 Rule of Law Framework), to recognize the warning signs of rule of law backsliding and to improve the capacity of the Union to respond to the backsliding.}

By 2019, the European Commission had produced a series of initiatives meant to strengthen the rule of law in Europe.\footnote{By 2019, the European Commission had produced a series of initiatives meant to strengthen the rule of law in Europe. These documents attest to the identification of the rule of law as a foundational element in any healthy democracy. Consequently, the Commission has created its own conceptualization and operationalization of the rule of law ideal, and has taken steps to officially introduce it as the benchmark for assessing the state of democracy in the EU member states. Signs of rule of law problems have been identified in, for example, Poland and Hungary. See also: Dimitry Kochenov and Laurent Pech, ‘EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenge’ (2015) Asia Europe Journal. Available at SSRN: <https://ssrn.com/abstract=2615313> accessed 15 June 2020.} These documents attest to the identification of the rule of law as a foundational element in any healthy democracy. Consequently, the Commission has created its own conceptualization and operationalization of the rule of law ideal, and has taken steps to officially introduce it as the benchmark for assessing the state of democracy in the EU member states.\footnote{Following up its April 2019 Communication, the Commission issued a blueprint for action in July 2019. The document was supported by the results of an extensive Eurobarometer poll carried out over spring 2019, assessing the view of European citizens on the rule of law. The research demonstrated that citizens consider the rule of law as a foundational and crucial concept for the proper functioning of a democratic society and also wish}
Chapter 1

inadequate constitutional reforms, and the capture of constitutional tribunals. However, the legal governance of historical memory has not yet been considered as an area signaling rule of law deterioration. These developments lead to the formulation of questions towards the relationship between the legal governance of historical memory and the rule of law, particularly towards how the former affects the latter.

for efforts for the Union’s part to improve the situation of the rule of law in Member States (EB 489 Special Eurobarometer on the rule of law, published July 2019).
Consequently the Commission’s blueprint for action establishes the importance of the rule of law in the life of every citizen as a tool to ensure equal treatment, the protection of fundamental rights and preventing abuses of power from state authorities, and as a basis for trust awarded to public institutions by citizens. The document outlines a three-pillar action plan to strengthen the rule of law: (1) promoting rule of law culture, (2) preventing the emergence of rule of law problems and (3) mounting an effective common response if problems do arise. The action plan will be ensured through the implementation of the Rule of Law Cycle – a series of regular reports on the situation of the rule of law in Member States (COM (2019) 343 final Communication from Commission to Parliament and Council on Strengthening the rule of law within the Union A blueprint for action, 17 July 2019)
1.3 Missing Connection between the Legal Governance of Historical Memory and the Rule of Law

Current legal scholarship displays a lack of attention to the relationship between the legal governance of historical memory and the rule of law. This is mainly due to legal scholars framing problems of historical memory in terms of human rights. Their studies have been complemented by works from other disciplines such as political science and history, focusing particularly on the politics of memory. However, these approaches are limited and cannot capture the entire spectrum of issues because they each miss the impact which the legal regulation of historical memory may have to the health of a state’s democracy. Therefore, the relevance of this thesis lies in its novel approach of incorporating the examination of memory laws in order to assess the problem of how they affect the rule of law.

Academic debates around the legal governance of historical memory initially focused on their restriction of human rights. However, as evidenced in the previous section, recent developments in Eastern and Central Europe point to a relation between the deterioration of the rule of law and the rise of memory laws. This relationship, therefore, necessitates a closer examination. Below, I discuss how the debate on memory laws developed in legal scholarship and how its discussion went beyond the framework of human rights to enter the rule of law. In particular, I point out how the effect of memory laws on the rule of law has been largely neglected in academic literature. Consequently, I identify how this thesis contributes to such discussion.

Scholarly analysis of memory laws emerged in the early 2000s in France, where the term ‘loi mémorielle’ was coined. The initial academic examination of French lois mémorielles focused on their impact on the freedom of historical research and has been carried out mainly by historians who considered themselves affected by these measures. The organization Liberté pour l’histoire (LpH) has had significant influence on the French public opinion on memory laws. Through tenacious lobbying, LpH managed to convince the French parliament that the lack of clarity with which the four lois mémorielles had been introduced represents a serious threat to academic freedom of expression. As a result, in 2008, the French parliament ordered a comprehensive review of French memory laws, led by the then President of the National Assembly, Bernard Accoyer. The so-called Accoyer Commission determined that further introduction of lois mémorielles would present undue infringements on historical research. Thus, the term lois mémorielles has become mired in controversy in France, and whenever French legislators attempt to adopt similar laws, they tend to make specific efforts to prove that they are not, in fact, enacting another memory law – even if the content of the prospective measures aligns perfectly with the previous lois mémorielles. As the French debate

38 See for example, for an encompassing analysis: Emanuela Fronza, Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law (Springer 2018)
39 The intellectual and political history of memory laws is closely entwined with their scholarly treatment as the term originates from academia, rather than from politics.
40 Technically loi mémorielle can be translated as memorial law, rather than memory law.
41 For example, see: P. Nora, Malaise dans l’identité historique, Liberté pour l’histoire, CNRS Éditions, 2008 <https://www.lph-asso.fr/index927.html> accessed 15 June 2020
43 Ibid 10.
44 No 1262 Rapport d’information au nom de la mission d’information sur les questions mémorielles (18 November 2008)
Chapter 1

on memory laws evolved, it was reoriented towards the potential impact of criminalizing the denial of the Armenian genocide (and potentially other genocides), and the issue of equal treatment between that tragedy and the Holocaust.\(^{45}\)

Once, legal scholars discovered the issue of memory laws, initial examinations focused on their criminal aspects, 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.\(^{46}\) The human rights perspective has brought the legal governance of historical memory under scrutiny in the European Court of Human Rights (ECtHR), EU law, and the domestic contexts of several European states. With respect to the ECtHR, debates revolve around the treatment of historical events by the Court, and the alleged double standard present between the Court’s views on the Holocaust versus other genocides. Aleksandra Gliszczyńska–Grabias has analyzed this issue extensively.\(^{47}\) In terms of the EU, particular attention has been given to the 2008 Council Framework Decision on Racism and Xenophobia, which requires Member States to introduce sweeping genocide denial bans, as well as on the extensive number of resolutions by the European Parliament dedicated to historical issues.\(^{48}\) In 2017, the first (and thus far the only) edited volume that delves into state and institutional legal practices on historical memory was published.\(^{49}\)


\(^{46}\) The most notable expert on the criminal aspects of memory laws is Emanuela Fronza. Fronza’s encompassing work on genocide denialism: *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (n 38)

\(^{47}\) On the double standard of the European Court of Human Rights see Aleksandra Gliszczyńska–Grabias and Grażyna Baranowska, ‘The European Court of Human Rights on Nazi and Soviet Past in Central and Eastern Europe’ (2016) 45 Polish Political Science Yearbook 117


\(^{49}\) Belavusau and Gliszczyńska-Grabias (eds), *Law and Memory* (n 10).
In recent years, academic attention has further considered the difference between memory laws in Western versus Central and Eastern Europe, and the special occurrence of memory wars and mnemonic securitization, especially as regards the relationships between states in Central and Eastern Europe.\textsuperscript{50} Growing attention has also been given to the adoption of new memory laws in the context of bilateral conflicts. The term ‘memory wars’ has been created to describe opposing views on the legacy of the same event between two states.\textsuperscript{51} In addition, the Hungarian context has brought the previously-unseen issue of ‘mnemonic constitutionalism’ under the academic radar, theorizing the elevation of the legal governance of historical memory to the constitutional level.\textsuperscript{52}

Memory laws touch upon legal and political aspects of society. This diverse phenomenon has led scholars to introduce the distinction between the different approaches towards treatment of the past via law. Eric Heinze distinguishes between a self-inculpatory and self-exculpatory approaches towards the treatment of the past.\textsuperscript{53} The self-inculpatory approach focuses on official narratives created by the state with the aim of conducting an honest reckoning of the past – including providing opportunities for open debate and assessing the state’s own role in historical atrocities through historical expertise.\textsuperscript{54} 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 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.\textsuperscript{55}

Maria Mälksoo, in her analysis of the treatment of states’ pasts from the perspective of transitional justice and foreign policy, creates her own model to describe the behavior of states.\textsuperscript{56} In the area of transitional justice, she distinguishes between reflective and mnemonic...
security-oriented approaches towards 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 mnemonic security-oriented approach culminates in confrontational, self-assertive foreign policy-related behavior, where decisions are influenced by perceived historical rights and wrongs.\textsuperscript{57} Mälksoo points out, the mnemonic security-related approach particularly produces a ‘militarization by means of punitive memory laws.’\textsuperscript{58} Thus, her interpretation of the mnemonic 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, are associated with the rule of law deterioration in various states. The self-inculpatory and self-exculpatory distinction is crucial to formulate the argument of the thesis because it shows the attitude of the state towards the rule of law.

The rule of law has been examined only sporadically in the scholarly debate on memory laws. Its first incidence in the context of memory laws occurred in debates regarding the justification of genocide denial bans. Several memory laws reference the rule of law as an abstract ideal, a benchmark that is desirable in a healthy democratic society.\textsuperscript{59} Moreover, in the aftermath of the democratic transitions of Central and Eastern Europe, Martin Krygier has assessed how the legacy of communist regimes may affect these states’ efforts to transform to a rule of law-based legal system.\textsuperscript{60} Krygier found that Central and Eastern European states present an institutional optimism as well as a cultural pessimism towards the rule of law. These states fight to create the constitutional system through institutional reform to strengthen the rule of law. Simultaneously, they often exhibit a cultural aversion – based on the belief that human rights and the rule of law are inventions of the West, and thus ultimately unattainable.\textsuperscript{61}

The analysis of memory wars and of 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 minority.\textsuperscript{62} Belavusau has identified how various Polish memory laws, for example, adversely affect national minorities and suggests a decline of democracy there. He also showcases the legal treatment of a Belarusian historical figure, Branislaŭ Taraškievič as a symbolic example of minority mistreatment.\textsuperscript{63} Belavusau further claims that

The list of cases of the Inter-American Court can be found in the Loyola Marymount University database – <https://iachr.lls.edu/advanced-search> accessed 15 June 2020

\textsuperscript{57} Ibid. Mälksoo 22
\textsuperscript{58} Ibid. Mälksoo 23
\textsuperscript{59} The language of the 2008 EU Framework Decision is a good example here stating: Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (preamble) – the document then identifies genocide denialism as a form of racism.
\textsuperscript{60} Martin Krygier ‘Marxism and the Rule of Law: Reflections after the Collapse of Communism’ 15 (1990) Law & Social Inquiry 4, 640
Further on the engagement of memory after transition in Central and Eastern Europe:
Adam Czarnota, Martin Krygier and Wojchich Szadurski (eds) Rethinking the Rule of Law after Communism (Central European University Press 2005)
\textsuperscript{63} Ibid.
Taraškievič, a Belarusian scholar, is a prominent figure due to his work on Belarusian culture and language, amongst which was his authorship of the first standardized grammar of the Belarusian language. He supported left-wing communist parties in 1930s Poland, representing the interests of the national Belarusian minority.
the growing incidence of memory laws correlates with the deterioration of the rule of law in
Central and Eastern Europe.\textsuperscript{64} Furthermore, Marta Bucholc, examining the deterioration of
democracy in Poland, has proposed that the idea of ‘commemorative lawmaking’ presents a
potential threat to the rule of law.\textsuperscript{65}

These contributions represent however only a segment amongst the numerous scholarly
analyses on the legal governance of historical memory I discussed in this section. In
consequence, the examination of the relationship between the legal governance of historical
memory and the rule of law remains underdeveloped. On the one hand, it is important to note
that the relationship between the legal governance of historical memory and the rule of law is
interdependent. In other words, the rule of law situation in a country may influence the legal
governance of historical memory, and vice versa. On the other hand, the countries where the
rule of law is at risk focus their attention to instrumentalizing memory laws to capture political
and social institutions, and, by implication, interfere with the life of their citizens. Due to the
neglected nature of this relationship, it is worth to study to aim the research question of the
thesis towards this problem.

\footnote{Currently, the oppression of the Belarusian minority by Poland is a narrative not supported by the Polish
government – as in their perception of history, Poles are exclusively presented as the victims of totalitarian
regimes. Thus, Taraškievič’s activities are removed from textbooks and his name is removed from public
buildings in the name of de-communization.}

\textsuperscript{64} Ibid.

\textsuperscript{65} Bucholc, ‘Commemorative Lawmaking’ (n 13)

Bucholc argues three forms of commemorative lawmaking: (1) bricolage – reconstructing new historical
narratives from previously present elements, (2) retouch – enhancing a concept or narrative with extra meaning,
and (3) re-stylization – reframing laws symbolically

She further claims that ‘the power of symbols which can be put to work against democracy and rule of law by
way of skillful memory politics’ (p 105)}
Chapter 1

1.4 Research Question: The Effect of the Legal Governance of Historical Memory on the Rule of Law

This thesis then aims to bring clarification to how the legal governance of historical memory relates to the rule of law. Research in this particular direction seems pertinent for a number of reasons. First, and as discussed in the previous sections, scholarly reflections on the impact that the legal governance of historical memory has on the rule of law are scarce.66 Second, the rule of law has increasingly become the primary benchmark to assess and measure the deterioration of democracy in Europe since the 2010s.67 The European Union, for instance, has characterized the problems of democratic backsliding and governmental capture in terms of the rule of law. Moreover, the rise of the legal governance of historical memory, particularly in Hungary, coincides with rule of law deterioration. This state of affairs warrants the preliminary observation that in states struggling with the fulfilment of the rule of law, an increased governmental interest and control over the legal governance of historical memory can be observed.68 Thus, the main research question asks:

How does the legal governance of historical memory affect the rule of law?

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66 See Section 1.3 on the relevance of the research.
67 Discussed in detail in Section 1.2 and will be further described in Chapter 3 as I begin to unpack the rule of law.
68 This is also the case in Ukraine and Russia as well, the relevant laws have been mentioned in Section 1.1.
1.5 Claim: Nature and Extent of the Legal Governance of Historical Memory’s Effect on the Rule of Law

This dissertation primarily focuses on the legal regulation of the past in democratic societies and the highly contested nature of this exercise. The creation of official narratives through law bears heavily on democratic life, and this dissertation examines this process by using concrete rule of law parameters. In doing so, the notions of self-inculpation and self-exculpation of states introduced by Eric Heinze and Maria Mälksoo constitute the starting point of my analysis. This distinction has pioneered a new direction in the research of the legal governance of historical memory and has played a crucial role in developing the rule of law perspective argued for here.

Heinze and Mälksoo identify two approaches employed by states in the creation of official narratives through memory laws. Heinze designates them as the self-inculpatory and the self-exculpatory attitudes towards the treatment of the past. Mälksoo, for her part, identifies them as self-reflective and security-related mnemonical attitudes. Her distinction is made from the perspective of international relations, but her categories are almost identical to Heinze’s. The present thesis takes this framework one analytical step further by developing this distinction as a factor with which to evaluate the effect of the legal governance of historical memory on the rule of law:

The distinction between self-inculpation and self-exculpation is crucial from the rule of law perspective. In fact, it leads me to make the following claim: The impact of a state’s legal governance of historical memory on the rule of law will vary according to the approach (self-inculpatory or self-exculpatory) used by the aforementioned state in exercising said governance through memory laws or other ostensibly legal measures. Thus, I argue that a state’s attitude towards the treatment of its past makes a significant difference in how the rule of law is affected in that state.

The employment of the self-inculpatory approach involves the creation of official narratives supported by experts such as historians. These narratives are also well-debated politically and in the public sphere. Policies following the self-inculpatory approach do not aim at prosecuting persons who disagree with the official state narrative. Rather, they focus on preventing public discourse from straying away from a well-researched, plural and publicly debated version of history. In contrast, self-exculpation supports an image of the past that is convenient for and controlled by the government. The self-inculpatory and self-exculpatory approaches both refer to symbolic, legal or practical measures taken by the state in order to demonstrate its contemporary attitude towards various historical questions.

These two approaches encompass every memory law and ostensibly legal measure relating to mnemonic regulation. Indeed, the self-inculpatory and self-exculpatory approaches to the legal governance of historical memory are found in the background (among the motivations) of all historical memory-related provisions. In the following sections, I present various examples of these approaches across Europe. These examples demonstrate the various practices of the legal governance of historical memory employed in less and more harmful

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69 Michael Bernhard and Jan Kubik (eds) Twenty Years after Communism: The Politics of Memory and Commemoration (OUP 2014)
70 On the intersection of politics and remembrance: Consuelo Cruz ‘Identity and Persuasion: How Nations Remember Their Pasts and Make Their Futures’ (2000) 52 World Politics 3
71 Heinze, ‘Should Governments Butt out of History?’ (n 53)
72 Maria Mälksoo ‘The Transitional Justice and Foreign Policy Nexus: The Inefficient Causation of State Ontological Security-Seeking’ (n 56) 22
73 Heinze, ‘Should Governments Butt out of History?’ (n 53)
ways. The examples preliminarily indicate that rule of law problems tend to recur within, although not exclusively, the self-exculpatory approach.
1.6 Legal Governance of Historical Memory in the European Context

In the attempt to find and answer to my principal research question, I describe the situation in two selected European states – France and Hungary. These countries are both members of European governmental organizations such as the EU and CoE and party to the ECHR. Neither of these states have been mentioned as exemplary actor of self-inculpation and self-exculpation. France can be perceived as employing a self-inculpatory approach regarding the regulation of remembrance to WWII atrocities, but its approach remains more self-exculpatory in the examination of the colonial past. Hungary, meanwhile, despite representing several new developments in the legal governance of historical memory, has been overshadowed by Poland in the examination of this transformation.

Although this thesis builds on selected national case studies, national developments within the European legal space cannot be examined without first affording due consideration of the European institutions, namely the Council of Europe (as well as the European Court of Human Rights) and the European Union, both in terms of the legal governance of historical memory and the assessment of the rule of law. With regards to the legal governance of historical memory, these institutions assert their influence over their Member States by creating historical narratives to legitimize their own existence and repossessing and incorporating existing national narratives into their constructed European history. On the basis of these narratives, the institutions consequently create standards in the legal governance of historical memory, whose embrace and rejection by Hungary and France constitutes an aspect of the national rule of law situation.

The European institutions play twofold 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. For example, both the Council of Europe (to a lesser extent) and the EU (to a much greater extent) 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 WWII. These measures usually manifest themselves as soft law 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 in order to ensure long-lasting peace on the continent.

On the other hand, the European institutions set examples by establishing standards for the creation of memory laws intended for Member State practice, encouraging the adoption of their viewpoints on the national level. These 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. These standards of the legal governance of historical memory matter significantly in the national case study context as the conformation and/or opposition of the selected Member

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74 An encompassing analysis can be found in: Stiina Löytömaki, Law and Politics of Memory: Confronting the Past (Routledge 2014)
75 In this respect, only the Hungarian Fundamental Law has been analysed from the perspective of historical memory – see the discussion in Section 1.1.
76 The rule of law aspect of this question is discussed in Chapter 3.
States towards the European institutions reveal the priorities and historical focus of local governments. They thus will be reflected in each of the forthcoming case studies.

### 1.6.1. The Council of Europe and Its Influence through ECtHR Judgments

In examination of the ECtHR’s work, memory laws are discussed in light of their impact on fundamental rights. In 2015, the Grand Chamber of the European Court of Human Rights rendered its controversial verdict in the case of *Perinçek v Switzerland* (2015).78 Straying from its previous case law on the strict punishment of Holocaust negationism, the Court found that Switzerland violated Article 10 of the European Convention on Human Rights when prosecuting statements such as ‘the Armenian genocide is an international lie’ as race-based discrimination.79 In the aftermath of the decision, academic attention turned towards the treatment of various historical events by the court. Scholars revisited earlier Strasbourg decisions such as *Vajnai v Hungary* (2008), and new cases such as *Janowiec and others v Russia* (2015), instances when the Court further reaffirmed the primacy of the Holocaust as the ultimate historical atrocity, rejecting the treatment other atrocities in a similarly condemning manner.80 These judgments provide an excellent insight into the priorities of the Court in the perception of historical events and can also be used to trace the memory governance standards it imposes on Member States.

I have identified three major streams in the Court’s case law related to the legal governance of historical memory. The first stream amongst these judgements covers the case law of the ECtHR on the historical truth, its protection under Article 10 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),81 *Chauvy and others v France* (2004)82 and *Monnat v Switzerland* (2006),83 whereas the Court had to determine to which degree historical truth is protected by the right to freedom of expression and determines the limits of historical research.84 The protection of Article 10 ECHR extends to historians encountering difficulties

> 78 *Perinçek v Switzerland* App no 27510/08 (ECCHR, 15 October 2015)
> 79 Uladzišiau Belavusau, ‘*Perinçek v Switzerland*’ (n 47)
> 80 Baranowska and Gliszczynska-Grabias, ‘*The European Court of Human Rights on Nazi and Soviet Past*’ (n 47); Ireneusz Kaminski, ‘*The Katyń Massacres before the European Court of Human Rights: From Justice Delayed to Justice Permanently Denied*’ (2015) East European Politics and Societies and Cultures 29, 784.
> In this case, the Court also introduced the notion of *clearly established historical facts* – defining it as particular unquestionable elements of the historical truth, usually related to the Holocaust.
> 82 *Chauvy and others v France* App no 64915/01 (ECCHR, 29 September 2004)
> 83 *Monnat v Switzerland* App no 73604/01 (ECCHR, 21 December 2006)
> 84 The landmark case regarding the historical truth is *Lehideux and Isorni v France* (n 81).
in accessing sensitive documents during their search for the historical truth, as pronounced in the cases of *Karsai v Hungary* (2009)\(^85\) and *Ungváry and Irodalom Kft. v Hungary* (2014).\(^86\) Although the historical truth constitutes an essential element of the Court’s relevant case law, the right to know the truth is not used as frequently. In the instances the right to the truth is alluded to, it is cited in connection with Article 2 and Article 3 ECHR to provide the right for the families of victims to learn of their relatives’ fate who had perished during historical atrocities, including in *Janowiec and others v Russia* (2015)\(^87\) and *Association 21 December 1989 and others v Romania* (2011).\(^88\)

The second group of cases deal with Court’s balancing of the right to freedom of expression and freedom of assembly with other rights, such as private life (Article 8 ECHR) 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 Convention (the abuse of rights). The majority result in the rejection of the application due to the abuse of fundamental underlying values of the Convention.\(^89\) Holocaust-related cases ongoing historical debate. The Court asserted that, in order for the debate to be open, all voices need to be heard. This opinion quashed the government’s argument for a wide margin of appreciation despite its claims that national courts are better placed to assess cases that concern national history. Subsequently, the Court has used this line of argumentation of deferring to the national authorities in matters of national historical importance as well as establishing in the case of *Chauvy*, that ‘it considers that it is an integral part of freedom of expression to seek (the) historical truth’ (*Chauvy*, para 69). This view was reiterated in the case of *Monnat v Switzerland*. Both of these cases concerned debates about responsibility for WWII atrocities. In *Monnat*, a journalist was prosecuted for his statements about the state’s anti-Semitism and the presence of the far right in Switzerland as well as its closeness to Nazi German, and laundering Nazi money. In *Chauvy*, the applicants wrote a book questioning the reputation of one of the heroes of the French resistance during WWII.

\(^85\) *Karsai v Hungary* App no 5380/07 (1 March 2010)
\(^86\) The *Karsai* case involved the controversy around the politician Pál Teleki, and his role in Hungary’s entrance to the World War II as well as the anti-Jewish laws enacted under his tenure as prime minister.
\(^87\) *Janowiec and others v Russia* App no 55508/07 and 29520/09 (ECHR, 21 October 2013)
\(^88\) This has happened in the following cases:

*Janowiec and others v Russia* (n 87)
In this case, the Court held Romania to be culpable of not releasing sufficient information about the circumstances of victims in the 1989 political uprisings.

*Chauvy* (n 87)
In this case, the applicants, relatives of victims of the 1940 Katyn massacre, brought their case to the Court claiming that the Russian state had not carried out an effective investigation about the victims’ fates, and furthermore has failed to release any viable information for decades, resulting in deep emotional suffering for the families. The Grand Chamber, in a very controversial and divided decision, refused to find any violation.

For further analysis on the right to truth, see:


\(^89\) The following cases deal with genocide denialism:

*T. v Belgium* App no 9777/8 (ECHR, 14 July 1983);
*B.H., M.W, H.P. and G.K. v Austria* App no 12774/87 (ECHR, 12 October 1989);
*F.P. v Germany* App no 19459/92 (ECHR, 29 March 1993);
*Honsik v Austria* App no 25062/94 (ECHR, 18 October 1995);
*Remer v Germany* App no 25096/94 (ECHR, 6 September 1995);
*Walendy v Germany* App no 21128/92 (ECHR, 11 January 1995);
*Marais v France* App no 31159/96 (ECHR, 24 June 1996);
progressing to the merit stage concern the comparison or instrumentalization of the atrocity. In these situations, the Court balanced freedom of expression and the rights of others (the victims and their descendants), for example, in *Hoffer and Annen v Germany* (2011) and in *PETA Deutschland v Germany* (2013).

The treatment of genocide denialism is actually a source of significant controversy in the Court’s work, as recent judgments led some scholars to accuse the Court of facilitating a double standard in the treatment of mass atrocities, especially differentiating between Holocaust denial and denial of the Armenian genocide, from the perspective of Article 10 protection.

These aforementioned cases involve the blatant denial or questioning of certain aspects of the Holocaust (its magnitude, the number of victims, the methods of extermination etc.). These applications are exclusively found to be inadmissible. Their treatment always involves the balancing of Articles 10 and 17 of the Convention. By nature, Article 17 concerns the abuse of rights, in order to prevent the possibility of anyone using a Convention right as blanket protection to infringe on another. In the late 1980s, and especially during the 1990s, the Court started to widen the scope of Article 17 in Holocaust denial-related cases. While the initial cases contained an actual balancing exercise between the two articles, by the late 1990s, the Court exclusively uses only Article 17 to reject these cases, without any balancing or the discussing of the merits. In addition, the Court regards the questioning of the Holocaust as an act deriving from intentional anti-Semitism. Article 17 is always used in conjunction to Article 10, as the ECtHR has not established any test or prerequisites for its trigger, instead preferring to assess its necessity on a case-by-case basis.


90 These cases include instances when the event itself is not questioned or denied, but instead used as a basis of comparison. In *Hoffer and Annen v Germany* (App no 397/07 and 2322/07 (ECHR 20 June 2011)), two anti-abortion activists distributed a pamphlet against a local doctor who was performing abortions with the slogan ‘then: Holocaust – today: Babycasus’ thus comparing the doctor’s work to Nazi war criminals. The Court claimed that the applicants’ conduct of implying that the doctor is committing a crime against humanity by performing abortions, severely infringes on the doctor’s personality rights. It decided that the government has not violated Article 10 of the Convention when distribution of the pamphlets was banned. The Court accepted the findings of German authorities by declaring that the Holocaust, one of the most heinous crimes in history, cannot be compared to abortions.

In *PETA Deutschland v Germany* (App no 43481/09 (ECHR, 18 March 2012)), the Court was asked to step in when the German wing of PETA (People for the Ethical Treatment of Animals), ran an ad campaign called ‘The Holocaust on your plate’. It showed images of butchered animals next to tortured Holocaust victims in order to transmit a suggestive message about the cruelty of extensive animal meat consumption. The organization Central Jewish Council in Germany, representing different Holocaust survivors, sued for an injunction against PETA Deutschland to stop the campaign. The Court needed to examine the actual intent of the ad campaign. The applicant argued nothing suggested that the campaign was in any way disrespectful or insulting towards victims of the Holocaust. In fact, it was merely using the shock factor to suggest a strong message to its audience. In contrast, the government presented the argument that the domestic courts examined carefully the context of the ad and found that even though the message indeed did not trivialize the Holocaust, it was still insulting for the survivors to see. In addition, the German authorities have a ‘special obligation’ to protect Holocaust victims, as these victims are entitled to the defense of their personality rights. The Court actually agreed with the government’s argument, introducing the notion of ‘instrumentalization of the Holocaust.’ Instrumentalization of the Holocaust meant that although PETA Deutschland’s conduct did not amount to denial or trivialization (therefore, no need to call on Article 17 of the Convention), but by showing pictures of Holocaust victims next to slaughtered animals the applicant organization lost Article 10 protection because it banalized the fate of the victims. Despite the fact that the message in no way intended to show disrespect to their memory.
As referenced above, the Court engages with the denial of the Armenian genocide in its landmark decision of Perinçek v Switzerland (2015), a judgment resulting in increased scrutiny over how the ECtHR differentiates between historical atrocities.\textsuperscript{91} It used a similar balancing the one established in Holocaust denialism cases, however, with significantly different results. Furthermore, the same technique is applied by the Court in cases dealing with the public display of totalitarian symbols, including in Vajnai v Hungary (2008) and Fratanoló v Hungary (2011).\textsuperscript{92} Lastly, the balances freedom of expression with the right to private life in the cases of Dzhugashvili v Russia (2013) and Putistin v Ukraine (2014). These judgments elaborate on how the disparagement of the reputation of ancestors may affect the individual. Considering the discussion concerning the ancestors’ role in historical events, the Court weighed the extent of the right to private life against the public interest of the historical debate.\textsuperscript{93} The Court further produced decisions on the freedom of association and assembly of groups representing extreme or negationist views, employing the aforementioned balancing exercises.\textsuperscript{94} The right to freedom of expression has been prioritized over the right to private life in these cases.

The final, third, stream 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 these judgments related to the legacy and reputation of national historical figures (for example, in the cases of Chauvy and others, Monnat, as well as Kenedi v Hungary and Fáber v Hungary).\textsuperscript{95}

Furthermore, in addition to the judgments of the Court, other sources originating from the Council’s institutions influence its Member States. References to the common heritage and democratic values of Member States have appeared in the treaties and conventions of the Council of Europe since its foundation, introducing the idea of European unity on the basis of common heritage encompassing the democratic values of human rights and the rule of law.\textsuperscript{96} Building on the idea of common European heritage of democratic values, the institutions of the Council of Europe have shaped the idea of shared history, advancing ‘united in diversity’ as the continent’s motto. The aim of all the related legislation has been twofold: first, to elevate

\textsuperscript{91} Perinçek v Switzerland (n 78)

In this case, Mr. Perinçek, the applicant, called the Armenian genocide ‘an international lie’ while he lectured in Switzerland. In a surprising verdict of the Grand Chamber, Switzerland was found to be in violation of Article 10 in prosecuting the applicant. The victory for the applicant can be summarized with the following reasons: (1) he did not deny that the Armenian genocide actually happened, only its categorization in international law, (2) his statements lacked hateful and inciting motives, (3) there is no consensus in academic and especially political circles about the nature of the Armenian genocide, (4) Switzerland has no historical ties to the Armenian genocide, thus the prosecution of its denial is disproportionate, (5) due to the passage of time (almost a century), the applicant right to express his opinion overrides the sensitivities of the Armenian community.

\textsuperscript{92} Such as in these cases:

Vajnai v Hungary App no 33629/06 (ECHR, 8 October 2008);
Fratanoló v Hungary App no 29459/10 (ECHR, 8 March 2011)

Commentaries on the ECtHR’s case law on communist symbols:


\textsuperscript{93} Putistin v Ukraine App no 16882/03 (ECHR, 21 February 2014);

Džugashvili v Russia App no 41123/10 (ECHR, 9 December 2014)

\textsuperscript{94} For example, in the case of W. P. and others v Poland App no 42264/98 (ECHR, 2 September 2004)

\textsuperscript{95} Kenedi v Hungary App no 31475/05 (ECHR, 26 August 2009);

Fáber v Hungary App no 40721/08 (ECHR 24 October 2012)

\textsuperscript{96} Luigi Cajani ‘History Teaching for the Unification of Europe: The Case of the Council of Europe’ in Berber Bevernage and Nico Wouters (eds.) The Palgrave Handbook of State-Sponsored History After 1945 (Plagrave, 2018) 289-290
Chapter I

the ‘European dimension’ into how history is taught in all Member States. Second, to harmonize the outlook on different historical events. Beginning in the 1950s, the Council of Europe sponsored a series of conferences on the topics of European cultural democratization, cultural diversity and identity. By the 1990s, the Committee of Ministers shifted its emphasis towards multiculturalism, pluralism and inclusivity in the historical narrative of common heritage and shared European history. The expansion of the idea of shared history entailed the integration of new Member States with communist legacies.

The non-binding recommendations of the CoM, resolutions of the PACE as well as rhetoric originating from the Commissioner for Human Rights, are also essential sources in the Council’s memory governance. Although they cannot influence Member States policy extensively, their content indicates the priorities and political directions in the legal governance of historical memory. They are particularly useful in complementing the Court’s stance on the balancing of fundamental rights, especially in the context of the conflict between the right to freedom of expression and the rights of others (victims and minorities) when assessing topics such as Holocaust denialism. The Council of Europe has articulated its own opinion on the totalitarian regimes of Europe. Its Parliamentary Assembly has issued multiple resolutions on the condemnation of totalitarian ideologies and lessons to be learned from the past.

As a result of the activities of Council of Europe, different standards can be traced for the Member States in several areas, including genocide denial prohibitions, the public display of totalitarian symbols, the protection of the dignity of victims of historical atrocities, access to historically-sensitive documents, banning organization who represent negationist views, shaping history teaching, and considering the local context in the evaluation of memory laws. These standards are inferred from the aforementioned relevant case law of the ECtHR, supported by the soft law originating from the CoM and the PACE. The following list of the

97 The focus on history teaching can be explained by its function as a space to transmit ‘official truth’ or the ‘official version’ of events. With regards to the memory of the Holocaust, its adequate education can be more than just an educational aim, but it might even be a moral duty, an idea considered by the Council’s institutions. The Council of Europe has commissioned the following reports to elaborate on the role of history teaching in its memory governance. An analysis on the Council’s role in the shaping of history education can be found in: Alfonso Diestro Fernández, ‘The Future of European Education: A Political Strategy & Four Action Areas’ (2014) 2 European Journal of Futures Research 49.

98 The initial period of efforts in the 1950s focused on the harmonization of historical textbooks in the Member States. The final declaration of the conference in Calw, Germany, where representatives of the Council’s institutions gathered to discuss history teaching in 1953, specified the ‘elimination of the traditional mistakes and prejudices and to establishing facts’ in history education through teaching the idea of ‘European unity’ as well as the ‘European conception of history’ in schools (Reflected in the Final Declaration of the Conference on ‘The European Idea in History Teaching, Calw, Germany, 4-12 August 1953) The results of the Calw conference greatly influenced the shaping of the European Cultural Convention whose preamble elaborates on the idea of using common heritage in education. This document subsequently became the legal foundation of all future projects shaping history education of the Council of Europe.

99 The following report of the Council expresses this shift; ‘Against Bias and Prejudice: The Council of Europe’s Work on History Teaching and History Textbooks’ (Strasbourg 1995) Scholarly analyses of this tendency in the Council’s memory governance can be found in: M. Gaillard, Les itinéraires culturels du Conseil de l’Europe: Entre europénité revendiquée et utopie européenne, Hermès: Cognition - communication - politique vol. 71 (2017).

100 The efforts to integrate the experience of CEE states manifested themselves in the organization of symposia, attended by representatives of the Council such as ‘History teaching in the new Europe’ symposium, held in Brugge in 1991, and continued in Sofia in 1994.

Council’s requirements regarding the legal governance of historical memory is based on my preliminary observations primarily from the case law cited above.

First, denial, questioning or trivialization of the Holocaust does not fall under the protection of the right to freedom of expression. Instead, the applicant is likely to be found in breach of Article 17 ECHR and thus, the application becomes inadmissible.\(^\text{102}\) Holocaust denial inherently carries anti-Semitic intentions and infringes on the very spirit of the Convention. The ‘banalization of the fate of Holocaust victims’ and the ‘instrumentalization of the Holocaust’ also amount to losing Article 10 ECHR protection, and warrants state interference.\(^\text{103}\) Second, in contrast to Holocaust denial, questioning the Armenian genocide could fall under the scope of Article 10 ECHR protection. Circumstances seem to matter in these cases, such as which country the denial happened in, whether statements had racist motives, and the passage of time.\(^\text{104}\) Third, using communist symbols (especially the red star) is protected by Article 10 ECHR. The motive and the passage of time affects the verdict. However, even if the display of such symbols occurs in a historically affected state, it does not constitute reasons for stricter scrutiny.\(^\text{105}\) Fourth, regarding the status of victims, the Court has been willing to recognize that dignity of Holocaust survivors can be prioritized over right to freedom of expression. In contrast, Article 10 ECHR protects the public display of communist symbols, despite consideration to the dignity of the communist regimes’ victims. The Court further ruled that descendants of victims of historical atrocities may be affected by the defamation of their ancestors, however, the restriction of freedom of expression in these defamation cases depends on public interest.\(^\text{106}\) Fifth, states have an obligation to ensure proper access to historically sensitive documents.\(^\text{107}\) Sixth, seeking the historical truth constitutes an integral part of the right to freedom of expression: thus, those who research the past merit Article 10 ECHR protection. National historical issues are an essential part of the public debate and provocative statements can also be protected by Article 10 ECHR.\(^\text{108}\) Seventh, organizations that are inspired by past extreme political ideologies and espouse negationist views can only be banned if their activities imply totalitarian intentions. Eighth, states should fight vigilantly against the recurrence of racist, xenophobic and anti-Semitic conduct: this could justify the creation of criminal provisions, especially concerning genocide denial online.\(^\text{109}\) Ninth, states should strive to cooperate in the area of history teaching, to pass on to their citizens the shared history of Europe.\(^\text{110}\)

\(^{102}\) Despite the fact that by ruling inadmissibility, the Court assisted to upholding some very hefty convictions and sentences. The best example for this is Schimanek v Austria (n 89), in which case the applicant, on the basis of the Austria’s National Socialist Prohibition Act, received a 15-year prison sentence from the first instance court (although it was later mitigated a bit on appeal) for allegedly providing false evidence as a witness in another National Socialist-themed case.

\(^{103}\) This standard is based on the deliberation in cases such as Hoffer and Annen (n 90) and PETA Deutschland (n 90)

\(^{104}\) This standard is based on the Perinček v Switzerland (n 78) judgment

\(^{105}\) This standard is based on Perinček v Switzerland (n 78) and Vajnai v Hungary (n 92)

\(^{106}\) This standard is based on Putsistin v Ukraine (n 93) and Dzhugashvili v Russia (n 93)

\(^{107}\) This standard is based on Ungváry and Irodalom Kft v Hungary (n 86) and Karsai v Hungary (n 85)

\(^{108}\) This standard is based on Chauvy and others v France (n 81) and Monnat v Switzerland (n 81)

\(^{109}\) This standard is based on the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (Treaty No.189, Strasbourg, 28/01/2003) as well as cases such as Vona v Hungary App no 35943/10 ECHR 12 September 2013

\(^{110}\) This standard is based on the following documents: 1283 (1996) on History and the learning of history in Europe; 1438 (2000) on Threat posed to democracy by extremist parties and movements in Europe; 15 (2001) on history teaching in twenty-first-century; 6 (2011) on intercultural dialogue and the image of the other in history teaching and Resolutions; 1096 (1996) on Measures to dismantle the heritage of former communist totalitarian systems;
In summary, the legal governance of historical memory by the institutions of the Council of Europe has evolved gradually since its inception. The narrative of common heritage founded in democratic values such as human rights and the rule of law is codified in the Statute, as well as in the ECHR and the European Cultural Convention. However, in the last fifty years, this narrative has been expanded as the idea of shared history became the basis of the Council’s memory governance. The shared history of the European continent is conceived to incorporate different geographical and political experiences, such as those originating from Central and Eastern Europe and the unique narratives of minorities, while also sustaining the protection of foundational democratic values, discovered in the aftermath of World War II.

1.6.2 The European Union and its Memory Framework

Within the institutions of the EU, attention has been paid to the construction of a narrative that presents the Union as a product of gradual progress from 1945-1990, connecting the economic cooperation-related development of the late 1940s and 1950s to the turn of the EU towards the triad of democracy, human rights and the rule of law beginning in the 1990s. The institutions of the Union (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.

The EU’s institutions have established a memory framework by the 2010s. The memory framework consists of a ‘collection of policies resolutions and decisions … that reflect and guide its moral and political attitude towards the past.’ 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, 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.


The idea of united Europe received the support of UK Prime Minister Winston Churchill, who himself referred to
foundational values of European unity and the selection of founding fathers who were committed to build a European supranational organization justifies the inevitability and necessity of its place on the continent. The foundational values of the Union explain its acting in its external relations as the defender of democracy, human rights and the rule of law. European integration dates back to the Schuman Declaration, the document regarded as inherently essential to the foundation of European cooperation, has gained an almost messianic role in the history of European integration.\textsuperscript{115} It is hailed as a manifesto of peace and forgiveness, leaving behind the continent’s past, representing the first step in the Union’s historical narrative of inevitable and necessary integration. Chancellor Adenauer proved to be open to negotiations. The negotiations resulted in the birth of the Treaty of Paris in 1951.

In the subsequent documents governing European integration, the idea of united Europe only strengthened. The preamble of the Treaty of Paris (1951) mentions the ‘substitution of age-old rivalries’ with cooperation within an economic community, and forming a community from the nations previously divided by war and other conflicts.\textsuperscript{116} The Treaty of Rome (1957) refers to and ‘ever closer Union’ in its preamble. It further outlines a cooperation in the area of culture between Member States intending to ‘bring the common cultural heritage to the fore’.\textsuperscript{117} In the Single European Act (1986), the preamble recalls the ‘European idea’, resulting in the economic and political cooperation and expressing the intention for this idea to evolve further.\textsuperscript{118} The Treaty of Maastricht (1991) reminisces on the ‘historical importance of ending the division of the European continent’ in its preamble.\textsuperscript{119} It outlines an intention to create a common future for Europe through the identified values of democracy, human rights and the rule of law.\textsuperscript{120} It also renews the idea of the Union’s competence in the area of culture in the name of common heritage.\textsuperscript{121} Outside the successful treaties, the common heritage of the continent also surfaced in 1952, during the conception of the European Defense Community.\textsuperscript{122} In the preamble of the Defense Treaty (1952), it pledges the common European army as a result of the common heritage, a step on ‘the road to the formation of a united Europe’.\textsuperscript{123} Furthermore, in 1974, the European Parliament introduced the idea of the European cultural heritage by assigning the protection severally architecturally and artistically significant monuments throughout the European Economic Community.\textsuperscript{124} Two years later the European Commission initiated the creation of an archive of the European institutions, within the walls of the newly formed European University Institute in Florence, with the specific intention to collect all documents relevant to the work of the European Community in the last two decades, specifically introducing the European perspective on history.\textsuperscript{125}
On the other hand, the EU’s memory framework incorporates 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, the institutions not only construct the EU’s own history and values, but repossess particular aspects from the Member States’ history by claiming that certain events, such as the French Revolution, WWI, WWII 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 a common European memory. The integration narrative warns against the reoccurrence of war on the continent, and identifies the only tool with 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. However, a united Europe comprised of several Member States of vastly different histories is not easy to achieve. A common narrative must coordinate the different experiences of the Member States while simultaneously acknowledge their unique nature. These aforementioned aspects of the EU memory framework can be discovered in its current documents. Its preamble emphasizes the Union’s endeavour to end division on the continent and stressing the idea of an ever-closer union. It further codifies the Union’s foundational values as well as the articulated the protection of the national identity of the Member States.

their life to bring peace to the continent, two Germans (Konrad Adenauer and Walter Hallstein), both of whom resisted the Nazi takeover in Germany, two Italians (Alcide de Gasperi and Alitiero Spinelli), two Dutchmen (Johan Willem Beyen and Sicco Mannsholt) – Beyen’s work is significant in the development of the common market while Mannsholt was a member of the Dutch resistance in WWII, one Belgian (Paul-Henri Spaak), one Luxembourgian (Joseph Bech) and one Brit, Winston Churchill, Prime Minister of the United Kingdom, whose merit in the allied victory of WWII is unquestionable. The Founding Fathers idealize all qualities which the Union values: resistance to totalitarian ideas, learning from the past, political will of cooperation and unshakeable belief in democracy, human rights and the rule of law.


126 Christina Kraenzle et al. ‘Introduction: The Usable Pasts and Futures of Transnational European Memories’ in Christina Kraenzle and Maria Mayr (eds), Changing Place of Europe in Global Memory Cultures: Usable Pasts and Futures (Palgrave, 2017) 2.

127 The role of the Union’s institutions differs in the memory framework. The EP is most the active in shaping the EU’s memory laws, by providing a space for debate and an abundance of resolutions indicating intentions and directions of the memory framework. In these debates, MEPs from Central and Eastern Europe have played the most prominent role. For example, between 2004 and 2009, 49% of MEPs represented CEE states but in historical debates, they dominated the discussion by contributing around 72% of all comments. The Commission is less active in the legal governance of historical memory, it mostly provides control and context around the EU’s memory laws. The Council of the EU and the Court of Justice only occasionally interfere in the debates.


128 TEU preamble

129 Ibid Article 2. In addition, references to European history were even more pronounced in the preamble of the constitutional treaty, echoing a national constitution, strengthening ideas on which the Union should be built – the possession of a common cultural, religious and humanist heritage among the countries of Europe and the Union’s role as a defender of its fundamental values on the international stage (peace, liberty, democracy, human rights and the rule of law). The constitutional treaty also would have included the idea of Europe as a continent “united in diversity”. The fundamental values of democracy, human rights and the rule of law were codified in its Article
Chapter 1

The legal governance of historical memory appeared in decisions, directives and regulations of the EU in the 1990s. During this decade, simultaneously to the rise of national memory laws, the question of criminalization of Holocaust denialism gained traction before the EU institutions. The debates resulted in the adoption of the 1996 Joint Action, whose Article A (c) defines genocide denial as a form of anti-Semitism and anti-democratic behavior and requires Member States to introduce national prohibitions against it. The Joint Action has been expanded and replaced in 2008 with a Council Framework Decision, reiterating the importance of genocide denial bans.\(^\text{130}\)

In addition, although the history-related resolutions and programs of the European Parliament and the European Commission do not have extensive influence over Member State policy, they indicate the priorities of these institutions about the legacy and importance of selected historical events.\(^\text{131}\) Furthermore, they complement the binding decisions, directives and regulations shaping the perception of history, usually supporting the narratives found in the aforementioned documents, especially on the topics of genocide denialism.

The European Parliament pioneered the creation of non-binding resolutions containing indications about its attitude towards certain historical events, presenting the search for a European memory. Several Parliament resolutions certainly deal with the memory of the Holocaust.\(^\text{132}\) Thirteen resolutions within nearly twenty years (1999-2017) reinforce continuous commitment towards commemoration, learning from the past, fighting against the anti-democratic behavior of deniers and the protection of the persecuted minorities. Through these documents, tendencies and shift in the EU’s legal governance of historical memory can be traced. The soft law originating from before the millennium contains narratives identifying the Holocaust. Its central role in the memory governance of the EU appeared in the Stockholm Declaration and continued with a series of resolution of the European parliament, calling for a fight against anti-Semitism, the criminalization of Holocaust denialism and the respect for the dignity of the victims.\(^\text{133}\)

I/2. Furthermore, Article I/8 instructed the establishment of Europe Day on 7 May. Ultimately, the treaty highlighted Europe sharing a common future along with a common past, stressing that the European community belongs together – with the encouragement of using the European flag and the European anthem.


132 These documents are the manifestations of European memory.

In 1973, the Copenhagen Summit, assembled by the heads of state in the contemporary Member States, emphasized the necessity of a creation of common narrative of the Union. Most Central and Eastern European states experienced a democratic transition throughout the 1990s. With the fragmentation of the Eastern bloc, the Union lost its identity as a main continental opponent of communism. Thus, it was in dire need of a slightly altered narrative to build on. The evolution of European memory can be observed in the evolution of language relating to the Holocaust. In the 1950s, it has been referred to as deplorable in the war context but by the 1990s, the language around it evolved into a moralizing rhetoric of ‘never again.’ By the 1990s, French historians Jacques Le Goff and Gerard Namer have identified these developments as a struggle for European memory, defining European memory as a political construct. They claimed that while it draws on cultural aspects of European history, it ultimately serves the political means of uniting the continent.

For an encompassing analysis, see: Catherine Guisan, *A Political Theory of Identity in European Integration* (Routledge, 2012);


133 The Declaration of the Stockholm International Forum on the Holocaust (Stockholm, 29 January 2000) However, the fact of electing such a monumental historical atrocity as a foundational memory has its consequences. On the one hand, the universal suffering of the Jewish community serves as a symbol with which
most Member States can identify with. Since Jews are present in every European nation, by choosing the Holocaust as a common European memory, the EU cannot be accused of prioritizing any national history over another. On the other hand, there are serious consequences for the choice of an ultimate trauma, a sort of repentance-based legacy. With this choice, the institutions elected to take a stand against hate, bigotry and discrimination, by stressing the significance of learning a lesson from the past so that such events may never happen again. It is therefore consequential to base the remembrance of the EU on the ‘politics of regret’ - political guilt based and the public culture of collective remorse. The EU has possessed this narrative as a new means of legitimation. In the following decades, the Holocaust narrative has expanded as the past prosecution of Europe’s Roma community appeared in the resolutions of the Parliament, with the intention of incorporating the experience of the Roma in the already established narrative of the Holocaust. See also: Ann Rigney, ‘Transforming Memory and the European Project’ 43 (2012) New Literary History 4; Jeffrey Olick, Politics of Regret: On Collective Memory and Responsibility (Routledge 2007) 15.

134 In consequence, although the prominence of the Holocaust is still present in the EU’s common narrative, in the recent decade, European memory has slightly altered. In Member States with former communist history (Estonia, Lithuania, Latvia, Poland, Czech Republic, Slovakia, Slovenia and Hungary), the oppression of the communist regime facilitated no opportunity to deal with the horrors of World War II as well as the lingering pre-war neighborly conflicts. Thus, the examination of the legacy, coupled with the additional burden of dealing with the communist past as well, only emerged after the democratic transition and resulted in several outcomes. First, Central and Eastern Europe became the battleground of constant memory wars and competing narratives. Second, as the crimes of the communist regimes became official public knowledge, they were regarded as equal in gravity with the Holocaust.

Aline Sierp, History, Memory, and Trans-European Identity (Routledge 2014);
Tony Judt, ‘From the House of Dead: An essay on Modern European Memory’ in: Postwar: A History of Europe since 1945 (Penguin Books, 2006);
David Clarke, ‘Communism and Memory Politics in the European Union’ (2014) 12 Central Europe 99.;

135 In 2005, the European Commission launched Plan D for Democracy, Dialogue and Debate. Among the aims of this strategy to stress common European memory resulting, in 2008, in the Prague Declaration on European Conscience and Communism, signed by representatives of the CEE Member States. By 2009, the Commission conceptualized the Stockholm Program, entailing a promotion of European citizens’ rights. In this program, the Union was defined as ‘an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes, including crimes committed by totalitarian
regimes. Its intentions reiterate that while each Member State can approach European memory differently, they should promote reconciliation, collective memory and shared history, with the Union playing the role of facilitator in inter-state conflicts. As an organization encompassing countries with vastly different historical and political experiences and backgrounds, the EP has become a battleground to reform European memory because reaction to the idea of a united continental narrative were mixed, ranging from a Euro-skeptic nationalist to the enthusiastic Euro-supporter perspectives.\textsuperscript{136}

In consequence, the new member states demanded the recognition of their experience under communism to be incorporated in the official narrative of the EU, led by MEPs from the Baltic states.\textsuperscript{137} The commitment towards the inclusion of the communist past to the common narrative was affirmed in European Parliament resolution on the 25th Anniversary of Solidarity and its message for Europe and in the Berlin Declaration in 2007.\textsuperscript{138} The next year’s Slovene presidency particularly supported further similar developments, affirmed by the Parliament’s resolution on ‘European conscience and totalitarianism’.\textsuperscript{139} The EP further expressed its condemnation of the atrocities in the Balkans during the Yugoslav War (especially the Srebrenica genocide),\textsuperscript{140} the genocide in Rwanda, Cambodia and (more recently) in Sudan and Myanmar.\textsuperscript{141} In addition, the EU retrospectively weighed the legacy of the Armenian genocide and the Ukrainian Holodomor as well, whose memory now became integrated in the anti-totalitarian stance.\textsuperscript{142}

The legacy of colonial atrocities, in contrast, is a historical process the EU memory framework does not properly incorporate.\textsuperscript{143} Early theorists of European integration imagined united Europe to be organically joined by the prospective Member States (primarily African) colonies in order to provide further economic resources to the European continent. The economic exploitation of the colonies in Africa was only one reason for their enthusiasm about the common European-African market. Several of them included the ‘elevation of the non-
developed races’ as well as reaching the continent’s full economic potential as part of the agenda of the integrated Euro-African vision.\textsuperscript{144} This idea eventually evolved into the conception of \textit{Eurafrica} – the common market of the European Communities and their African colonies in the late 1950s.\textsuperscript{145}

In 1999, the European Parliament mentioned the importance of education on slavery and colonialism in connection to fighting racism and xenophobia.\textsuperscript{146} The following year, the Parliament suggested that ‘racism in some Member States has roots in colonial history’ when articulating the for the EU’s position at the World Conference against Racism.\textsuperscript{147} In 2004, the Parliament issued a resolution to celebrate Haiti’s independence from slavery, but without mentioning any context to particular European participation, excluding this event from European memory.\textsuperscript{148} While the EU-Africa partnership has evolved from completely unilateral towards a more reciprocal, the past relationship of the two continents, and certain European

\textsuperscript{144} In 1951, when the Treaty of Paris was drafted, among its six signatories, three retained overseas territories (Belgium, France and the Netherlands). The negotiations of the 1950s on the European common market and the Treaty of Rome heavily relied on the involvement of the African territories as a weight on the side of the already cooperative Western-European states to balance the influence of the US and the Soviet Union on the continent. The Eurafrican common market had been incorporated in the Treaty of Rome, although not as extensively as the negotiations indicated. Emphasis was accorded to the colonial territories of the signatories in Articles 131 and 227, with reference of the especial relationship between the colonies and their European overlords. Le Monde magazine hailed the treaty as the ‘first step towards Eurafrica’

In the Treaty of Rome Article 131 specified how:

“The Member States agree to associate with the Community the non-European countries and territories … The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations … association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.”


\textsuperscript{145} The postwar institutionalization of Eurafrica started in 1948, when the Organization for European Economic Cooperation created its working group on Overseas Territories, assessing the opportunities to integrate the colonies into the idea of united Europe. In this view, the African colonies were regarded as the provider of resources and produce. The colonies integration to the European cooperation would have helped Germany to access colonial resources, in a gesture of reconciliation.

Two scholarly opinion emerged in relation to the lack of incorporation of colonial legacy in European memory.

According to Gary Marks, Europe was built on the ruins of its Nazi past, and due to the decolonization of the 1950s and 1960s, the implementation of Eurafrica never got off the ground, and should therefore not play a prominent role in the EU’s construction of European memory. Whereas, Peo Hansen, while agreeing with the importance of Europe’s experience in WWII, argues that the colonial origins of the European Communities and the EU are neglected in scholarship. Hansen states that the EU’s institutions were built on ‘the scaffolding of not yet ruined structures of Europe’s colonial empire’. He called the EU’s treatment of the legacy of African colonial rule as the ‘past that Europe forgot’. Colonialism remains barely discussed in the Union’s legal governance of historical memory. Although some Member States struggle particularly with this legacy on the national level, there is no political will to initiate a discussion on the EU level about the colonial past.


\textsuperscript{147} European Parliament recommendation on the European Union’s position at the World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance [2001] C 34 E/208

responsibilities in Africa, are not as frequently articulated in official documents.\(^{149}\) This has changed slightly in 2019, when the European Parliament issued its resolution on the ‘fundamental rights of people of African descent in Europe.’ This resolution has connected racism in Europe to the lingering legacy of colonial atrocities.\(^{150}\)

As a result of the aforementioned documents and museums, one can trace particular standards the EU’s institutions introduced for the Member States in the legal governance of historical memory. Most of these standards affect fundamental rights, through the balancing between the rights of others (even though it is not a right, respect for human dignity is often used in these documents to justify interference) and freedom of expression, present since the earliest days of genocide denial bans.\(^{151}\) The following standards can be observed within the EU’s memory governance. First, the equal condemnation of mass atrocities, especially the two most crucial from the European perspectives (Nazi and communist crimes): in this respect, the approach of the EU is quite different to that of the European Court of Human Rights. This mindset was strengthened upon the 2004 Eastern enlargement, with the discovery of the heavy weight of the communist past upon the new Member States. However, the EU further proclaimed its condemnation of the atrocities of the Yugoslav War and several other mass atrocities of the 20\(^{th}\) and 21\(^{st}\) centuries.\(^{152}\) Second, the condoning, trivialization and denial of genocide and crimes against humanity should be strictly prohibited in all Member States: the formulation of the 2008 Framework Decision gives clear evidence of such viewpoint. Furthermore, the EU has adopted the practice of connecting genocide denial to racist, xenophobic and anti-Semitic behavior, which altogether oppose the foundational values of the Union. The Framework Decision attempted to enhance judicial cooperation between Member States and, to some extent, harmonize their regulations. As a result, several Member States have now created genocide denial bans, although their practices remain quite diverse.\(^{153}\) Third, respect towards the experience of victims is crucial, Member States should strive for their protection. Complementary to the EU’s approach on genocide denial, the Union (especially the European Parliament) is keen on promoting the welfare of victims and the protection of historically persecuted minorities (for example, the Roma). Fourth, local viewpoints may take precedence over the interests of the Union (mostly with regards to the internal market), as long as it does not lead to discrimination: as evidenced by the treatment of communist symbols by the Commission and the EU courts, it seems that the sensitivities of one or a minority of Member States over certain historical events may justify restrictions within the internal

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\(^{149}\) On this topic, see:  
Morten Broberg: ‘From Colonial Power to Human Rights Promoter: On the Legal Regulation of The European Union’s Relations with the Developing Countries’ (2013) 26 Cambridge Review of International Affairs 4.;  
Bruno Cardechi and Guglielmo Cardechi, ‘Contradictions of European Integration’ 23 (1999) Capital & Class 1;  
Gerrit Olivier, ‘From Colonialism to Partnership in Africa-Europe Relations?’ 46 (2011) The International Spectator 1


\(^{153}\) This standard is based on 2008 FD (n 130)
Fifth, European citizens are expected to be aware of the lessons of the past: the efforts of the EU are directed towards the education of European citizens about past atrocities. European citizenship seems to be conceived with an awareness of past atrocities. While the development of European citizenship does not instantly involve the states themselves, but state practice can foster this awareness by dealing with the past openly and honestly by not hiding more delicate and uncomfortable aspects. Sixth, proper reconciliation and remembrance
practices are crucial to peaceful internal relations and are precursory to future accession: on the basis of the Balkan and Turkish examples, it seems that among the political criteria of candidacy, the EU has some room to require the recognition or commemoration of certain historical events in order to foster respect towards human rights and the rule of law.156

In conclusion, the primary features of the EU’s memory framework – in a relative contrast to the Council of Europe – involve leaving behind the unique nature of the Holocaust, instead incorporating it into a general anti-totalitarian perspective. However, the central elements of the narrative persist: the fact that lessons need to be learned from the condemned atrocities so as to prevent any such events to ever occur again in Europe. In addition, the institutions (especially the Parliament) regard behavior that rejects the anti-totalitarian stance as anti-democratic. Those who deny these atrocities are expressing xenophobia, racism and anti-Semitism and thus do not deserve to be member of the European community. Encouraged by this viewpoint, the preservation of the past and the prioritization of the victims are the manifestations of the EU’s historical narrative, serving the purpose of not allowing Member States to forget the shameful European past. Thus, the Union can be appropriately described as an ‘institutionalized edifice whose foundations contain the very lessons learned from the encouragement of citizens to regard the history of the EU as their own and to identify as ‘European’ in addition to being a citizen of a specific Member State. However, the intention of (4) carries even more weight: it plays heavily on the obligation side of European citizenship. By supporting the preservation of European memory sites, the program aims to ensure the idea of ‘learning from the past’ and raise awareness among European citizens on order to avoid such atrocities from happening again on European soil. Thus, the ‘Europe for Citizens’ program implies that along with the rights encompassed in the TEU, European citizens also accept a crucial duty: namely, to care for the past and learn from it. This leads to measures that if someone questions or denies the existence and magnitude of the atrocities, make them eligible for criminal prosecution. Initially, the Council decision established the ‘Europe for Citizens’ program for five years (2007-2013), but as it was considered to be at least partly successful in its evaluation, the Council opted for the adoption of a regulation to extend it, in a slightly adapted form, until at least 2020.155 Instead of the four areas, in the current regulation, two areas of funding are available: (1) ‘European Remembrance’ and (2) ‘Democratic engagement and civic participation.’ These two actually incorporate the previous four areas: European Remembrance combines the aims and means of the previous ‘Together for Europe’ and ‘Active European Remembrance’, while ‘Democratic engagement and civic participation’ combines the aim and means of the previous ‘Active citizens for Europe’ and ‘Active civil society in Europe.’ The efforts of the Union to shape citizenship impacted the practice of some Member States as well. In 2016, the French government conceived a legal package which contains a similar approach toward the relationship of memory and citizenship. Furthermore, in the late 2010s, the idea of European citizenship evolved even further, incorporating the subtle implication of the ‘European way of life’. In 2017, the Commission released a report on European citizenship, mentioning the European way of life and the promotion of common values to prevent radicalization. The idea that European values may conflict with some arrivals of the continent is gaining ground as in the new European Commission, one of the Vice Presidential positions is titled ‘Protecting the European Way of Life’, with a portfolio including the coordination of migration.156 This standard is based on the accession criteria established by the EU.

A fascinating development in the legal governance of historical memory the European institution has appeared in the negotiations processes of acceding Member States

Scholars have hypothesized the existence of an unspoken Copenhagen Remembrance Criteria, including expectations of the Union from future members to tailor their regulation of historical memory to the common European memory. These include demonstration from the candidate states of a commitment to Holocaust memory in the 2004 acceding states, as well as recognition of events such as the Armenian genocide and the Srebrenica genocide. These requirements are mentioned among the political criteria of the accession, particularly in relation to minorities, but have never been officially codified. Surprisingly, the EP’s resolution on Turkish negotiations explicitly states that ‘although recognition of the Armenian genocide as such is formally not one of the Copenhagen criteria, it is indispensable for a country on the road to membership to come to terms with and recognise its past.’

See further: Toth, ‘Dealing with Conflicting Visions of the Past’ (n 132) 123; Aline Sierp, ‘Drawing Lessons from the Past: Mapping Change in Central and South-Eastern Europe’ (2016) 30 East European Politics and Societies and Cultures 1

42
experience of totalitarian war, subjugation and European-wide genocide. As a result, the European institutions promote the notion of learning from the past and the founding the European identity and European community on universal values, such as the triage of human rights, the rule of law and democracy. The policy of the Union’s historical memory-building as a whole is – at times, rather as the Union’s normative ideal – intended to rise above the local tensions and squabbles of Member States and to provide European citizens with proper heritage and education on this mission. The narrative of European memory intends to promote a model of European ethical remembrance functioning as a tool in the EU’s mission of human rights protection and serving as a basis of its transnational constitutional identity.

1.7 National Case Studies

In Section 1.1, I have briefly described the most prominent aspects of the legal governance of historical memory in various European states. The issues appearing in those states highlight problems relating to the relationship between the legal governance of historical memory and the rule of law to examine these issues, I identified two European states as case studies – France and Hungary – to explore these problems within national contexts, and identify patterns and tendencies with a particular depth which cannot be gained from a superficial overview of a wide selection of states. In this respect, the thesis does not employ a comparative approach, instead, it uses the national case studies as the testing ground of the research question and the argument. Although I rely on only two cases studies, they are sufficient to unpack the complexities of the legal governance of historical memory and its effect on the rule of law due to the breadth of issues they represent. They present challenges in terms of legality, equality before the law, impartiality of the judiciary and the protection of fundamental rights.

Thus, I examine the relationship of the legal governance of historical memory and the rule of law through the analysis of the situation in France and Hungary, both members of the Council of Europe and the EU. The cases are selected on the basis of geographical location as well as political and historical background because they demonstrate a range of different constitutional contexts, historical experiences and current difficulties with the rule of law. Such selection aids in answering the research question due to the range these states represent in Europe both in terms of how they govern historical memory and the stability of their rule of law situation. In this way, the results of the analysis, whether similar or different, will indicate patterns and tendencies that may be found in other European states.

First, I delve into the French context around the legal governance of historical memory as an example of a Western-European state, especially as the state had been one of the earliest introducer of memory laws in Europe. France is a founding member of all European institutions. Furthermore, France is regarded as stable from the rule of law perspective. Hungarian law and policies constitute my second case study. Its historical and socio-political context is intertwined with an Eastern-European existence, a late passenger on the Euro-train. The country is currently also the obvious example par excellence of rule of law deterioration.


158 Milošević, ‘EU Politics of Memory’ (n 127) 15.

159 That memory law is the Loi Gayssot from 1990
While Hungary represents Central and Eastern Europe, the country has always striven to belong to the West and integrate into the Westerns human rights regime.\textsuperscript{161}

I restrict the time limit of the case studies to the time span between 1990 and 2018/19. The description and brief comparison of these two states demonstrates different, evolving approaches on the legal governance of historical memory. The more ‘traditional’ French approach on memory laws remains more connected to human rights, especially the right to freedom of expression, as well as more in line with the rule of law as seen by the EU. Whereas the ‘more recent’ Hungarian approach encompasses a governmental capture of historical memory which results in the appearance of official historical narratives in major areas of governance (for example, the constitution, foreign policy, minority rights etc.) and thus reveals different consequences for the national situation of the rule of law.

\textsuperscript{161} Chapter 5 discusses how, in the aftermath of the democratic transition, Hungary strived to take over the Western European ideas on the importance of human rights and democratic values.
1.8 Thesis Structure

In conclusion, in order to provide an answer to the main research question, this thesis consists of six chapters: the present chapter has provided a general introduction of the problématique and introduced the main research question. Chapter 2 defines the scope of the research subject, the legal governance of historical memory. Chapter 3 examines rule of law theories and building thereon conceptualizes the rule of law for the purpose of this dissertation. It distinguishes the procedural and the substantive conceptions. For the purpose of this dissertation the latter is the most fruitful, it will be developed into an analytical framework to operationalize the research and answer the research question. The following chapters apply this framework to the two case studies. Chapter 4 analyses how the legal governance of historical memory affects the rule of law in France, while Chapter 5 aims to accomplish the same for Hungary.

Finally, Chapter 6 will summarize the main findings of the case studies and answer the main research question. It offers conclusions demonstrating how the legal governance of historical memory affects the rule of law. Furthermore, it points to how the impact of the legal governance of historical memory on the rule of law is a problem affecting states with robust rule of law standards as well as states experiencing rule of law deterioration. The dissertation will highlight the risks that the legal governance of historical memory presents to the rule of law, including the capture of historical memory. It further will unpack the self-inculpatory and self-exculpatory approach to the legal governance of historical memory and the role this differentiation plays in how the legal governance of historical memory affects the rule of law.
Chapter 2
Scope of Research: From Memory Laws to Legal Governance of Historical Memory
Chapter 2

After the description of the problématique of the thesis, this chapter provides clarification pertaining its terminology and taxonomy. It introduces the differences between ‘memory laws’ and ‘legal governance of historical memory’. Subsequently, I highlight a taxonomy within the legal governance of historical memory. Demonstrating the different levels of legal and ostensibly legal provisions (possibly) coming into play in the case studies.

2.1 The Origins of Memory Laws

The definition of memory laws can be traced back to the French ‘lois mémorielles’ which were discussed for the first time in a December 2005 op-ed in Le Monde magazine by historian Françoise Chandernagor. In her article, she protested against the increasing number of laws enacted with the intention of ‘forc(ing) on historians the lens through which to consider the past’. Chandernagor identified four previous legal measures increasing pressure on historians to adopt certain views: first, the ‘loi Gayssot’ (adopted in 1990), introducing to the French Act on the Freedom of the Press a prohibition on the ‘contestation’ of crimes against humanity, as defined by the Charter of the International Military Tribunal. Second, she cited the ‘loi Arménie’ (adopted in 2001), introducing the recognition of the Armenian genocide. Third, the ‘loi Taubira’, (adopted in 2001 as well), recognizing slavery and the transatlantic slave trade as a crime against humanity and requiring schools to teach them as such. Finally, Chandernagor argues that the French list of lois mémorielles was broadened in 2005 with the ‘loi Rapatrié’, which requires French schools to teach the positive aspects of French presence on the colonies (especially in North Africa). This law proved to be the final straw for several historians, triggering their adverse reaction, and leading to widespread protests against the lois mémorielles. The same issue of Le Monde magazine, besides identifying and defining what the lois mémorielles were, also contained an appeal from the newly formed organization ‘Liberté pour l’histoire’ towards lawmakers, stressing the need to ensure the independence of historical research from the politically motivated creation of artificial narratives.

The concept of lois mémorielles has been translated as ‘memory laws’ throughout Europe, although the two terms cannot be identified completely. While the French term’s use is restricted mostly to the four original lois mémorielles (with the occasional inclusion of other provisions), the English term has been used to describe anything and everything from Holocaust denial prohibitions to decommunization laws, decrees on monuments and history education programs. The German term Erinnerungsgesetz carries a similar meaning to the English term for memory laws. 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

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163 Ibid.
164 Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe
165 Loi du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915
166 Loi du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité
167 Loi du 23 février 2005 portant reconnaissance de la nation et contribution nationale en faveur des Français rapatriés
169 Nikolay Koposov provides the most exhaustive overview on the terminology of memory laws – in Memory Laws, Memory Wars (n 50) 2.

See also: Kahn, ‘Does it Matter How One Opposes Hate Speech Bans?’ (n 42)
The German term Erinnerungsgesetz is connected to the notion of Erinnerungskultur – the “present-day obsession with the past”. See, for example: Jan Assmann, ‘Collective Memory and Cultural Identity’ (1995) New German Critique 65
of the Spanish Civil War and the dictatorship of General Francisco Franco. In the Hungarian language, two terms refer to memory laws: emléktörvény – indicating specifically declarative type of memory laws and emlékezettörvény – an umbrella term similar to the connotation of memory laws in English.

Despite subtle differences (in content), all memory laws have one thing in common: they encompass the state’s relationship with its past. According to Maria Mälksoo, memory laws “sanction a legitimate relationship to the past by regulating certain remembrances outside the accepted boundaries of political bargaining.” The pioneers of the term equate memory laws to “Pandora’s box”, as these laws only establish an official version of the truth, guarded by the state as unquestionable. The nature of what memory laws are can be quite vague, and providing an exact definition has proven to be particularly difficult. Eric Heinze simply qualifies them ‘legal aberrations’ – “formulated to proclaim authoritative versions of some invariably sensitive history.” In my view, the most appropriate definition of ‘memory law’ can be found in the first volume on the legal governance of memory ‘Law and Memory: Towards Legal Governance of History.’ The book’s introduction defines memory laws as “enshrin(ing) state-approved interpretations of historical events.”

Due to the gradually expanding interest in memory laws, Heinze has suggested widening the academic field by advancing a new discipline on ‘law and memory’ that will examine the specific issues memory laws present. However, similarly to the diversity of academic definitions, the term ‘memory laws’ in the public discourse possesses different connotations. Journalists write about memory laws synonymously with genocide denial bans, and non-academic interest in memory laws in the media has only begun to slowly emerge due to the controversy around Poland’s latest attempt to introduce the crime of ‘defamation of the Polish State and nation’.

To further elaborate on the sort of measures memory laws can encompass, an initial distinction has been made between punitive and declarative regulations on the basis of the four French lois mémorielles, centralizing the existence of criminal punishment in their differentiation. Emanuela Fronza characterized this distinction through motivation of memory laws by the invitation to remember versus the aim to punish negationist behavior. Sévane Garibian has further expanded on the classification by singling out laws with a
normative function versus laws with a declarative function.\(^{181}\) She defines laws with normative functions as representing more than merely criminal punishment. In her categorization, the *loi Rapatrié* (on the positive aspects of French presence in the colonies) also possesses normative functions due to its impact on education.\(^{182}\)

Memory laws have been classified on a diachronic basis as well. Uladzislau Belavusau have sorted memory laws into four streams: (1) genocide denial prohibitions, (2) laws concerning the ‘falls of 20\(^{th}\) 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’.\(^{183}\)

Antoon De Baets employs a different classification of memory laws on the basis of their impact on the work of historians, containing limits on such work set by public interest of the state or of society.\(^{184}\) De Baets identifies memory laws in four topics: laws regulating the legacy of historical figures (where, in his categorization a memory laws can function as an anti-defamation measures), laws regulating historical symbols - including flags, monuments, memorials, national anthems, street names. He regards these memory laws as ‘heritage laws’. His third group of laws encompasses measures regulating the legacy of historical figures through anniversaries and commemorations (in his categorization, these laws can also regulate public order as well).\(^{185}\) De Baets’ final group of memory laws concern historical events – identifying genocide denial laws and some recognition laws as examples. Despite his slightly different perspective, De Baets also employs the punitive/declarative divide in his categorization as he finds memory laws with prohibitive nature (criminal sanctions) particularly problematic. Whereas memory laws with prescriptive, non-coercive nature are not as extensively criticized by him.\(^{186}\) De Baets’ perspective is quite unique as it distinguishes memory laws from genocide denial laws - unlike any other categorization. He claims while these two groups can overlap but treats them separately due to the distinctive link identified between genocide denialism and hate speech.\(^{187}\)

Recently, the punitive-declarative distinction has proven insufficient to describe the expanding list of memory laws. Eric Heinze has thus proposed to replace the term memory law with ‘laws affecting historical memory’ to justify the broader scope of examination.\(^{188}\) He suggests, under this category, to differentiate between non-regulatory 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). The definition of ‘declarative memory law’ has varied since the inception of the term. Heinze uses it to indicate laws that do not require further government action, thus restricting the scope of declarative laws, citing the example of provisions such as the French state’s recognitions of the Armenian genocide.\(^{189}\) In contrast, Nikolay Koposov equates declarative memory laws to ‘memory laws of the periphery’

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\(^{181}\) Garibian, *Pour une lecture juridique des quatre lois « mémorielles »* (n 43) 161-162
\(^{182}\) Ibid 162.
\(^{183}\) Belavusau, ‘Memory Laws and Freedom of Speech’ (n 48) 543-545.
\(^{185}\) Antoon De Baets ‘Laws Governing the Historian’s Free Expression’ in Bevernage and Wouters (eds) *Palgrave Handbook of State-Sponsored History* (n 96) 40
\(^{186}\) Ibid 47
\(^{187}\) Ibid 55
\(^{188}\) De Baets further mentions how prescriptive memory laws have two types: coercive and non-coercive. In his categorization, prescriptive memory laws which are also coercive function similarly to prohibitive memory laws – containing possibly criminal sanctions in case of non-compliance.
\(^{189}\) Ibid 59.
\(^{189}\) Heinze, ‘Beyond Memory Laws’ (n 173) 415
\(^{189}\) Ibid 418
(whereas ‘hard core memory laws’, in his interpretation, consist of genocide denial bans). 190

Among the memory laws of the periphery, he introduces a wide scope of provisions whose common theme is ‘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. 191 In addition, while most scholars regard the creation of the first memory laws as dating from the late 1980s to the early 1990s, Koposov reaches back to the beginning of the 20th century to locate their origin. He regards the 1915 Declaration of the Entente concerning the massacre of the Armenians by the Ottoman Empire as Europe’s first memory law. He further differentiates between the ‘anti-racist’ and ‘anti-fascist’ memory laws adopted from the 1950s to the 1970s. 192

As a departure from the punitive-declarative division, George Soroka and Felix Krawatczek categorize memory laws from yet another perspective, focusing on the intentions and motivations of the state for the introduction of these measures. They differentiate between prescriptive and proscriptive memory laws. In their view, prescriptive memory laws ‘reflect and anxiety to preserve national values’, whereas proscriptive memory laws ‘codify already existing societal taboos’. 193 The Polish law of 2018 is cited as an example for the former, while Holocaust denial prohibitions represent the latter group. 194

In 2018, Uladzislau Belavusau introduced the concept of mnemonic constitutionalism into the discussion on the legal governance of historical memory. 195 He defines mnemonic constitutionalism as a ‘constitutionalism (that) encompasses, yet transcends pure measures against genocide denialism and declarative memory laws’. 196 Mnemonic constitutionalism theorizes the thorough incorporation of history into the constitutional project. On the one hand, use of history has not been missing from constitution-making. In fact, on several occasions, the constitutional preambles’ function entails an engagement with the history of the state – in order to affirm distance from previous totalitarian regimes, to commit to the investigation of the past or to justify the state’s existence with historical narratives. 197 On the other hand, 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, result 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 non-legal developments as well (such as policy decisions and rhetoric). The idea of constitutions as particular tools of transmitting historical narratives have appeared in the works of Heino Nyyssönen and Jussi Metsälä, who introduced the notion of

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190 Koposov, Memory Laws, Memory Wars (n 50) 6.
191 Ibid 7
192 Ibid 18-38
194 Ibid 159
195 Belavusau, ‘Final Thoughts on Mnemonic Constitutionalism’ (n 52)
196 Ibid.
197 Furthermore, in earlier considerations, Kim Lane Scheppelle has assessed various constitutions in terms of how they deal with historical memory. She claims that several post-transition Central and Eastern European states have enacted what she calls ‘not that’ constitutions – thus defining the past which they should avoid in the future. She brings as the example of ‘not that’ constitutions, Germany and Hungary.
constitutional memory, incorporating texts (primarily constitutional preambles) that ‘highlight historical events, canonize an interpretation of the past as the basis of the whole legal and political system.’

Furthermore, several provisions have been identified as transcending the traditional scope of memory laws, as they touch on policy areas previously disassociated from historical memory. For example, various citizenship laws in Europe are inspired by correcting historical wrongs, such as Spain’s practice on granting citizenship to the descendants of expelled Sephardi Jews and Hungary’s law on dual citizenship, developed specifically for the descendants of ethnic Hungarians who lived in territories belonging to Hungary before 1920. The EU’s approach includes the introduction of the remembrance of the Holocaust and of the communist regimes as a duty of ‘good’ European citizens via the Europe for Citizens Program.

2.2 Taxonomy of Memory Governance Sources

In this dissertation, I build upon some components regarding classifications of memory laws put forward by Uladzislau Belavusau, Emanuela Fronza and Nikolay Koposov, among others, discussed in Section 1.3. However, the previous discussions have demonstrated how inconsistent the definition of memory laws remains, as well as how the means through which some states approach the regulation of their past expand first within the realm of law, from punitive measures and recognition law to citizenship provisions as well as beyond the realm of law, to, for example, policy in international relations. Therefore, a taxonomy is necessary, in order to outline the types of sources the thesis considers, as its analysis is not confined to strictly legal measures. The taxonomy consists of both legal and ostensibly legal measures. In the following paragraphs, I elaborate on which type of sources these two groups encompass, and why their examination is necessary. While in the previous section, I have been referring to the origins of memory laws, the description and justification of these sources demonstrate a need to go beyond the analysis of the aforementioned traditional memory laws.

The first group of sources belonging under the legal governance of historical memory are ostensibly legal provisions which serve to support the narratives established through legal means. It is necessary to consider non-legal sources because these measures, which can take the form of, most importantly, political rhetoric, can help bring about legal codification. The formulation of memory laws often starts with their narrative’s appearance in the speeches of government representatives.

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200 There are various EU programs aimed at boosting the awareness of European citizenship – Remembrance to Europe’s totalitarian regimes is a crucial part of these programs (see n 154)
201 Official statements from state representatives do not possess legal weight but on the one hand, some historical narratives can be repeated on numerous occasions (in order for the public to accept them) and they eventually can be codified in a memory law. For example, Hungarian government representatives have been using of rhetoric of ‘Hungary needing to defend its and Europe’s Christian culture’. By 2018, the Seventh Amendment to Hungary’s Fundamental Law contained the requirement of state authorities to protect the country’s Christian culture. On the topic of how political rhetoric can influence lawmaking and democracy, see: Douglas Walton, ‘Criteria of Rationality for Evaluating Democratic Public Rhetoric’ in Benedetto Fontana, Cary J. Nederman and Gary Remer (eds) Talking Democracy: Historical Perspectives on Rhetoric and Democracy (Pennsylvania State University Press 2004);
The second group of measures belonging under the legal governance of historical memory – legal measures – consists of various sub-groups. These sub-groups integrate previously discussed classifications of memory laws. The first subgroup of memory laws is mnemonic constitutionalism.\textsuperscript{202} This category highlights the incorporation and emphasis of historical narratives into constitutions. Although both constitutional and non-constitutional documents can be classified as legal measures, I opted to separate mnemonic constitutionalism into a category of its own. This concept has recently been identified in the academic analysis of memory governance. Scholars have emphasized how the use of constitutional documents makes a great deal of difference in the consequences and repercussions of state interference in history via law.\textsuperscript{203}

The second category consists of traditional memory laws.\textsuperscript{204} It consists of all history-related legal measures below the constitutional level. It differentiates between punitive laws (legal measures containing criminal prohibitions),\textsuperscript{205} non-punitive laws (including recognition laws, declarations etc.)\textsuperscript{206} and quasi-memory laws.

Quasi-memory laws form a collective of provisions which, on the surface, do not contain historical references, but still possess a historical dimension. As closer examination shows an impact of historical memory, especially in their drafting and implementation. While quasi-memory laws possess no bearing on historical memory on their surface, their application can prominently affect various aspects of peoples’ lives through exclusionary devices.\textsuperscript{207} Such quasi-memory laws include regulations relating to citizenship,\textsuperscript{208} public administration (symbolic naming of public places),\textsuperscript{209} the judicial system (such as the Hungarian transformation of the judiciary on the basis of history)\textsuperscript{210} and minority protection (defining minorities on a historical basis, excluding certain groups).\textsuperscript{211}

\textsuperscript{202}Belavusau, ‘Final Thoughts on Mnemonic Constitutionalism’ (n 52)

\textsuperscript{203}Ibid

\textsuperscript{204}In addition, relevant court decisions stand on the border of two categories. On the one hand, certain court decision must be mentioned in connection to memory laws, as they contain the interpretation of these laws. Furthermore, court decisions can be the subject of influence by national governments through the capture of the judiciary, and thus they can function as ostensibly legal measures. On the other hand, some court decisions do not interpret certain concepts, such as the relationship between history and law or the historical truth. Accordingly, I will consider court decisions as ostensibly legal measures but will use them, on occasion, in the analysis of the statutory memory laws category as well.

\textsuperscript{205}On punitive memory laws, see a detailed monograph by Fronza in Memory and Punishment (n 46).

\textsuperscript{206}Agreeing with the classification of Koposov in Memory laws, Memory Wars (n 50) 6.

\textsuperscript{207}Such as the Hungarian Law – 2011/CLXXIX törvény a nemzetiségek jogairól

\textsuperscript{208}For example, the French law - Loi n° 2017-86 du 27 janvier 2017 relative à l’égalité et à la citoyenneté

\textsuperscript{209}More information on street renaming in Anna Wójcik and Uladzislau Belavusau, ‘Street Renaming after the Change of Political Regime: Legal and Policy Recommendations from Human Rights Perspectives’ T.M.C. Asser Institute for International & European Law, Policy Brief (April 1, 2018)

\textsuperscript{210}Such as the Hungarian law - 2011/CLXI törvény a bíróságok szervezetéről és igazgatásáról

\textsuperscript{211}For example, the Hungarian law – 2011/CLXXIX törvény a nemzetiségek jogairól (n 289)
2.3 State Approaches to Memory Governance

In addition to the classification of memory governance sources, it is worth considering the approaches states employ towards the creation of the laws and ostensible measures mentioned in the previous section. Especially since the claim of the thesis relies on these approaches. Chapter 1 has already outlined how states use the self-inculpatory and self-exculpatory approaches in dealing with their past. This distinction is central to my examination of how the legal governance of historical memory affects the rule of law.

The self-inculpatory and self-exculpatory approaches have been conceived with opposing natures. The self-inculpatory approach has been noted for its positive outcome of admitting responsibility for historical atrocities. Whereas the self-exculpatory approach has been viewed through its exclusively negative outcomes. For example, how this approach can become a tool of increasing governmental influence over the legal governance of historical memory and target those who oppose the official historical narratives. In contrast to initial definition of the self-inculpatory and self-exculpatory approaches, the case studies of France and Hungary, incorporating the rule of law as the analytical framework, will shed more expansive light on the positive and negative effects of both these approaches, expanding the limits of such research. They will demonstrate how the existing opposing distinction, namely how the self-inculpatory approach is always positive and self-exculpatory approach is always negative, cannot withstand scrutiny because using either a self-inculpatory or a self-exculpatory approach can end with quite similar results.

However, before delving into the case studies, the examples of Germany, Spain, Poland, Russia and Ukraine reveal how the self-inculpatory and self-exculpatory approaches appear in general. These brief descriptions reveal the advantages and setbacks of both approaches, for example, related to the regulation of genocide denialism and transitional justice. The countries singled out below have been characterized as typical and traditional in illustrating self-inculpation and self-exculpation regarding specific historical debates. Germany’s treatment of its past, especially WWII atrocities is alluded to as particularly a commendable instance of self-inculpation. Whereas the recent memory laws introduced in Poland, Russia and Ukraine have been identified by scholars as assets of self-exculpation.

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212 See n 54-58 on the works of Heinze and Malksöo
2.3.1 The Self-Inculpatory Approach to Memory Governance

The self-inculpatory approach appears in the creation of historical narratives that are firmly established, well-debated facts which are defended, and, in the best-case scenario, do not involve criminal sanctions. Unfortunately, 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 either go too far or not far enough. The most salient examples of the self-inculpatory approach include solidary recognition laws and genocide denial bans that target those questioning the existence or aspects of historical atrocities.

2.3.1.1 Prohibiting Genocide Denialism: Germany

Genocide denialism in Europe highlights the difficulties and limits of the self-inculpatory approach. Prohibition of genocide denialism inherently involves the application of criminal law, necessitating the restriction of various fundamental rights. Despite their criminal applications, genocide denial bans are tolerated in Europe. Despite serious misgivings over their justification and actual usefulness, criminal prohibitions on genocide denial – specifically, those directed towards the denial or minimization of the Holocaust – have become the only broadly-accepted form of punitive memory laws. Genocide denial bans function as a tool and as a symbol of the self-inculpatory approach, demonstrating that in light of an honest reckoning with the past, opinions that question established historical facts are not to be condoned or disseminated.

The conduct of West (and eventually unified) Germany provides the earliest and most obvious example to demonstrate the evolution and use of genocide denial bans related to Holocaust negationism. Genocide denialism has been prosecuted under provisions of hate speech or defamation from the 1960s, and West-Germany (FRG) became the first country in 1985 to amend its Criminal Code to combat the growing number of Holocaust denial instances. Two pieces of legislation to the German Code have been introduced in the late 1980s, later recognized as punitive memory laws, namely Article 86a created the prohibition on the dissemination of symbols of unconstitutional organizations, specifically Nazi memorabilia.

In addition, amendments had been adopted to Article 194. This provision initially served to regulate the prosecution of insult, but its amendment referenced, for the first time, the Nazi atrocities of WWII. The amendment eliminated the obligation of lodging an official petition in specific cases – if the insult is committed either in public, in broadcasting, or in dissemination, and if the victim of the insult is a member of a group that was prosecuted “under the National Socialist or another violent and arbitrary dominion”. In media and academic writings, the amendment had been referred to as the law against the Auschwitz lie (Gesetz gegen die Auschwitzlüge).

The necessity of introducing this provision was justified by the rising number of ‘neo-Nazi incidents’ and repeated instances of Holocaust denial. Thus, legislators had already attempted to adopt the first version of the law in 1982. This version contained a more

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213 Koposov, Memory Laws, Memory Wars (n 50) 14-20.
214 Strafgesetzbuch (StGB) Art 86a
215 Ibid. Art 194
217 By 1981, neo-Nazi incidents significantly increased in West-Germany, and Chancellor Helmut Schmidt argued for the necessity of filling a gap in criminal law to punish the trivialization of the Holocaust.
pronounced formulation of genocide denial. However, at that time, the already-existing provisions used against Holocaust deniers were deemed sufficient, namely Article 130 of the Criminal Code (Volksverhetzung – ‘incitement of the people’). In fact, during the debate of the law, the Christian Democrats argued for a provision prohibiting the denial of any genocide, not only the Holocaust. Nevertheless, the amendment introduced in 1985 does not resemble the genocide denial bans of the next two decades. A genocide denial ban, using the specific language of such prohibitions, was adopted in 1994 to the aforementioned Article 130 of the Criminal Code.

The introduction of the earliest German memory laws on the denial of the Holocaust initiated an extensive debate on the Nazi past. In the aftermath of the introduction of the law, in June 1986, historian Ernst Nolte wrote an article in the Frankfurter Allgemeine Zeitung hypothesizing the ‘past that never goes away’. He argued that Nazi past of Germany has gained a false uniqueness resulting in an endless cycle of guilt of the country. He thus proposed the treatment of the Nazi legacy as merely another area of history, without dedicating specific efforts to make it appear particularly horrific. Jürgen Habermas published his response soon thereafter, denouncing Nolte and his followers for their alleged apologetic writing of history. This exchange launched the German Historikerstreit, which continued in several articles throughout the late 1980s. Habermas was criticized for stifling honest inquiries into the past by Nolte’s supporters while Nolte’s group was criticized for making claims without much evidence and for relativizing the crimes of National Socialism.

In the German case, the supportive viewpoint towards the criminal prohibition of genocide denialism emerged victoriously, as the law enjoys significant support in society and from political parties. In the pioneering footsteps of West Germany, bans on genocide denialism have since spread across Europe. The following states have since adopted laws on genocide denialism: Albania (2008), Andorra (2005), Belgium (1995), Bulgaria

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218 More on the German genocide denial ban: Eric Stein, ‘History against Free Speech: The New German Law against the "Auschwitz" and Other: "Lies"’ (n 202)
219 Ibid 282
220 Gesetz zur Anderung des Strafgesetzbuches der Strafprozessordnung und anderer Gesetze (28 Oktober 1994)
222 Ernst Nolte, ‘Vergangenheit die nicht vergehen will’ (The past that refuses to pass away) Frankfurter Allgemeine Zeitung (Frankfurt 6 June 1986)
223 Jürgen Habermas, ‘A Kind of Damage Control: On Apologetic Tendencies in German History Writing’ Die Zeit (Berlin, 11 July 1986)
224 The Historikerstreit gained its name in the late 1980s from the decade-long debate between various German historians on the weight and treatment of the Nazi past in historical memory of West Germany. On the Historikerstreit: Peter Baldwin (ed) Reworking the Past: Hitler, the Holocaust, and the Historians’ Debate (Beacon Press, 1990)
226 Art 74a of the Criminal Code
227 Art 458 of the Criminal Code
228 Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l’approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale
Chapter 2

(2011), 229 Cyprus (2011), 230 Czech Republic (2000), 231 Greece (2014), 232 Hungary (2010), 233 Italy (2016), 234 Latvia (2009), 235 Liechtenstein (1999), 236 Luxemburg (1997), 237 Malta (2009), 238 Montenegro (2010), 239 North Macedonia (2004), 240 Romania (2015), 241 Russia (2014), 242 Slovenia (2004) 243 and Switzerland (1995). In addition, the genocide denial bans of certain states have been invalidated by domestic constitutional courts, for example in Spain: the domestic prohibition had been found unconstitutional in 2007, but it was reintroduced in 2015. 245 The debate on genocide denial has reached the European institutions as well: Article 1 is the most debated and discussed provision of the 2008 Council Framework Decision on Racism and Xenophobia on the obligation of states to introduce genocide denial bans. 246 Nowadays, several states and the EU justify genocide denial bans by equating such conduct with racism. In contrast, opponents of genocide denial bans argue for their greater disadvantages: making martyrs of the deniers who present themselves as champions of freedom of expression. 247

Most genocide denial bans are employed to combat Holocaust negationism. Legislators and scholars debate whether denial of other genocides (the Armenian genocide, Holodomor or communist crimes) could and/or should be included under the scope of such prohibitions. 248 Some states strive to expand genocide denial bans to cover several historical atrocities: the French government is trying relentlessly to criminalize the denial of the Armenian genocide 249 and Switzerland prosecuted Turkish politician Dogu Perinçek under its own genocide denial ban. 250 Several Central-European states adopted criminal provisions against the denial of crimes of the communist regimes. 251 However, the controversies around genocide denial bans,

229 Art 419a of the Criminal Code
230 Law no. 134(I) on the combat against certain forms of racism and xenophobia of 21 October 2011
231 Law 405 of 25 October 2000 amending Criminal Code Article 261a
232 Law 4285 of 2014;
Amendment of Law 927/1979 (A 139) on adapting to the decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and other provisions
233 Art 269c of the Criminal Code
234 Art 1 of Law 115/2016 (introduces the aggravating circumstance of denialism into the Criminal Code)
235 Art 74/1 of the Criminal Code
236 Art 283 of the Penal Code (amended in December 1999)
237 Loi du 19 juillet 1997 complétant le code pénal en modifiant l'incrimination du racisme et en portant l'incrimination du revisionnisme
238 Art 82b of the Criminal Code
239 Art 370/2 of the Criminal Code
240 Art 407a of the Criminal Code
241 Law 217 of 23 July 2015
243 Art 297 para. 2 of the Criminal Code on Incitement to hatred, violence and intolerance
244 Criminal Code Art 261bis
245 Art 607/2 of the Criminal Code, enacted in 2007, validated in 2015. Now, Holocaust denial is prosecuted under Article 510/1 of the Criminal Code
246 See Perinçek v Switzerland (n 78)
247 For example, Hungary criminalizes – Article 333 of the Criminal Code

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in terms of which atrocities they should concern and how severe their sanctions should be, points to the inherent paradox of the endorsement of a criminal law approach in the self-inculpatory attitude. Although the state intends to demonstrate the intolerance towards false narratives, its conduct harms fundamental rights and uneven implementation often results in even more controversial measures.

2.3.1.2 Transitional Justice: Spain

Transitional justice-related measures can contribute to the self-inculpatory approach to the legal governance of historical memory (although transitional justice encompasses much more, but the legal governance of historical memory is one of its crucial components). These efforts do not necessarily involve criminal prohibitions. The example of Spain serves to demonstrate the values and pitfalls of memory laws created within the framework of transitional justice – its intention towards coming to terms with the past, and its eventual consequences in instrumentalizing historical memory.

The legacy of the Spanish Civil War and the subsequent dictatorship of General Franco have been clouded in a past of forgetfulness and a wall of silence for decades. In 1977, the Spanish government adopted the Amnesty Law which enabled the forgetting and impunity of Francoist crimes. However, by the 1990s, grassroots NGOs initiated a review of the Franco regime’s legacy to break the wall of silence and help the families of the regime’s victims gain closure. The government of the People’s Party (PP) led by José María Aznar, expressed categorical opposition to any such initiatives (truth or reconciliation commissions, reparation, exhumations of mass graves etc.) with the argument of letting the past die.

The subsequent government of the Spanish Socialist Workers’ Party displayed the opposite attitude towards the Francoist past, resulting in the adoption of the Historical Memory Law of 2007. Generally regarded as the best-known memory law of Spain, it is considered a belated transitional justice measure, but its formulation is not without controversy. The law introduces economic, legal and symbolic measures to deal with the past, including financial support for the families of victims to uncover the fate of thousands of forcibly disappeared citizens, commemorating and honoring victims, and introducing prohibitions on the denial of the crimes of the Francoist regime. Nevertheless, the law specifies that it is not the task of the legislator to ‘impose collective memory.’

See further: Fronzà, ‘The Criminal Protection of Memory’ (n 178)

This can be observed, for instance, in Central and South America, historical memory-related laws and policy decisions are often required by the Inter-American Court of Human Rights within the framework of transitional justice. I have referred to different connotations of transitional justice and the legal governance of historical memory in Latin-America in Chapter 1.


At the end of the 1990s, grassroots organizations such as the Asociación para la Recuperación de la Memoria Histórica (ARMH) mobilized themselves to demand the debt the Spanish State owed Franco’s victims, and to assert their right to know the truth, and to regain appropriate reparations and historical recognition (or “historical memory”)


Levy 57/2007 por la que se reconocen y amplian derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura (Levy 57/2007)

Ibid

Despite the *exposicion de motivos* (explanation of motives) in Article 1, the law in fact establishes its own version of history by describing “the social reality and context it wishes to influence” and depicting “the kind of society it imagines to establish for the future.”\textsuperscript{259} Article 1 of the law states its purpose to recognize those who suffered persecution during and after the Civil War, to promote reparations and recovery of family memories, and to foster reconciliation among citizens. It further intends to guarantee the facilitation of knowledge on the events of the Civil War and Franco’s dictatorship, and the preservation and openness of archival evidence.\textsuperscript{260}

Although the Historical Memory Law is considered as the sign of significant progress in dealing with the past, it has also been criticized. The law designates the constitutional reform of 1978 as the starting point of a new era for Spain. However, it omits the controversial circumstances under which the new Spanish constitutions had been adopted.\textsuperscript{261} It also negates any former tradition of democratic constitutionalism dating back from before the Civil War. It does not create institutions to investigate past crimes, but only provides assistance to families searching for their lost relatives. Therefore, the attempt at reconciliation actually suppressed an open debate on the transition’s shortcomings, including its lack of accountability for those responsible for past crimes.\textsuperscript{262}

The German and Spanish examples highlight both the advantages and the pitfalls of the self-inculpatory approach. This approach towards the legal governance of historical memory should ideally support a free debate around sensitive historical issues and dealing with the past in an open manner. However, the endorsement of genocide denialism bans in the self-inculpatory approach presents an inherent paradox due to the aggressive use of criminal sanctions in reiterating official narratives. Furthermore, such bans cause the hierarchization of atrocities. Genocide denialism bans are tolerated as tools in the preservation of the results of an honest reckoning with the past.

If genocide denial prohibitions demonstrate the self-inculpatory version of punitive memory laws, then the Polish memory law of 2018, to be discussed in the next section, operates as its self-exculpatory foil, emphasizing how delicate the balance is between the use of criminal sanctions in the self-inculpatory and the self-exculpatory approaches. This is because genocide denial bans protect established historical facts, and intend to combat the spreading of false narratives, whereas the Polish memory law of 2018 supports a narrative based on dubious conclusions with criminal sanctions.

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2.3.2 The Self-Exculpatory Approach to Memory Governance

The self-exculpatory approach entails the creation of historical narratives focusing 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. This may happen through different means, such as criminal provisions, lack of funding or institutional takeovers. Memory laws demonstrating the self-exculpatory approach can frequently change arbitrarily without proper debate to achieve 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 (the *Loi Rapatrié*), is one such instance which tries to forward the state-approved narrative through the compulsory education system.263

2.3.2.1 Criminalizing Dissent: Poland

One of the manifestations of the self-exculpatory approach towards the treatment of the past entails the introduction of criminal sanctions towards the repression of dissent on sensitive historical questions. In contrast to the criminal prosecution of genocide denialism, memory laws similar to the Polish memory law of 2018 have been vehemently criticized. Although the criminalization of genocide denialism can be included in the self-inculpatory approach, the Polish memory law, while similarly introducing criminal sanctions, functions as an example of the self-exculpatory approach due its move towards the criminalization of selected historical narratives.

The Polish law on the ‘defamation of the good name of the Polish state and nation’ was enacted in early 2018, although its criminal sanctions were eliminated from the text a few months later.264 A similar prohibition appeared in the Criminal Code in 2006, but the constitutional court found it unconstitutional.265 The widespread criticism concentrated on several aspects of the law: its language proved to be very vague and it was adopted very quickly.266 The president of Poland signed the law despite widespread protests, but immediately sent it to the constitutional court for review.

The new Polish memory law was interpreted by Israel and several other countries as self-exculpatory due to its interpretation of the term ‘Polish death camps’.267 The Polish government has been very sensitive to the use of the term ‘Polish death camps’ in the public discourse. Usually, it is a short form for ‘Nazi concentration camp on the territory of occupied Poland’. However, widespread use of the term has fueled the debate of Polish responsibility in WWII, as the Polish government proved to be quite hostile towards research into the

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263 This will be elaborated in Chapter 4 in the French case study
265 Koncowicz, ‘On the Politics of Resentment, Mis-memory, and Constitutional Fidelity’ (n 19) 277.
268 Gliszczyńska–Grabias and Kozłowski, ‘Calling Murders by Their Names as Criminal Offence’ (n 15); Christopher Reeves ‘Reopening the Wounds of History? The Foreign Policy of the ‘Fourth’ Polish Republic’ (2010) 26 Journal of Communist Studies and Transition Politics 4, 518
responsibility of certain Poles in war atrocities, such as pogroms like the one in Jedwabne. In Poland, the law was interpreted to target researchers who argue for Polish responsibility for Holocaust crimes.

Ultimately, the Polish government conceded and removed the criminal sanctions from the law. This episode illustrates that the main problem of such memory laws is the punishment of anyone who contradicts the existing regime and its official narratives. While in some countries like Poland actual criminal law is used to achieve such results, there are other ways through which similar outcomes can be achieved: this makes research impossible by the taking over of institutions, retracting funding or establishing research programs loyal to the government which flood the public with research supporting their narratives.

The second, often overlooked part of the Polish law concerns the crimes committed by Ukrainian nationalists between 1925 and 1950. The debate on the role of the Ukrainian nationalists provides the source of a memory war between Poland and Ukraine, as the Polish legislation labels the Ukrainian nationalists as criminals who committed genocide against Poles and Jews, while their deeds are celebrated in Ukraine as freedom fighters resisting Nazi occupation. The timeframe of the crimes of the Ukrainian nationalists seems especially strange, as both 1925 and 1950 are rather arbitrary dates to be chosen.

2.3.2.2 Memory Wars and Mnemonic Security: Russia and Ukraine

The use of a self-exculpatory approach towards the past can occur without criminal sanctions as well. The example of Spain reveals that efforts relating to transitional justice should occur in the spirit of self-inculpation. However, the appearance of mnemonic securitization and memory wars demonstrate how states employing transitional justice as justification for the transformation and introduction of memory laws results in a self-exculpatory attitude towards the past.

In Central and Eastern Europe, the contradictory outlook on the same historical event by different states can lead to an adverse impact on several groups of society – including minorities. These viewpoints can lead to the securitization of historical memory as well as to the outbreak of memory wars. The recent memory laws of Ukraine aim at the creation of ‘mnemonic security’, in order to combat opposing narratives from Poland, Russia (and to a lesser extent, Hungary). The governments of post-Soviet Ukraine switch between the pro-

269 ‘Lengyelország megváltoztatta botrányos törvényét a náci bűnökért’ (n 250)
270 For example, in Turkey, journalists and academics often face hardships under the criminal provision (Art 301 of the Turkish Criminal Code) on ‘denigrating Turkishness’ (protecting the good name of Turkey), if they doubt the official narrative on the nature of the Armenian genocide. Furthermore, the Turkish government has its own research institutes supporting their anti-Armenian genocide narratives.
271 Similar in Hungary, the independence of Hungarian Academy of Sciences is at the moment attacked by the Hungarian government – its Institute of History leads the fight against the elimination of Academy’s independence, refusing to give up its academic freedom. As an answer, the government ordered the foundation of the Institute for the Research of Hungarian-ness (Magyarságkutató Intézet) in January 2019, intending to publish research in line with the government’s official historical narratives – this is an issue meriting further discussion in the Hungarian case study.
272 Article 2 of the 2018 Amendment on the Polish Institute of National Remembrance
273 Małecki and Mikuli ‘The New Polish “Memory Law”: A Short Critical Analysis’ (n 252)
274 Oxana Shevel, ‘The Battle for Historical Memory in Postrevolutionary Ukraine’ (2016) 115 Current History 783, 258
Russian and the pro-European approach. The current trend in national memory politics contains anti-Russian sentiments in which the Soviet Union is portrayed as an invader and the Holodomor famine is recognized as genocide.\textsuperscript{275}

A Ukrainian-Russian memory war has gradually emerged since the start of Ukraine’s Euromaidan revolution and the Russian annexation of Crimea.\textsuperscript{276} The recent Ukrainian decommunization legal package, introduced in 2014, supports its anti-Russian narrative. It consists of four laws: (1) the first law condemns the communist and National Socialist (Nazi) regimes and prohibits the ‘propagation’ of their symbols – this law also prohibits public denial of Nazi and communist crimes. It further includes a crackdown on communist monuments and street names.\textsuperscript{277} (2) The second law honors the memory of ‘fighters for the Independence of Ukraine in the 20th Century’ — this law recognizes the deeds of the Ukrainian Insurgent Army and the Organization of Ukrainian Nationalists during WWII and grants benefits to surviving members.\textsuperscript{278} (3) The third law commemorates the victory in WWII. This law invalidates and replaces a law from 2000 "on the perpetuation of victory in the Great Patriotic War of 1941-1945.\textsuperscript{279} (4) The last law regulates the access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991 — this law grants the Ukrainian Institute of National Remembrance control over the state archives concerning repression during the Soviet period.\textsuperscript{280} While on the one hand, these laws ought to be praised as a step in coming to terms of the totalitarian past of Ukraine, they have actually been severely criticized as overly-broad, disproportionate, and disparaging to the right to freedom of expression.\textsuperscript{281} These laws attempt to create a post-Soviet Ukrainian identity but they are instead misused for political-administrative and symbolic-representational purposes.\textsuperscript{282}

Furthermore, Ukraine has also attempted to introduce quasi memory laws that severely hinder the situation of national minorities, such as on minority languages, education and dual citizenship.\textsuperscript{283} The Ukrainian government intends to strengthen Ukraine’s independence from its neighbors, but the laws encountered prominent opposition from Hungary, Poland and

\textsuperscript{275} John Paul Himka, ‘Legislating Historical Truth: Ukraine’s Laws of 9 April 2015’ (\textit{Ab Imperio}, 21 April 2015)
\textsuperscript{277} Law 317-VIII On condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols
\textsuperscript{278} Law 314-VIII On the legal status and honoring the memory of fighters for Ukraine’s independence in the twentieth century
\textsuperscript{279} Law 315-VIII On perpetuation of the victory over Nazism in the Second World War of 1939-1945
\textsuperscript{280} Law 316-VIII On access to archives of repressive bodies of the totalitarian communist regime, 1917-1991
\textsuperscript{281} Joint interim opinion on the law of Ukraine on the condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their Symbols, adopted by the Venice Commission at its 105th Plenary Session, Venice, 18-19 December 2015, CDLAD(2015) 041.
\textsuperscript{282} Maria Mälksoo argues that within the framework of mnemonic security, Ukraine actually established these laws to serve within the framework of the idea of militant democracy: “On the one hand, the ban of the communist parties fits the bill of Weimar-inspired, ‘militant democracy’ rationale for banning essentially anti-democratic parties and ideologies.22 The “Weimar scenario” is apparently still relevant for a state which dealing with the communist legacy has been inconsistent and occasionally forestalled. On the other, the memory law in question has sought to deny communist parties the legitimacy by refusing them access to the electoral arena for their suspected threatening of certain elements within the constitutional order of the country and the identity of Ukraine as a democratic, European state during the time of active subversion attempts within and beyond Ukraine, which have utilized the communist symbolic paraphernalia in their respective struggles for political influence” See: Mälksoo ‘Memory Laws in Times of (Memory) War’ (n 13)
\textsuperscript{283} Thorbjorn Jagland, ‘Ukraine’s new language law is 'walking fine line' (\textit{EU Observer}, 5 October 2017) <https://euobserver.com/opinion/139294> accessed 15 June 2020
Russia. The Venice Commission criticized both the decommunization laws and the minority-related laws. Ukraine’s memory laws, if formulated properly, could serve as tool to gain recognition from the EU as the organization has expressed interest and is involved in the processes of transitional justice. However, the EU agrees with the Venice Commission’s condemnation of these laws.

On the other side of the conflict, before the annexation of Crimea, President Putin stressed that Ukraine continuously strips the Crimean Russian minority of their historical memory. The legal measures of previous Russian governments had proved to be quite ambivalent about the Soviet past until then. The government of Boris Yeltsin struggled with reconciling the Soviet horrors with Russian glory as he intended to shed light on Soviet crimes. By contrast, the governments led by Vladimir Putin are determined to create a myth of a strong Russia using the heritage of the Soviet Union. Since the organization Memorial tackled the task of honoring the victims of the Soviet Union, its voice has been suppressed by Putin’s regime. The Russian state frequently reacts negatively to the spreading of counter narratives and aims at silencing specific groups who would disseminate versions differing from the state’s official narrative. The current Russian memory politics place particular emphasis on the Great Patriotic War: the members of the Ukrainian Insurgent Army are regarded as fascist collaborators and Holodomor is interpreted as history being utilized for political means by the Ukrainian government. In 2013, President Putin ordered the complete revision of Russian history textbooks and the creation of new ones that ‘expose non-contradictory Russian history’.

In 2014, the state introduced a law on the dissemination of totalitarian propaganda. On the one hand, it criminalizes the ‘rehabilitation of Nazism’, but on the other hand, it further restricts the criticism of the Soviet Union’s actions in WWII. This law introduces the punishment of dissent and/or insult with regards to Russia’s “glorious” military past. The law of 2014 had been preceded by previous, similar attempts since 2007. Its first drafts even included criminal punishment for the ‘falsification of history’. The law clearly prevents any attempt in Russia to deal with its past responsibility in the start of WWII, including the crimes committed abroad by the Red Army and the crimes of the Soviet occupation regimes in the countries of Central and Eastern Europe.

Behind the military conflict between Russia and Ukraine, a memory war, fought with the aid of memory laws, appears. Both states are protecting themselves through historical

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284 Opinion on the provisions of the law on education of 5 September 2017 which concern the use of the state language and minority and other languages in education, adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017)

285 Ibid.

286 Mäklsoo ‘Memory Laws in Times of (Memory) War’ (n 13)

287 Nuzov, ‘The Dynamics of Collective Memory in the Ukraine Crisis’ (n 262);

288 Koposov, Memory Laws, Memory Wars (n 50) 210.

289 Ibid 181

290 Koposov, Une loi pour faire la guerre: la Russie et sa mémoire (n 18) 108.


292 Law 374-FZ and 375-FZ of 29 April 2014 For deeper analysis on these laws, see: Koposov, Une loi pour faire la guerre: la Russie et sa mémoire (n 18)

293 Ibid 105.


memory in order to ‘fix distinct understandings of the past in social memory in particular ways in order to bolster (their) stable sense of self’.\(^{295}\) The harsh criminal provisions respond to the threats, misunderstandings and assaults of the respective states’ vision of the past.\(^{296}\) In turn, both Russia and Ukraine employ self-exculpatory means to regulate and construct their past, to present themselves as the one who is ‘right’ about history and engage in the active suppression of dissent.

In conclusion, the above exemplified processes of self-inculpatory legal governance of historical memory, namely, the use of genocide denial bans and genuine approaches to transitional justice, all possess their self-exculpatory foils. Self-exculpation highlights the prosecution of dissent (via criminal or non-criminal means) and a defensive attitude towards transitional justice (leading to the appearance of memory wars and increased mnemonic securitization). In contrast to the self-inculpatory attitude, self-exculpation on the legal governance of historical memory only causes problems in terms of treating sensitive historical questions. The distinction between these two approaches is vital to answering the research question because it provides an explanatory lens on how the impact of memory laws on the rule of law develops.

\(^{295}\) Maria Mälksoo, “‘Memory must be Defended’” (n 50) 2.

\(^{296}\) Nuzov, ‘The Dynamics of Collective Memory in the Ukraine Crisis’ (n 262), 150-152.
2.4 Beyond Memory Laws: The Legal Governance of Historical Memory

The struggle to define and categorize memory laws reveals the inconsistency of which provisions are considered by politicians and scholars as such. As the demonstrated in the previous section, various academic categorizations of memory laws include anything and everything, from genocide denial bans through recognition laws to decrees on memorials and history education.\(^\text{297}\) In addition, the emergence of analyses on provisions previously disassociated from historical memory, such as citizenship laws, broadens the discussion on what kind of provisions fall within the scope of memory laws. At present, the consideration of selected measures as memory laws greatly depends on the subjective views of different scholars. Academic contributions therefore sometimes use more encompassing terms to describe the instrumentalization of history through law – including the legal governance of memory and the legal governance of history.\(^\text{298}\) However, the definition of these terms is even less developed than that of ‘memory laws’. At best, the legal governance of memory has been used in the context of discussion on the ‘forging of national identities’ as well as ‘integration processes’ within and beyond Europe.\(^\text{299}\)

In addition, the difficulties in terminology and classification of memory laws are exacerbated by the fact that their examination must reach beyond the strict realm of the discipline of law. The motivations behind memory laws, stemming from the politicization of historical narratives, must also be considered because use of memory laws in never independent from political and societal context.\(^\text{300}\) This thesis uses the term ‘legal governance of historical memory’ to stress the complex connections and interdependence of law and politics when describing processes relating to the creation of historical narratives via law. The idea of incorporating historical narratives into law often originates from political debates around different historical events, slowly finding their way into codification. As discussed in the previous section, the thesis relies on a wider selection of sources than strictly legal measures.

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\(^{297}\) Examples for these measures include:
- In the area of genocide denial: the Loi Gayssot from France
- In the area of recognition laws: in 2016 Germany’s decree on the Armenian genocide
See: ‘Turkish anger as German MPs prepare to vote on Armenian genocide’ The Guardian (2 June 2016) [https://www.theguardian.com/world/2016/jun/02/german-mps-armenian-genocide-vote-threatens-eu-turkey-refugee-deal] accessed 15 June 2020
- In the area of memorials: The Hungarian government’s 2013 decree on the erection of a memorial dedicated to the victims of Hungary’s German occupation in one of the central squares of Budapest (056/2013. (XII. 31.) Korm. határozat A Magyarország német megszállásának emléket állító, Budapest V. kerületben felállításra kerülő emlékmű megvalósításával összefüggő egyes kérdésekről
- In the area of history education: in Japan, a governmental decree regulates the review of history books, often resulting in changes of language on the role of the state in WWII atrocities
See: Hannah Elisabeth Collins, ‘An Unrelenting Past: Historical Memory in Japan and South Korea’ (DPhil thesis, Wright State University 2016)

\(^{298}\) See the aforementioned encompassing volume on memory laws, Belavusau and Gliszczyńska-Grabias (eds), Law and Memory (n 10) – all of these terms are used. The title refers to the ‘legal governance of history’ while the introductory chapter’s definitions use both ‘memory laws’ and ‘legal governance of memory.’

\(^{299}\) This was discussed in Chapter 1

\(^{300}\) Eva Clarita Pettai ‘Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia’ Workshop paper Heyman Center for the Humanities, Columbia University (27 October 2017). She argues: ‘… law does not exist outside politics and society; that both the phrasing of the memory laws and their interpretation by the courts often reflect on broader public discourses and political currents that have little to do with history or justice.’ (p. 2)
Employing the governance approach allows for the inclusion of these sources, especially since it has emerged in the context of the regulation of historical memory. The two terms – ‘memory laws’ and the ‘the legal governance of historical memory’ have been used almost synonymously. However, in my view, the legal governance of historical memory has evolved to transcend the limits of the strictly legal discipline because it connects to a wider process in society and the absolutely essential political context. Therefore, using a term focusing governance instead of only law better encompasses the extralegal dimension of legislation on historical memory.

Therefore, my choice of the formulation legal governance of historical memory over memory laws originates from the intention to capture the legal and non-legal elements (most importantly political rhetoric) of states’ treatment of their pasts. An empirical overview of the way historical memory is governed via law in Europe demonstrates the existence of an increasing amount of measures carrying little to no legal weight, for example, political rhetoric and policy decisions. As I mentioned above, the codification of historical narratives often starts from their appearance in official governmental rhetoric, thus these non-legal measures can also shape the way history is governed in a state.

Despite mentioning the political context around my sources, I refrain from using the term politics of memory because this term carries a specific meaning and does not consider the role of law as particularly significant in the creation of historical narratives. Instead, it focuses on identity building through political debates. Scholarly works on the politics of memory highlight the agreements and tensions between the political construction of historical memory and the academic discipline of history but they consider law only tangentially. Conversely, in this study we are taking the law as the primary research subject.

Nevertheless, my taxonomy of memory governance sources contains an extralegal aspect, necessitating the introduction of a term capture the shaping of legal measures through ostensibly legal measures and to consider the political and contextual implications in which the legal governance of historical memory is born. I subsequently refer to the state’s treatment of its past with the term legal governance of historical memory.

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301 The governance approach ‘includes extralegal and less formal activities by a variety of actors. Thus, while a governance approach includes legal measures, it is a much broader and more inclusive approach that allows regulations, policies and guidelines to contribute to solving an issue.’ In Charlotte Lilian Lane, ‘The Horizontal Effect of International Human Rights Law’ (DPHIL thesis, University of Groningen 2018) 319. See also: Aurelia Colombi Ciacchi, ‘Comparative Law and Governance: Towards a New Research Method’ in Aurelia Colombi Ciacchi and others (eds), Law and Governance: Beyond the Public-Private Law Divide (Eleven 2013) 223


In the same volume Bernd Van Der Meulen points out in his contribution on ‘Governance in Law: Charting Legal Intuition’ that: ‘…authors expressing governance approaches, call attention to instruments used by the government to achieve government objectives, other than the instruments which traditionally fall within public law…’ (p. 302)

303 Koposov, Une loi pour faire la guerre: la Russie et sa mémoire (n 18)


305 See, for example: Nicole Maurantionio, ‘The Politics of Memory’ in: Kenski K and Jamieson K H (eds), Oxford Handbook of Political Communication (OUP 2017) 219

This analysis criticizes the approaches in the politics of memory of ‘overemphasizing sites of memory and paying little attention to issues of reception’ (p 1396)
Chapter 2
Chapter 3
Analytical Framework: The Rule of Law in Europe
This chapter outlines the rule of law as the analytical framework of the thesis in two steps. The first step consists of an overview of rule of law conceptualizations originating from leading scholars and institutions. The second provides an explanation on how the rule of law’s particular elements are operationalized in the case studies. The chapter also contains a brief discussion regarding the effect of the rule of law on the legal governance of historical memory. This is not the focus of the thesis, but its consideration is necessary to provide context for each case study. Finally, the last section of the chapter looks ahead and identifies specific sub-questions guiding the upcoming case studies.

3.1 The Rule of Law as Analytical Framework

The rule of law will be conceptualized in this chapter and subsequently operationalized to be applied in the case studies to examine how it is impacted by the legal governance of historical memory. To conceptualize the rule of law for the purpose of this dissertation, I draw on conceptions developed in scholarship and definitions used by the European Commission and non-governmental organizations – such as the World Justice Project - which assess the rule of law’s fulfillment throughout the world. I dissect this multifaceted concept into several elements, and endorse the view that the rule of law is an important benchmark of democracy. I endorse this position because the rule of law’s success depends on the ability of state and non-state actors— including courts, parliaments and the public—to reach democratically legitimate outcomes. In addition, the rule of law is also suitable to assess backsliding in several specific areas, including fundamental rights, the judiciary and the fairness of the legal system in general. The multifaceted set of state organs and actors that are involved in the legal governance of historical memory all play a role in the achievement of the rule of law. This warrants its selection of the as the analytical framework.

The analytical framework draws on three different roles the rule of law plays in the international legal order. First, the crisis of the rule of law and the answer that European institutions have provided for its backsliding constitutes the context in which the dissertation operates and justifies the research question. Second, the rule of law has a long history in legal and political thought and is used as an ideal and foundational value of democracy by states, institutions and courts throughout the world. Third, its present conceptualization is rooted in its increasingly prominent presence in case law the case law of international tribunals.

As described in Chapters 1 and 2, legal governance of historical memory’s impact on the rule of law unveils particular issues, necessitating a mix of conceptualizations to be used instead of selecting a single scholar whose vision to follow. Consequently, I build on the work of past and present leading scholars on the rule of law (such prominent scholars as, the pioneer architect of the concept – Albert Venn Dicey, as well as Joseph Raz, Lon L. Fuller, Brian Z. Tamanaha, Ronald Dworkin and Tom Bingham, among others). In addition, I further draw on the conceptions of international, European supranational organizations and independent non-governmental organizations. These ideas help me conceptualize the rule of law for the purpose of this thesis.

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307 For example, the European Commission uses six elements of the rule of law to base its initiatives on – these are described in detail in the next section of this chapter. The assessment of the World Justice Project can be found here (it is also discussed in the next section): <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019> accessed 15 June 2020
3.2 Conceptions of the Rule of Law

This chapter begins with a short overview of the term’s short history and progresses towards an analysis of the prevalent divide between the two types of rule of law conceptions – on the basis of its formal versus its substantive elements. This dichotomy is crucial for the analysis of how the rule of law is affected by the legal governance of historical memory because only substantive conceptions encompass fully how the legal governance of historical memory affects it, particularly due to their prominent threat to fundamental rights. The investigation of scholarly and institutional conceptions finally leads to the formulation of a rule of law conception for the purpose of this thesis.

The term ‘rule of law’ in contemporary academic analysis originates from the pioneering work of the British scholar Albert Venn Dicey. In his 1885 volume ‘Introduction to the Study of the Law of the Constitution’, Dicey defines the rule of law through three elements: (a) the supremacy of law (including the absence of arbitrary exercises of power), (b) equality before the law and (c) judicial protection. The ‘supremacy of law’ contains references to the importance of clear and transparent legislative process, as well as to the presence of foreseeability. Such definition outlines the importance of a rule by law as a foundational aspect of a healthy democracy. It can be regarded as the predecessor to one of the most foundational elements of subsequent rule of law conceptions – the principle of legality. Government abstention from arbitrary power also evolved from Dicey’s conception, eventually becoming a self-standing principle in multiple rule of law conceptions. The prohibition of arbitrariness requires the freedom for all to act under the scope of the law’s permission, and that governmental decisions are guided and constrained by the law. It does not necessarily imply limited government, but it does infer a certain generality and autonomy of the law. Furthermore, rule of law conceptions also contains the enforcement and challenge of legal measures, concentrating on the role of the judiciary. Two conditions must be mentioned in rule of law conceptions, identified as guarantees for the proper functioning of the judiciary – its independence and impartiality from other organs of the state. These conditions can be fulfilled through the assurance of equal access to courts, equal treatment before the courts, and independence of both the individual judges and the institution of the judiciary as a whole. The judicial perspective regarding the rule of law appears in Dicey’s conception, singling out the judiciary as the essential institution through which legal principles are developed.
3.2.1 Formal v Substantive Conceptions

In the aftermath of Dicey’s work, in contemporary discussions, two principal approaches towards the rule of law emerged in scholarship - one conception emphasized its procedural elements, the other encompassed its substantive aspects. The first line of thinking, the formal or thin conception, stressed the rule of law as a set of institutions and procedural elements in the adoption of clear and transparent laws, a view championed by Joseph Raz. The work of Raz can be credited with conceptualizing the rule of law on strictly formal terms – through his refusal to include more substantive elements, such as the protection of fundamental rights and democracy. In Raz’s understanding, the rule of law requires prospective, clear and stable laws. The consideration of the role of the judiciary in the fulfillment of the rule of law further appeared in his definitions (including independence, observance of justice, judicial review and accessible courts). Raz expressed his endorsement towards the formal conception of the rule of law by articulating his belief that legal questions must be separated from the broader issues of political theory.

The principle of legality is a foundational element of formal rule of law conceptions. It possesses a diverse set of elements, encompassing the transparency of the law-making process, the formulation of the laws, and the weighing of predictability and consequences. One of the most detailed theories on the principle of legality originates from Lon L. Fuller who identified eight of its essential features, including laws need to be sufficiently general, publicly promulgated, non-retroactive, minimally clear and intelligible, free of contradictions, relatively constant, possible to obey, and obviously administered.

In addition to Raz and Fuller, other scholars who, despite not strictly adhering to the formal conception, provide further insight in formulating some rule of law elements. Jeremy Waldron emphasizes that arbitrariness needs to be absent from decision-making in order to ensure the creation of laws ‘within a constraining framework of public norms’ rather than on the basis of individual preferences. Martin Krygier considers the perspective of arbitrariness as the most essential understanding of the rule of law, the most imperative of elements for its fulfilment.

The second line of thinking includes thicker or substantive elements in conception of the rule of law. The substantive or thick rule of law conceptions contains elements such as the protection of fundamental rights, thus transcending the central procedural requirements of lawmaking. Tom Bingham particularly endorses the inclusion of fundamental rights protection in his conception of the rule of law because Bingham combines the formal rule of law elements of accessibility, equality before the law, the absence of arbitrariness, and the independence of the judiciary with a more expansive understanding of human rights as an additional rule of law principle. Bingham rejects Raz’s narrow definition and states as his reason for inclusion that

314 Joseph Raz, The Authority of Law (OUP 1979) 212.
Raz insists on a quite literal rule of law conception by stating that ‘the rule of law’ means literally what it says: the rule of the law.’ He further adds that it is not to be confused with democracy, human rights, justice or equality. Ibíd 214.
315 Ibid 214.
‘a state which savagely represses or persecuted sections of its people cannot be regarded as observing the rule of law’.  

The substantial or thick rule of law conception can introduce the notion of the separation of powers as well. The necessity to separate powers has been noted by T. R. S. Allan, who stresses the importance of the separation of powers in order to ensure an independently functioning judiciary.  

Ronald Dworkin goes even further in constructing his vision of the rule of law. He argues that substantive moral concepts – such as equality, morality and justice – are in themselves necessary to fulfill the formal requirements of the rule of law. In his work, equality before the law gains a more expansive definition. It does not only mean equal access to courts but includes the notion of general equality in society. Furthermore, he notes how practical argumentation in case law always involves the application of principles reaching beyond the strict limits of formal legal rules. He claims that the courts should be decide legal questions according to the best theory of justice. Dworkin’s conception emphasizes the idea that governments should not exercise powers over individuals arbitrarily and citizens possess rights and duties towards each other and against the state. These rights should be recognized in positive law and citizens should be able to assert them before courts. His ideal rule of law is ‘rule by an accurate public conception of individual rights’. This conceptualization goes beyond the framework suggested by Raz because it connects various other democratic concepts to the rule of law, a view Raz specifically rejects.  

The principal difference between the formal (thin) and the substantive (thick) conception of the rule of law lies in the following: formal conception focuses on requirements towards the formulation of the laws – and requirements towards the judiciary. Whereas, the substantive conception brings in fundamental rights along with other ideas, such as equality, justice and morality, beside the strict content of the laws.  

In addition to the aforementioned ideas, Brian Z. Tamanaha synthetizes the formal and the substantive conception. Although he endorses a thicker definition of the rule of law, with the inclusion of fundamental rights protection, he claims that human rights are a contested concept, thus its use in rule of law conceptions should be handled with care. In addition, Tamanaha supports a similar mix of formal and substantive elements of the rule of law, by emphasizing the principle of legality, the absence of arbitrariness, legal certainty, equality before the law, judicial independence and impartiality.  

Wolfgang Merkel provides an excellent summary of various rule of law conceptions by identifying three approaches towards the concept: minimalist, mid-range and maximalist. The minimalist approach to the rule of law ignores formal and substantive elements, instead

321 Ibid 67.
325 A summary of formal and substantive rule of law conceptions can be found in Craig, ‘Formal and Substantive Conceptions of The Rule of Law’ (n 316) 7.
326 Ibid 1
328 Ibid 94
329 Ibid 94

The article wonderfully summarizes various rule of law conceptions, from the most formal to the substantive and thick conceptualizations.
focusing on the role of the rule of law in maintaining order and regulating political transactions. The mid-range approach emphasizes the clarity and fairness of the legislative process, equality before the law, checks and balances and an independent judiciary – similarly to more formal conceptualizations of the rule of law. The maximalist approach embraces more substantive elements of the rule of law by stressing its role in the protection of rights and the reduction of inequalities.

Finally, the progress of debate around the rule of law’s formal and substantive conceptions shows the latter conception has gained significant traction, a development which inspired international organizations and institutions to consider substantive elements in their own rule of law frameworks.

3.2.2 The Role of States and International Organizations in Conceptualizing the Rule of Law

Scholarship on the rule of law has influenced the viewpoints of international and European organizations and vice versa. The diversity of conceptions originating from the Council of Europe, the EU, the United Nations as well as independent NGOs and states provide an opportunity to examine the priorities of these organizations. Each of them identifies different elements of the rule of law as essential to its fulfilment, embracing either a formal or a substantive conception. The analysis of the legal governance of historical memory points, which necessitates a substantive, human rights-centered approach. Some aspects of this approach have been overlooked by these institutions.

In 2011, The European Commission for Democracy Through Law (the Venice Commission) issued its first official report on the rule of law, identifying six of its elements: (1) the principle of legality, (2) legal certainty, (3) the prohibition of arbitrariness, (4) access to justice through independent and impartial courts, (5) respect for human rights and (6) equality before the law and non-discrimination. Five years later, the Venice Commission released its second report on the rule of law, containing slight changes in its conception: instead of six, the Venice Commission identified five elements – keeping (1) legality, (2) legal certainty, (3) the prohibition of arbitrariness and (4) equality before the law and non-discrimination, while combining the respect for human rights and access to justice.

The European Commission followed the Venice Commission in 2014, in setting up its own rule of law conception. The EC released its Communication (to the Council and the Parliament) on a New Framework to Strengthen the Rule of Law, identifying six elements of the rule of law: (1) the principle of legality, (2) legal certainty, (3) the prohibition of arbitrariness, (4) independent and impartial courts, (5) effective judicial review and respect for fundamental rights, and (6) equality before the law.

The definitions of the rule of law by European institutions endorse

330 Ibid 22
331 The mid-range definition summarizes various rule of law conceptions – it identifies most formal elements such as legality, equality before the law, independence of the judiciary (Ibid 22)
332 The maximalist definition cites the attainment of the welfare state – espousing a broader definition that even Bingham or Tamanaha (Ibid 22).
334 Rule of Law Checklist (CDL-AD(2016)007) Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) (Venice Commission on the rule of law, 2016)
335 Communication from the European Commission to the Parliament and the Council on A new EU Framework to strengthen the Rule of Law [2014] (COM(2014) 158 final/2) (2014 Rule of Law Framework) The conception of the rule of law has experience great change within the EU institutions in the last decade, as its deterioration in some Member States has required the re-evaluation of the concept.
a substantive conception of the rule of law, through the inclusion of fundamental rights protection – the Venice Commission has notably been inspired by the definition of Tom Bingham during the creation of its outlook on the rule of law.336 These organizations frequently conceptualize the rule of law in the substantial, rather than in the formal manner.

Examining the 2014 Commission Rule of Law Framework, Dimitry Kochenov has lauded the Commission for finally initiating a clarification of its definition of the rule of law in the European Union context.337 However, both Kochenov and scholars of EU law and comparative constitutional law, Laurent Pech and Kim Lane Scheppele, warned that such development presents merely a first step in the explanation of the rule of law’s meaning in the European Union.338 Scheppele remains particularly critical employing the rule of law as a benchmark of democracy distrusting the rule of law as a hazy concept, difficult to be converted into governmental checklists with actual impact.339 Nevertheless, the EC continues to refer to the rule of law as a democratic benchmark, and expand its conceptualization in the EU context as a practical set of standards for the Member States.340

The institutions of the United Nations approach the rule of law differently than the Council of Europe and the EU. In the United Nations, the rule of law is often connected to the

Historically, the rule of law has carried various connotations: on the one hand, it is observed as a foundational and universal value of the Union, serving as an ideal to both Member States and candidate states. On the other hand, the rule of law carries an understanding articulated by the Court of Justice in 1986 in the case of *Les Verts v European Parliament* (Case 294/83 [1986] paragraph 23). At the time of the Les Verts case, the rule of law was defined on a procedural basis, concentrating on judicial protection, the opportunity to challenge the legality of measures and the need for the European Community’s institutions to act according to their own laws. The Court of Justice established that the EU is a community based on the rule of law. In 1991, the Treaty of Maastricht does not mention the rule of law as a foundational value, however, it identifies the development of the rule of law as an objective of the Common Foreign and Security Policy. Furthermore, the concept was incorporated into the Copenhagen criteria for candidate states as well. The rule of law appears finally in the text of the Union’s foundational documents in 1997, with the modifications of the Treaty of Amsterdam. The amendments of Amsterdam introduced it by proclaiming that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. The dedication to the rule of law has been reaffirmed by the current Treaty on the European Union. Now, it can be found in the list of the EU’s foundational values in Article 2. Until the 2010s, the rule of law stood as an ideal in both the internal and the external dimensions of the EU: internally, it is a principle the Member States and the Union itself ought to profoundly respected and abided by. In the external dimension, the proper presence of rule of law standards function as a condition and expectation towards those states who wish to accede.


336 The Commission credits Bingham with the inspiration of its rule of law conception, including the inclusion of the protection of fundamental rights in the Commission’s rule of law principles: Venice Commission on the rule of law 2011, paras 36–37.

337 Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU’ (n 35), 512.

338 In addition, the 2014 documents are the result of a long period of inaction from the EU on the rule of law crisis within various Member States. More information: Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2017).

339 Kochenov and Pech, ‘Better Late than Never?’ (n 35), 1062.

340 I have described these efforts and documents in details in notes 36 and 37.
goals of peace and security, human rights and sustainable development. The yearly resolutions of the General Assembly consistently reinforce the rule of law’s importance in ensuring security and protecting fundamental rights. Among its Sustainable Development Goals for the next decade, the rule of law has been identified in the UN as the basis of effective governance. Its promotions has been selected as one mission to realize Sustainable Development Goal 16. In contrast to the European institutions, who prominently emphasize the situation of the judiciary in the fulfilment of rule of law standards, SDG16 stresses the overstepping of state authorities as a crucial rule of law problem. However, the formulation of SDG16 has been criticized as providing a loophole for authoritarian governments to sidestep the rule of law.

In 2014, the UN Secretary-General released his own report on Coordinating the United Nations’ Rule of Law Activities. In this report, the Secretary-General established a particular outlook on the rule of law emphasizing principles such as the supremacy of law, equality before the law, accountability of the law, fairness in the application of the law, the separation of powers, participation in decision-making, legal certainty, the prohibition of arbitrariness and procedural and legal transparency. While the UN Secretary-General does not mention fundamental rights, he also endorses notions such as the separation of powers, reaching beyond the most formal conceptions of the rule of law. Throughout the years, the UN has embraced the substantive conception of the rule of law earlier than the European institutions and its documents take a more holistic approach towards the rule of law’s fulfilment by consistently citing it as the foundation of good governance, security and the protection of fundamental rights.

Various NGOs have produced their own rule of law conceptions as well, with the intention of measuring its fulfillment. The World Justice Project issues its yearly rule of law index, focusing on the ‘perception and experience’ of the rule of law by the public in several countries. The organization defines the rule of law through four conditions: the

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341 The UN connects the rule of law to three pillars: rule of law and development, rule of law and human rights, rule of law and peace and security. The first pillar is focused on ensuring accountability and preventing human right abuses, the second pillar aims to uphold human dignity, the third pillar is centered on sustainable development. <https://www.un.org/ruleoflaw/three-pillars/> accessed 15 June 2020 and <https://sustainabledevelopment.un.org/sdg16> accessed 15 June 2020

342 On the rule of law and SDG 16: Niko Soininen ‘Torn by (Un)certainty – Can there be Peace Between Rule of Law and Other Sustainable Development Goals?’ in Duncan French and Louis J. Kotzé (eds) Sustainable Development Goals: Law, Theory and Implementation (Elgar, 2018)

343 Lauren McIntosh ‘SDG 16: The Rule of Law at Crossroads’ ILAC Policy Brief 1 (September 2019)

344 Report of the Secretary-General on Strengthening and coordinating United Nations rule of law activities (A/68/213/Add.1), 11 July 2014

345 The General Assembly issues a resolution on the ‘rule of law on national and international levels’ every year, accompanied by a yearly report of the Secretary-General.

346 Ibid

The Secretary-General did not classify separate elements of the rule of law, rather treating various concepts as principles of the rule of law including supremacy of law, equality before the law, accountability of the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency

In addition, the Report specifies that the rule of law is a principle of governance in which the state is accountable to the public, laws are equally enforced, independently adjudicated and consistent with human rights standards.

347 World Justice Project on the rule of law: <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed 15 June 2020
accountability of government officials under the law, fundamental rights protection through clear and predictable laws, an accessible and fair legislative process and guaranteed access to justice through an independent and ethical judiciary.  

Finally, it is worth mentioning how governments of countries in rule of law decline refer to a very formal, minimalist conceptualization in reaction to international criticism over the national situation. For example, in reaction to the initiation of the Article 7 procedure by the European Parliament, Hungary’s Minister of Foreign Affairs stated that each EU Member States interprets the rule of law according to their national traditions and cannot be forced to conform to the broad and inclusive conceptualization employed by EU institutions. Therefore, such governments cite their conduct as fulfilling the formal rule of law standards and rejecting criticisms regarding equality or fundamental rights. These debates around the rule of law among international organizations and states clarify how espousing a substantive conception of the rule of law is particularly crucial these days, in order to hold them accountable for the rule of law’s fulfilment.

348 Ibid.
3.3 The Rule of Law in this Research

As demonstrated in the previous sections, the rule of law as an ideal and standard is conceptualized and implemented in different ways across constitutional systems. I have further noted how states struggling with rule of law deterioration often reject substantive rule of law conceptions and insist that the rule of law means nothing more than the procedural requirements of lawmaking. Such interpretation echoes a historically communist conceptualization of the rule of law, characterized by using law to rule the people, without regard to the connotations laws may entail and the impact they may assert over citizens’ lives.\(^{351}\)

In contrast, scholars such as Bingham, Tamanaha and Dworkin endorse the opposite understanding in which the rule of law encompasses much more than formal requirements and arguably cannot become a tool of governmental oppression.\(^{352}\) Their conceptualizations take into account the law’s relationship with equality, human rights and justice.

The substantive conceptualization of Bingham, Tamanaha and Dworkin further have been espoused by the Venice Commission as well as EU institutions amidst the crisis of the 2010s.\(^{353}\) These institutions now incorporate substantive ideals among the rule of standards their Member States are supposed to abide by. In this way, the rule of law has become, in the CoE and the EU, a benchmark of assessment of democratic health. Therefore, a substantive conception of the rule of law is now considered as vital for the functioning of a proper democracy, an idea this thesis must engage with. Consequently, it uses a substantial rule of law conception as its analytical framework, rather than only relying on formal elements.

A substantial rule of law conception includes the initial questions and criticisms emerging in relation to memory laws, all pertaining to the impact of memory laws on fundamental rights, such as freedom of expression.\(^{354}\) Therefore, I find that the rule of law cannot sufficiently be examined without considering the protection of fundamental rights. However, despite the emphasis on fundamental rights, the foundational elements of formal definitions, particularly legality, the role of the judiciary and equality before the law are essential as well because they are needed as the foundation of the fulfilment of more substantive elements. As the examples demonstrate in Chapter 2, one should be equally concerned about the potential impact on legal certainty, equality before the law and the role of the judiciary because they can also be harmed by the legal governance of historical memory.

In consequence, rule of law is dissected into selected elements, because to demonstrate the impact of the legal governance of historical memory in the upcoming case studies. The selection of these elements draws on the aforementioned conceptions of scholars, institutions as well as problems exemplified in Germany, Spain, Poland, Russia and Ukraine in Chapter 1.

\(^{351}\) Martin Krygier’s analysis (see n 60) engages with the communist interpretation of the rule of law, involving how in the communist dictatorships of the late 20th century, law was instrumentalized by governments to rule their people. Although, the rule of law of the communist conception does not mean governing without law, it incorporates using laws as tools to maintain the regime. (637-638)

\(^{352}\) See notes 315, 318 and 319

\(^{353}\) The Venice Commission first mentioned substantive elements in its 2011 Report on the Rule of Law (referring to the work of Bingham specifically), the European Commission followed suit in its 2014 Rule of Law Framework.

\(^{354}\) I tracked the evolution of academic accounts on the problems relating to the legal governance of historical memory in Section 3 of Chapter 1.
Chapter 3

These include:

(1) legality,
(2) equality before the law,
(3) impartiality of the judiciary,
(4) protection of fundamental rights.\(^{355}\)

Legality is selected because it is a noteworthy element in every single academic and institutional account on the rule of law—whether formal or substantive and it provides the formal basis for the fulfilment of each other element. Equality before the law, as the heading suggests, is singled out to highlight the issue of equality—essential for the assessment of democracy. The impartiality of the judiciary is chosen to encompass the judicial aspect of rule of law conceptions—focusing on the power and opportunities of judges in shaping historical memory. The protection of fundamental rights is selected due to my endorsement of substantial rule of law conceptions and nexus with the traditional line of arguments around the legal governance of historical memory.\(^{356}\) I consider it necessary to examine equality before the law and the protection of fundamental rights separately, despite the fact that the principle of non-discrimination, an essential element of equality before the law, is often treated among human rights. However, in most of the literature on the rule of law, equality before the law is singled out as foundational to its conception, whereas the inclusion of the protection of other fundamental rights as a rule of law element is subject to significant controversy and not as universally embraced. As with the conceptions of the rule of law in the previous section, I similarly lean on the definitions of those who came before me for fleshing out each element, including: international human rights instruments, the case law of international courts, as well as the literature.\(^{357}\)

Finally, examples borrowed from the empirical overview of practices in Europe operationalize how these elements are used in the case studies. Therefore, the case studies will unpack how memory laws can: (1) help or hinder the fulfilment of the principle of legality (for example, by strengthen or undermine legal certainty and encouraging or discouraging arbitrariness in the decision-making of the executive), (2) protect or hinder equality before the law, (3) encourage or discourage judicial impartiality in the assessment of historical events and (4) defend or impair the protection of various fundamental rights (such as the right to freedom of expression).

3.3.1 Legality

The principle of legality is the first element crucial for the analysis offered in this dissertation. I endeavour to concentrate on two aspects of this concept, namely the presence of legal certainty and the prohibition on the arbitrary exercise of power, combining various elements of scholarly and institutional definitions regarding the principle of legality. Memory laws influence legality through issues relating to legal certainty (the foreseeability of the laws) and the presence of arbitrariness in the decision-making of the executive branch. Legal certainty is particularly problematic in the assessment of punitive memory laws, as lack of clarity has dire criminal consequences in their implementation. The examination of ostensibly

\(^{355}\) These elements are not ranked. They are equally vital to demonstrate the impact of the legal governance of historical memory on the rule of law.

\(^{356}\) See the discussion of the academic debate on the legal governance of historical memory in Chapter 1.

\(^{357}\) These include the ECtHR and the European Court of Justice, with an occasional reference to the IACtHR and the UNHRC), and international and European institutions (the Venice Commission and EC, with mentions of various UN bodies).
legal measures reveals problems relating to arbitrariness because governments can easily use these measures as tools in the creation of inaccurate and/or selective historical narratives – which may point to the increasing presence of self-exculpation. Therefore, in my conception of legality, the clarity and transparency of the legislative process does not appear, and I espouse a more expansive view on legality through the inclusion of legal certainty and the prohibition of arbitrariness. I opt for this instead of legality’s narrower interpretation concentrating on exclusively the law-making procedure such as the requirement of laws to be clear, general and publicly promulgated through a transparent, democratic process.

3.3.1.1 Definitions of Legality

Formal legality has been emphasized as one of the most foundational features of the rule of law in scholarly analyses; however, its definition remains as diverse as those of human rights documents and institutions. Dicey provides a characterization of formal legality, construing it as the ‘supremacy of the law’. According to Dicey, supremacy of the law entails procedural elements, as well as the presence of legal certainty and the prohibition of the arbitrary exercise of power. Jeremy Waldron espouses a wider definition of legality, identifying the lack of retroactivity, independent judiciary and the non-arbitrary exercise of power as elements of legality. A similar view is represented by Brian Z. Tamanaha, who defines legality as ‘rule-bound order’ including public and prospective laws, the presence of foreseeability and equal application of the law. In contrast, Martin Krygier, representing a novel interpretation of the rule of law through the relationship of the prohibition of arbitrariness to other rule of law principles, focuses on the arbitrary exercise of power as the most central element of the rule of law, and connects it to every subsequent aspect of it, including legality.

Furthermore, among institutional definitions, the Universal Declaration of Human Rights (UDHR), for instance, frames many elements associated to legality as individual rights, including the right to an effective remedy (Article 8 UDHR), the right to a fair trial (Article 10 UDHR) and the principle of non-retroactivity (Article 11 UDHR). The European Convention on Human Rights (ECHR), for its part, provides similar guarantees in its Articles 6, 7 and 13. The International Covenant on Civil and Political Rights specifies everyone’s equality before the law (Article 14 ICCPR), and the principle of non-retroactivity (Article 15 ICCPR). The EU Charter of Fundamental Rights (EUCFR) contains the right to an effective remedy and fair trial (Article 47 CFR) and the principle of legality in criminal offences and penalties (Article 49 CFR). The ECtHR amassed a significant amount of case law on the principles of legality during its evaluation of Article 6, 7 and 13 ECHR. Additionally, throughout the analysis of

358 Dicey, *Introduction to the Study to the Law of the Constitution* (n 302) 145.
359 Ibid 147
361 Tamanaha, *On the Rule of Law* (n 322) 119.
362 Krygier, *Rule of Law (and Rechtsstaat)* (n 313) 783.
363 The exact formulation of Article 49 of Charter is: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed…” (paragraph 1) – it also contains the principle of non-retroactivity
364 These cases actually do not have any connection to the legal governance of historical memory. However, Geranne Lautenbach produced an encompassing analysis on the rule of law conception of the European Court of
other rights (privacy, freedom of religion, freedom of assembly and freedom of expression), the Court assesses rights infringements in light of whether they had been ‘prescribed by law’ within the framework of a proportionality test. The ‘prescribed by law’ element demands the restriction of rights through accessible and foreseeable laws. Through this element, the ECtHR further examines two aspects of legality – the accessibility and clarity of the laws as well as the presence of legal certainty.

Other European institutions choose to confine the definition of formal legality to elements of the lawmaking process, classifying legal certainty and the prohibition of arbitrariness as separate rule of law principles. The Venice Commission in its 2011 Report on the Rule of Law identifies legality as its first rule of law element, defining it as requiring clarity and transparency in the lawmaking procedure. Legal certainty – entailing the creation of precisely formulated laws whose consequences are foreseeable and consistently implemented – is classified as the second element of the rule of law. The Venice Commission further establishes the prohibition on the arbitrary exercise of power as its third, separate rule of law principle. In its subsequent Rule of Law Checklist, created in 2016, the Venice Commission keeps this distinction, with additional emphasis on the accessibility and non-retroactivity of laws under the principle of legal certainty. The EC espouses a similar viewpoint. In its 2014 Framework to Strengthen the Rule of Law, the EC confines the definition of formal legality exclusively to the lawmaking procedure, while classifying legal certainty and the prohibition of the arbitrary exercise of power as self-standing rule of law principles. The 2014 Rule of Law Framework provides various justifications as to why each element is selected as a rule of law principle by the Commission, rooting in the case law of the ECJ. In the case of legality, the Court of Justice states that the principle of legality must be adhered to if the Community is to be governed by the rule of law. Furthermore, the Union needs to act with clear and predictable measures whose legitimate consequences can be reasonably anticipated.

3.3.1.2 Legality and the Legal Governance of Historical Memory

A variety of definitions exists on the principle of legality in international and European law. The mixing and diversity of these definitions leads me to employ legality as an umbrella term, to examine issues relating to legal certainty and the exercise of non-arbitrary power under its scope. Legal certainty encompasses the presence of predictability in the formulation and implementation of memory laws. It requires engagement with the activities of the law-making body, whose intentions are most prominently codified in memory laws. The presence of arbitrariness can manifest in either the content or the implementation and application of the

Human Rights, including extensive analysis of the case law related to Articles 6,7 and 13 ECHR: Lautenbach, The Rule of Law Concept (n 306).

368 Ibid 42
369 Venice Commission on the rule of law 2011 para 10.
370 Ibid para 11
371 Ibid
372 Venice Commission on the rule of law 2016 paras 11-17.
374 Joined cases 212 to 217/80 Amministrazione delle finanze dello Stato v Salumi [1981] ECR 2735, para 10. According to the court, clear and predictable measures are legitimate expectations that should be truly respected in terms of what the EU institutions can do.
375 Joined cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 02859, para 19. The Court proclaims that interferences must have legal basis and the protection from arbitrariness is a general principle of EU law.
memory laws. This aspect of the first element focuses on arbitrary power exercised by the executive in both the content and the implementation of these laws.

The following example demonstrates how I use the principle of legality in this thesis for the purpose of the case studies. It is drawn from the examples described in Chapter 1. From the standpoint of legal certainty, I have already mentioned the issues relating to the prohibition of using totalitarian symbols publicly, especially if those symbols have been used by a communist regime. In addition, legal certainty is particularly problematic in the assessment of genocide denial bans throughout Europe. Since the early 1990s, several European countries created bans on the denial and minimization of various genocides (either using language specific to Holocaust denialism or using definitions of international documents of events classified as genocides). The European Union has attempted twice to create its own standard in relation to genocide denialism - in its 1996 Joint Action (now discontinued) and in its 2008 Framework Decision on Racism and Xenophobia. The Framework Decision intends to unify genocide denialism bans by outlining the definition of genocide as contained in the 1945 London Agreement and the 1966 Rome Statute of the International Criminal Court. However, this definition has not managed to clear the confusion. For example, the document would suggest that the Armenian genocide is not an event that could qualify for a denial ban, nevertheless, various European countries (most notably, France) use the 2008 Framework Decision as a justification to attempt the introduction of a denial ban on the Armenian genocide.

The prohibition of genocide denial is further problematic from the perspective of arbitrary exercise of power. Arbitrary practices include the selectivity of historical events to be incorporated or excluded from under the scope of memory laws (whether punitive or not). For example, considerations on which historical atrocity may be or should be considered a genocide remains vague and unclear. Even if certain events are identified as genocide, their inclusion in memory laws is incredibly selective. Various events predating the creation of the crime of genocide (and crimes against humanity) as concepts in international law – most notably, the Armenian genocide, along with the transatlantic slave trade, colonial atrocities, and even tragic events of the French Revolution (for example, the so-called genocide in the Vendée) – are proposed suitable for inclusion in punitive prohibitions time and time again. However, their selection is arbitrary because it can happen without the expert opinion of historians. For instance, the French parliament has been particularly active in attempting to create such laws about the Armenian genocide. The Armenian genocide is a recurring topic in Germany and the Netherlands as well. Whereas, colonial atrocities present a different picture – in this case, neither France, not for example the Netherlands is eager to criminalize their denial.

### 3.3.2 Equality before the Law

Equality before the law brings out aspects of the rule of law related to minority protection and equal treatment. In this respect, the thesis departs from its definition in European law where this concept is connected to non-discrimination and is treated within the topic of fundamental rights protection.\(^377\) Instead, I subscribe to the conceptualization of international law and of leading theorists of the rule of law who treat this concept separately, in order to emphasize its importance.\(^378\) This helps me to expand the number of situations in the case studies that can be examined through the lens of equality before the law, in order to include issues relating to equality on the basis of personal views and beliefs, not only on the basis of minority status.

\(^377\) See the 2014 Rule of Law Framework

\(^378\) Equality before the law is a foundational element of academic rule of law conceptions. See discussion in Section 3.2.1
Thus, for the purpose of this dissertation, equality before the law encompasses two aspects. Firstly, it entails the idea of equal treatment before the law in terms of general equality, unrelated to belonging to a minority group. Secondly, it entails the notion of non-discrimination – the lack of differentiation before the law due to particular characteristics. These two aspects summarize equality before the law as a concept ensuring equal access to state resources to all its citizens as well as safeguarding various minority groups from exclusion.379

As the examples in this section demonstrate, involvement of the legal governance of historical memory cannot be confined to the prohibition of discrimination, because memory laws may restrict equality before the law regardless of minority status. Although memory laws certainly affect the protection of minorities, there are aspects of equality in their examination that transcend non-discrimination, such as the hierarchical ranking of atrocities through genocide denial prohibitions. I cited a unique example in Chapter 1, the Conseil Constitutionnel, singling out Holocaust denialism under the scope of the French genocide denial ban does place it above other atrocities of similar magnitude.380 Nevertheless, the Conseil Constitutionnel endorsed the hierarchical ranking repeating the reasoning provided by the European Court of Human Rights – that Holocaust denialism is a form of racism, and thus deserves special protection.381

3.3.2.1 Definitions of Equality before the Law

In academic analysis, equality before the law has been occasionally included in the definitions of the principle of legality, however, in most rule of law conceptions, it is classified as a separate principle. Various scholars treat equality before the law as an essential element of the rule of law, in order to uphold and protect the rights of marginalized groups, including Tom Bingham. Bingham, whose rule of law conceptions are cited extensively by the Venice Commission, noted that the implementation of equality before the law can only be disregarded if objective differences can justify the differentiation.382 Wolfgang Merkel refers to a definition of the rule of law greatly emphasizing equality before the law as an element in a mid-range rule of law conceptions.383 In his view, equality before the law embraces the independence and impartiality of the legal system and the judiciary to ensure its fulfillment.384 In relation to equality before the law, Tamanaha further states that the legislator cannot possess preconceived ideas on the concepts it codifies.385 Otherwise, laws may be designed to fit the interests of specific groups and particular situations.386 In the assessment of developments related to European law, various scholars examining the 2014 Framework, among them Dimitry Kochenov and Laurent Pech, criticized the document due to the vagueness of the European Commission’s definition. They were not able to explain the definition’s departure from associating equality before the law with non-discrimination.387

Academic literature refers to various concepts such as non-discrimination, equality before the law, positive action, equal protection of the law which are all interconnected and represent different sides of the same issue.
380 In the case of Vincent R. (Décision n° 2015-512 QPC du 8 janvier 2016) paragraphs 9-11. (Vincent R.)
381 Ibid para 11
382 Bingham, The Rule of Law (n 314) 55.
383 Merkel, ‘Measuring the Quality of Rule of Law’ (n 324), 39
Merkel assesses how various non-governmental organizations monitor the fulfilment of the rule of law around the world.
384 Ibid 38
385 Tamanaha, On the Rule of Law (n 322) 33.
386 Ibid 33
387 In particular, they express this viewpoint in: Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU’ (n 35) while commenting on the 2014 Rule of Law Framework
Similar to legality, equality before the law is defined in a different way in human rights instruments. The UDHR construes equality before the law as including of two conditions: (1) all people are equal before the law and (2) all are entitled to equal protection of the law. The UDHR specifies that these conditions should be ensured through the creation of non-discrimination clauses.\textsuperscript{388} The International Covenant on Civil and Political Rights refers to a similar interpretation of equality before the law as the UDHR - being equal before the law and equal protection.\textsuperscript{389} The ECHR initially did not endorse such definition. The document’s main body of text does not mention equality before the law, instead it provides a non-discrimination clause in its Article 14 ECHR.\textsuperscript{390} However, in its 12\textsuperscript{th} Protocol, the Convention introduces the same interpretation of equality before the law as the UDHR did – comprising of being equal in the eyes of the law as well as guaranteed equal protection through the use of non-discrimination clauses.\textsuperscript{391} In European law, the definition of equality before the law is often conflated with the prohibition of discrimination.\textsuperscript{392} The Treaty on the European Union (TEU) provides that all rights guaranteed in the ECHR should be regarded as general principles of EU law.\textsuperscript{393} Article 19 of Treaty of the Functioning of the European Union (TFEU) refers exclusively to non-discrimination (in relation to six minority grounds - sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation), without mentioning the equality before the law.\textsuperscript{394} In the EUCFR equality before the law and non-discrimination are classified separately (in Articles 20 and 21 of the Charter). Article 20 EUCFR determines a simple definition of equality before the law: ‘everyone is equal before the law.’\textsuperscript{395} Therefore, such a definition of equality before the law demonstrates that non-discrimination and minority protection possesses paramount importance in the conceptualization of the term by the EU.

However, institutional definitions of equality differ in another manner. In General Comment 18 to the International Covenant on Civil and Political Rights (ICCPR), the UNHRC states both non-discrimination and equality before the law are basic and general principles relating to the protection of human rights.\textsuperscript{396} General Comment 23 connects the rights of minorities to equality before the law and non-discrimination.\textsuperscript{397} General Comment 28 emphasizes the obligation of states to combat discrimination and ensure equality before the law.\textsuperscript{398} In contrast, the IACtHR, in an advisory opinion, referred to equality before the law and

\begin{itemize}
\item \textsuperscript{388} UDHR Art 7.
\item \textsuperscript{389} ICCPR Arts 14 and 26.
\item \textsuperscript{390} ECHR Art 14. This article, however, is always used together with another.
\item \textsuperscript{391} In the preamble of Protocol 12 states the existence of a “fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law” which is enforced “through the collective enforcement of a general prohibition of discrimination” (which is Article 1 of the Protocol).
\item \textsuperscript{392} For example, when the European Commission conceptualized equality before the law as a rule of law principle, it exclusively connected it to non-discrimination in its 2014 Rule of Law Framework.
\item \textsuperscript{393} TEU Art 6 – according to this article the EU should accede to the European Convention on Human Rights, which so far has not happened.
\item \textsuperscript{394} TFEU Art 19 – the institutions can take action to combat discrimination.
\item \textsuperscript{395} Mark Bell ‘European Social Policy: Between Market Integration and Social Citizenship’ in Mark Bell, \textit{Anti-Discrimination Law and the European Union} (OUP 2002)
\item \textsuperscript{396} The prohibition of discrimination is a self-standing category in EU law, but it is confined to certain specific areas (such as employment, welfare and goods and services).
\item \textsuperscript{397} EUCFR [2012] OJ C 326 Articles 20 and 21
\item \textsuperscript{398} General Comment 23 on Equality before the Law and Non-Discrimination (Adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989) para 1.
\item \textsuperscript{399} General Comment 23 on Minorities (Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994) para 4.
\item \textsuperscript{400} General Comment 28 on Equality Between Men and Women (Adopted at the Sixty-eighth session of the Human Rights Committee, on 29 March 2000) paragraph 31.
\end{itemize}
non-discrimination as principles or peremptory norms of jus cogens. In the definitions of the Venice Commission, equality before the law and non-discrimination are placed within the concept of human rights and the rule of law. To be more specific, in its 2011 Report on the Rule of Law, the Venice Commission specifies that equality before the law is ‘a human rights principle as much as it is a rule of law principle.’ It espouses the definitions of Tom Bingham on equality before the law, identifying equality before the law as the application of the laws without discrimination. In its 2016 Rule of Law checklist, the Venice Commission widened its conception of equality before the law. Its new definition of equality before the law includes equal application and implementation of the law, and the prohibition of discrimination, emphasizing its results in substantively equal treatment between various groups. The EC, however, does not entirely embrace such a definition. In contrast to the Venice Commission, in its 2014 Rule of Law Framework, the EC identifies equality before the law as a self-standing element of the rule of law, without mentioning non-discrimination or human rights. Although, when providing an actual definition for equality before the law, the EC exclusively refers to decisions of the Court of Justice relating to non-discrimination. The EC does not particularly elaborate on why it chose to highlight equality before the law to such an extent. It merely refers to the ECJ in relating equality before the law to non-discrimination, citing it as a general principle of EU law, through Article 20 of the EUCFR. The Court of Justice has also cited the breach of ‘superior rule of law for the protection of the individual’ in its case law additionally alluding to non-discrimination and equality before the law.

3.3.2.2 Equality before the Law and the Legal Governance of Historical Memory

Equality before the law has been provided with interpretations in various international arenas. While the European Court of Justice associates it closely with non-discrimination, the interpretation of the ECtHR is ambivalent, whereas those of the United Nations and the IACtHR are completely different. The same discrepancy is true for the interpretation of academia: experts of European law criticize the EC for departing from the non-discrimination-related interpretation of equality before the law. While scholars engaging with the rule of law on the theoretical level define equality before the law in a more expansive manner, often as a self-standing rule of law principle. As equality before the law is emphasized to such an extent

399 Advisory Opinion Oc-18/03 of 17 September 2003, Requested by The United Mexican States Juridical Condition and Rights of Undocumented Migrants – paragraph 101
In addition, and encompassing volume has been produced about the conception of international courts on the rule of law: Geert De Baere and Jan Wouters (eds), The Contribution of International and Supranational Courts to the Rule of Law (Edward Elgar, 2015)
400 Venice Commission on the rule of law 2011
401 Ibid para 13
402 Ibid para 9
403 Venice Commission on the rule of law 2016 paras 18-19.
407 Ibid
408 However, the Court of Justice of the European Union created its particular definition of the content of Article 20 CRF as containing equal treatment in comparable situations. In cases such as: C-101/12 Herbert Schaible v Land Baden-Württemberg [2013] ECLI:EU:C:2013:661 paras 76 and 77
Case C-156/15 Private Equity Insurance Group SIA v Swedbank AS [2016] ECLI:EU:C:2016:851 paragraph 49
Case C-313/04 Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. [2006] ECR I-6331, para 33

83
in scholarly works and European documents, I choose to similarly place significant emphasis on it and agree that it is worthy to be examined by itself, therefore the second element thus opting to endorse the theoretical, rather than the European interpretation. In summary, I interpret equality before the law as including both the prohibition of discrimination (as necessary for minority protection) and the implications of expressing particular opinions in relation to historical events, without belonging to a minority group.

Equality before the law is used in this thesis in two ways, drawn from the examples detailed in Chapter 1: first, from the perspective of minority protection and non-discrimination. Ukraine supplies a vivid example in this respect. During the Ukrainian-Russian memory war, the controversies regarding the linguistic diversity in Ukraine have become particularly emblematic. In April 2019, the Ukrainian parliament introduced a new law regulating the use of minority languages. Although the aim of the law has been characterized to strengthen and safeguard of the Ukrainian national identity, its impact nevertheless causes restricted access to the public use of languages such as Russian or Hungarian, for example, in the area of education.

In contrast, a French example regarding the effect of memory laws on equality before the law does not relate to the prohibition of discrimination of various minorities. Instead, the question of equality before the law boils down to holding an opinion on various historical events and the consequences the expression of these views may hold. Although this example will be further dissected and analyzed in Chapter 4, it is necessary to mention it here, in order to demonstrate how equality before the law will work in the case studies. In 2016, the Conseil Constitutionnel reviewed the local genocide denial ban in terms of equality before the law. The Conseil Constitutionnel examined whether the formulation of the prohibition (aiming at combatting Holocaust denial) may disproportionately affect those who negate or question the Holocaust in comparison to those negating and questioning other atrocities, such as the Armenian genocide. The Conseil Constitutionnel realized that, due to the formulation of the French prohibition, Holocaust deniers may receive criminal punishment for their activities, whereas those denying the Armenian genocide (or the existence/aspects of other historical events) may not. While the Conseil Constitutionnel did not invalidate the French genocide denial ban, this instance marked the first time that equality of the law is mentioned in relation to the legal governance of historical memory in a judicial decision.

409 Law 5670-d ‘On ensuring the functioning of Ukrainian as the state language’ adopted on 25 April 2019
410 There is a significant Hungarian minority in the West of Ukraine, in the territory of Karpaty. Hungary has been at odds with Ukraine on the situation of the Hungarian-speaking minority for years, even going as far as to constantly block the Ukrainian attempts to join NATO. This happens because the current Hungarian government is strongly protective of the Hungarian minorities living in territories that used to belong to Hungary (before the 1920 Treaty of Trianon) – this is an issue to be explored in the Hungarian case study
411 In the case of Vincent R, paras 9-11.
412 The Conseil Constitutionnel ultimately did not invalidate the French denial ban due to connection of Holocaust denialism to anti-Semitism (that denial is in itself anti-Semitic) The decision refers exactly to ‘principe d’égalité devant la loi pénale’ (principle of equality before/criminal law), rooted in Article 6 of the Declaration on the Rights of Man and Citizen (1789) – ‘the law must be the same for all whether it protects or punishes’ The role of this historic document in the French legal system, along with the consequences of the Conseil Constitutionnel’s decision, are issues to be explored in the case study chapter on France

84
3.3.3 Impartiality of the Judiciary

Judicial impartiality as a rule of law element is difficult to conceptualize, especially relating to the examination of the legal governance of historical memory. The most extensive analysis of the activities of the judiciary, especially in the European context, focuses on judicial independence rather than on impartiality. \(^{413}\) Scholarly assessments consider the threats posed to the independence of the judiciary through its capture, particularly prevalent these days in the European Union. \(^{414}\) Verdicts favorable to the government can be provided in historical memory-related cases if the judiciary is captured. Capture of the judiciary is a term introduced in Europe during the analysis of the rule of law backsliding in Hungary and Poland. It means that the government exerts influence of the judicial tribunal through exclusive nomination and the transformation of judge selection by law - the constitutional court is often the first tribunal to be captured. \(^{415}\) Such instances highlight the general deterioration of the rule of law and their impact on memory laws, which is not within the scope of my thesis. Instead, judicial capture is examined as a byproduct of the implementation of memory laws and policies that enable the subversion of judicial institutions and their instrumentalization in favor of a narrative or group.

Indeed, the issue of impartiality appears more prominently in terms of how the judiciary is affected by the presence of the legal governance of historical memory. Judicial impartiality pertaining to memory laws may result in: (1) providing opportunities for judges to act as arbiters of history or (2) courts themselves can choose to deliberate on historical questions in an erratic and inconsistent manner. Thus, the question of impartiality concentrates on the role of judges in the creation of official narratives, through the presence of judicial restraint and activism, in instances when judges usurp the powers of other branches of government, especially rendering verdicts influenced by their own policy preferences. \(^{416}\) Of course, judges are inevitably influenced by their environment and beliefs, but if they behave in an overly-activist manner, and particularly if they act as arbiters of history, they will ultimately shape historical memory. \(^{417}\) In the worst-case scenario, such judicial behavior can lead to the establishment of a hierarchy between mass atrocities. It has to be mentioned here that judges can shape historical memory in two manners. On the one hand, the judiciary and individual judges can initiate deliberations of historical events on the basis of their own personal views.

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\(^{413}\) Nevertheless, in the case of Les Verts, the Advocate-General initially equated the rule of law with judicial protection (Opinion of AG Mancini in Case 294/83 [1986] ECR 1339, p. 1350.)

\(^{414}\) On capture of the judiciary as a threat to the rule of law in the EU: Jan Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21 European Law Journal 141.

\(^{415}\) On Poland, for example: Sadurski ‘How Democracy Dies (in Poland)’ (n 22)

\(^{416}\) This definition of judicial activism comes from the volume on judicial activism by Stefanie A. Lindquist and Frank A. Cross, Measuring Judicial Activism (OUP 2009) 1. – although this book assesses judicial activism in the US, I find the definition suitable for the European context as well.

\(^{417}\) See for example, an analysis on how the ECtHR engages in judicial activism or restraint in its deliberation of historical issues: Anatoly Kovler ‘La Cour devant l’histoire, l’histoire devant la Cour, ou comment la Cour européenne juge l’histoire’ in La conscience des droits, Mélanges en l’honneur de J.-P. Costa (Dalloz, 2011) 337-352.
On the other hand, they can be influenced by external factors. In this case, their decisions can be accused with lack of impartiality due to the judiciary either being captured by the government or the judges being awarded powers allowing them to pronounce judgment on historical events. The legal governance of historical memory functions as such an external factor. Both in terms of scholarship and institutional accounts, the first case scenario, judges shaping historical memory on their own accord, has been more extensively analyzed. I nevertheless consider these accounts because they provide valuable insight into the problem of judges acting similar to historians. The main difference between those accounts and the conceptualization in this thesis is that I consider the context in which judicial impartiality happens, namely the power memory laws providing the opportunity judges to act arbiters of history.

3.3.3.1 Definitions of Judicial Impartiality

Judicial impartiality is fairly difficult to reconstruct. Geranne Lautenbach is one of the scholars who provides an appraisal of judicial impartiality depending on the presence of two preconditions. Firstly, if judges cannot remain subjectively impartial, they hold personal prejudices that may influence the result of the case. Secondly, if problems emerge with regards to the objective impartiality of judges, it means that a state lacks institutional safeguards built in the organizational structure of the judiciary, in order to ensure the independence of judges from the parties of the cases they oversee.418 Tamanaha approaches impartiality through the claim that a judge’s job is to interpret how the law is applied and, if the law does not need particular interpretation, judges must compare the facts of the case from both sides and, taking the law into consideration, decide for and against the respective parties.419 Considering Tamanaha’s conception on judicial impartiality, judges can be justified to require clarification or changes in memory laws. Judges are actors who shape the legal governance of historical memory because their verdicts can cause the reformulation of such laws. However, the problem of judicial activism emerges if judges intend to engage with sensitive questions of history. Such argument of connecting judicial impartiality and activism to the legal governance of historical memory appears in the works of various historians, attempting to define the limits of judicial and historical work.420 As Paul Ricoeur notes, the ultimate aim of the judiciary is to provide justice, and in order to fulfill such function, judicial impartiality is absolutely necessary.421 In order for proper judicial impartiality, it is further necessary that the judiciary be independent, to avoid judges becoming the tools of governmental interference.

Compared to historians, judges are extensively constrained by the nature of their job – while historians can allow themselves to make indefinite and one-sided assumptions on historical questions because they can change their opinion without legal consequences, judges cannot do the same. Their verdict will gain legal force and cannot be retracted later.422

418 Lautenbach, The Rule of Law Concept (n 306) 216-218.
419 Tamanaha, On the Rule of Law (n 322) 134-135.
420 In France, where historians oppose memory laws particularly actively, the limits of the power of judges is a relevant topic of scholarly discussion. For example: Jean-Denis Bredin, Le droit, le juge et l’historien, Le Débat Vol. 5 n° 93 (1984)
421 Paul Ricoeur, Memory, History, Forgetting (Chicago University Press, 2006) 314
422 Ricoeur elaborates as “…the respective roles of historian and judge, characterized by their aims of truth and justice, invite them to occupy the position of a third party with respect to the places occupied in the public space by the protagonists of social action. A vow of impartiality is attached to this third-party position.” Also, for example: Carlo Ginzburg, The Judge and the Historian: Marginal Notes on a Late-Twentieth Century Miscarriage of Justice (Verso 2012)
423 Ibid Ricoeur 316.
From the perspective of legal scholarship, Kim Lane Scheppele has examined the role of the judiciary in the shaping of historical memory. Scheppele asserts that in several states struggling to deal with their past in the aftermath of fallen totalitarian regimes, constitutional courts tend to play an activist role in order to ensure the stability of the reformed constitutional system. She cites as examples, the work of constitutional courts of Germany, Italy, Spain and Portugal, all of whom in the aftermath of bloody dictatorships, endorsed the ‘never again’ mentality in their treatment of those regimes’ legacy. In addition, Scheppele claims that French courts exhibit the opposite behavior, as the power of the judiciary tends to be more restrained in France. These differences highlight the different constitutional contexts in which the national judiciary functions. Consequently, judicial impartiality will be affected differently in each case study.

In comparison to legality and equality before the law, impartiality of the judiciary does not appear as extensively in rule of law conceptions. While legal scholars examining the rule of law focus less on judicial impartiality, a particular body of work originates from historians on the limitations of the judges’ work in history-related cases, and the considerable restraint judges ought to practice, in contrast to historians. Thus, in the definition of the third element, while I do not ignore legal documents and analyses, I will rely more on arguments and connections theorized by historians – in terms of defining judicial impartiality in terms of judges elaborating as little as possible on historical questions.

Even so, human rights instruments do provide guidance on the definition of judicial impartiality. It often appears as ‘access to an impartial tribunal’ in various human rights conventions (Article 6 ECHR, for example). In addition, the ECHR specifies in its Article 10 that the right to freedom of expression may be restricted if its exercise threatens the impartiality of the judiciary. In addition, the case law of the ECJ identified various facets regarding the connection of the impartial judiciary to the rule of law. Firstly, impartial judicial review is necessary to the fulfilment of the rule of law. Secondly, impartiality must be ensured in accordance with Article 47 of the EUCFR (right to fair trial and effective judicial review). The ECtHR considered impartiality of the judiciary as an element of the rule of law in the case

In addition: P. Fraisseix, Le Droit Mémoiriel Revue française de droit constitutionnel Vol. 67 p. 499-507 (2006) Fraisseix theorizes on the danger of historical realities being restored by judges and thus manipulating historical memory

Scheppele, ‘Constitutional Interpretation after Regimes of Horror’ (n 194) – Scheppele forms the term ‘juridical democracy’ to describe the phenomenon

Ibid 10
Ibid 13

However, since Scheppele’s deliberations, especially in the handling the legacies various genocides and crimes against humanity, French courts have evolved to play a more active role in shaping historical memory – this is an issue to be discussed in the French case study chapter

For example, in the context of the EU, the judicial activism of the Court of Justice has been mentioned as an opportunity to combat the deterioration of the rule of law in Member States: Andrá Jakab, ‘The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States’ in Closa and Kochenov (eds.) Reinforcing Rule of Law Oversight (n 350).

ECHR Article 10.

Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013] ECLI:EU:C:2013:625 para 91;
In these cases, the Court of Justice claims that the EU is based on the rule of law and the institutions’ actions are subject to judicial review of compatibility with treaties, the general principles of EU law and fundamental rights. Case C-50/00 P Unión de Pequeños Agricultores [2002] ECR I-06677, paras 38 and 39.

The Court of Justice states that individuals are entitled to effective judicial protection and it is a general principle of law stemming from the constitutional tradition of the Member States (reference to ECHR art. 6 and 13). In addition, judicial impartiality is ensured by Article 47 of EU Charter of Fundamental Rights.
of Kyprianou v Cyprus (2005). In this case, the applicant was convicted in Cyprus for contempt of court. However, his conviction was decided by the same judges who accused him of contempt. The ECtHR refused to uphold that the applicant’s domestic conviction was lawful. As justification, the Court mentioned, that an objective test of judicial impartiality derives from rule of law.

The European institutions interpret judicial impartiality in different manners. In its 2011 Report on the Rule of Law, the Venice Commission, defines the impartiality of the judiciary as lack of prejudice by judges towards the outcome of the case. In addition, the Venice Commission connects judicial impartiality to fundamental rights, through the idea of access to justice through a competent judiciary. In its 2016 Rule of Law Checklist, instead of treating the impartiality of the judiciary as a self-standing element of the rule of law, the Venice Commission incorporates it under its rule of law principle titled ‘access to justice’. The EC considers the impartiality of the judiciary as a self-standing element of the rule of law, relating it to effective judicial review. In addition, the European Commission places emphasis on the separation of powers to ensure both the independence and the impartiality of the judiciary.

3.3.3.2 Impartiality of the Judiciary and the Legal Governance of Historical Memory

As to how judicial impartiality is used in this thesis, the following examples demonstrate that the regulation of genocide denialism is an area of the legal governance of historical memory where the activism of the judiciary prominently appears – drawn from the examples considered in Chapter 1. Emanuela Fronza, in her expansive monograph on the criminal law aspects of memory laws, warns of the danger of judges becoming ‘memory-makers’, if they, through case law, establish a hierarchy between atrocities. The example of genocide denialism highlights the thin red line on which judges operate. On the one hand, a judge is justified to interpret whether certain statements may fall under the scope of an already existing ban on genocide denialism. On the other hand, a judge cannot assess whether a particular historical event itself can qualify as a genocide in order to include or exclude the offender from the scope of a crime. Regrettably, French memory laws encourage a similar development as they allow judges to expand the definition of genocide.

The differences between the practice of the ECJ and the ECtHR further exemplify the positive and negative implications of judicial impartiality in the legal governance of historical

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430 Kyprianou v Cyprus App no 73797/01 (ECHR, 15 December 2005)
431 Ibid paras 119-128
432 Venice Commission on the rule of law 2011 para 12
433 Ibid paras 11-12
434 Venice Commission on the rule of law 2016 para 22
435 2014 Rule of Law Framework para 4
436 Annex to the 2014 Rule of Law Framework para 2
437 Emanuela Fronza has produced an encompassing volume on the criminal aspects of memory laws and their dangers: Fronza, Memory and Punishment (n 46). She claims that criminal prohibitions elevating one specific narrative for criminal protection which carries the danger of judges reconstructing rather interpreting historical facts which can result in the hierarchical ranking of historical atrocities.
438 During the 1980s, in the case of Robert Faurisson who had been prosecuted for Holocaust denial, the judges in the case specifically defined their own limits in similar cases. They claimed that court do not have competence to judge history:
439 This is a topic which will be explored in the next chapters
440 For example, in 2012, the French parliament introduced a law reformulating the French genocide denial ban – according to the law the denial of any crime which has “led to a conviction handed down by a French or international court” should be prohibited (Proposition de loi n. 1342 du 11 Octobre 2011 visant à réprimer la contestation de l'existence des génocides reconnus par la loi, para 1)
memory. In the differentiation between historical events, the ECJ examined the local context of Member States extensively and it does not create hierarchies between historical atrocities. The ECJ repeatedly emphasized that its job is not to classify or define local historical events, but to leave their assessment to domestic experts.\textsuperscript{440} For example, in cases concerning communist symbols, the Court leaves such issues to the Member States.\textsuperscript{441} In contrast, the creation of a hierarchy between historical events emerged in the assessment of the activism of the ECtHR. During its examination of genocide denialism, the Court has been criticized as substantiating a double standard between the Holocaust and other atrocities. As Holocaust deniers are treated with exceptional harshness in comparison to similar offences relating to other atrocities of the 20\textsuperscript{th} century, such as the Armenian genocide and the crimes of the communist regimes of Central and Eastern Europe.\textsuperscript{442}

On the basis of these considerations, I choose to construct my element of the impartiality of the judiciary with similar reasoning by connecting the impartiality of the judiciary, through judicial activism, to the concerns of scholars such as Ricoeur, worried justifiably about the dangerous overlap of the work of judges and historians.\textsuperscript{443} Therefore, although I keep in my mind that judicial impartiality and activism cannot be completely avoided in the discussion of questions relating to history, the third element concentrates on the extent of activism and restraint present in various cases.

3.3.4 Protection of Fundamental Rights

I selected as the fourth and final element of the rule of law, the protection of fundamental rights, to demonstrate how the legal governance of memory affects the rule of law. This element considers various selected rights affected by the legal governance of historical memory.\textsuperscript{444} The selected rights are drawn from the discussions how the legal governance of historical memory affects human rights in Chapter 1. However, before the selection of such rights, it must be mentioned that the identification of the element represents a departure from the formal definitions of the rule of law towards the endorsement of its substantive interpretations.\textsuperscript{445} Scholars argue whether the protection of fundamental rights can

\textsuperscript{440} The Court of Justice claimed it’s not competent to decide on the national regulation of totalitarian symbols in the decisions of Case T-232/10 Couture Tech v Office for Harmonization of the Internal Market (OHIM) [2011] ECR II-06469 and Case C-328/04 Criminal proceedings against Attila Vajnai [2005] ECR I-08577
\textsuperscript{441} Ibid in Couture Tech Ltd v OHIM
The Court of Justice stated that until there is at least one Member State which has concern on the display of symbols associated with totalitarian regimes, the Court will take it into consideration an refer to the national expertise.
\textsuperscript{442} On the ECtHR double standard: Gliszczyńska-Grabias and Baranowska, ‘The European Court of Human Rights on Nazi and Soviet Past’ (n 47)
The Court of Justice on judicial activism - The necessity of judicial activism in the Court of Justice originate from the imbalance of the development of the EU legal order in contrast to its political integration. The political integration is much slower; thus, the Court of Justice often compensates with judicial activism. An analysis of this phenomenon can be found: Mark Dawson et al., Judicial Activism at the European Court of Justice (Edward Elgar, 2013) 2-5.
\textsuperscript{443} Ricoeur, Memory, History, Forgetting (n 413) 314
\textsuperscript{444} I am using the language of fundamental rights instead of human rights because the fundamental rights language is used in the treaties and constitutional documents I will be examining – such as the EU Charter of Fundamental Rights as well as the Hungarian Fundamental Law (guaranteeing fundamental rights instead of human rights)
\textsuperscript{445} On the differentiation between formal and substantive (or thin and thick) definitions of the rule of law: Krygier, ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’ (n 313) 215
be incorporated into rule of law conceptions. Some definitions of the rule of law insist on an interpretation consisting of purely formal elements - encompassing only the processes through which laws are formulated and implemented. However, other interpretations, such as those of Bingham and Tamanaha, argue for the possibility of including fundamental rights protection in rule of law conceptions. Even those not supporting the incorporation of fundamental rights protection under the umbrella of the rule of law agree that certain rights - such as the right to fair trial - are intrinsically linked to well-known elements of the rule of law, including equality before the law, access to justice and the prohibition of the arbitrary exercise of power.

International human rights instruments acknowledge the protection of fundamental rights as a necessity to fulfill the rule of law. The European institutions incorporate the protection of fundamental rights in their definitions of the rule of law. In its 2011 Report on the Rule of Law, the Venice Commission created its fifth rule of law principle titled ‘respect for human rights.’ The Venice Commission justifies this decision with the general overlap of human rights and the rule of law. It claims that beside the obvious example of the right to a fair trial, other rights such as the right to life and the right to freedom of expression relate to the rule of law as well. In the 2016 Rule of Law Checklist, the Venice Commission does not create a separate principle for the protection of fundamental rights as a self-standing element of the rule of law; however, it remains integrated in all other rule of law principles. Furthermore, the Venice Commission emphasizes the link between fundamental rights and the rule of law, as strong fulfillment of the rule of law is crucial to ensure the effective protection of fundamental rights. The EC, in its 2014 Rule of Law Framework, connects the protection of fundamental rights to effective judicial review, highlighting the role of the judiciary in the process.

On the basis of this predominant scholarship and European institutional discourse, I opted to include the protection of fundamental rights as the fourth rule of law element, due to the palpable connection between the two concepts. As the Venice Commission rightly indicates, without effective fulfillment of the rule of law, the protection of fundamental rights cannot be realized. In addition, academic interest in memory laws had started from the fundamental rights perspective, thus, it would be unwise to ignore them. As to how the protection of fundamental rights is used in the thesis, the legal governance of historical memory is considered due to its antagonistic relationship with three specific rights: the right to freedom of expression, the right to freedom of association and assembly, and notion of human dignity.

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446 There is a description of this debate in: Lautenbach, *The Rule of Law Concept* (n 306) 72-73.
447 Also see, for example: Brian Z. Tamanaha ‘The History and Elements of the Rule of Law’ (2012) Singapore Journal Legal Studies 232, 233-236.
448 One such scholar, who insisted on defining the rule of law on strictly formal terms is Joseph Raz in *The Authority of Law* (OUP 1979) 221
449 Tamanaha, *On the Rule of Law* (n 322) 111;
450 Bingham, *The Rule of Law* (n 314) 67
451 For example: Magen, ‘Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU’ (n 20) 1053.
452 UDHR preamble
453 EUCFR Art I
454 ECHR preamble
455 2014 Rule of Law Framework para 4
456 I do not regard human dignity as a right, rather subscribe to the view that it is a founding concept on which other rights are based - although the conceptualization of human dignity significantly differs on the levels of international, regional and national human rights instruments
3.3.4.1 Freedom of Expression

The right to freedom of expression is codified in several international human rights instruments, including the UDHR, the ICCPR, the ECHR and the EUCFR. 457 In addition to providing the right to freedom of expression, ICCPR further requires the introduction of provisions combatting hate speech in its Article 20, in contrast to the ECHR. 458

In terms of memory laws, the existence and extent of restrictions on freedom of expression present the most complicated problems. 459 The legal governance of historical memory threatens the right to freedom of expression in two manners. Firstly, states can introduce prohibitions of the denial of crimes of totalitarian regimes via legislation on speech or other conduct, such as display of symbols. Secondly, states can further enact laws to punish dissent from officially established narratives, for example through banning the ‘insult or defamation of the nation’. 460 These laws can target individuals disagreeing with official state narratives. Recent events in Poland exemplify this development. The Polish government’s attempt to criminalize ‘the defamation of the Polish state and nation’, was designed to discourage researchers who do not support the government’s narrative about Polish participation in WWII atrocities, originating from the particular agenda of presenting the country as an innocent victim of the war. 461 Such assessment of the right to freedom of expression has been associated with the legal governance of historical memory from the introduction of the first memory laws. In fact, the earliest critiques of these laws have been based on their intrusive effect on academic freedom of expression. 462 Such an effect is very present in countries like Turkey, for example, whereas Article 301 of the Turkish Criminal


UDHR Art 18; ICCPR Art 19; ECHR Art 10


In terms of restricting the right to freedom of expression, freedom of expression is identified as one of the fundamental principles of democracy (for example, the Copenhagen criteria of the EU particularly emphasizes media freedom as a crucial condition to be fulfilled by candidate states in order to be considered a functional democracy and admitted to the Union). John Stuart Mill, one of the earliest theorists on freedom of expression, states that freedom of expression should only be restricted with the intention to avoid harm. He states that freedom of expression is a tool to search the truth. On the basis of similar ideas, human rights courts are usually particularly protective to the right to freedom of expression, allowing ideas that ‘offend, shock or disturb’, as identified in the case of Handyside v the UK (App no 5493/72, ECHR 7 December 1976 paragraph 49) This case is the landmark case on the limits of freedom of expression by the European Court of Human Rights. However, the Court has also specified that the right freedom of expression is not absolute, as there are instances in which freedom of expression can be overruled. Among these situations, the use of hateful language (hate speech) towards minority groups and fight against racism, anti-Semitism and xenophobia are identified as one of the legitimate justifications to actually restrict speech. Therefore, memory laws often reference the fight against racism to justify their existence.


On Holocaust denial and hate speech: Kahn, ‘Holocaust Denial and Hate Speech’ (n 233).

Amendment on the Polish Institute of National Remembrance

On the Polish situation: Gliszczyńska–Grabias, and Kozlowski, ‘Calling Murders by Their Names as Criminal Offence’ (n 15)

These debates originated from France
Code forbids the ‘denigration of Turkishness.’\textsuperscript{463} This provision is regularly used in the prosecution of Turkish historians and journalists writing about the responsibility of the Ottoman Empire in the Armenian genocide.\textsuperscript{464}

In contrast, genocide denial bans have been restricting the expression of those who deny, question or minimize the atrocities these prohibitions encompass, most frequently the Holocaust and, on occasion, the crimes of the communist regimes of Central and Eastern Europe. Genocide denial bans are the oldest and most common forms designed to restrict the right to freedom of expression regarding memory laws, and the existence of such bans is often justified with efforts to combat hate speech, racism and anti-Semitism.\textsuperscript{465} However, the inclusion of genocide denial bans under the umbrella of hate speech is debatable. It could be argued that offenders questioning historical events, such as the Holocaust, do not directly aim to disparage certain groups due to their particular characteristics.\textsuperscript{466} Rather, offenders may aid in creating a hostile environment for members of certain minority groups, and undermine their standing in society.\textsuperscript{467}

International human rights courts and instruments tend to agree with this assessment, although their opinions on punitive measures towards hate speech differ. The EU’s stance on genocide denialism is quite extensive.\textsuperscript{468} The Union introduced its first legal document on genocide denialism in 1996: the Joint Action against Racism and Xenophobia.\textsuperscript{469} Although this document is now invalidated, it has provided the first standards in the area of genocide denialism from the EU, requiring Member States to introduce legal provisions banning the denial and minimization of genocides, defined according to the 1945 Charter of the International Military Tribunal.\textsuperscript{470}

This document urged Member States to introduce genocide denial bans similar to the French prohibition.\textsuperscript{471} In 2008, the Union secondary law went even further with the introduction of the Council Framework Decision on Combatting Racism and Xenophobia by means of Criminal Law.\textsuperscript{472} The Framework Decision expands the expectation of genocide denial bans significantly. It states that Member States should prohibit the denial and minimization of not only the genocides defined by the Charter of the International Military Tribunal (as the French prohibition outlines), but every genocide, crime against humanity and
war crime deemed as such by the Rome Statute of the International Criminal Court. Thus, the Framework Decision significantly broadens the scope of genocide denial provisions.

Most European states have introduced a prohibition on genocide denialism and these bans are usually upheld by local constitutional courts as well as the ECtHR. Their support is justified by the undemocratic nature of the offenders’ statements – as their denial infringes on foundational values of democratic societies. Since the 1990s, the European Court of Human Rights has generated a significant amount of case law balancing Article 10 – freedom of expression – with various other rights in cases relating to genocide denialism. In the case of Lehideux and Isorni v France (1998), the Court states that denial of ‘clearly-established historical facts’ does not deserve the protection of Article 10 of the Convention. Instead, offenders belong under the scope of Article 17 ECHR, due to their abuse of underlying foundational values of the Convention.

The UNHRC rendered a landmark verdict on genocide denialism in the case of Faurisson v France in 1996. The Human Rights Commission expressed its hesitance to approve blanket restrictions on freedom of expression. However, it justifies the existence of the French genocide denial ban with guaranteeing safety and respect towards, in particular, the Jewish community. The UNHRC refers to its General Comment 10 on the right to freedom of expression. Although General Comment 10 opposes blanket prohibitions restricting the right to freedom of expression, in Faurisson’s case, the UNHRC accepted the reasons put forward by the French state. The UNHRC notes that the French courts’ condemnation of Faurisson’s conduct derives from the desire of protecting the rights and reputation of France’s Jewish community – a provided legitimate aim to introduce restrictions of freedom of expression. In addition, the UNHRC endorses the argument of the French state that Faurisson’s statements inspired anti-Semitic feelings in the public and thus, the dominant aim of the law used to prosecute him is combating racism and anti-Semitism. The UNHRC ultimately agrees with France by stating that Holocaust denial is ‘the principal vehicle of anti-Semitism’. This case marks the prominent occasion when an international organization examines the impact of a particular domestic memory law on the right to freedom of expression, that is a fundamental right identified as one of the most foundational rights in a healthy democracy.

While the landmark decision of Faurisson v France (1996) united the judges of the UNHRC in endorsing France’s genocide denial ban, various separate opinions remarked on the danger of these prohibitions. Judges Elizabeth Evatt and David Kretzmer claimed that while the ICCPR provided the opportunity for France to introduce a provision in order to combat

473 Ibid. Art 1/c and d
474 For example, in the cases of Marais v France (1996) and Witzsch v Germany (2005), among others
475 For a general analysis of freedom of expression and memory laws, see Belavusau, ‘Memory Laws and Freedom of Speech: Governance of History in European Law’ (n 48)
476 Article 17 of the ECHR (on the abuse of rights) is cited by the Court in these cases to support this argument
477 Lehideux and Isorni v France (n 81) paragraph 47 - so far only Holocaust is classified as a clearly-established historical fact
479 See more on this debate: Aleksandra Gliszczyńska-Grabias, ‘Memory Laws or Memory Loss? Europe in Search of Its Historical Identity through the National and International Law’ [2014] Polish Yearbook of International Law 161, 178.
481 Ibid para 9.7
racism, nevertheless the expression of unpopular and revolting opinions should be allowed.\textsuperscript{482} The judges pointed to the logic behind equating Holocaust denial with an incitement to hatred and violence. In fact, while they ultimately did not disapprove of the outcome of this specific case, they warned of the dire consequences of the French law. They claimed that “the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences.”\textsuperscript{483} Therefore, the judges criticized the French genocide denial ban with the same argument as used decades later by critics of the 2018 Polish memory law, thus demonstrating the contradiction between the support and the opposition of similar punitive memory laws. Although, the motivation behind the French genocide denial ban and the Polish memory law of 2018 significantly differs, the existence of similar criticisms towards them question whether criminal sanctions provide a viable opportunity to deal with the past, and whether the risks of punitive memory laws outweigh their benefits.

Despite the UNHRC’s opinion in \textit{Faurisson v France}, the debate on genocide denialism continues in the United Nations, tiptoeing a delicate balance between the toleration of genocide denial prohibitions due to their value in fighting racism and their condemnation due to their adverse infringement on the rights to freedom of expression. In 2011, General Comment 10 on the right to freedom of expression was replaced by General Comment 34. This document specifically addresses the issue of genocide denial bans. In General Comment 34, the UNHRC adapted its stance and claims that “laws penalizing the expression of opinion about historical facts are incompatible with the obligations the Convention (ICCPR) imposes on State parties in relation to the respect for freedom of expression and opinion.”\textsuperscript{484} Moreover, in 2012, the UN Special Rapporteur on the Right to Freedom of Expression expressed a similar opinion in his annual report. As the Rapporteur declared, ‘historical events should be open to discussion’, reiterating the conclusions of General Comment 34.\textsuperscript{485}

Between the two types of restrictions on the right to freedom of expression by memory laws, the laws aiming to prosecute the defamation or insult of the nation, such as in Poland and Turkey, are particularly criticized in academic writings and by human rights courts. In contrast, provisions on genocide denialism receive significant support.\textsuperscript{486} The EU and the ECtHR openly endorses combatting genocide denialism through criminal sanctions, while the UNHRC, although not supporting such prohibitions as enthusiastically, tolerates their existence. The endorsement of genocide denial bans remains a specifically European trend, and is justified by combatting racism, xenophobia and anti-Semitism, deemed necessary by the special European circumstances, namely the legacy of the destruction of World War II.\textsuperscript{487} According to

\begin{itemize}
  \item \textsuperscript{482} The opinion states that the French law is fine because it combats anti-Semitism. However, ‘if a law were merely to prohibit any criticism of the functioning of the International Military Tribunal at Nuremberg or any denial of a historical event simpliciter, on pain of penalty, such law would not be justifiable under paragraph 3 (a) of article 19 and it would clearly be inconsistent under article 19, paragraph 2’
  \item \textsuperscript{483} Art 19/3 gives the opportunity to restrict freedom of expression, but it should consider offensive and shocking opinions - similar argument to Handyside case by the ECtHR
  \item \textsuperscript{484} Separate opinion in \textit{Faurisson} para 9.
  \item \textsuperscript{485} General Comment 34, adopted by Human Rights Committee 102nd session, Geneva, 11-29 July 2011 paragraph 19.
  \item In addition, in Hungary’s last periodic review, the UNHRC even identified ‘memory laws’ by name, as a threat towards the right to freedom of expression. The Committee expressed its concern over memory laws risking the criminalization of the debate of post-WWII history. It thus urged Hungary to review its memory laws. (Concluding observations of the Human Rights Committee on Hungary (CCPR/C/HUN/CO/5) Adopted by Human Rights Committee, 100th session Geneva, 11-29 October 2010, para 19)
  \item \textsuperscript{487} Fronza, \textit{Memory and Punishment} (n 46) xv
\end{itemize}
Emanuela Fronza, genocide denial bans both ‘criminalize dissent and protect the consensus’. Fronza claims that the emphasis on the Holocaust in the formulation of genocide denial bans treats its legacy with particular distinction. However, this treatment creates further problems – including the aforementioned hierarchical ranking of atrocities.\textsuperscript{488} Therefore, the United Nations’ more cautious and more critical approach towards genocide denial bans considers their risks much more than the approach of the European institutions.

### 3.3.4.2 Freedom of Association and Assembly

In connection to the previous example of the effect of memory laws on the right to freedom of expression, further issues appear due to the impact of various memory laws on freedom of association and assembly. Most European states have had to deal with groups, located on either the extreme left or the extreme right of the political spectrum, espousing either negationist views and/or inspired by historically extreme ideologies. Some European states have censured or banned these groups for negationism.\textsuperscript{489} However, in contrast to the endorsement of genocide denial prohibitions by European institutions (and states), judicial or governmental bans on such groups occur less often. The ECtHR does not employ Article 17 of the Conventions regarding the right to freedom of assembly and association.\textsuperscript{490} The results of attempts to ban these groups varies. The Court states that such groups can only be banned if they possess totalitarian intentions, towards undermining the foundation democratic values of the ECHR.\textsuperscript{491} Only the espousal of totalitarian intention warrants the use of Article 17 of the Convention. In the case of \textit{Vona v Hungary} (2008), the Court states various forms of totalitarian motives – including the expression of contempt towards the victims of totalitarian regimes and the intention towards the destruction of values codified in Article 17 ECHR.

A similar viewpoint on the restriction of the right to freedom of assembly and association appears in the deliberation of various UN bodies. In his 2013 Report, the United Nations Special Rapporteur on Freedom of Assembly and Association similarly acknowledged that UN Conventions provide the opportunity to ban political parties and groups, but only if they use violence or ‘national, racial or religious hatred constituting incitement to discrimination, hostility or violence.’\textsuperscript{492} Otherwise pluralism, as the hallmark of democracy should be as preserved as possible.\textsuperscript{493}

Furthermore, the groups’ activities must aim at the ‘destruction of rights and freedoms enshrined in international human rights law’, similar to the ECHR’s standing on totalitarian intentions. The NHRC has not yet provided a General Comment on the right to freedom of assembly and association. As of early 2019, General Comments are planned for both Article

\textsuperscript{488} Fronza parallels the increasing criminalization of genocide denialism to the emerging European trend of restricting freedom of expression with the reason of safety and protection: “the crime of historical denialism reflects another European trend, whereby freedom of expression is limited to safeguard other values or to fight phenomena such as international terrorism. Indeed, Europe is displaying an increasing trend of limiting freedom of speech.”

\textsuperscript{489} For example, the Hungarian Guard in Hungary has been banned for this reason.

\textsuperscript{490} For example, the case of \textit{NPD v Germany} (App no 55977/13 ECHR 4 October 2016) on the ban on an extreme right-wing party in Germany

\textsuperscript{491} For the European Court of Human Rights, when regulating political parties and associations - pluralism is most important, reasons for any ban need to be particularly convincing (established in cases such as \textit{Communist Party of Turkey v Turkey} (App no 133/1996/752/951 ECHR 30 January 1998) and \textit{Vona v Hungary} (App no 35943/10 ECHR 12 September 2013 - the Hungarian Guard case)

\textsuperscript{492} Report on Rights to freedom of peaceful assembly and of association (A/68/299, 7 August 2013) para 38

The rapporteur mentions further that similar view is also codified in Article 20 of ICCPR and in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination)

\textsuperscript{493} Ibid para 37
Chapter 3

21 (freedom of assembly) and Article 22 (freedom of association) of the ICCPR.\textsuperscript{494} In contrast to the examination of the right to freedom of expression, the right to freedom of assembly and association has not been connected by the United Nations to particular memory laws, thus a General Comment similar to N.34 would be welcome to clarify the opinion of the Human Rights Commission on the effect of memory laws on the right to freedom of assembly and association.

3.3.4.3 Human Dignity

References to human dignity are frequently used to justify the prosecution of genocide denialism and the subsequent restriction of the protection of freedom of expression of individuals and groups espousing extreme ideologies.\textsuperscript{495} As mentioned before, while human dignity is an underlying principle of fundamental rights protection, it is not codified as a right in international human rights instruments, in contrast with the rights to freedom of expression and freedom of association.\textsuperscript{496} Human dignity appears in the preamble of the United Nations Charter.\textsuperscript{497} The ECHR and the ICCPR do not classify human dignity as a right, whereas the UDHR and the EUCFR do.\textsuperscript{498} Human dignity further emerged as a norm of customary international law as well as a general principle of international law.\textsuperscript{499} In addition to international documents, human dignity is included in diverse national constitutions as well. In Europe, the German constitution features human dignity prominently.\textsuperscript{500} Through the influence of the German Constitutional Court, various Central and Eastern European states have developed human dignity in domestic constitutional law. Most notably, the Hungarian Constitutional Court, in the footsteps of the German Constitutional Court, espoused the view of dignity being the ‘mother right’ of all other human rights codified in the Hungarian


\textsuperscript{495} As in the cases of Witzsch v Germany (paragraph 3) and M’Bala M’Bala v France (paragraph 18) before the ECHR.

\textsuperscript{496} The ICCPR refers to dignity in its preamble (“right derive from the inherent dignity of the human person”). The ECHR only mentions dignity in the preamble of its Protocol 13 on the abolition of the death penalty (“abolition of the death penalty is essential for the full recognition of the inherent dignity of all human being” – Protocol 13 preamble).

\textsuperscript{497} UN Charter, preamble

\textsuperscript{498} Although it has to be mentioned that in contrast to the other examples, the Universal Declaration of Human Rights is not a binding human rights instrument. Thus, the majority of foundational human rights documents actually does not regard human dignity as a right.

UDHR Art 1;

EUCFR Art 1.

Furthermore, in the case of the European Convention of Human Rights, while human dignity is not in the Convention, it appears in case law, for example in the landmark case of Tyrer v UK (App no 5856/72 ECHR 25 April 1978) para 33

\textsuperscript{499} Dignity is identified in various areas of human rights as concept to ensure the lack of degrading treatment and providing self-respect to various groups – it comes up in terms of anti-discrimination, women’s rights, as a minimum standard of international humanitarian law, in relation to the preservation of cultural identity and connected to social development.

See further: Petersen ‘Human Dignity, International Protection’ (n 488);

Christopher McCrudden, Understanding Human Dignity (OUP 2014)

\textsuperscript{500} Grundgesetz (Basic Law of Germany) Art 1 – ‘Human dignity shall be inviolable’
Human dignity in the German setting significantly influence the attitude towards genocide denialism as well. German courts convicted the animal rights group PETA, when in one of their advertisements the group compared the suffering of animals to that of Holocaust victims. PETA was condemned for violating the human dignity of the victims. Therefore, although the status of human dignity as a fundamental rights has not been agreed upon, the notion permeates through international human rights instruments as well as national constitutions. Its consideration allows for the protection of several groups. The presumption of dignity often lurks behind legal concepts such as the protection of fundamental rights, the rule of law and equality. Human dignity is perceived as a normative cornerstone of the international order, albeit one with unproven binding legal status.

While the nature of human dignity as a fundamental right is debated (as it is often not codified as such in foundational human rights instruments), I choose to use it for the following reason. First, the notion of human dignity encompasses the protection of all groups (including the victims of totalitarian regimes and mass atrocities, their descendant, and historically persecuted minority groups) who may be the target of genocide denialism. ‘Victim’s dignity’, a legal concept originating from international humanitarian law, in my view is not satisfactory to cover all the aforementioned groups. As the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law defines ‘victims’ as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.” While the document allows the inclusion of immediate family member or other dependant in this definition, difficulties arise in the consideration of the impact of genocide denialism on contemporary groups (such as the descendants of the victims of mass atrocities). For example, in the case of Perinçek v Switzerland (2015), the ECtHR examined whether calling the Armenian genocide an international lie may damage the dignity of Switzerland’s Armenian minority in general. In this respect, the member of the current Armenian minority did not suffer from the atrocity of the genocide (rather, their ancestors did). Thus, I opt for the more expansive notion of human dignity, and will characterize how memory laws affect this notion.

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501 Dignity was not codified in the 1989 constitutional amendments but was taken on by the Constitutional Court. Since the introduction of the Fundamental Law in 2012, dignity is codified in its Article II – it is specifically cited in relation to the protection of human life from the moment of conception – a very controversial addendum. The idea of dignity as the mother right of all fundamental rights was imported by the Hungarian Constitutional Court in the 1990s, under Court President László Sólyom (in the decision 8/1990). Furthermore: Uladzislau Belavusau, ‘Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant?’ (Czech Republic, Hungary and Poland) (2014) 47 Israel Law Review 27.

502 While the regional courts insisted on using the central role of dignity in condemning PETA, the German Constitutional Court rather upheld the conviction due to the violation of the personality rights (rather than human dignity) of the Holocaust victims. The case eventually made its way to the European Court of Human Rights which refused to find a violation of Article 10 (freedom of expression) of the Convention for PETA. The European Court of Human Rights also did not go for the dignity argument, instead found no violation due to PETA’s conduct of ‘banalizing the fate of Holocaust victims’ (PETA Deurschland v. Germany, para 48.)

503 On the development of human dignity as a concept: Antoon de Baets, ‘A Successful Utopia: The Doctrine of Human Dignity’ (n 448)


505 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 Art V

506 Perinçek v Switzerland, para 156. – Moreover, the case originated from an association representing the Armenian minority of Switzerland. The applicant even questioned the associations’ and the Armenian community’s standing as a victim in the case
The legal governance of historical memory concerns human dignity through two avenues. Firstly, the dignity of the victims centers the perspective of those who actually suffered due to historical atrocities. The ECtHR espouses the view that human dignity is wronged by the practice of genocide denialism. The Court uses this argument as an attempt to justify the refusal of application citing freedom of expression by referencing the dignity of the deceased.\textsuperscript{507} However, the Court so far has not created any legal obligations towards states in the protection of human dignity of the dead. Whereas in his landmark book ‘Responsible History’, Antoon de Baets theorizes that the dignity of the dead does imply various moral and legal duties of the living towards them, including various conditions memory laws codify – combatting denialism as well as the preservation and commemoration of the victims’ memory.\textsuperscript{508}

Secondly, considerations of human dignity need to be accorded towards some groups as well, such as the descendants of the aforementioned victims of historical atrocities or specific minority groups that have suffered historical persecution.\textsuperscript{509} The ECtHR proclaimed in \textit{Perinçek v Switzerland} (2015) that the ancestors’ memory can bear significant impact on their descendants as well as the persecuted group as a whole. However, considerations of the dignity of victim descendants are not absolute, and must be balanced against the rights of others exclusively guarantee the Court rendering a decision favorable towards these groups.\textsuperscript{510} The European Parliament (EP) embraces a similar viewpoint, advocating for, in the name of learning from the past. Therefore, the relevance of human dignity in the legal governance of historical memory significantly appears in Europe. Although human dignity has not been emphasized as a human right, its normative value makes it pertinent to analyze in this thesis.

\textsuperscript{507} Mentioned in the case of \textit{Witzsch v Germany} (paragraph 3.)
\textsuperscript{508} Antoon de Baets, \textit{Responsible History} (Berghahn Books, 2009) 120-141.
\textsuperscript{509} de Baets introduces his Universal Declaration of Duties of the Living to the Dead (inspired by the UNESCO Declaration from Present to Future generations), introducing 10 rights which the dead possess, on the basis of their dignity, ranging from body-related rights (such as a proper funeral) to rights including commemoration of the dead and the right to know the truth of human rights abuses
\textsuperscript{510} This view is espoused by the European Parliament in various resolutions, such as P6_TA(2009)0213 Resolution of 2 April 2009 on European conscience and totalitarianism (paragraph 15)
\textsuperscript{511} Such as in the case of \textit{Perinçek v Switzerland} (paras 155-156) – The Court states that the Armenian community’s dignity is harmed by negationist statement about the Armenian genocide. However, in the case of Perinçek, the dignity of the Armenian community was ultimately disregarded to favor the applicant’s right to freedom of expression (para 156)
Chapter 3

3.4 The Effects of the Rule of Law on the Legal Governance of Historical Memory

This thesis explores how the legal governance of historical memory affects the rule of law. However, it cannot be ignored that memory laws themselves can be influenced by the general progress or deterioration of the rule of law in various states. This may happen in situations where some state institutions are captured by governments, because the governmental influence likely leads to problematic legislation. Namely, due to the capture of democratic institutions, memory laws may progress through the law-making procedure without proper debate and/or consultation, which makes the manifestation of the substantive threats to the rule of law much likelier. This direction of the relationship between the legal governance of historical memory and the rule of law will be discussed in each chapter, as a necessary element of context, but it will not be the focus.

Examining the influence of the general deterioration of the rule of law on the legal governance of historical memory, problems appear in three areas identified as elements of the rule of law: (1) the law-making procedure, (2) independence of the judiciary and (3) the deterioration of the standards of fundamental rights protection.

The role of the legislative branch stands as the focus of the first point. Parliaments, as the creators of new legal measures and amendments, must work in a transparent and democratic manner so that memory laws can be openly and sufficiently debated. The quality of the clarity of the law-making process can be observed via the examination of the following aspects of parliamentary procedure: (1) the parliamentary debates of draft memory laws and amendments, (2) the existence of consultation on the historical accuracy of the content of the measures, (3) the speed of the law-making procedure and (4) voting statistics. Therefore, the following qualities of the debates on new legal and policy measures on historical memory must be weighed - whether those opposed to the measures have been provided with the opportunity to express their opinion and whether experts (such as historians), had been consulted, in an effort to refine the formulation of the measures and ensure that the narrative they convey remains factually accurate. In addition, the timeframe of the measures must be considered (whose brevity may further point to lack of proper debate and consultation) as well as voting statistics (as if a memory law is only supported by the government that may also demonstrate a one-sided bias to a certain version of history). For example, with respect to the capture of the legislation, the current Hungarian government gained supermajority in 2010. Since then, the creation of new Hungarian memory laws has been plagued with procedural problems. Most of them have passed through parliament within a matter of days, and, although several of them touched on sensitive historical questions, no experts have been consulted concerning their content. In addition, the laws have been pushed through parliament without any support (or votes) from the opposition.

With regards to the independence of the judiciary, it can be considered from the perspective of any governmental and/or legislative control of judges. The independence of the judiciary should be ensured through the appointment of its members and the assurance of its own independent decision-making over its inner workings. The weakening of the judiciary is among the first sign of trouble in the general situation of the rule of law, its capture serves as the removal of judicial checks of legal and policy decisions. With respect to the capture of the judiciary, the Hungarian Constitutional Court is nowadays comprised of judges

511 On the independence of the judiciary:
Robert Stevens, Independence of the Judiciary: The View from the Lord Chancellor's Office (OUP 1997)
Nils A. Engstad, Astrid Laerdal Froseth and Bard Tonder, The Independence of Judges (Eleven, 2014)

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exclusively appointed by the current government. Simultaneously, the Hungarian Fundamental Law introduced the concept of ‘achievement of the historical constitution’ to the legal system. If certain notions (such as freedom of religion) are regarded as an achievement of the historical constitution, they possess greater legal weight. However, the Hungarian Constitutional Court selects these notions quite randomly, which, due to the capture of the court, may result in verdicts favorable to the government.  

In terms of the standards of fundamental rights protection, the general state of the right to freedom of expression and minority protection will be considered on the basis of reports originating from NGOs such as Freedom House, the European Commission against Racism and Intolerance, among others. Widespread state interference in these rights further enable their weakening. Thus, the ignorance of concerns over the content of memory laws results in badly formulated laws with unclear consequences, which is ultimately harmful for fundamental rights.

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513 Such as in 28/2013 Hungarian Constitutional Court decision (28/2013 (X. 9.) AB határozat, ABH 2013, 865.) – in a separate opinion, one of the judges specifically remarked on the randomness of such tendencies.
3.5 Concluding Remarks and Questions for the Case Studies

As I reach the very end of the theoretical Part I of the thesis, it is reasonable to return to the main research question of ‘How does the legal governance of historical memory affect the rule of law?’ As Chapters 1 and 2 shed light on my understanding of these two concepts, their details allow for the introduction of sub-questions to guide the upcoming case studies.

The evolution of the legal governance of historical memory since the late 1980s – early 1990s has experienced significant transformation. The context between Western and Central/Eastern Europe radically differs due to their historical background – in the West, there is a colonial perspective to consider, while in the East, the legacy of communism weighs heavy. Certain historical issues are treated somewhat similarly (such as the legacy of the Holocaust, and prohibitions of its denial), but even in those cases, the journey to introduce such measures is different – for example, in the East, the emphasis on the Holocaust is smaller and it is regarded as equal to the legacy of communist regimes. Furthermore, the recent rise of nationalist and populist rhetoric in Europe, while represented in both West and East, has different connotations towards the legal governance of historical memory in France and in Hungary.

Furthermore, throughout the national case studies of France and Hungary, similar questions appear, in order to discover the intricacies of the legal governance of historical memory in these states. First, an inquiry must be directed at the local practice of the legal governance of historical memory – namely, the memory self-governance present in these states aimed at the creation of official historical narratives. An additional question should address the conformity of the legal governance of historical memory in these states to the standards established by the aforementioned European institutions. Consequently, a query should concern how France and Hungary articulate and regulate the self-perception of their history via law and whether the legal governance of historical memory in these states conforms to the standards adopted by the Council of Europe and the European Union.

Beside the inquiries directed at the context around the case studies, the analytical element of the principal research question must be introduced to them as well. In both case studies, the effect of the legal governance of historical memory on the selected rule of law elements (legality, equality before the law, impartiality of the judiciary and the protection of fundamental rights) will be discussed. Consequently, concluding both case studies, it is further worth to ask whether the legal governance of historical memory contributes to weakening or to the reinforcement the rule of law in France and Hungary. The primary finding of the case studies will then be analyzed in the final chapter where the research question is answered.

As a result of the aforementioned concerns, a discussion should be afforded to the role of the legal governance of historical memory in rule of law assessments originating from academic analyses as well as the deliberations of European institutions. Since the argument of the thesis aims to highlight the relevance of the impact the legal governance of historical memory asserts on the rule of law, it is worth asking whether memory laws ever appeared in rule of law assessments previously. Both scholars and European institutions have gradually emphasized the practical aspects of the rule of law and have identified various requirements to indicate its domestic situation. Accordingly, one should inquire about criteria scholars and the selected European institutions (the Council of Europe and the European Union) use to assess the fulfillment of the rule of law in Member States and whether the legal governance of historical memory been considered among these. And, if it has not, should it be?

Finally, as I have mentioned in the previous section, the partner to the principal research question - How can the general situation of the rule of law in states influence their legal governance of historical memory? - will not be ignored. The contextualization of each case
study requires a general description of the national situation of the rule of law, but its influence on the legal governance of historical memory will not be the primary focus.
Chapter 4
Case Study 1: The Legal Governance of Historical Memory and the Rule of Law in France
This chapter focuses on the legal governance of historical memory in France and its effect on the rule of law. In order to explain this relationship, I take the following steps: in Section 2, I provide context around the French legal governance of historical memory, including: (1) a sketch of the French socio-political situation since the 1990s, (2) a presentation of the controversial issues in French historical memory, and (4) a short synopsis of French developments through the standards of the European institutions. This overview serves the purpose of introducing the most prominent actors and problems in the treatment of French historical memory. Section 3 describes the French concept of the rule of law as well as the domestic rule of law situation, with a brief depiction of its impact on the legal governance of historical memory. Section 4 engages in the analysis of how legality, equality before the law, impartiality of the judiciary and the protection of fundamental rights are affected by various legal and ostensibly legal measures. Finally, in Section 5, I summarize the findings of the case study.

4.1 Why France?

The French case presents compelling opportunities for such analysis for several reasons. First, the influence of the French legal system permeates throughout Europe and the world. On the one hand, French practices (along with equally prevalent influences from Germany) have traditionally provided a sample to mimic for various continental European states in the organization and codification of their legal systems. The French Code Civil, for instance, significantly influenced the post-1945 reformulation of the Hungarian Civil Code. On the other hand, the French legal system shapes lawmaking overseas. Although the colonial empire of France has collapsed, French legal influences have proliferated several states in Africa (such as Rwanda, Cameroon or Côte d’Ivoire), and, to some extent, Canada.

Second, the initial terminology of memory laws (in French, les lois mémorielles) emerged in France. The French state introduced its first memory law in 1990, and the French government’s efforts prompted local historians to identify the term ‘loi mémorielle’. Before the 2000s, legal measures today classified as memory laws consisted of genocide denial bans; thus, they amended existing laws on hate speech and discrimination, rather than creating new legislation on remembrance. In contrast, in 2005, three of the four provisions first described as lois mémorielles in France were not amendments but self-standing regulations, aiming at introducing the state’s official interpretation of certain historical events – the Armenian genocide, the slave trade and the French colonial presence. Therefore, these French efforts may be credited with launching the academic examination of the legal governance of historical memory.

The French approach to the legal governance of historical memory may be characterized as both self-inculpatory and self-exculpatory. The legal governance of historical memory in France highlights the shortcomings of the self-inculpatory approach. In the last decade, the French state has assumed responsibility for its role in certain historical events, such as the law from West Germany, regarded as the earliest European memory law: German Criminal Code art 86a.
as the deportations during WWII and atrocities in its colonies (although, the latter consists only of President Macron’s recognition in September 2018 of atrocities committed by the French army during the Algerian War). However, such recognitions, especially regarding France’s colonial past, are subject to controversy. The French state’s efforts to deal with its colonial legacy have been accused of carrying more symbolism – in order to present an politically constructed image on the international stage – rather than arising from true reckoning with the past, especially in terms of colonial atrocities. In addition, from the perspective of self-exculpation, while the nationalistic overtones in the legal governance of historical memory is often considered problematic in Central and Eastern Europe, the presence of a similar outlook in France does not seem to particularly alarm the European institutions. Admittedly, France is considered more stable from a rule of law perspective than some Central and Eastern European states.

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520 This will be discussed in detail in the following sections
521 For example, in the case of The Fundamental Law of Hungry
522 See ‘The Rule of Law in France’ section
4.2 Context around the Legal Governance of Historical Memory in France

4.2.1 Socio-Political Situation since the 1990s

Since the early 1990s, three mainstream parties have controlled the French government: the UMP (Union pour un Mouvement Populaire), a conservative power; the Socialist Party, a left-wing, liberal power; and most recently REM (La Republique En Marche!), founded by current President Emmanuel Macron, representing a pro-European, centrist perspective. However, French government have for decades been struggling with the rise of the extreme right, and anti-Semitism and Islamophobia in France. France’s most notorious extreme right-wing political party, Le Front National (known today as National Rally - Rassemblement National, renamed in June 2018) was founded by Jean-Marie Le Pen in the early 1970s. While for decades it was dismissed as a populist fringe group, in 2002 Le Pen successfully qualified himself to the second round in the presidential elections. Although he was defeated by a considerable margin by Jacques Chirac, the influence of the National Front on a significant amount of French voters became abundantly clear. In the 2000s, Jean-Marie Le Pen’s daughter, Marine Le Pen, pushed her notorious father out of party leadership and reinvented the National Front as a force in contention for government. Due to her efforts, the National Front moved away from open incitement of violence against minorities and instead advocates for their ideas without the parade of militaristic extremism. Marine Le Pen’s success with her line of politics can be measured in the presidential election of 2018: she easily qualified for the second round where, although she was defeated by Emmanuel Macron, she received over 30% of votes cast.

The rise of the National Front demonstrates conflict in French society. The treatment of religious minorities, especially their ostracization, is a longstanding problem in France. The traditions of the Revolution strengthened the French state’s aversion to the church, culminating in a very strong, almost violent enforcement of the separation of church and state, sometimes to the disadvantage of freedom of religion. This doctrine of the laïcité is one of the foundations of the French state. Using the laïcité, forces such as the National Front capitalize on conflicts with the Muslim minority to advocate for intolerance. The glorification of the Revolution strongly cemented the connection between ‘Frenchness’ and the French language, as well as other elements of the glorious past identifiable for French citizens (predominantly excluding minorities). The National Front seeks to repossess the French past in their own way: by representing themselves as a new resistance (heirs to the Resistance of WWII) who fight against the invasion of Islam. The party’s populism incorporates national heritage through their sentiment of ‘France belongs to the French’ (who are white, French-speaking, and Christian or non-religious).

524 On the Front National: https://www.rassemblementnational.fr – Their program can be found on this website accessed 15 June 2020
526 Ibid 55.
527 G. Zoïa, Laïcité et identité culturelle, Tréma Vol. 3 (2012)
528 G. Zoïa, Laïcité et identité culturelle, Tréma Vol. 3 (2012)
529 Alon Confino, Foundational Pasts: The Holocaust as Historical Understanding (Cambridge 2011);
530 Dominique Reynié, “‘Heritage Populism’ and France’s National Front’ (n 517) 52.
531 A. Dupeyrix, C, 789386> accessed 15 June 2020
532 Emile Chabal, A Divided Republic: Nation, State and Citizenship in Contemporary France (CUP 2015)
In 1972, the French parliament introduced the *Loi Pleven*, in order to combat the incitement of violence and hate speech against minority groups in France. 532 In addition to the prosecution of Islamophobic intolerance, this law became the main tool, until the adoption of the *Loi Gayssot* in 1990, in combatting the rise of Holocaust denialism in France. Different forms of questioning of Nazi atrocities in WWII have been present in the country since the 1950s (such as the case of Rassinier in 1951533 and Bardèche in 1952534), but such questioning became particularly numerous during the 1980s and 1990s (famous cases include, for example: *Robert Faurisson* (1983)535, *Henri Roques* (1985)536, *Jean-Marie Le Pen* (1987)537, the *le Vieille Taupe* case (1987)538, *Roger Garaudy* (1995)539, *Jean Plantin* (1999)540, *Serge Thion* (2000)541, and *Bruno Gollnisch* (2005)542). Between 1992 and 2006, French courts condemned some form of contestation of the Holocaust on several occasions.543 The late 20th century also involved the local trials of Nazi collaborators: Klaus Barbie in 1987, Paul Touvier in 1989, and Maurice Papon in 1990.544

Many scholars consider today’s France to be a divided and fragmented nation.545 The French identity’s roots in the Revolution and its focus on universal republicanism are plagued by a dark side.546 Some regard multiculturalism and communitarism as potential threats to the

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532 This law’s official title is: *Loi n° 72-546 du 1 juillet 1972 relative à la lutte contre le racisme*

533 Paul Rassinier was himself a Holocaust survivor who nevertheless questioned the existence of gas chambers for more on his life, see Nadine Fresco, *Fabrication d’un antisémite* (La Librairie du XXe siècle 1999)

534 Maurice Bardèche defended the Nazi occupation and atrocities in France in his book ‘Nuremberg ou la terre promise’ (2003) for which he was fined and jailed several times in the 1950s. (available on internet)


539 Jean-Marie Le Pen dismissed the Holocaust as a ‘detail of history’:


540 La Vieille Taupe was a bookstore selling the works of multiple French Holocaust denialists, such as Paul Rassinier and Robert Faurisson. It closed in in 1991.


542 The Garaudy affair reached the ECtHR in *Garaudy v France* (2000) App no 65831/01. It was rejected as inadmissible

543 Jean Plantin was accused of operating a negationist bookstore in Lyon: Rousso, Golsan and Golsan, ‘The Political and Cultural Roots of Negationism in France’ (n 528) 78

544 In 2000, Serge Thion was fired from Centre National de la Recherche Scientifique for questioning the existence of crimes against humanity Rousso, Golsan and Golsan, ‘The Political and Cultural Roots of Negationism in France’ (n 528).

545 Bruno Gollnisch was named as a representative of the European parliament when he made negationist statements. He took his case to the ECtHR, but his application was rejected: *Gollnisch v France*, App no 48135/08 ECHR 7 June 2011

546 Fronza, *Memory and Punishment* (n 46) 81

547 On these trials see: Pakier and Strath (eds) *A European Memory: Contested Histories and Politics of Remembrance* (n 156)

548 Alistair Cole, ‘France: Between Centralization and Fragmentation’ in Frank Hendriks et al. (eds), *Oxford Handbook of Local and Regional Democracy in Europe* (OUP 2010)

549 Rebecca Clifford, *Commemorating the Holocaust: The Dilemmas of Remembrance in France and Italy* (OUP 2013)
republican myth. Thus, an invitation to belong to the French nation is challenging to extend to various minorities because a certain portion of society is desperately trying to hold on to its imagined idea of ‘Frenchness’. On the one hand, this culminates in narratives such as the refusal to call the Algerian War an actual war, merely referring to it as ‘military operations in North Africa’. On the other hand, the exclusivity of the republican ideal results in the introduction of assertive measures by ‘lobbyists nostalgic for the return of French glory’, such as the Loi Rapatrié, in which the positive aspects of French presence in the colonies is highlighted without any critical reflection on the brutality of colonial rule and decolonization.

However, several political powers in France continue to fight this trend. Legal measures, such as the Loi Pleven and the Loi Gayssot, provide the basis for the prosecution of incitement to violence, hate speech and genocide denialism. In the early 2000s, a parliamentary commission was established to reexamine the principle of the laïcité in order to accommodate certain practices of religious minorities. Ultimately, these measures in French society affected the legal governance of historical memory. The memory of the Holocaust unified the French Jewish community behind their suffering from genocide. Meanwhile, the new immigrant communities demanded the incorporation of their experiences of migration, imperialism and stigmatization into the national historical consciousness.

4.2.2 Controversial Historical Issues and the Mobilization of Historians and Civil Society in Debate

In 1989, historian Pierre Nora contended in his essay ‘Between Memory and History’ that France existed in an ‘age of commemoration’. The relationship between history and historical memory in France has steadily become a significant focal point of research since the 1970s, with Nora at the helm of the research. Nora and several of his colleagues were concerned about the intrusion of constructed historical memory into their academic research. Nora stated that by the late 20th century, historical memory had become an artificial creation preserved in the lieux de mémoire (realms of memory). He defined this term as man-made objects carrying collective memory, such as monuments, archives and even school textbooks. Nora claimed that before the institutionalized forms of historical memory, the remembrance of these events was more organically preserved through oral traditions of personal storytelling. He therefore objected to most forms of institutionalized historical memory, especially memory laws, seeing them as dangerous constraints on the work of historians.

548 Algerian war amnesty laws were introduced in 1962, 1966, 1968 and 1982.
552 M. Otto, ‘The Loi Gayssot will be discussed later in this chapter
553 Laïcité et République, Rapport de la commission de réflexion sur l’application du principe de laïcité dans la République, La Documentation Française, Paris, 11 décembre 2003
The rise of examining historical memory in France in the 1970s and 1980s occurred simultaneously with the emerging debates over the legacy of the Vichy regime. In the immediate aftermath of WWII, in the eyes of the public, France was generally regarded as a victim of the war. Moreover, as historian Henry Rousso claimed, the 1950s and 1960s brought about a general amnesia of the events that had occurred. With the exception of the investigation of the most ardent Nazis, such as Klaus Barbie, the French were more concerned with the reputation of survivors and with presenting France as a ‘nation of resisters’ during the German occupation. In addition, because Germany took full responsibility for Nazi atrocities, it became easier for occupied states such as France to shirk their own citizens’ or state authorities’ participation in the atrocities.

The amnesiac attitude towards the Vichy regime and French participation in the Holocaust started to change in the late 1980s to 1990s. Rousso’s seminal work, The Vichy Syndrome, summarized and confronted French society with the biased treatment of WWII memories. As the divide between history and memory became increasingly pronounced, representatives of the state strived to replace their commemoration of peace with further self-reflection. This resulted in consideration of the devoir de mémoire (‘duty to memory’ or ‘duty to remember’), as a doctrine essential for commemoration. In 1995, President Jacques Chirac, at a commemoration ceremony in Vél d’Hiv, the most symbolic French site of Jewish deportation, publicly recognized the role that representatives of the French state played in the atrocities and publicly apologized for the state’s role. Chirac has since been dubbed as the ‘President of the duty to memory’ in the French media.

The 1990s have been further characterized in France as ‘the decade of the duty to memory’. The informal adoption of the duty to memory on the political level inspired the idea of facing the past, at least in relation to WWII. This happened through the dedication of new monuments to the victims and to peace, the trial and condemnation of French collaborators with the Nazi occupation, and the introduction of several non-punitive and one punitive memory law. In 1990, the French Act on the Freedom of the Press with the Nazi occupation, and the introduction of several non-punitive and one punitive memory law. In 1990, the French Act on the Freedom of the Press was modified to prohibit the


559 H. Rousso, Le syndrome de Vichy de 1944 à nos jours, Editions de Seuil, 1987, 384 p.;


Csilla Kiss, ‘Historical Memory in Post-Cold War Europe’ (2014) 19 The European Legacy 419, 423.

560 Daniel Chirot, ‘Why World War II Memories Remain So Troubled in Europe and East Asia’ in Vladimir Tismaneanu and Bogdan C Iacob (eds), Remembrance, History, and Justice: Coming to Terms with Traumatic Passes in Democratic Societies (Central European University Press 2015), 52.

561 Rousso, Le syndrome de Vichy de 1944 à nos jours (n 553);

H. Rousso et E. Conan, Vichy, un passé qui ne passe pas, Gallimard, 1994, 528 p.

562 C. Bouton, Le devoir de mémoire comme responsabilité envers le passé’ dans Myriam Bienenstock, Devoir de mémoire? Les lois mémorielles et l’histoire, La Bibliothèque des fondations, 2013 p. 53


The public recognition of responsibility was enshrined in a decision from 16 February 2009 by the Conseil d’État (Décision n. 315499)


565 Ibid 179
contestation of genocide, as defined by the Charter of the International Military Tribunal (or the London Agreement), becoming known as the *Loi Gayssot*. This provision has since been used consistently to tackle the denial of the Holocaust.\(^{566}\)

In the 2000s, three declarative laws were enacted to commemorate various heroes and victims of France during WWII. The first was a 2000 law commemorating the Righteous of France, namely, individuals who helped to hide Jews during the war.\(^{567}\) In 2003, another law was proposed to commemorate those who gave their lives to various causes throughout French history.\(^{568}\) Finally, in 2013, a third piece of legislation allotted 27 May as the Day of Remembrance of the French Resistance.\(^{569}\)

The relevance of the duty to memory divided the French historical community. On the one hand, some researchers greeted its advent as the final push for the state to reckon with its sensitive historical past—the final admission of culpability and responsibility.\(^{570}\) They claimed:

(The duty to memory) is not separable from the notion of culpability. While it is not absolutely necessary to impose coercive punishment … the duty to memory transcends the life of an individual … (it) relates to a past that was not necessarily present for the one who remembers. It is about people who are no longer there to defend themselves.\(^{571}\)

On the other hand, many warned of the slippery slope of the duty to memory— that it is primarily a political construct, it instrumentalizes history, and consequently research could be easily infringed on or manipulated.\(^{572}\) Above all, the duty to memory provides the opportunity for the law to dictate the subjects and limits of historical research—thus an official historical truth is established and those who do not agree stand the risk of receiving punishment.\(^{573}\) Paul Ricoeur called the duty to memory an ‘attempted exorcism in a historical situation marked by the obsession with traumas suffered by the French.’\(^{574}\) Ricoeur and many others worried about the new “age of commemoration” and the subsequent surge in memory laws. Thus, it remains a term equally glorified and cloaked in doubt.

Ricoeur is only one among a significant number of French historians who opposed and/or protested against what they perceived as the political and legal instrumentalization of historical memory.\(^{575}\) Pierre Nora founded with fellow historians René Rémond and Françoise

\(^{566}\) This law’s official title is: Loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe

On the Loi Gayssot and its use, see:


\(^{567}\) This law’s official title is: Loi no 2000-644 du 10 juillet 2000 instaurant une journée nationale à la mémoire des victimes des crimes racistes et antisémites de l’Etat français et d’hommage aux « Justes » de France

\(^{568}\) This law’s official title is: Loi n° 2012-273 du 28 février 2012 fixant au 11 novembre la commémoration de tous les morts pour la France

\(^{569}\) This law’s official title is: Loi n° 2013-642 du 19 juillet 2013 relative à l’instauration du 27 mai comme journée nationale de la Résistance

\(^{570}\) The first monument dedicated to the memory of the deportation in Vél d’Hiv was erected under the Mitterrand presidency.

C. Bouton, *Le devoir de mémoire comme responsabilité envers le passé* (n 556) p. 55.


\(^{572}\) P. Nora, *Malaise dans l’identité historique* (n 41) 486

\(^{573}\) Fraisseix, *Le droit mémoriel* (n 414) 486

\(^{574}\) Ricoeur, *Memory, History, Forgetting* (n 413) 90

\(^{575}\) Protests against Gayssot law in 1990

Chandernagor the organization Liberté pour l’histoire. The establishment of LpH was inspired by the Loi Rapatrié, which obliged French schools to teach the positive role of the French presence in the colonies. This law represented the last straw for numerous historians frustrated with the intrusion of politics into historical research. LpH issued its first appeal against memory laws and the instrumentalization of history in 2006, claiming that the capture of history through political means should end. They argued that history is a science and thus neither politics nor law. LpH identified four problems with the legal governance of historical memory in France: (1) memory laws establish an official truth. (2) They project modern values onto historical situations through the projection of present values on historical situations, becoming ever more problematic as one looks for the legal classification of events further in the past, for example, the Armenian genocide or the transatlantic slave trade. (3) Memory laws regulate education to enforce the official narrative on children, and (4) while memory laws support the image of France abroad as the defender of fundamental rights, they are harmful to local groups in France. LpH warned of the spreading of memory laws as potentially leading to a tyrannical takeover of history.

Among French memory laws, only one law has not inspired the objection of LpH: the genocide denial prohibition created by the Loi Gayssot. According to LpH, the Loi Gayssot is a necessary evil as its sole aim is the punishment of people questioning factually accurate and truthful narratives. Nevertheless, LpH expressed concern that memory laws may force historians to restrict their research. Furthermore, they claimed that memory laws had no right to decree truths and decide historical debates. In fact, certain laws even attempt to rewrite the past retroactively (in the case of the Armenian genocide). LpH vocalized their concerns quite strongly and managed to influence and stop (at least, in name) the creation of proposed memory laws in parliament.

The Loi Rapatrié further influenced the establishment of another organization of historians, the Comité de vigilance face aux usages publics de l’histoire (Committee of Vigilance Against the Public Uses of History – henceforth CvuH) led by historian Gérard Noiriel. While the opposition of the CvuH towards memory laws is not as strong as LpH’s, they still support LpH’s belief in history not being a legal and/or political issue. The organization also advocates for the elimination of as many memory laws as possible, as well as the retraction of existing legal measures.

Despite the widespread protests, there are historians in France who actively support the existence of memory laws. Support has emerged for the genocide denial prohibition and its

576 About the mission of the organization, information can be found on its general website: Liberté pour l’histoire, <http://www.lph-assos.fr> accessed 15 June 2020
577 The official title of this law is: Loi du 23 février 2005 portant reconnaissance de la nation et contribution nationale en faveur des Français rapatriés
579 Robert Kahn, ‘Does it Matter How One Opposes Hate Speech Bans?’ (n 42), 16-30
expansion to events other than the Holocaust, such as the Armenian genocide. Some researchers have expressed support for the renewed attempts of the French legislature to criminalize denial of the Armenian genocide. Thus, the advocacy of LpH has been criticized as hypocritical for refusing the expansion of the *Loi Gayssot* and singling out victims of the Holocaust, thus disregarding the impact of other mass atrocities.585

In addition to the conflict around memory laws and the duty their introduction owes to victim communities, the belief in France as a pioneer representative of fundamental rights has also spurred efforts for reconciliation with the past through ostensibly legal measures, as well as the recognition of events unrelated to French history. Since France is a founding member of various international and European organizations, the narrative of the country as one fighting for fundamental rights has been deeply inculcated into general beliefs and public narratives.586 Furthermore, the myth of the French Revolution has been cemented as a fight against the elite of the *Ancien Régime* and for the rights of citizens.587

The Revolution, in particular, serves as the foundational root of such an outlook on French history. The ideology of nationalism championed during the French Revolution influenced the entire European continent in the 19th century.588 In the early 20th century, the legacy of the Revolution brought together the nation of French patriots.589 In addition, the achievements of the Revolution provided the basis of France’s ‘civilizing mission’ - the exportation of French cultural values and intellectual traditions to the colonies. Simultaneously, access to French citizenship increasingly hinges on the meaning of Frenchness, evolving into an increasingly exclusionary concept. French society tends to aggressively defend its historical values, often perceiving the nation as a space of intrusion.590 Thus, the memory of the French Revolution and its subsequent impact on the evolution of French values is instrumentalized by various political forces in France, frequently generating actual legal consequences with regard to access to citizenship as well as the protection of minorities.591

Based on the narrative of France as the defender of fundamental rights, in the early 1990s the narrative of the government of François Mitterand revolved around the French support of European solidarity. France took an active role in the foundation of the EU, and the European narrative of learning from past atrocities was one the contemporary French government actively supported.592 This supportive attitude continued under the governments led by Jacques Chirac, from 1995 to 2007. Chirac made several symbolic gestures in an attempt for France to deal with its past, such as taking responsibility and apologizing for the French participation in WWII atrocities. Furthermore, Chirac supported the intervention into Yugoslavia, explicitly citing history in doing so, expressing abhorrence towards the massacre in Srebrenica, comparing it to WWII atrocities, and led French foreign policy in the support of European intervention in the Balkans.593

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585 Robert Kahn, ‘Does it Matter How One Opposes Hate Speech Bans?’ (n 42) 42.
586 Stiina Löytömaki, *Law and Politics of Memory: Confronting the Past* (n 74) 39
590 An encompassing analysis on the awarding of French citizenship can be found in: Marie Beauchamps, *Governing Affective Citizenship: Denaturalization, Belonging, and Repression* (Rowman and Littlefield 2018)
591 These are detailed in Section 4.2
592 Frederike Schotters, ‘Mitterrand’s Europe: Functions and Limits of ‘European Solidarity’ in French Policy during the 1980s’ (2017) 24 European Review of History 6, 973-990
Since the early 2000s, spurred on by the support of France’s significant Armenian diaspora population, various governments have attempted to elevate the condemnation of the Armenian genocide to that of the Holocaust. This was inspired by the legacy of 20th century humanitarian crises, as France has been accused of inaction and prioritizing politics over the rights of victims. This attitude is especially noticeable in the case of the Armenian genocide. Even contemporary newspapers condemned the French government for not interfering in the massacre of the Armenian minority by the Ottoman Empire. On this basis, the attempt to equate of the gravity of the Armenian genocide to that of the Holocaust has taken place in two ways. First, through the enactment of a law recognizing the Armenian genocide, and second by attempts to include the punishment of Armenian genocide denialism in either the scope of the Loi Gayssot and/or creating a separate punitive law to prosecute such instances. Although France possesses no territorial connection to the Armenian genocide all of the above factors, coupled with the French pride in representing the defense of fundamental rights, inspires renewed attempts to crack down on deniers of the Armenian genocide. Yet none one of these efforts have ever succeeded.

Beside the debate around the commemoration of the Armenian genocide, France recognized the transatlantic slave trade as a crime against humanity in 2001, and instructed this narrative to be included in the education of French history. The remembrance to slavery in France is connected to the duty to memory. Although state recognition is present in the laws, the narrative of France’s involvement in the transatlantic slave trade primarily focuses on the gentle colonialist while the victim narrative is generally ignored. But the commemoration of slavery conforms very well to the French narrative on fundamental rights, as its role as a human rights defender supports the recognition of the slave trade and its inclusion in education.

In contrast to the approach towards reflection on WWII, the slave trade, and various other genocides of the 20th century, France’s track record with the remembrance of its brutal colonial history is far less impressive. The official narrative on the legacy of French colonization in Africa, Asia and other territories has only recently started to change. The country especially struggles to deal with the memory of the Algerian War. In 1952, the Front National de Libération (FNL) launched a guerrilla-like war of independence in Algeria. The hostilities, which lasted over a decade, encompassed violence, with the French colonial army resorting regularly to torture. By the early 1960s, the majority of pieds-noirs (the descendants of European colonizers living in North Africa) as well as local communities of harkis (North African Muslims who helped the French army) further joined the escape, as they were targeted by FLN for their cooperation with the French forces. Ultimately, the brutal French tactics of torture and violence proved to be ineffective against the guerrilla war of FLN, and Algeria gained its independence in 1962.

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598 On the development of the recognition and criminalization attempts of the Armenian genocide, see: V. Duclert, La France face au génocide des Arméniens du milieu du XIXe siècle à nos jours: Une nation impériale et le devoir d’humanité, Fayard, 2015, 424 p.

599 On this basis, the attempt to equate of the gravity of the Armenian genocide to that of the Holocaust has taken place in two ways. First, through the enactment of a law recognizing the Armenian genocide, and second by attempts to include the punishment of Armenian genocide denialism in either the scope of the Loi Gayssot and/or creating a separate punitive law to prosecute such instances. Although France possesses no territorial connection to the Armenian genocide all of the above factors, coupled with the French pride in representing the defense of fundamental rights, inspires renewed attempts to crack down on deniers of the Armenian genocide. Yet none one of these efforts have ever succeeded.

600 See further on this law: Jan Jansen, ‘Politics of Remembrance, Colonialism and the Algerian War of Independence in France’ in Małgorzata Pakier and Bo Stråth (eds) A European Memory?: Contested Histories and Politics of Remembrance (Berghahn Books 2010)
The war took its toll on the domestic French government as well. Its legacy has been characterized by institutionalized forgetting for decades.601 The hostilities until 1999 have been referred to as ‘opérations effectuées en Afrique du Nord’ (operations carried out in North Africa), instead of ‘war’, and a significant amount of public pressure and self-reflection was required to achieve the change in terminology.602 Even so, the memory of the Algerian War represented a blindspot in the self-reflective attitude of the French state in the 1980s and 1990s.603 After the symbolic renaming of the hostilities to war, the legacy continued to remain unsettled in the 2000s, with laws like the Loi Rapatrié stressing the positive role of French presence on the colonies.604 The influx of refugees in the aftermath of the war continue to impact French society, as these communities often feel left behind and victimized by the majority.605 Certain French governments insist that remembrance of the Algerian War aims at reconciliation as well as to demonstrate a fight against racism. However, the anti-repentant, decade-long attitude is not easy to shake off.606 Even President Chirac, who proved his commitment to dealing with the past in the cases of the Vichy regime and WWII atrocities, caused controversy when he praised the ‘importance and grandeur of the work accomplished by France in the colonies, of which she is proud’.607 In 2018, President Emmanuel Macron finally recognized publicly the practices of torture carried out by the French army in Algeria.608

The allegations of the use of torture by the French colonial army surfaced to the public in the late 1990s, during the trial of General Paul Aussaresses. Aussaresses confessed in his autobiography of resorting to torture of prisoners of war during his time in Algeria, after which he was sued for crimes against humanity in 1999.609 His trial focused public attention on the war and led to the establishment of the first memorial on French soil dedicated to the War, and initiated the renaming of the events.610 In 2012, a memory law was introduced on the status of

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602 Ibid 161.
604 C.-L. Bouvier, La mémoire et le droit des crimes de guerre et des crimes contre l’humanité depuis la seconde guerre mondiale: Comparaison Allemagne Fédérale et France, Thèse d’Institut Universitaire Varenne, 2015, p. 304
607 Geoffroy de Laforcade, ‘“Foreigners”, Nationalism and the “Colonial Fracture”: Stigmatized Subjects of Historical Memory in France’ (n 546) 227.
Emmanuel Macron published his book Macron par Macron in 2017 where he articulated these policies
609 Sutina Löytömäki, ‘Legalisation of the Memory of the Algerian War in France’ (n 595) 158-165
610 Richard J Golsan, ‘Paradoxes of Remembrance: Dissecting France’s “Duty to Memory”’ in: Marc Silberman and Florence Vatan, Memory and Postwar Memorials: Confronting the Violence of the Past (Palgrave 2013) 197
victims of the Algerian War in order to prevent their historical erasure and to commemorate the events.\textsuperscript{611}

In summary, the developments regarding the legal governance of historical memory in France have inspired controversial practices. On the one hand, dealing with the past has been initiated regarding WWII memories. However, the emergence of the doctrine of duty to memory and its adoption to the political scene have greatly upset many historians. According to these historians, the use of the duty to memory doctrine as well as the growing number of memory laws makes history into propaganda and imposes official history through law.\textsuperscript{612} It creates a political construct out of historical memory, which does not allow for subtlety. Instead, divided politics creates divided viewpoints on memory as they bend historical memory into more useful shapes: the UMP’s Gaullist viewpoint espouses a more conservative narrative on colonialism, whereas a party like the National Front uses the Revolution and WWII to protest against the multiculturalism of France. Meanwhile, the left-wing viewpoint pushes for ever further recognition, sometimes going far too intrusively into the realm of historical research.\textsuperscript{613}

The role of historians and researchers in such a situation is tricky. Several French historians chose to mobilize actively in the debates regarding the legal governance of historical memory, arguing that it is only the job of historians to define the past and to be neither legislators nor judges, both of which require the establishment of an ‘official’ truth, which any proper historian would inherently oppose. In their view, a need arises to differentiate historiography from the creation of historical memory, in order to combat the unsettled remembrance of sensitive historical events.\textsuperscript{614} Henry Rousso criticized the attitude of the French state of ‘converting truth into justice in the contemporary memory project’. Rousso argued that truth is the paramount goal for historians, whereas justice belongs in the area of law and ethics. If these two are mixed and confused, historians may be expected to decide upon the protagonists and antagonists of history and attempt to redress the wrongs of the past – both of which countermand the task they traditionally represent.\textsuperscript{615} The evolution of the public debate on historical memory in France demonstrates the importance of an independent public space where these issues can be discussed as well as the essential involvement of experts (historians) in shaping the state’s attitude and public perception towards history.

\textsuperscript{611} The official title of this law is: Loi n° 2012-1361 du 6 décembre 2012 relative à la reconnaissance du 19 mars comme journée nationale du souvenir et de recueillement à la mémoire des victimes civiles et militaires de la guerre d’Algérie et des combats en Tunisie et au Maroc
\textsuperscript{612} C. Bouton, Le devoir de mémoire comme responsabilité envers le passé’ (n 556) 63.
\textsuperscript{613} F. Hartog et J. Revel, Les usages politiques du passé, École des Hautes Etudes en Sciences Sociales, 2001
\textsuperscript{614} Ioanna Tourkochoriti, ‘Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece’ in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), Law and Memory: Towards Legal Governance of History (CUP 2017)
\textsuperscript{615} Henry Rousso, The Haunting Past. History, Memory, and Justice in Contemporary France (University of Pennsylvania Press 2003) 48
4.2.3 Overview and Classification of French Memory Governance Sources

4.2.3.1 History in French Constitutions

Mnemonic constitutionalism may not seem as influential in France, it is nevertheless present in the legal system, albeit in a different mode. Instead of inclusion of numerous historical narratives, the constitution functions in legal governance of historical memory as a balance and limit on the creation of memory laws. This section serves two purposes: first, even though the presence of historical narratives in the current French constitution is not extensive, historical references throughout the evolution of French constitutional documents must be traced. It is necessary to do this because the recurring emphasis in France’s ever-changing constitutional charters on the achievements of the Revolution, French values and the Declaration on the Rights of Man and Citizen provides continuity for the nation’s existence and becomes a foundational narrative on which memory laws may be based on. The second purpose of this section is to illustrate articles of the constitution are cited in the debate around memory laws as anchors and obstacles against the activism of the legislators in their quest to introduce new measures.

On the surface, compared to constitutions of Central and Eastern Europe, French constitutions do not contain many historical references. The few historical references present in these documents encompass the inclusion of various historical documents in the constitutional preambles, thus providing them with legal weight. Inclusion of history in the constitution serves as a symbolic market of the state’s priorities as well as a tool of possible justification for the introduction of memory laws. It shows the state approved image of the nation – France as a unitary, secular republic. It also establishes French citizenship as the source of equality in society through the definition of citizenship, and the properties of Frenchness gain meaning affecting the treatment of minorities.

Since the French Revolution, France has had fifteen different constitutions. Thus, certain other documents beside the constitutions, such as the Declaration of the Rights of Man and Citizen, have also become part of the constitutional order. Its importance in the French constitutional system is paramount as it symbolizes the traditions of the Revolution and codifies several concepts that are cemented in French society: its subject, the citoyen (citizen), as well as certain fundamental rights – liberty, property, safety, resistance against oppression and the transparency of the state. The significance of the declaration can be traced in several decisions of the Conseil Constitutionnel. The Declaration’s articles are almost always cited as a measuring stick in constitutional decisions. Thus, this historical document functions as the equivalent of a ‘rights and duties’ section of other constitutions. Contrary to other European constitutions, where the list of fundamental rights is not incorporated in the actual text of the constitution, instead they are mentioned briefly in the preamble.

The Declaration was first incorporated into the first French constitution of 1791. This constitution was enacted at a time when the state transformed from the absolute organization of the Bourbon dynasty into a constitutional monarchy. It further guaranteed the indivisibility

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617 S. Garibian, *Droit, histoire, mémoire. Le négationnisme: Exercice d’une liberté ou violation d’un droit?* (n 607) 3
618 Declaration of the Rights of Man and Citizen, 1789
619 Constitution de 1791
of the French nation and required citizens to swear an oath to ensure it.\textsuperscript{621} The constitution visibly rejected the absolute political and feudal system previously in place.\textsuperscript{622} It singled out the courts as the institutions guaranteeing the freedom of citizens as well as the importance of the separation of powers.

However, the constitution of the Restoration did not last long. In 1830, new King Louis-Philippe created a new document to justify his rule.\textsuperscript{623} In 1848, with the proclamation of the Second French Republic, the need arose for an updated version. This constitution introduced the famous motto of Liberté, Égalité, Fraternité as France’s foundational principles.\textsuperscript{624} This constitution survived only until 1852, the year of the coup d’état of Napoleon III, whose constitutional document included a renewed focus on remembrance to the past. This constitution starts with a specific preamble, titled ‘Proclamation’, which explains the past of the French nation, from resisting the oppression of the Ancien Régime, through to the achievements of the Revolution and Napoleon’s Consulate and Empire.\textsuperscript{625} It also cemented the tradition of the Code Civil, which by that point had been in force for almost half a century. After outlining the achievements, mistakes and shortcoming of previous systems, the proclamation justified the need for further regime change.\textsuperscript{626} In 1875, the Third French Republic created their own document,\textsuperscript{627} as did the National Assembly of the Fourth French Republic, which enacted a provisional document in 1945 after the German occupation, before agreeing on a final text in 1946.\textsuperscript{628}

The current French constitution was created in 1958 at the proclamation of the Fifth French Republic. In its preamble, it pledges to incorporate the Declaration of the Rights of Man and Citizen, as well as the preamble of the 1946 constitution.\textsuperscript{629} Through the inclusion of the 1946 preamble, the French constitution rejects the occupations of the past and pledges itself to becoming a pioneer of human rights, a narrative strongly emphasized in the national consciousness.\textsuperscript{630} The preamble further grants several fundamental rights to French citizens, thus gaining similar status as the Declaration of the Rights of Man and Citizen, becoming an additional prominent foundation of constitutional decisions on the basis of fundamental rights protection. The first article of the 1958 Constitution reaffirmed several historical symbols, such as the central role of the French language, the Tricolore (French flag), the motto of Liberté, Égalité, Fraternité and the national anthem of la Marseillaise.\textsuperscript{631}

The constitution of 1958 is frequently referred to as a prominent obstacle to stop the French parliament to expand statutory memory laws. Articles 34 and 37-I are used in the debate to quell proposal for new declaratory laws aiming at recognition. As these articles concern the competences and powers of the parliament, scholars opposing the introduction of memory laws cite them as constraints on the legislators.\textsuperscript{632}

The French parliament further encountered a difficulty in the attempts to debate memory laws aimed at providing compensation to victims of historical atrocities, for example, the descendants of slaves in France’s ex-colonial Caribbean territories. During these debates,
Article 40 of the constitution, concerning the prohibition of the creation of public expenditures, resulted in the failure of multiple legal proposals on victim compensation.

In conclusion, mnemonic constitutionalism has not appeared as prominently in France, history permeates through the constitutional documents, influencing the work of the Conseil Constitutionnel as it uses the Declaration of the Rights of Man and Citizen and the preamble of the 1946 constitution as a basis for their decision-making. The constitution of 1958 contains statements about French history but does not delve into great detail. Although different French governments have tried to force the inclusion of their vision of history in the legal governance of historical memory, they have most frequently attempted to do so through statutory law because constitutional amendments must be approved by both chambers of the French parliament (the National Assembly and the Senate), as well as by a national referendum.

Ultimately, on purpose of the constitution is to cherish the ‘adoption and conservation of basic societal choices and principle and enshrined in the Declaration since 1789.’ As evidenced by the overview on the evolution of French constitutional documents, all of them are rooted in the achievements of the Revolution. Therefore, the current constitution provides the basis for historical narratives and the perception of ‘Frenchness’ but it does not directly impact the rule of law.

4.2.3.2 Memory Laws and Ostensibly Legal Measures

On 12 December 2005, an op-ed written by French historian Francoise Chandernagor appeared in Le Monde magazine, which expressed discontent with the French ‘lois mémorielles.’ The term loi mémorielle, or memory law, has been since then further referred to in the context of the four specific legal measures which, in some way or another, impeded the work of French historians. The oldest law, retroactively considered a loi mémorielle, is called the Loi Gayssot. This law modifies Article 24 of the French Act on the Freedom of the Press, introducing the crime of the contestation of genocide and crimes against humanity as defined by Article 6 of the Statute of the International Military Tribunal. The French state employs a more traditional approach to memory laws - statutory memory laws are most numerous among the sources of memory governance. As the genealogy of French memory laws has already been dissected in Chapter 1, this overview on the domestic evolution of terminology focuses on how the initial conception and definition of les lois mémorielles developed, due to tenacious efforts led by historians, into a disadvantageous and rejected term in political debates by the late 2000s.

The first and so far, only punitive memory law – the country’s genocide denial ban – originated from a bill proposed by Jean-Claude Gayssot, a representative of the Communist Party of France. In the bill’s proposal, the necessity to create such a law was supported by an increasing amount of incidents of Holocaust denial in France, among them the most notorious case of Robert Faurisson from Université de Lyon. Faurisson was initially prosecuted under

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633 Fraisseix, Le droit mémoriel (n 414) 504
This amendment is officially known as: Loi constitutionnelle du 23 juillet 2008 de modernisation des institutions de la Ve République
634 This amendment is officially known as: Loi constitutionnelle du 23 juillet 2008 de modernisation des institutions de la Ve République
636 Ibid. 24.
637 Francoise Chandernagor, L’enfer de bonne intentions, Le Monde, 12 décembre 2005
638 Loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe
639 These intentions can be observed in the travaux préparatoires of the aforementioned law: <http://www.assemblee-nationale.fr/9/dossiers/880043.asp> accessed 15 June 2020
Article 1382 of the Code Civil for defamation. Although at the time the term ‘memory law’ was not discussed, the proposal stirred up considerable controversy and not just among fringe groups and denialists. Several historians opposed the law, due to its perceived unjust infringement on the right to freedom of expression. They claimed that such a law would interfere with one of the most fundamental rights granted in the Declaration of the Rights of Man and Citizen – freedom of expression.

After significant time and deliberation, the French parliament passed the bill and it is still in force in 2020. Throughout the years, several types of conduct have been identified under the scope of contestation. These include mitigating the Holocaust, denying the burning of human beings in concentration camps, quoting banned books, denying the genocide itself, promoting revisionist theories, and even comparing the horrors of Auschwitz to colonialism. Despite protests over the enactment of the genocide denial ban, various arguments have been cited in its support. First, freedom of expression is not unlimited. Second, the denial ban itself has its own legal limitations, and third, denial itself can be perceived as an abuse of law, thus deserving of prosecution.

The next laws identified as 
lois mémorielles include two declarative provisions enacted shortly after one another in 2001, championed by Socialist parliamentary representative Christiane Taubira. The Loi Arménie, contains a recognition of the Armenian genocide, a gesture which at the time cause considerable diplomatic pain to the French government with Turkey. Nevertheless, the law was supported as a symbolic nod to the heavy lobbying of France’s Armenian minority as well as the perceived consciousness of France as a defender of human rights. The Loi Taubira, proclaimed the transatlantic slave trade as a crime against humanity and obligated its inclusion in the education system. It too was the result of a very long legislative discussion. Its proposal was framed around the principle of the duty to memory, as an obligation of the nation to recognize the victimized communities of the West Indies. In 1994, a parliamentary committee was established to commemorate victims of the slave trade, beginning debate about the role of law in commemoration more generally.

The last law that ultimately sparked the academic debate on memory laws is the Loi Rapatrié. Most of the law’s text deals with benefits accorded to French citizens returning from Algeria to France in the aftermath of the colonial war. Article 4 proved especially controversial as, if it had been passed, it would have commanded French schools to teach the ‘positive aspects


Art. 1382 C. civ.

Declaration of the Rights of Man and Citizen Article 6


Sévane Garibian, ‘Taking Denial Seriously’ (n 177) 484


On French domestic troubles with Turkey:

David Fraser, ‘Law’s Holocaust Denial: State, Memory, Legality’ in Hennebel and Hochmann (eds), Genocide Denial and the Law (n 89)

Loi Taubira took years to be introduced officially (from December 1998 to May 2001)

Ledoux, ‘“Devoir de Mémoire”’ (n 543) 243.
of French presence on the colonies. Several historians and teachers interpreted this law as a direct attack on the freedom of their research and education. The law was perceived as an effort by the Sarkozy government to reinvigorate the official narrative of France as a colonial power in the aftermath of the Loi Taubira’s success. Ultimately, Article 4 was struck down by the Conseil Constitutionnel.654

In the aftermath of the identification of the first memory laws, the problematic nature of these measures became a prominent issue in in French politics. Despite the pleas of groups such as LpH or CvuH, newer memory law proposals have appeared before parliament. Nonetheless, several historians continued to protest against the existence of any proposed legal governance of historical memory except the Loi Gayssot. The controversies around les lois mémorielles reached their zenith in 2008, when several representatives in the French parliament, to ensure conformation to the EU Council’s Framework Decision, called for the inclusion of the Armenian genocide under the scope of the Loi Gayssot.655

In order to maintain control over the discourse on legal governance of history in France, the National Assembly commissioned a detailed report on the impact of memory laws, through a commission headed by then-National Assembly President Bernard Accoyer.656 Several historians, among them members of LpH, were consulted during the preparation of this report.657 The Commission identified seven French legal measures as memory laws. Beyond the four already mentioned (Gayssot, Arménie, Taubira, and Rapatrié) it also cited a provision granting benefits to the victims of the Algerian War,658 a 1999 provision on the official renaming of the colonial war as the ‘Algerian War’659 and a governmental decree designating a remembrance day for those who have died for France in any historical conflict.660 Ultimately, the conclusions of the Accoyer Commission repeated almost exactly the position of LpH – that the French parliament should refrain from the introduction of future measures and reexamine those already in existence. The Commission found only one contemporary law suitable to remain in force, the genocide denial ban of the Loi Gayssot.661 The conclusions of this report generated an unfortunate and two-sided practice in France: every successive legal attempt to regulate historical memory has been formulated as explicitly not a memory law, despite their content being inspired by previous lois mémorielles, demonstrating that state interference in the legal governance of historical memory continues to survive, albeit under a different name.

The French parliament has introduced several different types of statutory memory laws, including punitive, non-punitive measures as well as quasi-memory laws – provisions that may

652 Loi du 23 février 2005 portant reconnaissance de la nation et contribution nationale en faveur des Français rapatriés
653 Ledoux, Écrire une histoire du « devoir de mémoire » (p 558) 183
656 Rapport d’information au nom De La Mission d’information sur les questions mémorielles, 18 novembre 2008
657 Pierre Nora, among others, provided expert opinion for the report.
658 The official title of this law is: Loi n° 94-488 du 11 juin 1994 relative aux rapatriés anciens membres des formations supplétives et assimilés ou victimes de la captivité en Algérie
659 The official title of this law is: Loi du 18 octobre 1999 relative à la substitution, à l'expression « aux opérations effectuées en Afrique du Nord », de l'expression « à la guerre d’Algérie ou aux combats en Tunisie et au Maroc
660 The official title of this law is: Loi n° 2012-273 du 28 février 2012 fixant au 11 novembre la commémoration de tous les morts pour la France
661 Rapport d’information Au nom De La Mission d’information sur les questions mémorielles, 18 novembre 2008 – conclusions
662 Loi Taubira’s success. Arnaud de tous les morts pour la France effectuées en Afrique du Nord
not look like memory laws on the surface, but the context of their formulation and implementation suggests they in fact, can be regarded as such. In the assessment of French memory governance sources, failed law-making attempts ought to be considered with just as much weight because their content and aims tell a fascinating tale of the intention about the different actors in the legal governance of historical memory in France – either originating from the government or from the political opposition.

Only one punitive memory law currently remains in force in France – the first of its kind – the aforementioned Loi Gayssot, prohibiting the denial of the Holocaust.\footnote{Loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe} It has been criticized by academics, politicians and citizens alike and has been reviewed by the Conseil Constitutionnel on multiple occasions. The success of this law highlights how the French state remains committed to the protection of the legacy of the Holocaust, and takes a similar approach to genocide denialism as the ECtHR, namely that Holocaust denial is the only conduct to be punished with criminal sanctions. This viewpoint is supported by the failure of several attempts to either expand the scope of the Loi Gayssot to other genocides or introduce completely new punitive provisions. In the last two decades, there have been five unsuccessful proposals to ban the denial of the Armenian genocide.\footnote{The criminalization of the Armenian genocide was attempted in 2004 (twice), 2006, 2010 and 2011. The exact citation of these laws can be found in the appendix.} Furthermore, punitive memory laws have failed in their effort to prohibit the denial of ‘all genocides’, ‘20\textsuperscript{th} century genocides’ and ‘crimes against humanity’\footnote{Attempted in 2002, 2005 and 2014 These proposals can be found in the appendix.} on seven different occasions.

Non-punitive memory laws in France particularly concern recognition of historical events and their commemoration. The recognized atrocities include the Armenian genocide, the transatlantic slave trade as a crime against humanity, and the Algerian war. In addition, there have been attempts to recognize the Holodomor, the Porajmos, the Assyrian genocide, and the massacre in the Vendée as genocide.\footnote{2854 Relative à l'incrimination pénale de la contestation publique des crimes contre l'humanité 8 février 2006} Regarding commemoration, memorial days have been created to honor the Resistance (after several failed attempts, this law has passed in 2013), the victims of racist and anti-Semitic crimes,\footnote{The attempts are the following: Holodomor in 2006, Porajmos on 2008, Vendée genocide in 2013 and Assyrian genocide in 2001. The detailed list can be found in the appendix.} as well as people who have died for France in its wars (including in the Algerian War, in which laws commemorate both French soldiers and the harkis, and the War in Indochina).\footnote{These laws were introduced in 1994 (on the Algerian War), 2003 (on the heroes who died for France) and 2005 (on the war in Indochina) These laws contain historical connotations not in their text, but in their justification and debates. In ostensibly legal measures, consideration should be afforded to court decisions regarding memory laws as several failed attempts have been terminated due to the rejection of} Only few memory laws are directed at investigation of atrocities and education.\footnote{One of such laws is for example: Proposition N° 3411 de loi visant à réprimer la négation des crimes de génocide et des crimes contre l'humanité (19 janvier 2016) The official title of this law is: Loi n° 2000-644 du 10 juillet 2000 instaurant une journée nationale à la mémoire des victimes des crimes racistes et antisémites de l'Etat français et d'hommage aux « Justes » de France} Quasi memory laws concern efforts to include a historical perspective in the shaping of French citizenship\footnote{The official title of the law is: Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté (Article 173) These laws contain historical connotations not in their text, but in their justification and debates. In ostensibly legal measures, consideration should be afforded to court decisions regarding memory laws as several failed attempts have been terminated due to the rejection of} and the establishment of a history-related committee in the Ministry of Culture.\footnote{The title of the law is: Arrêté du 11 mars 1993 portant création d'un comité d'histoire du ministère de la culture} These laws contain historical connotations not in their text, but in their justification and debates. In ostensibly legal measures, consideration should be afforded to court decisions regarding memory laws as several failed attempts have been terminated due to the rejection of
the Conseil Constitutionnel. Amongst the sources the chapter further considers political rhetoric as well.

4.2.4 The Legal Governance of Historical Memory in France vis-à-vis the Standards of the European Institutions

The French memory laws generally conform to the guidelines set forth by the Council of Europe the EU. The domestic governance of historical memory touches on five areas the European institutions regulate.

First, regarding the content of genocide denial bans, the prosecution of negationism and its balancing with the rights of victims and minorities. The French laws containing criminal sanctions to combat genocide, while conforming to the basic requirements of the European institutions, point to conflicts between the standards originating from the ECtHR and the EU. The genocide denial ban of France, enacted in 1990 (the aforementioned Loi Gayssot), serves the purpose that both the ECtHR and the EU endorse, namely the prosecution of Holocaust denialism. French governments in the last decade have tried to expand the scope of the current genocide denial band to encompass, in particular, the denial of the Armenian genocide. As evidenced in the laws and attempts cited in the previous section, numerous proposals have failed in the parliament (five times) and before the Conseil Constitutionnel (twice) on this topic.

In 2008, in the wake of the newly introduced Council Framework Decision on Racism and Xenophobia, requiring broader genocide denial prohibitions, the French parliament attempted to criminalize the denial of the Armenian genocide by referring to this document. The repeated failure of the expansion of the French prohibition in parliament or before the Conseil Constitutionnel shows the contested nature of criminalizing genocide denialism and the conflicts and double standards existing in such legislation. The dignity of victim communities repeatedly loses to the right to freedom of expression in France, with the notable exception on the treatment of Holocaust denialism. However, this stance on genocide denialism and the balancing of fundamental rights originates primarily from the case law of Conseil Constitutionnel, which echoes the approach of the ECtHR. In contrast, different political powers in the French parliament have attempted on several occasions, to enhance the protection of victim communities, an approach more reminiscent to the views of EU institutions.

The second area in the legal governance of historical memory entails shaping citizenship according to the history-inspired approach. The EU’s views on citizenship based on historical awareness found an avid audience in France. By 2016, the French government introduced its Law on Equality and Citizenship, echoing the sentiments of the EU almost verbatim, requiring particular historical awareness from citizens, especially in the area of totalitarian regimes. Several French governments (including the current government) have further attempted to confront the past. French responsibility in WWII atrocities is an admitted fact since the mid-1990s. The French parliament continues to debate new declarative memory laws carrying the intention of deepening awareness and reckoning with the past. The glaring exception from the openness of memory laws is the treatment of the legacy of French colonialism, especially the Algerian War. Colonial nostalgia still resonates strongly in France, however, on the political level, efforts and inclination are directed to include the colonial past under critical scrutiny. The colonial past does not belong under the close supervision of European institutions either; therefore, French governments possess a certain amount of freedom in its treatment.

The final issue encompasses the reaction of the European institutions to the treatment of sensitive domestic historical issues – historical events that do not possess transnational

671 Art 173 of the Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté
connotations. Sensitive historical questions often reach the level of the ECtHR, such as concerning the memory of Philippe Pétain, the memory of the members of the Résistance, and other aspects of French participation in WWII. The cases of *Chauvy v France* (2004) and *Lehideux and Isorni v France* (1998) led the ECtHR to articulate strong views on historical truth and the duties of the historian in presenting facts and narratives.

In summary, the French efforts in the legal governance of historical memory conform rather aptly to the guidelines of the European institutions. Due to the activity of a significant portion of the academic community, the French legislator is often restrained even in policy areas where it intends to reach further than the European institutions did. For example, the viewpoints of the French legislator on the Armenian genocide actually contradict those espoused by the ECtHR in *Perincek v Switzerland*.

The legal governance of historical memory in France demonstrates both conformation and conflict to European standards. In some areas, such as shaping citizenship, French memory laws follow the direction of provided by the EU. On the other hand, despite the requirements posed by the 2008 Framework Decision, the expansion of the scope of the French genocide denial ban has not been successful, due to the influence of historians and a thorough political debate. Such rejection unveils a fierce debate around the protection of minorities versus ensuring the fundamental right to freedom of expression.

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672 *Lehideux and Isorni v France* App no 55/1997/839/1045 (ECHR, 23 September 1998). This case concerned the presentation of historical events in a ‘manifestly erroneous manner’

673 *Chauvy and others v France* App no 64915/01 (ECtHR, 29 June 2004). This case concerned historical truth as part of the right to freedom of expression

674 *Perincek v Switzerland* App no 27510/08 (ECHR, 15 October 2015)
Chapter 4

4.3 Rule of Law Analysis

3.3.1 The Rule of Law in France

This section provides a brief reflection on the academic consideration about the domestic conception of the rule of law – the notion of État de droit. Second, utilizing the reports originating from NGOs such as Freedom House and the World Justice Project as well as the European Commission against Racism and Intolerance, it assesses the general situation of the rule of law in France and how this affects the introduction of memory laws.

The concept of the rule of law does not possess its exact equivalent in the French language. The French conception of État de droit places particular emphasis on the principle of legality as well as the supremacy of laws as the principal governing power of the state. Simultaneously, the power of the judiciary possesses a smaller impact on the organization of the state. The French legal system distinctly draws on the Declaration of the Rights of Man and Citizen, introduced by the first National Assembly in August 1789, as one of its foundational documents. The Declaration grants various rights to French citizens, including the right to freedom of expression, among others. It further emphasizes freedom of religion, encompassing the principle of the laïcité - the complete separation of church and state - and the suppression of religious expression in public places.

As a result of the chaotic events of the French Revolution, the quick succession of governments, as well as the uncertainty in the judiciary, the French conception of the État de droit emphasizes the protection from arbitrary power above all else. The prohibition against arbitrariness is not established primarily by judicial control, but rather through the supremacy of the laws. The État de droit reject the ‘gouvernement de juges’ (government of judges). While French constitutionalism has existed since the French Revolution, until the introduction of the constitution of the Fifth Republic and the establishment of the Conseil Constitutionnel, it existed in name only. Finally, the 1958 Constitution limits the power of the executive branch in favor of the judiciary. As the French constitution has changed and been amended on several occasions over the past two centuries, the Declaration of the Rights of Man and Citizen and the Napoleonic Code (le Code Civil), in force since the early 19th century have been considered with esteem and importance. Therefore, ideally in France, the state should govern by law through the separation of powers in order to ensure the protection of fundamental rights.

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676 R. Carré de Malberg, Contribution à la théorie générale de l’État, Siney, 1920, 1526 p.
677 Declaration of the Rights of Man and Citizen Article 6
678 Ibid Article 10
See more: Zoïa, Laïcité et identité culturelle (n 519)
679 Chevallier, État de droit (n 669) 53
680 Pech, ‘Rule of Law in France’ (n 669) 18
681 Ibid 9
682 L. Favoreu, De la démocratie à l’état de droit, Le Débat Vol 2 n°64 p. 155 (1991)
The French legal system incorporates civil law (European continental law) similar to most other mainland European legal systems. The court system has three tiers – first instance courts, appeals courts (Cour d’Appel) and the supreme courts (the Conseil d’État, the Cour de Cassation and the Conseil Constitutionnel). The foundation of the Conseil d’État and the Cour de Cassation date back to the French Revolution. The Conseil d’État (Council of the State), reminiscent to its name, has advisory as well as judicial powers. It was founded in 1799 and serves as the highest appeals court in administrative cases. In its advisory role, it can issue opinions on several topics, such as draft legislation before its introduction, signature or entry into force. The Conseil d’État has officially recognized certain general principles of law (such as fundamental rights) in order to protect the state from authoritarian tendencies. The Cour de Cassation was founded in 1790 as Tribunal de Cassation and serves as the highest court of appeal in civil and criminal matters.

As the constitution continuously transformed at the whim of governments, and the work of judges was steeped in an air of doubt, rejection and distrust, no constitutional level judiciary power existed in France until 1958. The constitution of the Fifth French Republic established the Conseil Constitutionnel in order to place further checks on the parliament and the government. However, the Conseil Constitutionnel differs from other European constitutional courts in the sense that it is not entirely a judicial entity. Along with its nine regular members, the previous, living presidents of the republic – in 2019, Nicolas Sarkozy and Francois Hollande – have the opportunity to sit on the Conseil Constitutionnel. The Conseil Constitutionnel is not directly accessible for citizens, only through the court system – the Conseil d’État and the Cour de Cassation. At the time of its foundation, the Conseil Constitutionnel received the power of a posteriori judicial control (it could only pronounce on the constitutionality of new legal measures after their adoption). However, in the latest amendment of the French constitution in 2008, the Conseil Constitutionnel received the power of a priori judicial control. Before the introduction of new laws, the President, Prime Minister, President of the National Assembly, and President of the Senate can refer them to the Conseil Constitutionnel for constitutional check. In addition, the Conseil Constitutionnel supervises the fairness of elections and interprets provisions of the constitution as well as treaties and procedural law.

According to reports of the World Justice Project, France generally scores quite high on the fulfilment of the NGO’s rule of law standards. From the perspective of legality, the introduction of French memory laws can be regarded as mostly transparent and clear. The 2018 Report of the NGO Freedom House, described France as possessing ‘vibrant democratic processes and generally strong protections for civil liberties and fundamental rights.’ The report claims that the French government operates in transparency; however, Freedom House voiced

685 Ibid.
686 Carré de Malberg, Contribution à la théorie générale de l’État (n 670) 415
688 Carré de Malberg, Contribution à la théorie générale de l’État (n 670) 418
689 On the Powers of the Conseil Constitutionnel, information can be found on its general website: https://www.conseil-constitutionnel.fr accessed 15 June 2020
690 Ibid.
692 This power set was introduced by the following law: Loi constitutionnelle du 23 juillet 2008 de modernisation des institutions de la Ve République – in force since 2010

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concerns regarding the presence of corruption in the country. Nevertheless, elections are conducted fairly and political parties can operate freely. In terms of legal governance of historical memory, certain organizations founded by historians possess significant influence over the content (and even existence) of memory laws. The drafts of memory laws are vigorously debated in parliament over the course of several weeks; hence proposals that cause concern over their impact on certain fundamental rights, most frequently freedom of expression, never materialize. The length and thoroughness of parliamentary debates make it difficult to exercise power arbitrarily. However, Freedom House expressed unease over the prevalent practice of French governments to circumvent the parliamentary legislative procedure and the exercise of power via ordonnances (governmental decrees). In the aftermath of the terrorist attacks in Paris in November 2015, a state of emergency was declared lasting until October 2017. After the emergency ended, the practice of bypassing parliament has been included in a new constitutional amendment. While public discussion remains open and vibrant, new laws have been introduced on domestic surveillance. Although circumvention of parliament and arbitrary decision-making have not yet appeared significantly in the legal governance of historical memory, each French government since 1990 has had their own vision on historical memory. However, their impact depends on the respective government’s success.

Regarding judicial impartiality and independence, the French situation is quite satisfactory. Freedom House claims that the judiciary is sufficiently independent, but is nevertheless concerned about the state of emergency and its aftermath, which prominently curbed the power of the judiciary as well. Even so, despite the historical distrust of the judiciary, the Conseil Constitutionnel received wider powers in 2008 and the judiciary remains independent. In fact, some parliamentary groups are especially aware of the power certain memory laws attempt to place in the hands of judges and seek to mitigate and regulate such power. Unlike in some states of Central and Eastern Europe, the judiciary have not been captured by the government in France, and the real danger lies in the influence of memory laws on the work of judges as these laws may require judges to act as arbiters of history, by deciding on the nature of historical events and not the laws regulating their remembrance.

Lastly, the protection of fundamental rights has had a checkered history in France. While the country prides itself on its pioneering role in rights protection, anti-Semitism and Islamophobia remains a relevant and unsolved problem. French governments do try to combat these issues (some more than others) but both Freedom House and the European

694 The activities of such organizations, including Liberté pour l’histoire and Comité de vigilance face aux usages publics de l’histoire, will be discussed in the next section of this chapter.
696 Venice Commission, Opinion on The Draft Constitutional Law on “Protection of the Nation” of France, adopted by the Venice Commission at its 106th Plenary Session (Venice Commission, 11-12 March 2016)
697 These narratives will be detailed in the following sections of this chapter.
699 This can be found in the National Assembly debates on the following proposal : Proposition de loi N° 3842 portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien (18 octobre 2011) - <http://www.assemblee-nationale.fr/13/dossiers/lutte_racisme_genocide_armenien.asp> accessed 15 June 2020
700 Robert Barreto and Julieth Alejandra Rodríguez 'France and Islamophobia: Historical and Contemporary Conflict' (2016) Ciencia Política 22, 99-129
Commission against Racism and Intolerance is concerned about the police abuse as well as employment discrimination experienced by migrants.\textsuperscript{701} Moreover, the European Commission on Racism and Intolerance proposes in its 2016 review on France an extension of the scope of laws regulating hate speech (including the French genocide denial ban).\textsuperscript{702} However, Freedom House further notes that the right to freedom of expression (in terms of freedom of the media and academic freedom) enjoys only few restrictions. As the legal governance of historical memory involves constant balancing between the right to freedom of expression and the protection of minorities, the latter often loses.

In summary, the rule of law situation in France can be regarded as stable although worrying tendencies have started to gain ground, due to the answer to the recent wave of terrorist attacks France has experienced. Nevertheless, according to the assessment of independent NGOs, the branches of government are properly independent, separate and functioning. Formal legality is observed during the introduction of new legal measures – they must be accessible, intelligible and their hierarchy is observed. Since the situation of the rule of law enjoys such strength, its influence on the legal governance of historical memory cannot be regarded as particularly harmful.

\textbf{4.3.2 Legality}

The first problem resulting in the legal governance of historical memory’s effect on the rule of law concerns the failed and successful attempts of the legislator in recognizing historical events as genocide or crimes against humanity and the subsequent introduction of punitive measures towards their denial. It demonstrates how the enthusiasm of the legislator to recognize and punish denial creates a significant amount of unpredictability with regard to the work of historians. Furthermore, the selection of the historical events covered in these laws and proposals are extensively arbitrary, by expanding recognitions and prohibitions to events that predate (some of them considerably) the conception of the international legal concepts of genocide and crimes against humanity.

The second problem encompasses the extent of control the state possesses over spaces in which history is publicly discussed, namely museums, research institutes and the history curriculum. It shows how changing political regimes wish to assert their own vision of history, particularly in the establishment of museums. However, it further finds that, at present, there is no danger of the governmental control and eventual capture of historical research and education.

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\textsuperscript{701} In fact, many memory laws are consequential to efforts to combat racism and xenophobia:
European Commission against Racism and Intolerance, ‘ECRI Report on France (fifth monitoring cycle) CRI(2018)\textsuperscript{1}
\textsuperscript{702} Ibid.
4.3.2.1 Legal Certainty and Arbitrariness: Recognition of Historical Events as Genocides and the Punitive Memory Laws Sanctioning their Denial

On 12 June 2005, historian Olivier Pétré-Grenouilleau was interviewed by the weekly *Journal de Dimanche* á propos regarding his recent book *Le traite negrière* (The Slave Trade), published the previous year. The year 2005 was a particularly turbulent year in terms of memory laws in France. The freshly adopted *Loi Rapatrié* rattled the French historical community. In the interview, Pétré-Grenouilleau was asked about the impact of memory laws, to which he replied:

… the problem with the Taubira Law, which considers the trade of the Africans by Europeans as a crime against humanity, (is) the implication of a comparison with the Shoah. The transatlantic slave trade was not a genocide. It did not involve intention to exterminate people. Slaves were property who had value to be worked as much as possible. The Jewish genocide and the transatlantic slave trade are different processes. There is no such thing as a Richter scale of suffering.703

The interview proved to be extremely controversial. Several people demanded that Pétré-Grenouilleau apologize and resign his university seat. In September 2005, the organization Collectif DOM (representing French overseas communities) commenced a lawsuit against the historian.704 They cited Article 1382 of the Civil Code, claiming that since the *Loi Taubira* recognizes slavery as a crime against humanity, Pétré-Grenouilleau was guilty of the defamation of the descendants of the persecuted communities. This affair, coupled with the already-fiery impact of the *Loi Rapatrié* on the positive role of French colonization, caused an uproar in the French historical community. The newly formed LpH launched a petition in defense of Pétré-Grenouilleau and demanded the repeal of memory laws and a stop to the interference of politics in historical research.705

Pétré-Grenouilleau was not the only historian who found himself in trouble due to the impact of certain French memory laws. In 1995, American historian Bernard Lewis refused to classify the Ottoman massacre of the Armenian minority as a genocide.706 Even though France at the time did not recognize the Armenian genocide, Lewis was also sued under Article 1382 of the Civil Code.707 Moreover, in his case, his accusers, the *Forum des associations arméniennes de France* (Forum of Armenian Associations of France), attempted to bring the case under the French genocide denial ban, created by the *Loi Gayssot* in 1990.708 Ultimately, neither civil claim resulted in serious punishment - the case against Lewis was refused by French courts and the complaint against Pétré-Grenouilleau was retracted in February 2006.709

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703 The interview: <https://www.potomitan.info/lafwans/grenouilleau.php> accessed 15 June 2020
704 Noirliel, *De l'histoire-mémoire aux "lois mémorielles": Note sur les usages publics de l'histoire en France* (n 578) 41
705 The complaint was initiated in September 2005
706 Noiriel, ‘Malaise dans l’identité historique’ (n 41)
707 Ibid.
Regardless of the content of these historians’ statements and whether one agrees with them or not, their cases reveal dangerous trends in terms of the potential chilling effects of French memory laws. In the two decades since these laws appeared in France, some forces in the French parliament initiated several attempts to recognize different historical events as genocide and crimes against humanity. The trend started with an unsuccessful attempt to have the French state recognize the Armenian genocide in 1988.\(^{710}\) Eventually, the *Loi Arménie* was introduced in 2001, followed by the aforementioned *Loi Taubira* on the recognition of the slave trade as a crime against humanity.\(^{711}\) Failed attempts followed to recognize events such as the Holodomor (2006),\(^{712}\) the genocide of the Roma during WWII (2008),\(^{713}\) the Vendée genocide (2013),\(^{714}\) and the Assyrian genocide (2015).\(^{715}\)

Further attempts to criminalize denialism followed these recognition laws. This appeared in two forms: (1) proposals for certain events to be included under the scope of the current genocide denial ban, and (2) completely new draft laws to supplement it. In 2002, an unsuccessful proposal intended to modify Article 24 of the Act on the Freedom of the Press to punish contestation of ‘all genocides and crimes against humanity’.\(^{716}\) In 2004, another proposal was tabled to punish the negation of the Armenian genocide ‘with the same conditions as other crimes against humanity’.\(^{717}\) In 2005, a law was proposed to punish contestation of ‘all crimes against humanity’.\(^{718}\) In 2006, a similar proposal was introduced, along with a new attempt to criminalize the denial of the Armenian genocide\(^{719}\). After its failure, a bill on the contestation of the Armenian genocide was brought before the National Assembly in 2010.\(^{720}\)

In 2011, a similar attempt was lodged in order “to fight hatred and racism” against the

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See more: Ledoux “‘Devoir de Mémoire’” (n 543)

710 The official title of this law is: N° 3474 Assemblée nationale Constitution du 4 octobre 1958 Douzième législature Enregistré à la présidence de l’assemblée nationale le 30 novembre 2006 Proposition de loi relative à la reconnaissance du génocide ukrainien de 1932-1933

711 The official title of this law is: N° 337 Sénat Session ordinaire de 2007-2008 Annexe au procès-verbal de la séance du 15 mai 2008 Proposition de loi tendant à la reconnaissance du génocide tzigane pendant la Seconde guerre mondiale

712 The official title of this law is: N° 607 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 23 novembre 2008 Proposition de loi relative à la reconnaissance du génocide arménien de 1915

713 The official title of this law is: N° 607 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 1er décembre 2008 Proposition de loi relative à la reconnaissance du génocide arménien de 1915

714 The official title of this law is: N° 607 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 1er décembre 2008 Proposition de loi relative à la reconnaissance du génocide arménien de 1915

715 The official title of this law is: N° 607 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 1er décembre 2008 Proposition de loi relative à la reconnaissance du génocide arménien de 1915

716 After its failure, the *Loi Taubira* was introduced in 2001, followed by the aforementioned *Loi Taubira* on the recognition of the slave trade as a crime against humanity.\(^{711}\)

717 In 2005, a law was proposed to punish contestation of ‘all crimes against humanity’.\(^{718}\) In 2006, a similar proposal was introduced, along with a new attempt to criminalize the denial of the Armenian genocide\(^{719}\). After its failure, a bill on the contestation of the Armenian genocide was brought before the National Assembly in 2010.\(^{720}\) In 2011, a similar attempt was lodged to order “to fight hatred and racism” against the...
Armenian community. In 2013, in an attempt to conform to the 2008 European Council Decision on Racism and Xenophobia, a law was proposed that would have punished denial of the Armenian genocide, slavery and the slave trade, as well as those genocides already under the scope of Article 24 of the Freedom of the Press Act. In 2014, an amendment was proposed to the Criminal Code to prohibit contestation of the ‘genocides of the 20th century’. The most recent proposition failed in early 2016. Its aim intended to amend the Freedom of the Press Act to expand its general scope – to include events based on domestic or international recognition.

The formulation of most of these provisions remains problematic. Several of the would-be punitive prohibitions used language such as ‘all genocides’, ‘all crimes against humanity’, and ‘genocides of the 20th century’ – terms legally unclear and completely undefined. In fact, the root of the problem lies in the definition of the crime of ‘genocide’ or ‘crimes against humanity’. Using strictly legal language, these concepts were adopted in international law in the 20th century (genocide was first used in 1948 in the Genocide Convention, while crimes against humanity originated from the Hague Convention of 1907). Thus, characterizing pre-WWII events as such is legally problematic as it requires retroactive utilization of terms. The best example for the confusion of such characterization is the Armenian genocide: this event occurred between 1915 and 1918. It is true that the Armenian events originally inspired Raphael Lemkin to create the concept of genocide. Thus, in popular language it is referred to as a ‘genocide’, although technically this term had not yet been used in international law at the time, although it has since become accepted as a term describing what happened. If the characterization of the Armenian genocide causes problems in this respect, characterizations of events become even more debatable when categorizing pre-20th century events, such as the transatlantic slave trade, which falls outside the scope of the current legal definition. While legally speaking these events, had they happened today, could be characterized as genocide or crimes against humanity, this language was not in use at the time. Although it can mean symbolic recognition for the victims, once these terms are incorporated into the legal governance of historical memory, such definitions can become life changing for certain communities, in this case, the historians who research these periods.

The misapplication of lois mémorielles can feasibly affect historians by introducing unpredictability into their work. A problem emerges when the French parliament randomly selects an event it pleases to classify as genocide and crimes against humanity. This is not a hypothetical question – an example can be cited as the attempt in 2013 to recognize the genocide in the Vendée, the massacre of rebelling peasants in 1793 by the Jacobin dictatorship during the French Revolution. This event, while tragic, has never been labelled a genocide by any historian and is too far in the past to be characterized as such. Furthermore, if the French state recognizes an event as a genocide or crime against humanity, as the situation stands now, historians may be liable for their work and be sued for defamation – even though the recognition laws are declarative and with no criminal punishment. Even worse, the legislator may attempt to criminalize the contestation of these already questionable categorizations.

721 See, on this attempt: Thomas Hochmann, *Pas de lunettes sous les aïlères: le Conseil constitutionnel et le négationnisme*, RDLF Vol 6 (2017)
722 N° 337 Sénat Session ordinaire de 2007-2008 Annexe au procès-verbal de la séance du 15 mai 2008 Proposition de loi tendant à la reconnaissance du génocide tzigan pendant la Seconde guerre mondiale
723 N° 2276 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 14 octobre 2014 Proposition de loi visant à réprimer la négation des génocides et des crimes contre l’humanité du XXème siècle
724 Ibid.
725 Hague Conventions of 1899 and 1907
Thus, the purpose of these non-punitive laws is quite misleading. If, in their text, they claim to exist only to express the solidarity of the French state and raise awareness, then they should not be used to restrict the work of researchers. Therefore, the inconsistent attempts of French legislators to recognize historical events as genocide or crimes against humanity and subsequently ban their contestation present an impossible task for historians, who must essentially speculate on the consequences of the laws and interpret what is legally safe for them to write or say. Although historians possess a civic responsibility, the unpredictability of these memory laws are disproportionately more harmful to their activities. 

4.3.2.2 Historical Research, Museums, Education: Governmental Control over Institutions

This section concerns governmental control over spaces where history is independently and publicly discussed and debated. Apart from the creation of memory laws, French governments usually do not interfere with the legal governance of historical memory, control over spaces where history is debated is not extensive. Some governments have attempted to create institutions to transmit their constructed opinion, but they have been thwarted by protests from historians and failed through the legislative debate.

Historical research is not particularly centralized. The CNRS (Centre Nationale de la Recherche Scientifique – National Center for Scientific Research) exists as an umbrella organization to enhance cooperation and communication between domestic research institutes rather than as a tool of governmental control. However, in parliament and government some historical events have received particular attention. In 1993, within the framework of the Ministry for Culture, the Comité d’histoire (History Committee) was established. This committee examines the history of the Ministry of Culture, and is responsible for gathering existing work on history, commissioning relevant research and disseminating this research to the public, organizing events highlighting historical questions, promoting cooperation between historical research institutes, encouraging and gathering archival evidence of historical events, and advising the minister on history-related questions.

In addition, the 2001 Loi Taubira on the recognition of slavery as a crime against humanity encouraged the establishment of an institute dedicated to this narrative. In 2009, the Comité pour la mémoire et l’histoire de l’esclavage (Committee for the Memory and History of Slavery) was founded. The committee’s tasks involve assisting the government in the regulation of research, dissemination and teaching of this historical period, making recommendations on the dedication of remembrance days and commemorative events, identifying places of memory and connecting them to an international cooperative network, and raising awareness of the period in French schools and French society. Lastly, the government can require the committee to provide professional advice related to the legal governance of slavery’s remembrance.

727 Conseil Constitutionnel Décision 94-343 on the civil responsibility of historians
See also: T. Hochmann, Les limites à la liberté de l’historien en France et en Allemagne (n 527)
728 On the organization, information can be found on its general website: <http://www.cnrs.fr> accessed 15 June 2020
731 On the work of the Comité pour la mémoire de l’esclavage, information can be found on their general website: <http://www.cnmhe.fr> accessed 15 June 2020
732 Ibid.
Similar to historical research, history education is not generally regulated by French governments. Although the history curriculum is supervised by the Haut Conseil de l’Éducation (High Council of Education), no state-supervised textbooks exist, and teachers can choose textbooks from a varied selection. Professional historians possess certain influence over the content of textbooks. For example, the rise of the Annales school of thought on history influenced the focus of newer textbooks. Unfortunately, French history textbooks have been criticized as excluding the viewpoint of minorities and presenting French colonization from an especially problematic and whitewashing perspective, as well as presenting decolonization as a ‘crisis of Western civilization’ and an ‘appendix to WWII’.

Regarding the establishment of museums, in September 2011, President Nicolas Sarkozy announced an ambitious project on French history. He intended to establish the Maison de l’histoire de la France (House of French History) - a museum dedicated to the grandiose retelling of French history. The museum was to be located in the same building as the National Archives, further linking it symbolically to the most tangible parts of French history. This project met with widespread opposition. On the one hand, employees of the National Archives expressed concerns about incorporating the Maison de l’histoire de la France into their building. They claimed that the narratives presented in the museum would not be rooted in objective historical evidence, but instead would present an official account established by the government to directly contradict the work of the archive. Several associations of historians, among them LpH and CvuH, objected on similar grounds against the museum. They perceived it to be the latest interference of politics into history.

Such instrumentalization of historical narratives is not exclusive to the Sarkozy government. While the influence of the legal governance of historical memory beyond actual memory laws is not as palpable in France, each government has tried to twist and turn the French historical narrative to suit their interests. The unequivocal sign of governmental influence on historical narratives, the spreading of memorials, appeared significantly in France following the Franco-German War of 1870. Ever since this event, memorials and rhetoric have been the most effective weapon of domestic governments to ensure the incorporation of their version of history in the official historical narrative.

Even more symbolic of governmental control over history than the Maison de l’histoire de la France was the short-lived existence of the Ministère de l’Immigration, de l’Intégration, de l’Identité Nationale et du Développement Solidaire (Ministry of Immigration, Integration, National Identity and Solidary Development). The idea for this ministry surfaced towards the

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733 In fact, Pierre Nora cites that the textbooks themselves can be regarded as sites of memory due to the different historical narratives and viewpoints they present.


735 Ibid.

736 Petitions against the museum:
‘La Maison de l’histoire de France est un projet dangereux’ (La Monde, 2 November 2010) <https://www.lemonde.fr/idees/article/2010/10/21/la-maison-de-l-histoire-de-france-est-un-projet-dangereux_1429317_3232.html> accessed 15 June 2020

petition against Maison, signed by historians
‘Maison de l’histoire de France: De La Genese a la polemique’ (Histoire Pour Tous De France Et Du Monde, 3 February 2012) <https://www.histoire-pour-tous.fr/dossiers/3956-maison-de-l-histoire-de-france--de-la-genese-a-la-polemique.html> accessed 15 June 2020


end of Sarkozy’s presidency as he launched a bid for a second term. The ministry was eventually established by the government of François Fillon in May 2007. As a subdivision of the Ministry of Internal Affairs, the institution’s task was to “participate, in cooperation with relevant other ministries, in the politics of memory and in the promotion of citizenship and the values of the Republic.”

The creation of this institution inspired widespread protest. In June 2007, a petition was published in the newspaper Libération, signed by over 200 French public figures, intellectuals and organizations. The signatories expressed their opposition to the idea of “this ministry, who retains the priority of policing and controlling powers, to be also responsible for promoting national identity and defining a politics of memory in the area of immigration.” The protest reached its goal and the ministry was discontinued in 2010.

The current French government of Emmanuel Macron has taken a different attitude towards French history, although so far, this government has not attempted to establish museums or political bodies to justify its historical narratives. Macron himself professed that he does not intend to shy away from sensitive historical topics. He stated that he is from “a generation which, from a historical perspective, has neither totems nor taboos.” During his campaign he presented an inclusive approach to history. When his opponent, Marine Le Pen, prevaricated on French responsibility on the anniversary of the Vel d’Hiv deportations, Macron responded by continuing the apologetic narrative originating from Jacques Chirac. He further supported the inclusion of diverse perspectives into the historical narrative, as evidenced by one of his first official acts as president, that is, the commemoration of feminist icon Simone Veil.

In March 2017, Macron gave an interview to the newspaper L’Histoire in which he specifically detailed his future government’s vision of history. In this interview, he simultaneously supported the ‘traditional’, less confrontational approach to history that previous governments employed in the pre-1990s while attempting to appeal to the Chirac-ian approach to French history, namely dealing with the past head on. Macron claimed:

> When I advocate for the return to a national narrative, it is to highlight that 1805 comes from 1789, which itself is born out of the womb of the deep currents formed under the Old Regime [the feudal and monarchic political system in place in France before the French Revolution] - remember the Jansenists’ role during the French Revolution! Joan of Arc is also a heroine of the Republic, Clovis is not the prerogative of a certain catholic tradition, the third Republic emerges from the blood spilled during the Commune de Paris. It means that a segmented history serving ideologies does not give us the keys necessary to unlock the answers for the coming world.

738 Information on the mission of the ministry can be found in its foundational document:
Décret n° 2010-1444 du 25 novembre 2010 relatif aux attributions du ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration

739 Demonstrations against the ministry:

740 Macron’s stance on history:
Macron’s interview with L’Histoire: ‘Emmanuel Macron: « Réconcilier les mémoires »’ (L’Histoire, 23 mars 2017) <https://www.lhistoire.fr/entretien/emmanuel-macron%C2%A0-%C2%AB%C2%A0r%C3%A9concilier-les-m%C3%A9moires%C2%A0%C2%BB> accessed 15 June 2020

741 Ibid

742 Ibid
The interview encapsulates Macron’s centrist viewpoint with which he tries to appeal to both the traditionalists and the progressives. He cites the legacies and myths of Clovis, Joan of Arc and the French Revolution. He also defers to the more progressive views on historical memory as he does not deny or attempt to hide the ugly parts of French history and admits that historical narratives should not cater to political will. Nevertheless, even Macron’s seemingly honest and confrontational attitude has been accused of serving his government’s hold on power. Although he made one of the most significant and delicate gestures in French history by initiating a conversation about French colonialism - admitting the use of torture by French forces during the Algerian War - he was simultaneously accused of only supporting that narrative for political gain. He admitted what has happened in Algeria but has failed to publicly apologize.

4.3.2.3 Legality and the Self-Inculpatory and Self-Exculpatory Approaches

The memory laws and ostensibly legal measures affecting legality in France reveal advantages and hindrances of the aforementioned approaches. The self-inculpatory approach appears in the zeal of the French legislator to recognize genocides and crimes against humanity and eventually punish their denial. This approach in itself is not wrong as these legal actions can acknowledge the victims of atrocities as well as single out undemocratic conduct with regard to how these events are publicly discussed. However, the inconsistency and arbitrariness in the selection and implementation of these measures demonstrates the primary hindrance of self-inculpation. If it is done with criminal sanctions and through the lack of involvement of those who will be most affected (especially those researching these events), then the self-inculpatory memory laws lead to significant unpredictability.

The self-exculpatory approach is detected in the government rhetoric and failed attempt to establish the Maison de l’histoire de la France. The glorifying narratives of the state are not necessarily problematic as all states, in aiding the collective building of a community, should be allowed to create and possess certain narratives, even if they are not entirely historically accurate, as part of national identity. However, such narratives should be as inclusive as possible; otherwise they become a justification for exclusionary measures.

In conclusion, memory laws and policies affect legality in two different ways in France. On the one hand, legal certainty is affected as the recognition of historical events as genocide and the criminalization of their denial remains inconsistent, threatening the work of historians. The selection of historical events to be recognized as genocide remains fairly arbitrary, as several of these events occurred considerably earlier than the conception of the crime of genocide in international law. While the introduction of such recognition laws would not be inherently problematic, unfortunately they have been used in the prosecution of historians for their research. Despite the fact that by law, Holocaust denialism is the only conduct officially criminalized, the aforementioned recognition laws can become the arbitrary basis of legal cases against historians, as evidenced by the Olivier Pétré-Grenouilleau affair.

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743 His government also has a stance on European history: [https://www.elysee.fr/emmanuel-macron/2019/03/04/for-european-renewal.en] accessed 15 June 2020

744 Many in Algeria believe Mr Macron’s decision is all about French internal affairs: Abdelkader Cheref, ‘More than half a century after French-Algerian war, Macron’s admission could be too little, too late’ Opinion (20 September 2018) [https://www.thenational.ae/opinion/comment/more-than-half-a-century-after-french-algerian-war-macron-s-admission-could-be-too-little-too-late-1.772333] accessed 15 June 2020

On the other hand, French governments pursue control over institutions and spaces where independent and pluralist historical debate via memory laws less frequently. From time to time, governments attempt establishing museums to transmit the official narrative and/or influence history education, however, these attempts are often discontinued in light of backlash from researchers and educators.

4.3.3 Equality before the Law

The discussion of how the legal governance of historical memory affects equality before the law examines two problems. The first involves an analysis of the French genocide denial ban from the perspective of equality before the law. As this law is the only punitive measure in relation to genocide denialism it has been questioned whether it breaches the equality of those denying the Holocaust before courts versus those who deny other genocides and crimes against humanity which are not subject to the punitive law.

The second problem entails the impact of the legal governance of historical memory on the rights of minorities, especially in the awarding and revoking of French citizenship. This involves the evolution of the meaning of French citizenship and its increasing connection to viewing history with the right outlook. The regulations on French citizenship contain considerable nationalism in the formulation of citizenship regulations. Furthermore, in recent years, the protection of French cultural values has strengthened to the detriment of (particularly) non-Christian minorities.

4.3.3.1 General Equality

Equality before the law has appeared in the assessment of the impact of French (especially punitive) memory laws. The Conseil Constitutionnel has examined the differences between sanctioning the denial of selected historical atrocities. In the case of Vincent R,\textsuperscript{745} which reaffirmed the constitutionality of the genocide denial ban, the Conseil Constitutionnel considered Article 6 of the Declaration of Rights of Man and Citizen, which states that the law should apply equally to all.\textsuperscript{746} The Conseil Constitutionnel stated that since the crime of denial in itself carries racist and anti-Semitic overtones, the legislature did not make a mistake in treating it in a harsh way.

Equality before the law emerged in a similar context in the constitutional review of Article 48(2) of the Act on the Freedom of the Press.\textsuperscript{747} This article stated that organizations can act as parties in civil cases concerning the justification of war crimes and crimes against humanity. The Association Communauté Rwandaise de France (Association of Community of French Rwandans) requested the constitutional review of this article.\textsuperscript{748} The Conseil Constitutionnel determined that the formulation of this article, especially the definition of war crimes and crimes against humanity in the French genocide denial ban, meant that only those organizations representing the interests of WWII victims and the honor of the Resistance were eligible to bring cases. Thus an organization like the Association Communauté Rwandaise de

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\textsuperscript{745} Décision n° 2015-512 QPC du Conseil Constitutionnel du 8 janvier 2016 M. Vincent R. [Délit de contestation de l'existence de certains crimes contre l'humanité]

\textsuperscript{746} Ibid.

For further information on this case, see the following commentary: Hochmann, ‘Pas de lunettes sous les œillères’ (n 715)

\textsuperscript{747} Décision n° 2015-492 QPC du Conseil Constitutionnel du 16 octobre 2015 Association Communauté rwandaise de France [Associations pouvant exercer les droits reconnus à la partie civile en ce qui concerne l'apologie des crimes de guerre et des crimes contre l'humanité]

\textsuperscript{748} Ibid
France, dedicated to defend the interests of victims of the Rwandan genocide, could not commence a claim under this law. In this case, as opposed to the decision in Vincent R, the Conseil Constitutionnel demanded changes to the provision in question due to considerations relating to equality before the law, ensuring success for the Association Communauté Rwandaise de France. These cases mark a unique occasion when equality before the law has been examined in relation to the legal governance of historical memory and has been identified as essential for the proper implementation of memory laws.

4.3.3.2 Minority Protection and Non-Discrimination: French Citizenship

The French approach towards historical memory, originating from the legacy of the French Revolution as the one of the foundations of the French nation, has resulted in references to the national culture and values, justifying the exclusion of minorities from citizenship. This is so because French citizenship connects to French nationalism and has evolved into a question of what it means to be ‘French’ in order to be entitled to French citizenship. Since French nationalism has historically treated minorities in a quite exclusionary manner, citizenship has caused similar issues: minorities (especially immigrants from Africa) are not regarded by some as proper French citizens, even if they possessed citizenship, because they supposedly refuse to integrate to French values. However, from the 1980s, a process of pluralization emerged in the French conception of citizenship, with great difficulty, historical narrative has begun to include the voices of minorities in history education, in an attempt to change narratives on French citizenship. In fact, President François Mitterrand expressed worry that the transformation of history education might aid in the loss of French collective memory.

However, in the 2000s, the French conception of citizenship started to follow trends in the transformation of the idea of European citizenship, which increasingly entangles with the duty to memory. According to EU regulations, being a good European citizen implied a certain outlook on historical events, such as the rejection of genocide denialism and valuing the lessons learned from the totalitarian past. The French citizenship evolved in a similar way. In 2016, in the aftermath of the deadliest terrorist attacks on French soil, the government of François Hollande initiated a new law titled ‘Loi relative à l’égalité et à la citoyenneté’ (Law on Equality and Citizenship). This law concerns a wide array of topics connected to the best practice of French citizenship, includi...
memory law, although it is formulated in exactly the same way as previous memory laws and functions as a quasi-memory law. While the pluralization of citizenship ideals is a commendable intention, the French government ended up taking over the narrative of the EU to arbitrarily include a duty to memory among the conditions of good citizenship. The Conseil Constitutionnel, when reviewing Article 173, rejected this provision in early 2017 on similar grounds, further proclaiming that the existing genocide denial ban in France sufficiently serves to reach the same goals the government intended this provision to achieve.\footnote{Décision n° 2016-745 DC du 26 janvier 2017 (Loi relative à l’égalité et à la citoyenneté)}

Furthermore, the historical roots of awarding French citizenship may harm communities refusing to conform to the doctrine of the laïcité. The debate of secularism/secularity touches historical memory from the perspective of religious symbols. On the one hand, the display of religious-inspired jewelry or clothing in public places continues to generate controversy. On the other hand, in the case of Muslim women’s religious clothing, the display of such symbols has evolved into an arbitrary conditionality for citizenship.

In the 2000s, the government of Jacques Chirac commissioned the reexamination of the notion of the laïcité, in light of mass immigration and the growing (especially Muslim) minority and its integration into French society. The so-called Stasi Commission delivered its report in 2003, providing the basis for a new quasi-memory law in 2004 on the prohibition of the public display of religious symbols.\footnote{The official title of this law is: Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics} The law contains specific mention of the doctrine of the laïcité as its justification. In addition, it does not single out any religious community, introducing an equal prohibition of Christian, Jewish, Muslim, Sikh or any other religious clothing and imagery.

Simultaneously, during the naturalization procedure of would-be French citizens of the Muslim faith, authorities have increasingly denied certain applications for citizenship due to the presence of religious clothing or observance of religious customs, especially by Muslim women (such as refusing to shake hands with a male official at the citizenship award ceremony or wearing clothing hiding their hair or faces (burqa, niqab or hijab).\footnote{Abdellali Hajjat, Port du hijab et « défaut d’assimilation ». Étude d’un cas problématique pour l’acquisition de la nationalité française, Sociologie Vol. 4 p. 451 (2010)} Both the behavior of the government authorities and French courts presents particularly inconsistent tendencies in the treatment of the relationship between French citizenship and religious customs. In 1994, the Conseil d’État granted citizenship to an applicant who was refused French citizenship due to her religious clothing. However, by 2008, the Conseil d’État referred to Article 21(4) of le Code Civil to deny citizenship applications with the justification of ‘défaut d’assimilation’ (lack of assimilation).\footnote{Ibid.} In addition, in 2010, the Sarkozy government prohibited wearing veils covering the face – the burqa and the niqab – in public places.\footnote{The official title of this law is: Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public}

While all these legal provisions and judicial decisions are rooted in the cultural interpretation of Frenchness and French citizenship, their implementation remains inconsistent and contradictory with the implication that there is a way to be a ‘good French Muslim’ and a ‘bad French Muslim’, without clarification of what this might mean. Furthermore, the issue


758 Décision n° 2016-745 DC du 26 janvier 2017 (Loi relative à l’égalité et à la citoyenneté)

See also: Hochmann, ‘Pas de lunettes sous les aïllères’ (n 715)

759 The official title of this law is: Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics


761 Ibid.

762 The official title of this law is: Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public


763 Ibid.
Chapter 4

of religious symbols initiates tension between the historical tradition of France, ‘the pioneer defender of human rights’, and the multiculturalism and diversity of French society. French governments justify its intervention in religious freedom with the necessity of protecting the rights of women and to ensuring equality before the law.\textsuperscript{764} The debate eventually reached the ECtHR, for example, the case of \textit{S.A.S v France}, which challenged the 2010 law on religious clothing. The Court ultimately supported the viewpoint of the French government.\textsuperscript{765}

\textbf{4.3.3.3 Equality before the Law and the Self-Inculpatory and Self-Exculpatory Approaches}

The self-inculpatory approach appears in measures affecting equality before the law in the prosecution of genocide denialism and shows how the state does not tolerate undemocratic speech and conduct. However, its selectivity creates problems with equality before the law, questioning whether criminal sanctions should be necessary in the regulation of genocide denialism. In this way, the problem with the self-inculpatory approach is whether restrictions stemming from self-inculpation can be tolerated in order to create a safer society for minorities.

The self-exculpatory approach is discovered behind measures directed at the awarding of French citizenship on the basis of historical knowledge and on the condition of conforming to French culture. It further emerges in connection to bans on religious clothing in the name of French culture. In this respect, defining what it means to be French would not necessarily be a problem as a certain amount of cultural awareness is not unreasonable to expect from citizens. Problems arise when these efforts create discriminatory practices and limit the free choice to conform to religious beliefs because support for domestic cultural values and religious traditions conflicts with the Muslim minority.

In summary, the French conception of citizenship palpably relates to issues of the past, causing problems with equality before the law. On the one hand, the horrors of the Holocaust must be accepted by law-abiding French citizens. On the other hand, access to French citizenship prominently depends on the acknowledgement of certain French values, stemming from the nationalism introduced by the French Revolution as well as from the rhetoric of France as a pioneer human rights defender. The modern outlook on diversity seems to be at odds with the traditional outlook on French culture (in the sense that religious freedom is superseded in favor of protection of women’s rights and equality before the law). However, ultimately such interpretation gives rise to significant arbitrary decision-making on behalf of courts and government authorities.

\textsuperscript{764} In the ECtHR case of \textit{SAS v France} App no 43835/11 (ECHR, 1 July 2014)
\textsuperscript{765} Ibid para 121.
4.3.4 Impartiality of the Judiciary

4.3.4.1 Judges as Arbiters of History

The impact of French memory laws on judicial impartiality highlights the particular problem of judges receiving a significant amount of power from these laws to act as arbiters of history. In consequence, judges may cross into the realm of historians and make decisions about the classification of historical events rather than adjudicating on the laws these events inspired.

In 2011, Valerie Boyer, a representative of the Socialist party, initiated a proposal to reformulate France’s genocide denial ban. The proposition, which was framed as an effort to align French legislation to the requirements of the 2008 EU Council Framework Decision on Racism and Xenophobia, states:

Those will be punished who apologize, deny or grossly trivialize the crime of genocide, crimes against humanity and war crimes. These crimes are defined: (1) by Article 6 and 7 of the Statute of the International Criminal Court, (2) by the relevant articles of the French Criminal Code, (3) by Article 6 of the Statute of the International Military Tribunal. These crimes are furthermore recognized by a law or an international convention signed and ratified by France or recognized by an international institution to which France has acceded or qualified as such by a French jurisdiction...

This provision’s unstated intention was to expand the scope of the genocide denial ban to cover the denial of the Armenian genocide. The travaux préparatoires outline this intention, supporting it with the claim that the Armenian genocide has become an internationally-recognized phenomenon, and that not expanding the scope of this provision would present an increased threat of racism and xenophobia towards France’s Armenian minority. Nevertheless, instead of referencing the Armenian genocide by name, the proposition broadens its scope by including a wide array of recognized events. In this respect, the most controversial part of the provision is the final sentence. While the previous points cite international conventions or institutions, the last part of the final sentence states that an event can be classified as a genocide, crime against humanity or war crime if it is ‘qualified as such by a French jurisdiction’, that is, if a French court decides it can be regarded as such. Since the proposition specifies that only one of the conditions is enough for recognition, it is possible that French courts may recognize an event that is not recognized at the international level. Before legislative debate commenced on this proposal, the French legislature unsuccessfully tried to recognize the Holodomor and the genocide of the Roma as genocide, crime against

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766 The title of this proposal is: N° 3842 Assemblée nationale constitution du 4 octobre 1958 treizième législature, Enregistré à la Présidence de l’Assemblée nationale le 18 octobre 2011 proposition de loi portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien
For more information, see: V. Duclert, Faut-il une loi contre le négationnisme du génocide des arméniens? un raisonnement historien sur le tournant de 2012. Partie I: Vie et mort de la loi Boyer (n 42)

767 Art 1 of the proposal

768 This can be surmised from the travaux préparatoires of the proposal: [http://www.assemblee-nationale.fr/13/propositions/pion3842.asp](http://www.assemblee-nationale.fr/13/propositions/pion3842.asp) accessed 15 June 2020

769 On these attempts, see:
Michael Bazyler, ‘Holocaust Denial and the Law’ in Michael Bazyler (ed), Holocaust, Genocide and the Law (OUP 2016)
Robert Kahn, ‘Holocaust Denial and Hate Speech’ (n 233)
humanity and/or war crime. While these events have gained some international recognition, and nobody disputes that they were terrible, there is thus far no international consensus on their status. That any French court would have the power to recognize such events as genocide (or crimes against humanity or war crimes), and thus make dissenters eligible for punishment under the scope of the denial ban, was commented on by the Commission of Laws of the National Assembly, which examined the possible implications of the law. In its report on the text of the law, the Law Commission claimed that:

...the conditions which allow judges, from whom the principle of legality strictly requires the interpretation of criminal law, to pronounce without its [legality’s] appreciation encourages criticism of arbitrariness...

According to the interpretation of the Law Commission, French judges are constrained by the principle of legality and their job is to interpret the law itself, not the historical events they cover. It is not the judge’s role to pronounce whether the Armenian genocide amounts to genocide - that is for the role of historians. Furthermore, as the Law Commission also underlined, in the case of the Armenian genocide employing such legal concepts leads to accusations of retroactivity.

Despite concerns regarding the proposal’s implications on the right to freedom of expression and the freedom of academic research, it eventually became law in 2011. However, it did not survive long as the Conseil Constitutionnel struck it down the following year. The Conseil Constitutionnel concentrated its comments mainly on the law’s conflict with the right to freedom of expression, based on the Declaration of the Rights of Man and Citizen.

Although this law was invalidated the notion that French courts should be empowered to recognize historical events as genocide or crimes against humanity has not disappeared from the political debates. In 2014, the French parliament tabled a proposal to prohibit the negation of 20th century genocides. This proposal specified that any event could either be recognized by a French court or, in the case of lack of recognition, the judge should appoint an expert commission to determine its nature. The committee should consist of at least two historians, two lawyers and an international civil servant. Nevertheless, the committee would only be formed if the other means of recognition were unavailable. This proposition ultimately failed to progress through the National Assembly.

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770 These proposals are:
N° 3474 Assemblée nationale Constitution du 4 octobre 1958 Douzième législature Enregistré à la présidence de l’assemblée nationale le 30 novembre 2006 Proposition de loi relative à la reconnaissance du génocide ukrainien de 1932-1933
N° 337 Sénat Session ordinaire de 2007-2008 Annexe au procès-verbal de la séance du 15 mai 2008 Proposition de loi tendant à la reconnaissance du génocide tzigane pendant la Seconde guerre mondiale
771 Report of the Law Commission:
Rapport Fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur la proposition de loi, Adoptée par l'Assemblée Nationale, visant à réprimer la contestation de l'existence des génocides reconnus par la loi (18 Janvier 2012)
772 Ibid. 19.
773 Nora, ’Malaise dans l’identité historique’ (n 41)
774 Décision n° 2012-647 DC du Conseil Constitutionnel du 28 février 2012
775 This proposal is: N° 2276 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 14 octobre 2014 Proposition de loi visant à réprimer la négation des génocides et des crimes contre l’humanité du XXème siècle
776 Art 1 of the aforementioned law
Two years later another proposal appeared before the National Assembly, this time on the repression of the crime of denialism, that is, the denial of genocide and crimes against humanity.\(^{777}\) This proposal also amended the current genocide denial ban to state that the event should be recognized by “a national court of the State under whose authority the crimes were committed.”\(^{778}\) Not every court in France may recognize an event as genocide or a crime against humanity - only those whose authority would cover these crimes (most likely criminal courts). Ultimately, this proposal also failed.

The last effort to include judges in the recognition of historical events can be found in the 2016 Law on Equality and Citizenship. Article 173 of this law intended to reform the relevant section of the Act of the Freedom of the Press on genocide denial. This article stated that the crimes in question needed to be condemned by an international or French jurisdiction.\(^{779}\) The Conseil Constitutionnel invalidated Article 173 by citing, among other reasons, the detrimental impact of the provision imposing on judges the obligation to “establish constituting elements of the offense, to pronounce on the existence of a crime whose denial… is alleged and… no court has ruled on the facts pronounced as criminal.”\(^{780}\) Although the provision has been rejected by the Conseil Constitutionnel, officially the law has not yet been changed.\(^{781}\)

Therefore, French memory laws attempt to mix the roles of judges and historians. As the report of the Law Commission stated at the time of Loi Boyer (2011), a judge’s role is to interpret the law, and not to classify historical events. Precisely this reason inspired organizations of historians such as LpH to express their opposition towards the law.\(^{782}\) LpH alleged that judges view the past through present standards and thus are incompetent to examine historical events. They argued that allowing judges to become memory-makers would be a dangerous path to take.\(^{783}\) Already in 1983, the Cour d’Appel in Paris proclaimed that judges have no competence to decide on the content of historical questions.\(^{784}\) Furthermore, in the 1990s, it was proclaimed that while judges are guardians of the established historical truth, they have no place in creating it.\(^{785}\)

In order to circumvent the problem of judges adjudicating history, historians may be called upon during trials as experts (as the 2014 proposal on 20\(^{th}\) century genocides had intended to do). The work of judges and historians should be kept separate. A judge should respect historical truth, but they cannot proclaim to decree it.\(^{786}\) In contrast, historians possess

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\(^{777}\) This proposal is: N° 3411 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 19 janvier 2016 Proposition de loi visant à réprimer la négation des crimes de génocide et des crimes contre l’humanité

\(^{778}\) Art 1 of the aforementioned proposal.

\(^{779}\) Art 173 of Loi n° 2017-86 du 27 janvier 2017 relative à l’égalité et à la citoyenneté

\(^{780}\) Décision n° 2016-745 DC du Conseil Constitutionnel du 26 janvier 2017 (Loi relative à l’égalité et à la citoyenneté)

\(^{781}\) Current version of the law: [https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=20190129](https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=20190129) accessed 15 June 2020


\(^{783}\) Ibid.

\(^{784}\) This was proclaimed in decision n° 11/00543 of 5 october 2011 of Cour d'appel de Paris (Pôle 1 - chambre 2)

\(^{785}\) In the decision of 0564977 of 03 January 2006 of Cour d'appel de Paris during the proceedings against Georges Theil Fronza, ‘The Criminal Protection of Memory’ (n 178).

\(^{786}\) Bredin, *Le droit, le juge et l'historien*, (n 417) 5-6
the competence to establish historical truth but they can be constrained by the law.\(^{787}\) The extent of these constraints is determined by constant balancing between their right to freedom of expression and the rights of those victim and minority groups that French memory laws aim to protect.

### 4.3.4.2 Impartiality of the Judiciary and the Self-Inculpatory and Self-Exculpatory Approaches

The self-inculpatory approach appears in memory laws affecting judicial impartiality. These laws reflect the attitude of the state in attempting to provide recognition and acknowledgement to victim communities of historical atrocities. The laws purport to extend these powers to judges so they can decide about the nature of historical events. Although this originates from noble intentions, it carries the danger of judges acting as arbiters of history. Expert opinions should be taken into consideration, the power of judges to do so is worrisome as their role should be to evaluate the law of the land, not make them, especially not in relation to history.

In conclusion, French memory laws provide judges with significant power to define historical events. Although the proposals may incorporate the obligation to call for the involvement of expert opinion of historians, the decision remains in the hands of judges. Such power enables French judges to act as arbiters of history, a role that should not belong under their judicial competence.

### 4.3.5 Protection of Fundamental Rights

The legal governance of historical memory in France affects selected fundamental rights through three issues. The first problem involves the protection of the human dignity of victim groups, focusing on the legislator’s attempts to enhance protections of the Armenian minority through criminalizing the denial of the Armenian genocide. Several attempts have occurred to achieve this, but the dignity of the Armenian community is outweighed in favor of pluralist historical debate and the right to freedom of expression.

The second includes the restriction of freedom of expression in relation to denial of the Holocaust, highlighting the double standard between the case law of the ECtHR and French legal practice. Holocaust denial has been identified as the one form of history-related speech deserving of criminal punishment. However, as demonstrated in previous sections, this distinction brings its own problems relating to equality before the law and the restriction of fundamental rights.

The final issue concerns the French regulations regarding access to sensitive historical documents. These regulations have been found lacking as secrecy justified by national interests and national security often trumps freedom of research.

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Chapter 4

4.3.5.1 Victims and Minorities’ Human Dignity: Prohibition of the Armenian Genocide’s Denial

The French memory laws’ treatment of fundamental rights involves a delicate balancing between the right to freedom of expression, represented by historians opposing these measures, and the legislator’s intention to expand and protect the dignity of certain victim and minority groups. The intention articulated in every single (proposed) punitive memory law involves combatting racism and xenophobia. The first French memory law, introduced by the Loi Gayssot, was inspired by the rise of racist and xenophobic incidents against immigrants and the increasingly notorious instances of Holocaust negationism. French courts condemned Robert Faurisson in 1987, a few years before the enactment of the Loi Gayssot, and his case at the time that the law was pending before the United Nations Human Rights Committee.788

Subsequently, the legislator’s zeal to criminalize the denial of the Armenian genocide was also justified on the basis of the need to further protect France’s Armenian minority, an issue still prevalent today.789 Similarly, many declarative memory laws, among them the recognition of the transatlantic slave trade as a crime against humanity, spanned from the intention of encouraging recognition and protection of the interests of the descendants of those who suffered during this event.790 In fact, the 2014 attempt to prohibit the denial of 20th century genocides places particular emphasis on the descendants of the victims of historical atrocities, specifically stating that the law was created in their protection and giving them standing to bring cases of alleged denialism.791 While the victims of WWII and the slave trade enjoy particular protections, the recognition and protection of victims of French colonization has happened much more slowly. President Macron apologized for the French use of torture during the Algerian War only in September 2018.792 The legacy of colonialism continues to be a sensitive issue in French historical consciousness and thus the protections for descendants of victims is not as extensive (although the protections for the descendants of the harkis are considered essential in the minority protection regime).793 The attitude to the protection of victims, especially in relation to the narrative of the Armenian genocide, is supported by the narrative of France as the pioneer human rights defender of Europe.

Respecting the dignity of these victims is in conflict with the right to freedom of expression – on the one hand, the free expression of negationists and, on the other hand, the free expression of those who might disagree with the official narratives without being negationists, such as certain historians, journalists and other citizens. Similar to the wider European practice, French memory laws prioritize the suppression of the right to freedom of expression in the case of Holocaust denial. The genocide denial ban of Article 24 of the Freedom of the Press Act (enacted in the 1990 Loi Gayssot) is the only punitive memory law


His claim was rejected.

789 President Macron has reaffirmed the commitment as recently as February 2019 via Twitter:

La France regarde l’Histoire en face. Comme je m’y suis engagé, dans les prochaines semaines, la France fera du 24 avril une journée de commémoration du génocide arménien.

https://twitter.com/EmmanuelMacron/status/1092910027587883008 accessed 15 June 2020

790 This can be observed in the travaux préparatoires of the Loi Taubira: <http://www.assemblee-nationale.fr/11/dossiers/esclavage.asp> accessed 15 June 2020

791 N° 2276 Assemblée nationale Constitution du 4 octobre 1958 Quatorzième législature Enregistré à la présidence de l’assemblée nationale le 14 octobre 2014 Proposition de loi visant à réprimer la négation des génocides et des crimes contre l’humanité du XXème siècle


793 They are protected by Loi n° 94-488 du 11 juin 1994 relative aux rapatriés anciens membres des formations supplétives et assimilés ou victimes de la captivité en Algérie
which has survived until today. Its necessity is generally unquestioned by the public as well as by most French historians. Even organizations like LpH that are otherwise vehemently opposed to memory laws regard the *Loi Gayssot* as a necessary evil. Similarly, French courts continuously uphold the Holocaust denial prohibition. Most recently, the *Conseil Constitutionnel* reinforced its relevance in 2016 in the case of Vincent R.

Most attempts to create new memory laws originate from the left side of the political spectrum. The *Loi Gayssot* was proposed by the Communist Party. Christiane Taubira and Valerie Boyer, pioneers of the creation of two eponymous declarative and punitive provisions, were both affiliated with the Socialist Party. The notable exception from this trend is the *Loi Rapatrié* on the positive role of French colonization, which was initiated by representatives of the conservative, right-wing UMP. Simultaneously, the influence of historians is also palpable - most notably, the report of the Accoyer Commission on the viability of memory laws cites LpH members by name.

The European institutions’ expectation of respecting the victims’ dignity and experiences has been espoused by French governments. However, due to the tenacious protests of the academic historical community, very few attempts to enact these laws actually managed to materialize. Some French governments achieved significant results in expressing support and respect for the experience of victims via official admissions and apologies. However, despite the push from minority groups, such as the local Armenian minority or NGOs representing the descendants of slaves in France’s overseas territories, their explicit protection is still not fully realized. The French state has recognized the Armenian genocide and the slave trade as crimes against humanity, but the inclusion of these under denial bans have consistently failed. The most successful attempt happened in 2012, when the revised genocide denial ban was struck down by the *Conseil Constitutionnel*. The French state subsequently attempted to recognize further historical atrocities, such as the Holodomor, again unsuccessfully. Nevertheless, spurred on by its narrative as a historical defender and pioneer of human rights, the state continues to strive to recognize different atrocities.

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795 Décision n° 2015-512 QPC du 8 janvier 2016 M. Vincent R. [Délit de contestation de l'existence de certains crimes contre l'humanité]


797 Ibid.


799 Rapport d’information au nom De La Mission d’information sur les questions mémorielles, 18 novembre 2008

800 Loi du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915

801 Loi du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité

802 Décision n° 2012-647 DC du 28 février 2012 (Loi visant à réprimer la contestation de l'existence des génocides reconnaiss par la loi)

803 On this decision see for a detailed analysis: Garibian, *Droit et cultures la mémoire est-elle soluble dans le droit?* (n 768)


805 In the following proposal: N° 3474 Assemblée nationale Constitution du 4 octobre 1958 Douzième législature Enregistré à la présidence de l’assemblée nationale le 30 novembre 2006 Proposition de loi relative à la reconnaissance du génocide ukrainien de 1932-1933
4.3.5.2 Freedom of Expression and Freedom of Assembly: Holocaust Denial Bans

The current French genocide denial ban was introduced in 1990, the third such provision in the world (after West-Germany and Israel). It thus pre-dates any provision originating from the European institutions. Despite heavy objections from historians against any measure interfering in the creation of historical narratives, the French genocide denial ban is the only punitive memory law consistently upheld by local courts, especially the Conseil Constitutionnel as recently as 2016. However, although its formulation is currently considered old-fashioned, the French legislature has been unsuccessful in adapting it according to the requirements of the 2008 EU Council Framework Decision on Racism and Xenophobia. The Framework Decision would require the prosecution of denial of crimes defined in the Statute of the International Military Tribunal as well as the Rome Statute of the ICC, whereas the text of the French prohibition only refers to the Statute of the International Military Tribunal. In fact, if the French genocide denial conformed to this requirement of the Framework Decision, a long-awaited opportunity would be provided for the prosecution of denials of genocides other than the Holocaust. However, every attempt at expanding the scope of the genocide denial ban to cover specific events, such as the Armenian genocide, or general concepts, such as the genocides of the 20th century, have failed. Although the 2016 Law on Equality and Citizenship was successfully pushed through the French parliament to revise the genocide denial ban, its relevant section has been invalidated by the Conseil Constitutionnel, although its decision is still to be executed by the government.

Despite the old-fashioned formulation of the French ban, in practice denial of the Holocaust is usually dealt with swiftly and efficiently. Before the introduction of the prohibition, the prosecution of deniers could be achieved in two ways: either through the Loi Pleven (prohibition of hate speech and incitement to violence), or through the provisions of the civil code concerning defamation, under Article 1382 of the Civil Code. These avenues are still open in cases of alleged denial of events other than the Holocaust. However, for Holocaust denial, the Loi Gayssot’s genocide denial ban has been used before French courts. Several French negationists attempted to bring their cases to the ECtHR in order to overturn the genocide denial bans, but their attempts have been unsuccessful. In fact, their efforts led to landmark decisions of the ECtHR, such as the case of Garaudy v France (2003), which cemented the ECtHR’s practice of rejecting such applications as inadmissible, without thorough consideration of the merits through the right to freedom of expression. Therefore, the ECtHR’s direction on the thorough prosecution of Holocaust denialism has been implemented in France.

Punitive memory laws with implications on the right to freedom of expression met with strong opposition from the public (especially LpH) and generated fierce debates in parliament. The continued failure of the French parliaments to criminalize the denial of the Armenian genocide and to expand the scope of the Loi Gayssot is a perfect example of this phenomenon. The parliamentary committees already present obstacles to the passage of the proposals, not to mention the debates, as several bills failed to become law due to the doubts presented by lawmakers. Organizations comprised of historians, such as LpH and CvuH possess significant

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804 Décision n° 2016-745 DC du 26 janvier 2017 (Loi relative à l’égalité et à la citoyenneté)
805 Dhoquois, ‘Les thèses négationnistes et la liberté d’expression en France’ (n 529) 28
806 Rejected ECHR cases: Garaudy v France App no 65831/01 (ECHR, 24 June 2003), Marais v France App no 31159/96 (ECHR, 24 June 1996), M Bala M Bala v France App no 25239/13 (ECHR, 20 October 2015), Gollnisch v France App no 48135/08 (ECHR, 7 June 2011)
807 Gollnisch v France App no 48135/08 (ECHR, 7 June 2011) – anti-semitism is rejected due to Art 17 ECHR
clout to lobby lawmakers to reject such proposals. The few proposals that do progress through both the National Assembly and the Senate to become law are consistently invalidated by the Conseil Constitutionnel. The Conseil Constitutionnel regularly cites the disproportionate restriction of the right to freedom of expression as the chief reason why these laws are unconstitutional. The most recent attempt, the Law on Equality and Citizenship, was similarly invalidated but is still incorporated in the official text of the provision. These developments show how the right to freedom of expression remains strongly defended in France.

4.3.5.3 Freedom of Research and Access to Archives

The active involvement of French historians in the shaping of legal regulations on history is exemplified through an examination of the access of the public to archives. Article 25 of the Declaration of the Rights of Man and Citizen specifies that French society has a right to demand transparency from its administration. Therefore, the inner working of state authorities must be accessible, including historical documents. Despite such a strong basis for access in a document incorporated into the current French constitution, the state’s efforts towards providing full access to archives remains checkered. The first modern law regulating archives originates from 1979. From its conception, it was criticized by French historians due to the introduction of particularly long restriction times on sensitive documents; for example, documents dating from the Vichy regime and the Algerian War.

In the 1990s, France experienced a 'crisis of archives' (crise d'archives), involving multiple instances of historians uncovering sensitive documents despite efforts of the state (in reference to the 1979 law) to stop them. These documents caused a public outrage against the restrictions posed by the 1979 law and initiated a process of reform. After an arduous debate, in 2004 the French parliament incorporated the regulations of archival access into its Code de Patrimoine (Code of Cultural Heritage). These regulations, while more permissive than those of the 1979 law, have still drawn the ire of researchers demanding public access and transparency on the basis of Article 25 of the Declaration of the Rights of Man and Citizen. This code has established the primary French authority on archival access – the Conseil Supérieure d’Archives.

The 2000s brought mixed developments in archival research. Despite the reform of the legal regulation on archives, subsequent amendments introduced greater restrictions in the name of national defense and security, thus further infringing on the right to the freedom of research. However, the developments have not been entirely negative. In the last decade, the French governments have opened up restricted documents to the public concerning the Vichy

808 Ibid.
809 Declaration on the Rights of Man and Citizen Art 15
810 The official title of this law is:
Loi n° 79-18 du 3 janvier 1979 sur les archives
For more information, see:
813 Code de Patrimoine, Livre II Archives
The efforts of French governments to reduce restriction on sensitive documents regarding the Algerian War is far less impressive, although it has happened to some extent. Consequently, the French regulation on access to archives are slightly controversial. There are still significant barriers for researchers to access historically sensitive documents, such as by citing interests of national defense and security. In contrast, recent French governments (particularly those of François Hollande and Emmanuel Macron) have eased the rules somewhat and ensured that historians can be granted access to documents relating to contested periods of French history.

4.3.4.2 Protection of Fundamental Rights and the Self-Inculpatory and Self-Exculpatory Approaches

The memory laws affecting fundamental rights are approached with both the self-inculpatory and self-exculpatory manner. The attempts of legislators to criminalize the denial of the Armenian genocide and protect the human dignity of the Armenian community attests to the presence of the self-inculpatory approach. The same happens to the punitive memory laws restricting the right to freedom of expression and assembly as those laws target those whose conduct has been identified as undemocratic and unacceptable. This selectivity has already caused issues in terms of legality and equality before the law, highlighting further the cost of punitive laws. The question remains as to whether it is worthwhile to introduce memory laws at all - even if they aim to prosecute unacceptable behavior.

The self-exculpatory approach appears behind the regulation on access to archives. The access to archives and historically sensitive documents points to an approach of the state that prioritizes national interests and security instead of freedom of research. In the last few years, changes have been introduced to some documents, including those from the Vichy period and the Algerian War, have become more accessible. In conclusion, the self-inculpatory approach of the state via the attempted protection of human dignity and prosecution of Holocaust denialism conforms to European standards and protect some minorities, but its selectivity remains problematic. Whereas the self-exculpation found in the lack of access to archives aggravates the future of freedom of research.

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4.4 Case Study Findings

The legal governance of historical memory is instrumentalized in a particular manner. The findings of this case study lead to the formulation of four particular characteristics: (1) the consequences of attempts of French non-punitive memory laws to categorize certain historical events as genocide creates unpredictable situations for researchers. (2) Access to French citizenship depends on the acceptance of French values – including the legacy of the Revolution and the idea of France as a human rights defender, as well as the rejection of genocide denialism. This tendency subsequently leads to the arbitrary rejection of citizenship to members of the Muslim minority. 816 (3) French memory laws attempt to authorize judges to act as arbiters of history and decide on the nature of historic events. (4) Finally, despite efforts of the legislator, the impact of French memory laws on the right to freedom of expression and equality before the law are mitigated due to the activism and involvement of researchers and civil society, diminishing some of the harm that may be caused by memory laws. Consequently, the rule of law is not affected by the legal governance of historical memory very prominently, although the impact of the legal governance of historical memory can be detected on the four rule of law elements.

Further mitigation happens because the general state of the rule of law is more stable in the country. The parliamentary processes are fairly transparent and new legislation is debated to a notable degree. Thus, failures of new proposals are quite frequent, compared to a state where the governmental control on parliament is so firm that new legal measures are passed without contest and at the whim of the government. In addition, not only the parliament but the judiciary enjoys significant independence, although the Conseil Constitutionnel does not possess as much power as other constitutional courts and is not as easily accessible. Nevertheless, the influence of the general state of the rule of law in France has little to no bearing on new memory laws.

4.4.1 The Legal Governance of Historical Memory in France vis-à-vis the Selected Rule of Law Elements

From the perspective of the influence of the legal governance of historical memory on the local situation of the rule of law, the examination of the four elements tells an intriguing story. In the case of legality, the constant governmental attempts to recognize different events as genocide or crimes against humanity affects the work of researchers as they can be less and less certain as to what may incur possible prosecution. However, the impact is assuaged due to the widespread influence of certain historian-led organizations makes it difficult to expand or amend the existing criminal provision. As a result, only one punitive memory law has survived the past decades.

Regarding equality before the law, the French legislator has copied the approach of the EU in tailoring citizenship to historical memory. Apart from the independence of research, citizenship is the area most affected by the legal governance of historical memory as the Law on Equality and Citizenship specifies a strong stance on genocide denialism. In addition, the zealous efforts to uphold the notion of the laïcité, coupled with the use of the rhetoric around France as a human rights defender, causes the introduction of the forced prohibition of religious symbols and religious clothing in public places, clashing with the idea of multiculturalism, diversity and freedom of religion.

Furthermore, the impact of memory laws on equality before the law can be detected in the examination of the genocide denialism bans. The *Conseil Constitutionnel* has assessed whether the fact that the French prohibition is only used for the prosecution of Holocaust negationism may have issues regarding equality before law. The law imposes harsh punishment on Holocaust deniers but not on persons denying other events (such as the Armenian genocide) since those events do not belong under its scope. Although the *Conseil Constitutionnel* acknowledged this issue, it has chosen to endorse the genocide denialism ban as is, with the justification of the magnitude of the Holocaust. This development further points to the problems of accidental hierarchical ranking of historical atrocities, creating double standards and inconsistencies of genocide denialism prohibitions.

Another fascinating aspect of the influence of the legal governance of historical memory on the rule of law concerns judicial impartiality. While the judiciary remains independent, several recent memory laws specify that the accusation of genocide denialism may be incurred if the historical event is recognized as such by a French court. Such formulation of memory laws puts a significant amount of power in the hand of judges, as these laws require them to act as historians and actually rule on the essence of certain historical questions. Several members of the French historical community vehemently oppose these provisions. According to the view of LpH and CvuH, judges have no place in such debates as they are not experts in the field. Governmental capture of historical memory today cannot be implemented in France because the involvement and activity of private actors (academics and civil society) is able to mitigate the governments’ efforts in this area.

Lastly, the French protection of fundamental rights entails balancing between the right to freedom of expression and the rights of victims and minorities. Similar to the view of the ECtHR, freedom of expression generally prevails over minority rights, with the exception of Holocaust denialism. The vociferous prosecution of negationism, therefore, conforms to the viewpoint of both the ECtHR and the EU. While the legislator periodically attempts to expand the protection of victims and minorities, these attempts are usually thwarted during the parliamentary debates with the aid of historian groups such as LpH and CvuH. The French legislator has intended to go further in the protection of victims and minorities than what is required by the European institutions; for example, with the attempt to criminalize the Armenian genocide’s denial.\footnote{Robert Kahn, ‘Should Geography Matter?’ in Belavusau and Gliszczynska-Grabias (eds) *Law and Memory* (n 10)}

### 4.4.2 The Presence of the Self-Inculpatory and Self-Exculpatory Approaches in the Analysis of the Elements

The self-inculpatory and self-exculpatory approach to the legal governance of historical memory are present France. All measures, whether self-inculpatory or self-exculpatory, affect the rule of law. Neither approach necessarily carries solely positive or negative implications. The self-inculpatory approach involves attempts by the state to honestly reckon with the past. However, the French example shows that such intentions, if implemented in a self-serving or inconsistent manner, negatively impact on the rule of law. Such result leads to a query regarding the choice of governments between avoiding the introduction of regulations on historical memory or taking proactive steps to ensure symbolic and actual recognition of past mistakes, even at the cost of possibly creating further problems regarding the rule of law.

The self-exculpatory approach results in different ramifications. The glorifying, not entirely historically accurate mythicization of national heroes and values embodies self-exculpation. However, this tendency is not intrinsically harmful, but its consequences boil
down to the extent of control. Namely, the extent of control the state intends to possess over historical narratives in order to present an image of itself in the eyes of the world. Unfortunately, using the self-exculpatory approach can easily contribute to issues regarding the rule of law. In the French case, the presence of this approach is problematic due to it incorporating nationalistic tendencies (including the narrative of a secular society built on French values). These tendencies, especially wrapped in a rhetoric aimed at the defense of democratic values, are worrying from the rule of law perspective. Ultimately, as historical memory is not captured by the French government, the rule of law does not suffer as extensively.

4.4.3 Final Remarks

The intention of governments to instrumentalize the legal governance of historical memory via legal or ostensibly legal means appears prominently in France. Although the situation has not yet progressed to the capture of historical memory (and maybe never will), all French governments as well as other parties such as the National Front have forged their own version of history and attempted to enforce it. This can be observed, for example, from Nicolas Sarkozy’s *La Maison de l’histoire de la France* to Emmanuel Macron’s centrist balancing between a nationalistic outlook on history and eventual reckoning with the colonial past. Furthermore, The National Front has produced its own alternative narrative, capitalizing on the myth of the Resistance and casting themselves as the opponents of Muslim invasion.

The examination of the four rule of law elements highlighted that the impact of the legal governance of historical memory is most extensive on equality before the law, where the use of the self-exculpatory approach is most noticeable. Although, some degree of the French government’s intrusion in history may be reasonable as it intends to actively oppose groups such as the Front National with their alternative historical narratives. Most interventions in the legal governance of historical memory are justified with the fighting of racism and xenophobia in society. This tendency inspired the first French memory law and continues to rationalize the creation of most legal measures.

In light of these issues, a large group of the French historical community vehemently opposes any form of legal governance of historical memory. The activity and involvement of French historians remains prominent in the development of memory laws. In France, the activity of certain groups in society mitigates the harmful influence of the legal governance of historical memory on the local situation of the rule of law.

Nevertheless, the opposition of the historical community raises a specific issue in the French context. Even if memory laws have self-inculpatory intentions, French governments eventually end up interfering in and instrumentalizing historical memory, to the detriment of the rule of law. Organizations such as LpH and CvuH argue that governments should interfere in the legal governance of historical memory as little as possible. Instead, independent spaces where history can be publicly discussed, such as strongly pluralized and expertise-based education, offers a better solution to the transfer of factually accurate historical knowledge, thus decreasing the threat of negationism and alternative narratives. In this respect, the French situation is adequate as the education of history continues to evolve in a pluralistic manner. Textbooks and the history curriculum gradually incorporate addressing sensitive and controversial aspects of the past.

In conclusion, the French case study of the legal governance of historical memory illustrates that even in a state unaffected by the immediate deterioration of the rule of law, the legal governance of historical memory can adversely influence the fulfilment of rule of law

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818 Kahn, ‘Holocaust Denial and Hate Speech’ (n 233), 95.
standards. Nonetheless, the strong involvement of historians in the creation of memory laws as well as the pruning of the education system somewhat combats the undermining influence of the legal governance of historical memory on the rule of law. Although instrumentalization of history exists in France, its effect on the rule of law remains narrower and less harmful than in a state where these factors are missing in the legal governance of historical memory.
Chapter 5
Case Study 2: The Legal Governance of Historical Memory and the Rule of Law in Hungary
This chapter focuses on the legal governance of historical memory in Hungary and its effect on the rule of law. It unpacks the case study highlighting topical legal issues in memory politics emerging in the Central and Eastern side of Europe. In Section 2, I provide an overview on the Hungarian governance of historical memory including: (1) a sketch of the Hungarian socio-political situation since the 1990s, (2) presentation of the controversial issues in Hungarian historical memory, (3) a short synopsis on the terminology of Hungarian memory laws. This overview serves the purpose of introducing the most prominent actors and problems in the treatment of Hungarian historical memory. Section 3 describes the specificities regarding the concept of the rule of law in the context of the Hungarian constitutional system as well as the domestic rule of law situation, which contextualizes the current backsliding happening in the country. Section 4 engages in the analysis of the impact the legal governance of historical memory asserts on the rule of law. Finally, in Section 5, I summarize the findings of the case study.

5.1 Why Hungary?

Hungary has been experiencing a plethora of ideal socio-legal developments since its democratic transition, making it a prime candidate to analyze its situation for the following reasons. In the aftermath of the democratic transition of 1989-1990, the Hungarian legal system and the work of the Constitutional Court (henceforth referred to as the HCC) have been significantly influenced by, to a greater extent, German, and to a lesser extent, French practices. In addition, the strength of Hungarian democracy and its constitutional court became a frequently cited example of a successful democratic transition in the 1990s. The country became the first among the ex-communist states to join the Council of Europe in 1990 and to initiate its application of accession to the European Union. Although Hungarian constitutional developments were influenced by Western-European practices, the legal governance of historical memory initially progressed separately in the 1990s. Hungarian politics have identified certain ‘memorial laws’ throughout this decade. The Western-European influence arrived only in the 2000s, as Hungary was softly required to make changes to its remembrance practices in preparation for EU accession. This manifested itself in a shift towards highlighting Holocaust remembrance, with the opening of the country’s Holocaust Museum in 2004. In contrast to the Western-European example of France – but typical for a country in the Central-Eastern European region – Hungary continues to struggle with the legacy of its communist regime. Meanwhile unlike the French case study in this thesis, its Hungarian counterpart lacks a colonial legacy.

819 On German influences, see András Sajó and Michel Rosenfeld, ‘Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies’ (2005) Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies Working Paper no. 144, 24-26
820 On French influences, see Bónis Péter: A nyugat-európai kódexek hatása a magyar polgári jogi kodikációra fedezet- és szerződésbiztosítéki jogunkban (n 507)
821 There is also a significant American influence as well, for example, the Hungarian Constitutional Court has been inspired to use the ‘clear and present danger’ test of the US Supreme Court. See, for example: Péter Molnár ‘Towards Improved Law and Policy on ‘Hate Speech’ – The ‘Clear and Present Danger’ Test in Hungary’ in Ivan Hare and James Weinstein (eds.) Extreme Speech and Democracy (OUP 2009), 237-264.
823 Hungary adopted its resolution for accession in 1994. Regarding this process of accession, see Ágnes Batory ‘The Political Context of EU Accession in Hungary’ The Royal Institute of International Affairs Briefing Paper, November 2002
824 It joined the EU eventually in 2004 alongside several new Central and Eastern European democracies
Finally, the Hungarian case study also demonstrates the differences between the self-inculpatory and self-exculpatory approaches to the legal governance of historical memory. These approaches permeate the analysis of the rule of law. The transformation of the already existing memory laws and the introduction of new ones, these developments cement the efforts towards the creation of an official narrative controlled by the government. These efforts cause problems concerning legality, equality before the law, judicial impartiality and the protection of fundamental rights, taking the form of institutional takeover, shrinking space for open debate and the elimination of funding for independent research.
5.2 The Context around the Legal Governance of Historical Memory in Hungary

5.2.1 Socio-Political Situation since the Democratic Transition

The democratic transition inspired hope in Hungarian society in achieving the same progress and lifestyle as the citizens of Western-European states. However, by the 2010s, its results were shrouded in controversy. In fact, the rhetoric of the political language of the 2010s, regardless of party affiliation, considered the democratic transition of 1990 and the subsequent two decades of Hungary’s history as either a failure or a partial success at best. While this consensus exists on the surface, as Hungarian people strive for a better future, increasing polarization lies underneath.

The polarization of Hungarian society is the result of the mismanagement of the state since the democratic transition, both economically and politically. In the immediate aftermath of the transition, most Hungarians expected improvements to their lifestyle, and better economic opportunities. Unfortunately, in part due to the remaining debt of the communist regime and the entrepreneurial interest of Western-European multinational companies to expand in Hungary, the economy came close to a complete collapse by the mid-1990s. Only a set of harsh austerity measures imposed by then Minister for Interior Affairs, Lajos Bokros, saved the economy from catastrophe. However, the necessity of these measures represented the first step towards the disillusionment in the transition.

Fortunately, the economic high of the early 2000s brought significant prosperity to Hungary, which was further spurred by the accession to the European Union in 2004. While the economic situation seemed to progress, political tensions pulled the country further apart. In September 2006, a private speech by socialist Prime Minister Ferenc Gyurcsány was leaked to the public in which he admitted that his government had ‘made many mistakes.’ He mentioned on the tape how his government had lied to the citizens and failed to accomplish any of the goals and promises of its current term. This speech generated widespread riots in Budapest throughout the fall of 2006, characterized by mistreatment and countermeasures from the police. Simultaneously the speech undermined any and all credibility of the third socialist government (2006-2009), aggravated by the fact that the PM refused to resign despite increasing calls for his resignation. He only stepped down in 2009, as the economic crisis hit Hungary. Nevertheless, the demeanor of the third socialist government, further stimulated by encouragement of Fidesz from opposition, has created an enormous divide between Hungarian voters. The unpopularity of the third socialist government has led to Fidesz winning the 2010 election with a supermajority in fair and democratic elections.

After their landslide victory, the second Orbán government (2010-2014) initiated the transformation of Hungarian society into what is referred to as the System of National Cooperation (Nemzeti Együttműködés Rendszere – abbreviated NER, as it is commonly

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Kornai János: Szocializmus, kapitalizmus, demokrácia és rendszerváltás (n 808)

On the tape, he used much more expletive language.

Reports on the demonstrations:


The first Fidesz government lasted from 1998 to 2002.
referred to in the Hungarian press). The victorious politicians of Fidesz claimed that a revolution had occurred in the voting booths, and the 2010 elections had finally freed Hungary from oppression after a failed democratic transition. Thus, they claimed the election had birthed a ‘new social contract’ with the citizens mandating the government to build a ‘new system of politics and economy founded on the pillars absolutely necessary for the prosperity and dignified human life connecting the diverse Hungarian nation.’

The basis of the NER covers five pillars: work, home, family, health and order. The NER also encompasses an increasing control over the legal governance of historical memory through the codification of a nationalistic, Christianity-based view of history. All Hungarians, even those living beyond the borders, were invited to participate in building this system. However, after eight years in government, the shortcomings of the NER have become painfully obvious. They have shown themselves through ardent corruption, a dismantled legal system and the constant quest for ontological enemies whose hate unite ‘Hungarian patriots’, such as refugees, George Soros, NGOs or ‘Brussels’ (the bureaucrats of the EU). The 2018 election highlighted the division of Hungarian society, as Fidesz again emerged victoriously with a supermajority as its opposition becomes increasingly fragmented.

5.2.2 Controversial Issues regarding Hungarian Historical Memory

5.2.2.1 Trianon Treaty and War Atrocities

As one of the products of the democratic transition, the legal governance of historical memory gained significant prominence in the 1990s. Several delicate issues of Hungarian history, repressed during the communist era, reappeared in the public debate, such as Hungary’s role in WWII and the legacy of the Treaty of Trianon. Meanwhile other new or previously undiscussed phenomena presented further difficulties in the historical discussion, such as dealing with the memory of the communist regime itself, and the role of Christianity in the Hungarian historical consciousness.

The Treaty of Trianon of 1920, concluded in the aftermath of WWI, came as an especially serious blow because pre-WWI policy had been aimed at the assimilation of the many minorities living in Hungary. Therefore, Trianon represented a defeat to the Hungarian political elite, which generated an active and institutionalized movement for its revision between the two wars. Monuments were erected to showcase the ‘Hungarian Pain’ over the


831 Ibid.

832 In the aftermath of the conception of Austria-Hungary, the Hungarian parliament initially encouraged the expansion of minority rights (1868 Act). However, by the early 20th century, less than 50% of Hungarian citizens claimed to be ethnic Hungarian (national minorities included Slovakian, Romanian, Ruthenian, German, and Serbian). Thus, the Hungarian political elite has initiated a program of assimilation. This resulted in the 1907/XXVII Act (dubbed Lex Apponyi) which required teachers to teach schoolchildren ‘the attachment to the Hungarian spirit).


833 This included the legal commemoration of the ‘Sopron referendum’ (1922/XXIXtörvény a soproni népszavazás emlékének törvénybeiktatásáról – Act on the commemoration of the Sopron referendum). This referendum was the result of widespread resistance in the Western border town and villages to join Austria (as ordered by the Treaty of Trianon). The violent scuffles managed to convince the League of Nations to allow a referendum in which the town of Sopron and three small villages could choose which country (Hungary or Austria), they wish to belong to (they chose Hungary).

loss. The conservative Hungarian government grew more and more radical in the 1930s and increasing rapprochement with Nazi Germany gave Hungary the opportunity to claim some of its lost territories back. However, World War II ended in disaster for Hungary, which resulted in the reinstatement of the Trianon borders. The political efforts of the late 1940s were aimed at acceptance and rebuilding rather than revisionism. Acceptance turned into forced forgetting after the communist takeover. As the neighboring countries (with the exception of Austria) also joined the communist Eastern Bloc, they became Hungary’s political allies. Therefore, active commemoration of the Treaty of Trianon and any sort of commemorative effort or revisionist tendency needed to be severely repressed. The only exception from this regime of forced forgetting consisted of Hungarian-Romanian negotiations over the situation of the Hungarian minority in Romania. As the communist regime fell, the debate over the legacy of the Treaty of Trianon reappeared on the political agenda. The stance of post-communist political parties ranged from outright revisionist activities to the urging of acceptance. However, the official policy mostly ignored the issue.

The 1989 Constitutional amendments referenced territorial issues, i.e. that Hungary would abide by its obligations laid out in international agreements. In addition, the Hungarian minority abroad was also mentioned. The Constitution specified that ‘the Republic of Hungary feels responsibility for the fate of Hungarian beyond the borders and encourages caring for their relationship with Hungary.’ József Antall, the first Prime Minister of democratic Hungary proclaimed his intention of ‘acting as the Prime Minister of 15 million Hungarians.’ However, the HCC declared that the constitutional provision on responsibility does not actually compel the state to aid Hungarian communities abroad. As the upcoming of this chapter demonstrate, the issue remains unsolved and continues to cause problems described in the next sections.

Hungary’s role in World War II atrocities is probably the most controversial topic in discussion related to historical legacies, highlighted by two main aspects: (1) assistance of the domestic authorities in the deportation of most of the country’s Jewish population and (2) atrocities committed against civilians by the Hungarian army abroad. Regarding the first aspect of the topic, the participation of Hungarian authorities in the Holocaust is particularly sensitive. The government apologized for the state’s role in the Holocaust before the UN in 2013. Furthermore, on the visit of Israeli Prime Minister Benjamin Netanyahu in Budapest, Prime Minister Orbán admitted Hungarian responsibility and declared his government’s intentions to combat the resurgence of such dangers. Nevertheless, in the domestic context, the

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834 The Paris treaty of 1947 reinstated the Trianon borders (with three additional villages on the Northwestern border awarded to Czechoslovakia).

835 On the postwar Hungarian views of the Trianon Treaty, see for example: Romsics Ignác: Trianon és a magyar politikai gondolkodás 1920-1953, Budapest, 1998, Osiris Kiadó

836 Pogonyi Szabolcs: Nemzetpolitika a határon túli szavazati jog fogságában. In: Magyar kisebbség nemzetpolitikai szemle, 2013/18 évf. 3 sz., 222-223

837 Romsics Ignác: Trianon és a magyar politikai gondolkodás 1920-1953, Budapest, 1998, Osiris Kiadó (Trianon and Hungarian political thinking)

838 A Magyar Köztársaság alkotmánya (hatályos 2011 december 31-ig) 2. és 7. cikkely

839 Ibid 6 (3) cikkely

840 As Hungary’s population fluctuates around 10 million, this statement was interpreted as intentionally including the Hungarian minorities living in neighboring countries.

841 Speech of József Antall at the III. National Convention of MDF (2 June 1990)


844 Prime Minister Orbán’s speech at Prime Minister Netanyahu’s visit:
governments of the 2010s have been constantly facilitating the narrative of Hungarian innocence by creating new monuments, supporting certain research institutes and reforming the history and literature curriculum.

Finally, the democratic transition of Hungary has further pushed to the forefront the differences in how Hungary remembers WWII atrocities versus its communist past. While WWII-era atrocities have been painted as cruel and inhumane, communist atrocities have not been perceived as wholly negative, and aggressive decommunization only started in the 2010s. The state introduced measures aimed at partial compensation of some victims of the atrocities mostly by regulating property disputes. In addition, the 1993 ban on totalitarian symbols singled out the swastika, the SS runes and the arrow cross for forbidden public usage.

Regarding the second element of the topic, namely, the WWII atrocities of the Hungarian army abroad, these precede Hungary’s official war participation. Hungary officially became a belligerent party in June 1941, but, years earlier, the Hungarian army had already reoccupied territories it lost due to the Treaty of Trianon. The foreign policy successes of Nazi Germany enabled Hungary to repossess the Felvidék (currently the territory of Horniaky in Slovakia) in late 1938, to swiftly annex Kárpátalja (currently the territory of Karpaty in Ukraine) in spring 1939 and occupy parts of Transylvania in 1940.

The occupation of Felvidék gained some international recognition (at least from the side of Nazi Germany and Italy who mediated between Slovakia and Hungary to revise the Treaty of Trianon). Whereas the occupation of Karpaty happened as Hungary was encouraged by Germany’s success to consolidate the unlawful takeover and partition of Czechoslovakia. The territory declared its independence from Slovakia on 14 March 1939, and Hungarian troops annexed it the next day, consequently initiating a bloody and violent breakdown of the local insurgents, against non-Hungarian inhabitants. This resulted in the closing of schools, deportations and further unrest. Similar events occurred at the time of the Second Vienna Award in late 1940, when Hungary repossessed the northern part of Transylvania.

In December 1940, Hungary and the Kingdom of Yugoslavia signed a treaty of friendship and non-aggression. However, in the following months, the Hungarian government, led by Prime Minister Pál Teleki, gave in to significant pressure from Nazi Germany to assist in an attack against Yugoslavia, and thus enter the war. Officially, Hungary had remained neutral up to that point, despite carrying out military actions in its Vienna Award occupied territories. Teleki refused to acquiesce to the German requests and committed suicide in April 1941. When the Ustaše Movement proclaimed the independence of Croatia days later, the new


The lieu de mémoire of communist nostalgia is the Memento Park outside Budapest. <http://www.mementopark.hu/> accessed 15 June 2020


This is the 1993. évi XLV Törvény a Büntető Törvénykönyvről szóló 1978. évi IV törvény módosításáról
On the politics around the repossessing of territories see: Romsics Ignác: Magyarország a második világháborúban, Budapest, 2001, Kossuth Kiadó

Ibid.
Ibid.
government regarded the friendship treaty null and void and joined German forces in crossing into Yugoslavia. The Hungarian army annexed the territories of Délvidék (currently the territory of Vojvodina in Serbia), and subsequently started to purge the local inhabitants, hunting for partisans and deporting the Jewish population. The most violent of such actions took place in January 1942, when Hungarian forces massacred Serbs and Jews in Novi Sad and the surrounding area. On 26 June 2013, Hungarian president Janos Áder called the atrocity an ‘immoral act perpetuated by sin’ and officially apologized to Serbia for the crimes committed by Hungarian troops.850

Despite the military action in Yugoslavia, Hungary still did not join the war for some months. This was in part due to the fact that the Allies accepted PM Teleki’s suicide as a symbol of the pressure Hungary was under from Nazi Germany. Hungary eventually joined the war after an alleged Soviet act of aggression in late June 1941, and Hungarian forces were sent to the Eastern front as auxiliaries to the German army. Several units actively aided the Nazis in committing war crimes and crimes against humanity. One such event entails the army’s participation in the massacre at Kamianets-Podilskyi in August 1941, when around 20 000 Jewish refugees were murdered in the territory of today’s Ukraine.851 After the democratic transition, these controversies resurfaced, and successive Hungarian memory laws reflect the transformations of official government attitudes towards these events.

850 Áder’s apology:
<http://www.keh.hu/beszede/1753-Ader_Janos_koztarsasagi_elnek_beszede_Csurogon_a_II_vilaghaboruban_eletuket_vesztett_magyar_aldozatok_emlekmuvenek_Tomislav_Nikol%C4%87_szerb_koztarsasagi_elnokek_kozos_megkoszoruzasat_kovoetoen>
accessed 15 June 2020

The Serbian parliament adopted its anwer, apologizing for the atrocities committed by Serbs against the Hungarian minority in Vojvodina in 1944-45:
accessed 15 June 2020

On Hungarian apologies:
The Hungarian government has apologized for the state’s role in the Holocaust (in 2013):
Magyar bocsánatkérés a Holokausztért, 2014 január 23., Magyar Nemzet
<https://mno.hu/kulfold/magyar-bocsanatkeres-a-holokausztert-1207072>
accessed 15 June 2020

and for the 1946 expulsion of the German minority:
Magyar bocsánatkérés a németek kitelepítéséért, 2007. november 16., Index
<https://index.hu/belfold/kit6796>
accessed 15 June 2020

Hungary has received apologies from Russian President Boris Yeltsin for the atrocities committed by the Soviet Army during the 1956 Revolution:
<https://kronika.ro/szempont/a-megkessett-orosz-bocsanatkeres>
accessed 15 June 2020

Slovakia for the 1946 expulsion of the Hungarian minority.
<https://mno.hu/migr/bocsanatkeres-a-szlovakiai-magyarok-kitelepiteseert-580474>
accessed 15 June 2020

However, in 2007, the Slovakian parliament ruled on the imprescriptibility of the Beneš decrees (the legal basis of the expulsion of the Hungarian minority), thus causing a diplomatic rift between the two countries (1487/2007 decree of the Slovakian Parliament)
851 See for example: Randolph L. Braham, ‘The Kamenets-Podolsk and Délvidék Massacres: Prelude to the Holocaust in Hungary’ (1973) Yad Vashem Studies 9, 133–156
5.2.2.2 Historical Symbols

One of the most well-known and controversial legacies of Hungarian history stems from the puzzle regarding the public display of totalitarian symbols. This ardent socio-legal debate emerged early after the democratic transition. The Hungarian parliament adopted a criminal prohibition on the public use of five totalitarian symbols in 1993. The provision forbids the public display of the swastika, the SS insignia, the Arrow Cross, the five-pointed red star and the hammer and sickle, unless with the aim of artistic, educational or scientific representation. It covers two Nazi symbols also banned in other states. It further includes the Arrow Cross, the symbol of the Hungarian fascist Arrow Cross Party who took power with the aid of the German occupying forces in October 1944, and, in public consciousness, are held responsible for the Hungarian deportations and other war atrocities. Finally, it punishes the display of two communist symbols. These two symbols are not as widely condemned as the Nazi insignia and are often legal to use in Western-European states.

The existence of the prohibition has been questioned right from its inception. Yet the HCC proclaimed this provision constitutional in 2000. However, in its 2008 decision of Vajnai v Hungary, the ECtHR declared any criminal sanctions on public display of the red star as an infringement on the right to freedom of expression. Despite this judgement in Strasbourg, the ban was not re-evaluated in Hungary. The debate on communist symbols reignited in 2013 during reformulation of the new Criminal Code. In the midst of the debate, the HCC reversed its decision to follow the ECtHR (albeit for different reasons). Finally, parliament redrafted the ban according to the HCC’s instructions, so that criminal sanction would only apply if the display of the symbol presented danger to public peace.

In addition, several symbols, originating from ancient Hungarian pagan tradition, while not banned, generate significant controversy. The most-debated wartime symbol, the Árpád-flag (árpádsávos zászló) has been adopted by organizations with nationalistic, revisionist and extreme views throughout the 20th century. While originally symbolizing the medieval

852 Codified as Article 269/B in the Criminal Code
853 Such as in Germany (Article 86 of Criminal Code)
854 As the first constitutional complaint against was lodged immediately in 1993.
The Court reasoned that only a short time has passed since the fall of the communist regime, thus the public display of the symbols may still encourage its return. Furthermore, the protection of public peace and the dignity of victim communities provide legitimate reasons for the punitive measures.
856 Vajnai v Hungary App no 33629/06 (ECHR, 8 October 2008) paragraph 58.
857 Prime Minister Orbán even considered to modify the Fundamental law to counter and refuse the decision of the HCC
Földes András: Orbán újra hozzányúihat az alkotmányhoz, 2013. február 25., Index
<https://index.hu/belfold/2013/02/25/orban_ujra_hozzanyuhhat_az_alkotmanyhoz/> accessed 15 June 2020
Az önkényuralmi jelképek használata, 2014. február 3., Ars Boni
<https://arsboni.hu/onkenyuralmi/> accessed 15 June 2020
858 Btk. 333. cikkely
859 In the decision of Noé, Vajnai and Bakó v Hungary (App no 24515/09, 24539/09, 24611/09, ECHR 23 September 2014) and Horváth and Vajnai v Hungary (App no 55795/11 and 55798/11, ECHR 23 September 2014)
860 For example, the glorification for nonnonnot-banned but still controversial symbol commemorating Ferenc Szálasi, the wartime PM of Hungary who actively supported Nazi Germany and is considered responsible for the organization of the deportations in Hungary
<https://hvg.hu/itthon/20110531_szalasi_emlekmu_udvaron> accessed 15 June 2020

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Hungarian ruling dynasty, its meaning became especially tainted during WWII, when it was used by the Arrow Cross Party. Nevertheless, due to its historical roots, it is not illegal to display the flag in Hungary (especially since it is incorporated into both the national flag and the coat of arms), although courts have occasionally banned its use in specific circumstances, with the reasoning that it inspires fear in Holocaust survivors. In addition, the extreme organizations using these symbols are actually allowed to operate in Hungary.

The extreme right-wing Jobbik party initiated the repossession of these symbols in the mid-2000s. The Árpád-flag, which the party adopted in their official logo, has already been mentioned. Second, Jobbik further revitalized the cult of the turul bird (turulmadár). This fictional bird is a Hungarian mythological symbol, a mix between an eagle and a hawk. A public use of this symbol started in the 19th century when it was incorporated into the façade of several public buildings. After the democratic transition, many turul monuments were refurbished. The most prominent can be found next to the town of Tatabánya, in Western Hungary, on a hill where Hungarian tribes led by chieftain Árpád allegedly defeated the armies of Svatopluk I of Moravia. In 2007, the building of a new turul monument in the 12th district of Budapest caused serious debate, as the image of the turul was engraved on a WWII memorial. Several citizens protested the monument because the turul, similarly to the Árpád-flag, had been claimed by the extremist parties of the interwar period. Third, Jobbik launched the renaissance of the old Hungarian alphabet, Hungarian Runic (rovásírás). In the 2010s, several towns and villages of Hungary received the runic version of their signpost due to a specific, nationwide action plan undertaken by Jobbik. The contemporary Hungarian regulations state that a petition for permission of these signposts should not be requested from the municipality, but from Magyar Közút Zrt. the state company responsible for the upkeep of roads since the signposts count as traffic signals. Thus, they can appear without permission, or even despite expressed opposition, from the local municipality. The signposts appeared even outside Hungary, in the ex-Trianon territories.

Recently, the second and third Fidesz governments (2010-2018) have increased their tolerance towards these controversial symbols and gradually included them in their own historical narrative. As a result, the legal governance of historical memory in Hungary remains inconsistent and controversial.

861 An analysis on the dispute around the Árpád-flag
<https://index.hu/belfold/arpad1263/> accessed 15 June 2020

862 Once such instance evolved into the ECtHR case of Fáber v Hungary (App no 40721/08, ECHR 24 October 2012). The ECtHR decided that the use of the flag as a local question, which local authorities should be able to assess, but it did rule violation of Article 10 of the Convention for the restriction of its use.

863 On the controversy around the turul bird

864 On the controversy around the use of the Hungarian Runic
Király András: Terjednek a rovásírásos helynévtáblák, 2011. július 31., Index

As it happened in Hodmezovasarhely, the Fidesz leadership protested against the Hungarian Runic signposts. For further analysis of the non-banned symbols and their controversies, see Smuk Péter: A szuverenitás jelképei és alkotmányos védelmük. MTA Law Working Papers 2014/37. An example of Hungarian Runic signpost abroad happened in Miercurea Ciuc, Romania (Csikszereda in Hungarian).
5.2.3 Overview and Classification of Hungarian Memory Governance Sources

5.2.3.1 Mnemonic Constitutionalism in Hungary

Fundamental laws and history are interconnected. Constitutional documents are often born in the aftermath of troubled times. They are products of fear, the awe of the previous regime’s return.\(^{866}\) Hungary did not have a written constitution until 1949. The first document reminiscent of a constitution originates from 1946, intended to be the foundation of the post-WWII era. This law determined Hungary’s form of government as a representative democracy. It cited the current system as the product of ‘four hundred years of struggle … two revolutions and consecutive oppression.’\(^{867}\) However, before this document could be formulated as an actual constitution, its progress was cut short by the communist takeover. For lack of a written constitution, Hungarian constitutionalism places emphasizes the tradition of the historical constitution. On the surface, the historical constitution consists of ancient documents ‘of foundational value’ which help ensure state continuity without a single basic law.\(^{868}\) Several of such documents have been identified by scholars, including the Golden Bull of 1222 (\textit{Aranybulla}),\(^{869}\) the Pragmatica Sanctio of 1723,\(^{870}\) the 1791/X Act,\(^{871}\) and the April Laws of 1848.\(^{872}\) Thus, pre-1949 Hungarian constitutionalism looked quite similar to the British organization of the state, i.e. collected foundational documents without a constitutional charter.

The historical constitution is also interconnected with the doctrine of the Holy Crown. This doctrine stresses both the symbolic and actual role of the Holy Crown in guarding the independence of Hungary.\(^{873}\) On the symbolic level, the role of the Holy Crown originates from the myth of Hungary’s first king St. Stephen I. He swore fealty in exchange for the protection of the Christian pope and the Virgin Mary. On the practical level, the Hungarian nobility has always refused to acknowledge any ruler not anointed by the Holy Crown to be the king of Hungary. Scholars trace the origin of the Holy Crown doctrine to 16\(^{th}\) century politician and writer István Werbőczy who provided its first formulation in his work, Tripartitum.\(^{874}\) Tripartitum has since become one of the foundations of Hungarian constitutional studies.\(^{875}\)

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\(^{867}\) 1946/I Törvény Magyarország államformájáról, preamble


\(^{869}\) This document is sometimes called the ‘Hungarian version of the Magna Carta’ as its drafting has been influenced by the Magna Carta. See more in: Kristó Gyula: Az Aranybullák évszázada, Budapest, 1998, Kossuth Kiadó.

\(^{870}\) This document ensured female succession on the Hungarian throne. For more information: Szilágyi Sándor: Magyarország története a Szatmári békétől a Bécsi kongresszusig, 1711-1815, Budapest, 1989, Atheaneum Kiadó.

\(^{871}\) This act proclaimed the autonomy and quasi-independence of Hungary within the Habsburg Empire. 1790/91. évi X. Törvényelők Magyarország és a hozzákapcsolt részek függetlenségéről

\(^{872}\) As a result of a general uprising on 15 March 1848, this legal package of 31 laws ensures the first independent Hungarian parliament. The collection of laws can be found here: <https://1000evhu/index.php?a=2&k=3&f=5268&param=5268#tv5268> accessed 15 June 2020


\(^{875}\) The role of the Tripartitum in Hungarian constitutionalism is similar to the regard of the Westphalian Treaty in international law, it is regarded as a historical foundation
The historical constitution has been established as the manifestation of the ‘national soul and morals’.\(^{876}\) Despite its debated nature, several scholars argue that lack of consideration of the historical constitution could be equated with lack of regard for concepts such as the rule of law. These scholars claim that if a notion has not been identified as part of the historical constitution, its value in the Hungarian legal system can be questioned.\(^{877}\) They trace modern legal doctrines in Hungarian constitutionalism as actual parts of the historical constitution.\(^{878}\)

The first written constitution is formulated in the spirit of its communist epoch.\(^{879}\) It contained some historical references, such as the commemoration of the ‘liberation’ of Hungary by the Soviet Red Army in 1945 and the glorification of the memory of the short-lived Hungarian Soviet Republic (April-August 1919).\(^{880}\) As the Hungarian Soviet Republic also functioned as an effectively communist state, the 1949 Constitution invokes continuation and justification from the 1919 Republic. However, other than these statements in the preamble, the 1949 constitution is not that different from contemporary constitutional documents.\(^{881}\)

Hungary did not receive a new constitution in the transitional period of the 1990s. In 1989, constitutional amendments were introduced profoundly transforming the 1949 document into a democratically spirited constitution. However, until 2010, no government achieved an appropriate majority or reached consensus with the opposition to create a new basic law.\(^{882}\) Nevertheless, the constitutional amendments mirror the spirit of democracy. Its preamble does not contain historical references. The document does briefly reflect on history, in its section concerning the responsibility towards ‘Hungarians beyond the borders.’\(^{883}\) In addition, the amendments safeguard fundamental rights, among them human dignity,\(^{884}\) freedom of expression (with a special mention of the freedom of researchers),\(^{885}\) minority rights\(^{886}\) and freedom of association.\(^{887}\)

\(^{876}\) Mezey Barna: Magyar Alkotmánytörténet, Budapest, 2003, Osiris Kiadó, 144
Mezey cites other researchers of the historical constitution (Csekey István, Bölöny József és Egyed István) to support his conclusions about its foundational nature


\(^{879}\) The Hungarian Worker’s Party took over government in 1948 and established a communist system supported with the first written Hungarian constitution.

\(^{880}\) 1949 XX. törvény A Magyar Népköztársaság Alkotmánya, preamble

\(^{881}\) In the sense that its structure and content is similar to other European constitutions, only written with a communist worldview.

See more:

Szabó Patrik: Vissza a jelenbe? – A Nemzeti Hitvallás és a magyar alkotmánytörténet preambulumai, 2018. szeptember 6., Ars Boni

<https://arsboni.hu/vissza-a-jelenbe-a-nemzeti-hitvallas-es-a-magyar-alkotmantortenet-preambulumai/>

accessed 15 June 2020

\(^{882}\) István Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy’ (1993) 42 International and Comparative Law Quarterly 332, 345

For more information on the newest constitution see: Gábor Attila Tóth (ed), Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law (Central European University Press 2012)

\(^{883}\) A Magyar Köztársaság alkotmánya (hatályos 2011 december 31-ig) 6 (3) cikkely

\(^{884}\) Ibid 32/A (2) cikkely

\(^{885}\) Ibid 61 (1) cikkely on freedom of expression and 70/G (1) cikkely on the support of the freedom of academic life

\(^{886}\) Ibid 68. cikkely on how ethnic and national minorities are part of the Hungarian nation - protected and represented

\(^{887}\) Ibid 62 (1) cikkely on freedom of assembly

There is a ‘militant democracy clause’ – as according to Article 2 (3) ‘nobody can strive for the complete possession and violent seizure of power’
The constitutional situation changed drastically with the landslide victory of Fidesz in the 2010 elections. As a result of their supermajority, the government was able to initiate the drafting of a new constitution immediately. In the summer of 2010, Prime Minister Orbán asked six experts to assist in the drafting process. The process proved controversial as the opposition parties complained about the complete lack of consultation and the perceived disregard for any suggestion or modification that originated from them. Thus, two opposition parties, LMP and MSZP, walked out of the drafting process entirely, and boycotted debates and votes over the draft in parliament. The draft of the Fundamental Law was presented to parliament in March 2011, and was accepted without any significant modifications after two short debates held within two weeks. Its public announcement was timed for 25 April 2011 on Easter Monday, giving the Fundamental Law the nickname of the ‘Easter Constitution’. In the end, the Fundamental Law was enacted with only the government parties (Fidesz and KDNP) voting for it. Among the opposition parties, Jobbik voted against the draft, while LMP and MSZP boycotted the vote. The Fundamental Law came into force on 1 January 2012.

The Fundamental Law was subject to severe criticism from the moment of its conception. From the public announcement of the first draft, opposition parties and many voices in the media denounced the legislation as not complying with the rule of law. After the final vote, the Fundamental Law was referred to the Venice Commission, which issued a harsh Opinion in June 2011. In its Opinion, the Venice Commission criticized aspects of the National Avowal (such as the claim of loss of self-determination and the legal problems created by shunning the 1949 constitution), and the preamble (such as Articles D and R) among others. The Commission also found the enactment process worrisome, as the Fundamental Law made it through parliament without significant debates, consultations or modifications. In an attempt to rectify these critiques, the government initiated a ‘national consultation’ on the Fundamental Law to ask the opinion of citizens. However, independent media outlets and academics criticized the consultation as lacking meaningful questions, and several citizens

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888 They have won 262 seats out of 386. <http://www.valasztas.hu/dyn/pv10/outroot/vdin2/hu/f50.htm> accessed 15 June 2020

889 Among these experts were: Péter Boross, previous prime minister (1993-94), Imre Pozsgay (one of the key figures of the democratic transition and previous candidate for the Hungarian presidency), Katalin Szili (previous President of Parliament)


891 The Fundamental law was debated for 5 days in a ‘general debate’ (between 22-28 March 2011) and 2 days of ‘detailed debate’ (between 1-4 April 2011). The transcripts and statistics of the Fundamental Law <http://www.parlament.hu/fomanyok-elozo-ciklusbeli-adatai?p_auth=bp2ZVOh7&p_p_id=pairproxy WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&p_pairproxy WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Ffinternet%2Fcpsql%2Fogy_irom.iron_adat%3Fp_cki%3D39%26p_izon%3D2627> accessed 15 June 2020

892 Ibid.

893 Criticism of László Sólyom, previous President of the HCC and President of the Republic:


895 Ibid para 11
complained that their voices were not adequately heard and considered in the debate. Despite grassroots initiatives, the government has refused to initiate a referendum on the Fundamental Law. The later constitutional amendments did not fare any better under the scrutiny of the Venice Commission.

Hungary’s new basic law is intentionally not referred to as a constitution, but rather as a ‘Fundamental Law’ (Alaptörvény), a decision of the government which, in itself, carries historical overtones. Before 1945, the phrase ‘fundamental law’ alluded to some aforementioned documents identified as elements of the historical constitution. Thus, naming the Hungarian constitution Fundamental Law mixes it with the tradition of the historical constitution. Scholars suggested that the government’s intention may have been to interpret the Fundamental Law as an ultimate foundational document of Hungary’s historical constitution (as the constitution of the unwritten constitution). Gábor Schweitzer, in particular, suggests that the Fundamental Law intends to historicize public law by using archaic expressions which often do not make much sense.

The preamble of the Fundamental Law is also unique from any other constitutional preambles. In comparison, of the twenty-six EU Member States that possess a written constitution, only fifteen contain a preamble. The emphasis on the preamble must be emphasized as it often serves as a general placeholder for historical references. Among the fifteen, five constitutions (the French, Greek, Irish, Italian and German constitutions) incorporate short and introductory preambles in order to symbolically differentiate their respective political systems from previous regimes, with brief but respectful nods towards their historical achievements. Two additional constitutions, the Spanish and the Portuguese, include a lengthier preamble, with declarations of transition from fascist dictatorships to democracy. These documents intend to constructively aid the process of democratization. The constitutions of the rest of the EU Member States are products of the fall of communist dictatorships in Bulgaria, the Czech Republic, Estonia, Lithuania, Poland, Slovakia and Slovenia. Their quite protracted preambles reference historical narratives, moral and even religious values. Such historical citations are used because these states had either ceased to exist from time to time throughout history or only gained independence in the early 1990s. Thus, their constitutional preambles serve the purpose of grounding the existence of the state in its surrounding historical continuity.

However, the preamble of the Hungarian Fundamental Law goes further than any other aforementioned document in terms of providing historical depth and references. It is divided very particularly: it starts with the National Avowal, which fills the similar function as more traditional constitutional texts in Europe. Then, it continues with the part referred to as Foundation (Articles A-U) which acts as a continuation of the preamble. The third part, Freedom and Responsibility (Articles I-XXXI), lists the rights and duties of Hungarian

896 Reports on citizen reactions:

898 Ibid 130.
899 The UK does not have a written constitution
See further: Nyyssönen and Metsälä, ‘Highlights of National History?’ (n 196)
From then on, the Fundamental Law continues ordinarily with descriptions of the functions of the state, the parliament, the constitutional court, and so forth. Section 4.3 will highlight the problematic parts of the Fundamental Law that engage with historical memory, including the national avowal, Article R and the Transitional Decrees (reformulated in 2013 as Article U).

### 5.2.3.2 Memory Laws and Ostensibly Legal Measures

The initial conceptualization of memory laws is quite unique in Hungary. In fact, the wording of ‘memory law’ exists in two distinct translations in the Hungarian language, both of which have their own specific definition and context of use: ‘emléktörvény’ and ‘emlékezettörvény.’ The emléktörvény is the older phrase, and the one that has been used in local political debates and court decisions.\(^902\) It can be literally translated as ‘individual-memory law or law of a single memory’. The first emléktörvény was enacted in 1990, on the first day of sitting of the first freely elected Hungarian parliament. The law commemorates Imre Nagy and other communist politicians who participated in the 1956 Revolution and were executed for it.\(^903\) This law has proved to be controversial as parliament was called upon to also enact laws affirming the culpability of certain communist leaders, which it has failed to do thus far.\(^904\) Nevertheless, more of these laws have been introduced in the last 30 years.

In the early 2000s, the French wording of *loi mémorielle* emerged simultaneously. The Hungarian emléktörvény, while sharing some similarities to the *lois mémorielles*, has its roots in the 19th century and is defined locally in a different way.\(^905\) Contemporary commentators have identified the 1827/XII Act as the first emléktörvény.\(^906\) Since the 1827 Act, all legal measures aimed at commemoration are referred to as *emléktörvény*. Their topics include many momentous events and significant people from Hungarian history. These include the 1848-1849 Revolution and War of Independence, the significance of which is noted by several anniversaries and commemorative honors for its figureheads,\(^907\) several pro-Hungary figures

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\(^901\) Magyarország Alaptörvénye IX (4) és (5) cikkely: freedom of expression cannot be aimed at the insult of the dignity of others. It also cannot be directed at the derogation of the Hungarian nation as well as ethnic, religious, racial and national communities.

Magyarország Alaptörvénye X. cikkely on freedom of research, II. cikkely on human dignity and VIII. cikkely on freedom of assembly

\(^902\) It was used in parliamentary debates as early as 1990, in relation to the remembrance to the heroes of the 1956 Revolution. See transcripts of debates (in Hungarian): [http://www.parlament.hu/naplo35/194/1940216.htm] accessed 15 June 2020

[http://www.parlament.hu/naplo34/001/001tart.htm] accessed 15 June 2020

\(^903\) 1990. évi XXVIII. törvény az 1956 októberi forradalom és szabadságharc jelentőségének törvénybe iktatásáról

\(^904\) The fist academic articles mentioning ‘emléktörvény’ have appeared in the late 1990s, see for example: Miklós Tamás Gáspár: A Nagy Imre-Ugy. (The Imre Nagy case) In: Beszélő, 1996/1 évf. 5. sz.

<http://beszelo.c3.hu/cikkek/a-nagy-imre-ugy> accessed 15 June 2020

\(^905\) The similarities include that the provisions labelled emléktörvény serve commemorative function and the name has been created not by lawyers or legal scholars but instead historians (France) and politicians (Hungary)

\(^906\) This law was dedicated to the memory of those offered support to spread the Hungarian language and helped in the foundation of the Scientific Society in the early 19th century (1827/XII törvény azoknak nevei, a kik a tudós társaság fölállítására, vagy a hazai nyelv terjesztésére is ajánlatokat tettek, az utókor emlékezete végett törvénybe iktattaknak – Act on the commemoration of those who have helped establish the Hungarian Scientific Society)

There is even a wikipedia page collecting all provisions considered to be emléktörvény (it does not cite any credible sources, but the collection is nearly complete):

<https://hu.wikipedia.org/wiki/Eml%C3%A9kt%C3%B6rv%C3%A9ny> accessed 15 June 2020

\(^907\) See for example:

1898/V Törvény Az 1848. évi törvények megalkotása emlékének ünnepeléséről;
1927/XXXII Törvény Kossuth Lajos öröködéimeinek és emlékének törvénybeiktatásáról;
1948/XXIII Törvény az 1848/49. évi forradalom és szabadságharc emlékének megőrőkítéséről

166
from the Habsburg dynasty, the founding of the state, the War of Independence in the early 18th century led by Ferenc Rákóczi, and the resistance efforts in the post-WWI chaos.

The term *emléktörvény* has also appeared in a 2009 HCC decision. According to the Court, it is always declarative, its sole aim being to commemorate the significance of historical persons or events. On the political level, *emléktörvény* has also been cited as a legislative measure with a value-creating function: a signifier of values the parliament holds worthy of the active commemoration for citizens.

The other concept, ‘*emlékezettörvény*’, has a somewhat more confusing genesis and definition. It is a newer term that can be translated as ‘collective-memory law or law of collective memory.’ It has found its way to the Hungarian language as the translation of the everyday name of the Spanish Historical Memory Law. It has been so far used exclusively in reference to foreign memory laws. It has not appeared in political debates or court decisions; however, translations of English academic articles that refer to memory laws have used ‘*emlékezettörvény*’ rather than ‘*emléktörvény*’. As scholarship in Hungarian on memory laws is quite sparse, the name ‘*emlékezettörvény*’ is yet to appear in an original Hungarian article. Nevertheless, ‘*emlékezettörvény*’ would actually be a more inclusive translation of *emlékezettörvény*.

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908 See for example: 1917/I Törvény Dicsőült Első Ferencz József király emlékének törvénybe iktatásáról
909 For example: 1896/VII Törvény a honalapitás évezredes emlékének törvénybe iktatásáról
910 For example: 1906/XX Törvény II. Rákóczi Ferencz és bujdosó társai hamvainak hazahozataláról
911 For example: 1922/XXIX Törvény a soproni népszavazás emlékének törvénybeiktatásáról;
2014/CIII Törvény a hűség falvairól
913 Ibid.
914 See parliamentary debate on the 2010 Act on the Testimony of National Cohesion, in which the President of the parliament defines what these laws entail: <http://www.parlament.hu/orszaggyulesi-naplo-elozo-ciklusbeli-adatok?p_auth=9oXxCizk&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Ffogy Napoleon_fadat%3Fp_ckl%3D39%26p_uln%3D5%26p_felsz%3D2%26p_szoveg%3Dempl%3C%3A91kt%3B6rv%3C%3A9ny%3B_felszig%3D2> accessed 15 June 2020
915 Ley 57/2007

Enacted in 2007, the Spanish media has dubbed it as Ley de Memoria Historica (Historical Memory Law) Simultaneously of the Spanish law’s enactment, the Hungarian media has translated it as ‘*emlékezettörvény*.’ The moniker has also been used in research. See for example: Reporting on the Spanish memory law: Spanyol állampolgárságot kaphatnak a polgárháborús menekültek leszármazottai, 2008. december 30. <https://multikor.hu/20081230_spanyol_allampolgarsagot_kaphatnak_a_polgahaborus_menekultek_leszarmazottai> accessed 15 June 2020

Report of the Minority Rights Research Institute of the Hungarian Academy of Sciences, also referring to the Spanish memory law as ‘*emlékezettörvény*’: Halász Iván: Állampolgárság, migráció és integráció, Budapest, MTA Jogtudományi Intézet, 2006


memory laws. The other phrase only covers declarative provisions, whereas memory laws in English have become broader. Other Hungarian laws, such as the 1993 totalitarian symbols ban, are cited in the context of Hungarian memory politics, therefore they would need a Hungarian title and ‘emlékezettörvény’ would be an ideal description.

Moving on from terminology towards the actual laws, Hungary possesses punitive, non-punitive and quasi-memory laws. Of the two punitive memory laws, the prohibition on genocide denialism - the 2010 ban on the denial, trivialization or justification of genocide and crimes against humanity committed by the National Socialist and communist regimes - is similar to this type of law found in other European countries. Whereas the already mentioned ban on the public display of totalitarian symbols is more regionally unique to Central and Eastern Europe. Non-punitive memory laws regulate several areas connected to remembrance, including recognition of historical atrocities,\textsuperscript{919} the commemoration of famous figures and events,\textsuperscript{920} the investigation of the past,\textsuperscript{921} and the teaching of Hungarian history.\textsuperscript{922} Quasi-memory laws have appeared in multiple areas of lawmaking, including related to the awarding of citizenship,\textsuperscript{923} minority rights,\textsuperscript{924} administrative law,\textsuperscript{925} and the legal system.

To demonstrate how quasi-memory laws can be used to repossess perceptions about history, I will briefly analyze the regulations relating to the transformation of the Hungarian legal and administrative system via the inclusion of history – recalling the glorification of the past. In the historical memory and historical education of Hungary, the era of Austria-Hungary (1867-1918), especially its 19th century years, are regarded as a golden age of national history. In the aftermath of the Austro-Hungarian Compromise of 1867, the Hungarian nation had become a vocal part of a contemporary European superpower. The Hungarian political elite, representing less than 50% percent of the total population, controlled the policy direction and internal affairs of the Hungarian half of the empire. This legacy of this period, the so-called ‘dualism’ (\textit{dualizmus}), is wrapped in nostalgia, idealizing the country due to its much larger territory and its strong and active role in European politics, which Hungary has lost in the 20th

\textsuperscript{919} Halász Iván és Schweitzer Gábor (szerk.): Szimbolika és közjog: Az állami és nemzeti jelképek helye a magyar alkotmányos rendszerben, Budapest, 2010, Kalligram Kiadó
\textsuperscript{920} H/6288 Országgalélyi határozati javaslat az 1932-33. évi nagy ukrajnai éhínség 70. évfordulójára
\textsuperscript{921} These include, for example: the 1990/XXVIII törvény az 1956 októberi forradalom és szabadságharc jelentőségének törvénybe iktatásáról;
\textsuperscript{922} 2000/I törvény Szent István államalapításának emlékéről és a Szent Koronáról;
\textsuperscript{923} 2010/XLV a Nemzeti Összetartozás melletti tanúságtételről;
\textsuperscript{924} 2010/XLV a Nemzeti Összetartozás melletti tanúságtételről
\textsuperscript{925} These include, for example: the 1991/XXV törvény a tulajdonviszonyok rendezése érdekében, az állam által az állampolgárok tulajdonánban igazságtalanul okozott károk részleges kárpótlásáról;
\textsuperscript{926} the 1992/XXXII törvény az életüktől és szabadságtól politikai okból jogtalalban megfosztottak kárpótlásáról;
\textsuperscript{927} and the 2013/CCXLI törvény a Nemzeti Emlékezet Bizottságáról
\textsuperscript{928} These include, for example: the 1995/LXVI törvény a köziratokról, a közlevéltárakról és a magánlevéltári anyag védelméről;
\textsuperscript{929} and the 2003/III törvény az elmúlt rendszer titkoszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról
\textsuperscript{930} 2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról – this law grants easy access to citizenship to those with Hungarian ancestry, especially aimed at the Hungarian minorities living in the Trianon territories (more detail in Section 5.3)
\textsuperscript{931} 2011/CLXXIX törvény a nemzetiségek jogairól – this law defines minority groups on the basis of history (detailed discussion in Section 5.3)
\textsuperscript{932} These laws aim at prohibiting naming organizations, public places and media products after persons connected to totalitarian regimes.

See, for example: 2006/V törvény a cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról - (Article 3(6));
\textsuperscript{933} and the 2011/CLXXXI törvény a civil szervezetek bírósági nyilvántartásáról és az ezzel összefüggő eljárási szabályokról

168
century. Therefore, the quasi-memory laws intending to transform the legal system are tools of symbolism to compare the Hungary of the 2010s to this magnificent era.

In 2012, the Hungarian Supreme Court (Legfelsőbb Bíróság), then the highest court in non-constitutional matters since the 1990 democratic transition, was succeeded by the Kúria.\textsuperscript{926} The Kúria retained the powers of its predecessor and was authorized to act as the highest appeals court, to create standards for lower courts to achieve legal uniformity, and to analyze domestic case law in order to map contemporary legal practice. While it fills the same position as the highest adjudicator in non-constitutional matters as the Supreme Court, translating its name in English to Supreme Court would ignore the historical undertones the title ‘Kúria’ carries. It is inspired by the Magyar Királyi Kúria (Kúria of the Hungarian Kingdom), the highest court of the land between 1723 and 1949.\textsuperscript{927} These institutions ceased to exist in the aftermath of the communist coup d’etat and the subsequent re-structuring of the judicial system and had not been restored after the democratic transition. Their places had previously been filled by the Constitutional Court and the Supreme Court. The renaming of the highest non-constitutional court of Hungary to Kúria carried the symbolic reference to ‘more prosperous’ times - especially the second half of the 19th century which is regarded, at least in history books, as the “golden age” of Hungary. It further echoed the elimination of the last remnants of communism.\textsuperscript{928} Quasi memory laws similarly transformed the administration system as well. Before the territory loss caused by the Trianon treaty, the administrative units of Hungary were called ‘járdás’ (this administrative unit is untranslatable to English). Each county consisted of around 10-15 járdás. They had been eliminated in the 1980s, and were restored in 2013.\textsuperscript{929} Similarly, the appeals courts of the 19th century had been known as Itélőtábla. There was no discernible reason for such a drastic transformation of the legal and administrative system post-2010, but it confirms the arbitrary selection of historical narratives, in these cases used to underline nostalgia for allegedly better times and symbolically connect the current regime to the golden age of 19th-century Hungary.

Finally, in terms of ostensibly legal measures, this chapter analyzes the case law of the HCC, with occasional mentions of cases originating from lower courts.\textsuperscript{930} The inclusion of history in policy making decision and the use of political rhetoric based in historical narratives will also be discussed to illustrate how they are used in order to justify the codification of narratives in memory laws.

\textsuperscript{926} On the powers and activities of the Kúria: <http://www.lb.hu/hu/kuria-tortenete> accessed 15 June 2020
\textsuperscript{927} It consisted of various tribunals: the five Királyi Itélőtábla (Tabula Regia Judiciaria, or Tribunal of the King, courts that were located in prominent Hungarian cities) and the Hétszemélyes Tábla (Seven-person Tribunal, or Excelsa Tabula Septemvirals). The five Királyi Itélőtábla served as both first instance and appeals courts, while the Hétszemélyes Tábla was dedicated to the highest appeals only and became rather a council than a court by the 19th century.

The new organization of the court system refers to the old law: 1871. évi XXXI. Törvény. The administrative units of Hungary were called ‘járdás’ (this administrative unit is untranslatable to English). Each county consisted of around 10-15 járdás. They had been eliminated in the 1980s, and were restored in 2013.

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5.2.4 The Legal Governance of Historical Memory in Hungary vis-à-vis the Standards of the European Institutions

European institutions set standards in several areas crucial to the Hungarian governance of historical memory, including: (1) the existence of genocide denial prohibitions, (2) the existence of a ban on the public display of totalitarian symbols, (3) the rights of victims of totalitarian regimes, (4) access to historically-sensitive documents, and (5) banning organizations who represent extreme viewpoints. Hungary’s practices conform to the standards of European institutions on the surface. However, deeper examination shows that the motives behind the introduction and transformation of memory laws poisons their seemingly proper conformation.931

Several developments that may be categorized as conforming to European standards can be criticized for exhibiting less than honest motives. In recent years, the Hungarian government has presented itself as the champion of national minorities with respect to both minority communities within the state’s borders and the Hungarians living in neighboring states.932 The 2011 Act on Nationalities received substantial commendation from the Venice Commission for its efforts to protect certain minorities.933 However, this law is very selective, as it defines the protected ‘nationalities’ on a historical basis. Only those who lived in Hungary before World War I are entitled to the protection of the 2011 Act.934 Its scope does not extend to several vulnerable groups, including Muslim refugees, who have become the target of an increasingly xenophobic campaign of hate and intolerance. The rhetorical and moral justifications of this campaign root back to the established narrative of Hungary as the defender of Christian Europe, a discourse problematic to the right of freedom of religion. The tactics of the third and fourth Fidesz governments (2010-2018) continues to oppose the implementation of EU initiatives attempting to combat the refugee crisis. The government’s attitude instead opts to alter the perception of certain historical events. It purports to play the roles of the hero and victim, and thus villainize the institutions of the EU. Fidesz’s plans to provide easy access to citizenship for Hungarians beyond the country’s borders have been called self-gratifying and suspect of being used to gain votes. Due to the formulation of the election law, Hungarian dual citizens are entitled to special procedures under which they cast their vote, a situation often cited as positive discrimination. Therefore, Fidesz has been accused of awarding these rights for political gain.935

The Hungarian government’s protection of the victims of communist regimes through the prohibition of the use of symbols associated with such dictatorships further strengthens the suspicion of opportunistic motives behind this legislation. While the need for regulating

931 On the conflict between the aims of the European institutions and the historical memory of Central and Eastern Europe: Małgorzata Pakier and Joanna Wawrzy niak (eds) Memory and Change in Europe: Eastern Perspectives (Berghahn, 2015)
932 The three Fidesz governments since 2010 continuously stepped up to protect Hungarian communities abroad, most recently by actively supporting the Hungarian minority in Ukraine over the use of minority languages. Pándi Balázs: Érvénytelen a kisebbségek jogait szélesítő ukrán nyelvtörvény, 2018. február 28., Index <https://index.hu/kulfold/2018/02/28/ervenytelen_a_kisebbsegek_jogait_szelesito_ukran_nyelvtorveny/> accessed 15 June 2020
933 2011/CLXXIX. törvény a nemzetiségek jogairól
934 Ibid 1 (1) cikkel
communist symbols is almost unanimously supported by the political spectrum, the latest measures aimed at such regulation reveal increasing doubts as to what the new proposals actually intend to achieve. Scholars still debate what the Vajnai case will mean for the communist legacy in Hungary. The 2017 amendment to prosecute the use of the red star for ‘commercial gain’ was widely interpreted as solely directed at Heineken due to political and business disputes.936

The Heineken law points to an additional problem when Hungarian memory laws may infringe on the free movement of goods, codified in the TFEU and the freedom of business, codified in the Charter of Fundamental Rights. In this way, restrictions on the conduct of corporations displaying totalitarian symbols may infringe on the internal market. However, the European Commission expressed its support for such law, provided that it does not discriminate. But the political motivations of the law exactly bring up the threat of discrimination.

The overall position of the CoE is similar to the one held by the EU on genocide denialism.937 In fact, the ECtHR has established significant case law on the prosecution of Holocaust denial, approaching Holocaust negationism exclusively as a form of racism and thus deciding applications as manifestly ill-founded under Article 17 of the Convention. Thus, within the European institutions, negationism is not tolerated and Hungary duly complies.938

Furthermore, the ECtHR generally opposes banning certain extreme right-wing and left-wing organizations for their political views. The Court stated these organizations can only be dissolved if they are proved to possess ‘totalitarian intentions.’ In other words, if their activities directly aim towards the destruction of democracy.939 The European institutions require Member States to combat the expansion of these organizations’ ideology but accept that even such groups can benefit from the right to freedom of assembly and association.

In addition, the concerns over Hungarian memory laws and the impact on equality before the law can also come into conflict with the expectation of non-discrimination arising from the EU. The Race Equality Directive (Articles 2 and 3) requires Member States to ensure the protection of minorities and non-discrimination in several areas, including social protection and social advantages. Since Hungarian memory laws differentiate on a historical basis between minorities and thus lead some of them to not access benefits and rights granted, they threaten the notion of non-discrimination ensured by the Race Equality Directive.

The greatest conflicts between Hungary and the European institutions involve the status of communist symbols and the answer to the refugee crisis. In these instances, the rejection of the Council of Europe’s and the EU’s guidelines demonstrate a dismissal of some integratory efforts in favor of historical narratives but stemming from different motivations. Upholding the ban on communist symbols broadens an accepted form of memory law in the name of protecting human dignity. Whereas the refusal to implement measures for the benefit of refugees results in a more disparaging impact on equality before the law.

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936 Ibid.
937 For the opinion of the Council of Europe, see for example: Parliamentary Assembly Resolution 2106 (2016)1 Renewed commitment in the fight against antisemitism in Europe and Parliamentary Assembly Resolution 1563 (2007)1 Combating anti-Semitism in Europe
938 Since the late 1980, the ECtHR routinely rejects applications intending to use Article 10 of ECHR as protection of negationist behavior.
939 In the case of Vona v Hungary (2013), the ECtHR examined the uniquely upheld ban on the activities of the Hungarian Guard – an organization known for its racist, particularly anti-Roma rhetoric. The Court, in this case, found that the organization is an example for aiming for the destruction of democracy (paragraph 69)
5.3 Rule of Law Analysis

5.3.1 The Rule of Law in Hungary

After providing context on the legal governance of historical memory in Hungary, this section presents the domestic situation of the rule of law. It starts with a brief description of terminology and history of the concept. Consequently, the primary emphasis of the section falls on the post-2010 developments of rule of law decline, illustrated with the transformation of the constitution, regulations on the media and the election and the capture of the judiciary, among others.

The Hungarian terminology adopting the Western constitutional parlance of the rule of law, jogállam, was gradually conceptualized in the aftermath of the democratic transition. The constitutional amendments of 1989 specified that ‘Hungary is an independent, democratic rule-of-law state’ a sentence retained in the 2011 Fundamental Law as well. The jogállam concept was fleshed out by the Hungarian Constitutional Court throughout the 1990s-2000s. Firstly, the court identified it as a ‘foundational value of the republic’ as well as a ‘self-standing norm of constitutional law’. The court stated:

The qualification of jogállam is at the same time a fact and a program. Not only must the laws and the operation of state authorities be in compliance with the constitution, but the culture and values of the constitution also have to permeate through the entire Hungarian society. This is the rule of law, this is how the constitution becomes a reality. The building of the jogállam is a process.

Secondly, the HCC further identified various elements of this concept crucial to the democratic working of the state, including legal certainty, the separation of powers and the protection of fundamental rights. In addition, the court emphasized the importance of checks and balances in the realization of a democratic Hungarian state. However, Prime Minister Orbán recently renounced the system of checks and balances in the process of the last decade’s deterioration of the rule of law in Hungary.

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940 Magyarország Alaptörvénye B cikkely
944 Ibid
946 62/2003 (XII. 15.) AB határozat, ABH 2003, 637
948 Prime Minister Orbán’s speech from December 2014

"Checks and balances are only meaningful in the United States or in presidential systems where there are two identifiable sovereign powers, a directly elected president and legislature. That is not the case in Europe, where there is only one sovereign, there’s nowhere to 'check it or balance it,' because all of the power is delegated by parliament. In a case like that, it is more appropriate to talk about "cooperation" rather than checks and balances.” See more in Attila Juhász, Róbert László and Edit Zgut, ‘Consequences of an Illiberal Vision up to the Present Day’ Study by Friedrich-Ebert-Stiftung Büro Budapest (Published September 2015)
Several concepts have been used to describe the post-2010 developments in Hungary. The process has been referred to as ‘the making of an illiberal democracy’,949 ‘creating a grey zone between democracy and dictatorship’,950 ‘slowly sliding into competitive authoritarianism’,951 ‘effective constitutional capture’,952 ‘rule of law backsliding’,953 ‘gradual Belarus-ization’954 or simply ‘mafia state.’955 As a result of the last decade’s developments, the country which was once praised as one of the strongest Central and Eastern European post-transitional democracies has now stepped onto a slippery slope.956 Thus, the current Hungarian government is often criticized and condemned with regards to the state of the rule of law, respect for fundamental rights and overall democratic pluralism in Hungary.957

Rule of law backsliding is the best term for capturing the recent course of events because it means that the situation used to be forward-looking, whereas the progress Hungary is experiencing now seems to have reversed. Kim Lane Scheppel and Laurent Pech offer a definition of the rule of law backsliding which aptly fits the Hungarian events, namely ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.’958

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Renáta Uitz, ‘Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary’ (2015) 13 I-Con 1
957 Antal Visegrády ‘Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country – Hungary’ (n 815) 259
959 Pech and Scheppel, ‘Illiberalism Within’ (n 947) 7. Pech and Schepppe further mapped the 8-step process through which rule of law backsliding is achieved: (1) citizens losing faith in the established system, (2) citizens elect a leader who promises change, (3) once elected, weakening and shutting down critical institutions such as the independent judiciary, the media and the public prosecutor, (4) giving away benefits to remain popular and simultaneously transforming public debate to bully any critical voices such as NGOs, (5) changing the election law to hinder the opposition ever gaining power again, (6) no constitutional solution remains to lawfully shut them out of power once citizens realize the dire situation,
Chapter 5

After winning the elections and gaining a supermajority, the second Fidesz government (2010-14) launched the country on the path towards the deconstruction of democratic institutions. The overwhelming majority enabled them to adopt a new constitution, the Fundamental Law, immediately and without much debate or compromise. Once that was achieved, the document provided the basis for all further measures. These measures include transforming the powers of the Constitutional Court; changing all major legal regulations (for example, on the media and on the elections); and replacing several important public functionaries, including the Chief Public Prosecutor and the President of the Hungarian National Bank. In August 2014, Prime Minister Viktor Orbán declared his government’s mission to transform Hungary into an illiberal democracy. While he did not actually define what illiberal democracy meant in the Hungarian context, apart from being inspired by ‘work’ and ‘nationalism’, he cited Russia, China and Turkey as examples Hungary should strive for.

The constitutional project of the Fidesz governments extends to the reform of the Hungarian legal and judicial system as well. Hungary’s legal system is founded in civil law, as are most European states. First, the second Fidesz government reformulated all major legal statutes (the Criminal Code in 2012 and the Civil Code in 2013). Second, the government introduced a comprehensive structural reform of the judicial system. Currently, the two highest courts in Hungary are the Constitutional Court (Alkotmánybíróság, for constitutional matters) and the Kúria (for any other matters). The HCC has once been one of the strongest of such tribunals in Central and Eastern Europe. Changes in the work of the HCC include raising the number of judges on the Constitutional Court from nine to fifteen (thus presenting Fidesz with the opportunity to name several judges to the court immediately) and the invalidation of all its pre-2012 case law. Furthermore, the Court is barred from reviewing the Fundamental Law itself. Currently, three avenues remain to reach the HCC: (1) Hungarian courts may refer cases to clarify the constitutionality of certain provisions (even the Kúria can ask for constitutional review, through its president), (2) if the request for constitutional review does not originate from the courts, it can be initiated by either the Commissioner for Fundamental Rights (the ombudsman), the Prosecutor General, one fourth of parliamentary representatives (min. 50 representatives) or (3) by individual petition (actio popularis).

(7) in case of resistance, organizing biased events to disguise policies as the ‘will of the people’ (8) creating imaginary enemies to continue to stay in power with the help of weak institutions and an unfair election law.

959 The Fundamental Law actually is intentionally not called a constitution for reasons discussed in the next section of this chapter
960 Its new powers were elaborated on in the 2011/CLI Törvény az Alkotmánybíróságról
961 Introducing the National Media Authority to control the creators of media products: 2010/CLXXXV Törvény a mediaszolgáltatásokról és a tömegkommunikációról
962 As the result of widespread gerrymandering and other electoral machinations, Fidesz won both the 2014 and 2018 elections with a supermajority, even though only around 45-47% of eligible citizens voted for them 2013/XXXVI Törvény a választási eljárásról
963 They have been replaced 2010 and 2013 respectively
965 Ibid.
966 The New laws are: 2012/C Törvény a Büntető Törvény and 2013/V Törvény a Polgári Törvény
968 Introduced in the Fourth Amendment of the Hungarian Fundamental Law (adopted March 2013)
969 Introduced in Article 38 of the Fundamental Law and in 2011/CLI törvény az Alkotmánybíróságról
Fidesz’s reforms extended to the re-organization of the Hungarian court system as well. The first Fidesz government established the National Judicial Office (Országos Bírósági Hivatal), as a supervisory authority for the appropriate management of courts. The head of the National Judicial Office is appointed by Parliament and the authority represents the attempt for the centralization of the Hungarian court system. While, according to its list of competences, the National Judicial Office should not interfere in the professional standards of judicial activities, the institution does have the power to remove and replace judges based on the standards of their work.

Meanwhile the seventh amendment to the Fundamental Law lays the foundations for the expansion of powers of a special type of court, known as administrative courts, and their new appeals forum, the Upper Administrative Court (Közigazgatási Felsőbíróság). As their name suggests, these new courts will deal with ‘administrative issues’. The Upper Administrative Court will receive the same standing as the Kúria, and thus will become the highest appeals court in administrative issues. However, these plans have been severely criticized from the viewpoint of judicial independence as the vague formulation of ‘administrative issues’ carries the suspicion that such courts will be a tool in hiding delicate disputes related to possible corruption. The administrative courts will adjudicate on the nature of public funds, conflicts of interest in public procurements, and several other areas where members of the government are suspected to be involved in illegal transactions. Due to protests originating from EU institutions, the implementation of the administrative court system has been abandoned.

As a result, the transformation of the Hungarian legal and judicial system, the general situation of the rule of law affects the legal governance of the historical memory as well. The parliamentary takeover by Fidesz enables the transformation and introduction of memory laws without debate, consultation or opposition. While the supermajority victory of Fidesz happened in fair and democratic elections, the second and third victories took place amongst distorted and questionable electoral processes. During the last decade, changes in memory laws as well as new measures like the Fundamental Law, which, as a constitutional document, reformed the Hungarian legal system, were voted into law solely through the support of representatives of the government parties and despite the opposition of various groups including professional historians and political figures. These developments in the legislative process casts doubts over all historical memory-related measures from the perspective of the principle of legality.

Furthermore, the capture of the judiciary has enabled the three governments of the last decade to assert their wills not only through parliament, but through judicial interpretation of laws as well. The takeover of the Constitutional Court and the Kúria was completed years ago, and government oversight around regular courts continues to grow. These developments then

970 On the National Judicial Office: <https://birosag.hu/obh> accessed 15 June 2020
971 The office is overseen by the National Judicial Council (Országos Bírói Tanács), a 15-member committee, consisting of high-ranking judges. Recently, several conflicts emerged between the two bodies, as the Council thinks that the National Judicial Office is unjustly interfering with the election of judges in favour of the government.
972 Furthermore, the administrative courts would try to wriggle out of the jurisdiction of EU law:
973 The plans for the administrative courts were announced to cease in October 2019.
impact both the independence of Hungarian tribunals as well as the impartiality of individual judges serving on them. This facilitates opportunities for legal interpretation favorable to the government and the neglect of delicate cases.

Finally, the deterioration of the situation with fundamental rights further affects the legal governance of historical memory in the sense that opposition space around new measures is shrinking. The capture of several media organizations, schools and research institutes permits the governments of the last decade to assert their will without much control.

5.3.2 Legality

This section examines three issues demonstrating how the legal governance of historical memory affects legal certainty. The first problem involves legal certainty around the prohibition of the communist symbol of the red star. It demonstrates how the reformulation of this prohibition strengthens unpredictability around its implementation because formulation of the law makes its consequences particularly unclear, decreasing legal certainty.

The second issue considers the establishment of official historical narratives and their politically motivated, but legally arbitrary, appearance in Hungary’s constitutions and in its legal and administrative system. It deals with arbitrariness and selectivity in the selection of historical narratives incorporated into the Fundamental Law and ostensible legal measures. The selectiveness and arbitrary inclusion of often inaccurate narratives provides the justification and basis for statutory memory laws.

The third puzzle inspects the use of ostensibly legal measures to control historical research, museums and education. The governmental capture of these institutions contributes to the shrinking of independent public space suitable for the pluralist discussion of sensitive and controversial historical questions.

The final of the examination of legality engages with the presence of self-inculpatory and self-exculpatory approaches permeating these measures, showing that increasing governmental control over the debated memory laws brings a more extensive use of the self-exculpatory approach leading to a growing impact over legality.

5.3.2.1 Legal Certainty: Tailoring Memory Laws to Political Situations

In 2017, government representatives introduced a proposal for further amendments to prevent the public display of totalitarian symbols ‘for commercial gain.’\footnote{974} During the parliamentary debate over the amendment, representatives of the opposition accused the government of only using the amendment to put pressure on Heineken, the Dutch beer producer, in particular. In fact, this led the Hungarian media to term the proposal as ‘Lex Heineken.’ Heineken had previously been involved in a copyright dispute in Romania with Igazi Csíki Sör, a Hungarian operating in Transylvania.\footnote{975} Nevertheless, even after the parties reached an agreement, the extended prohibition of the red star was continues to remain on the parliamentary agenda. Surprisingly, after the Hungarian government referred the amendment to the European Commission, the Commission allowed the prohibition to proceed, with the caveat that it should not give space to discrimination against any specific company or product within the internal market.\footnote{976} A spokesperson for the Director-General for the Internal Market

\footnote{974} Proposition T/14441 (2017) az önkényuralmi jelképek kereskedelmi célú hasznosításának tilalmáról, valamint az ezzel összefüggő egyes törvények módosításáról
\footnote{975} On the political context around the proposal: Fábián Tamás: A sörbotrány, amiben minden fursca, 2017. február 10., Index <https://index.hu/gazdasag/2017/02/10/a_sorbotrany_amiben_minden_furcsa/> accessed 15 June 2020
\footnote{976} Opinion of the European Commission:
justified the position of the Commission by citing the ‘special historical context and circumstances in Hungary’ concerning the legacy of the country’s previous communism regime.977

The proposition presents serious complications to one of the fundamental freedoms of the European single market – the free movement of goods (Article 26 (2) TFEU). Although the provision is not in force yet, if it would ever be approved in parliament, its implementation will still be problematic. For instance, what would happen if the average Hungarian citizen were to watch a UEFA Champions League game on television? They would immediately be confronted with Heineken’s red star as the Dutch brewer is one of the main sponsors of the League. Would the Hungarian television channels then be obliged to censor these visuals? Or would they be allowed to broadcast the symbol but be obliged to provide a detailed historical explanation for the viewers? The ubiquity of internet and television makes it impossible to completely shield Hungarians from seeing the red star from time to time.

Implementing the ban would create a situation in which several brands might find it difficult to sell their products in Hungarian stores. The principle of mutual recognition within the EU’s internal market requires Hungary to allow the distribution of any product that can lawfully be sold or marketed in other EU Member States. In this respect, the Hungarian prohibition would permit exemptions granted by the government if the requesting company could prove that (1) its particular interest in using the prohibited symbol would be severely and disproportionately harmed, and (2) this interest does not offend the sensitivities of victim groups associated with the historical use of the symbol in question.978 These conditions provide the procedural basis to ensure respect for free movement and mutual recognition. However, the proposal further specifies that requests will be examined on a case-by-case basis and the mere existence of symbols as part of well-established copyrighted company logos would not qualify for an automatic exemption. According to the current draft, it is impossible to predict which companies would be exempt and will be able to continue to operate in Hungary. The proposal has long been accused of being tailored to attack one specific company. It is understandable that a company might doubt the neutrality of the approval process – thus, there is a lack of predictability present, if the proposal should ever be approved.
5.3.2.2 Arbitrariness in Establishing an Official Historical Narrative

5.3.2.2.1 Relevance of History in the Fundamental Law

The preamble of the Fundamental Law, the National Avowal, is the principal tool for establishing an official narrative of Hungarian history. The name of the National Avowal draws heavily on the motives of Christian texts. It especially recalls the memory of the declarations of protestant churches, such as the Augsburg Confession (the confession of faith of the Lutheran Church, called Ágostai Hitvallás in Hungarian). Already with the title of its preamble, the Fundamental Law references Christianity as a foundation of Hungarian statehood. The overt and frequent mentions of Christianity are now a prominent characteristic of Hungarian historical memory.

The National Avowal contains a comprehensive narrative of Hungarian history that can be summarized in five points. The first section encompasses the state’s foundation and its role in fighting for independence and protecting Europe. The National Avowal refers to the Founding of the Hungarian state by king St. Stephen I, and recognizes his achievement in integrating the new Hungarian state into Christian Europe. Christianity is recognized as possessing ‘a role in the preservation of nationhood’. Furthermore, this section references the struggles of the Hungarian state to keep its independence and fight for its existence throughout several invasions and revolutions. These include the Turkish wars, the revolutions of 1848-49 and 1956). Since 2018, the seventh constitutional amendment also introduced an obligation of state authorities to protect Hungary’s ‘self-identity’ and Christian culture.

The second section of the National Avowal states that Hungary has become a divided nation in the 20th century after the post-WWI Treaty of Trianon. This narrative of national division justifies Hungary’s role in the protection of the ‘Hungarians beyond the borders’. The third section honors the ‘achievements of the historical constitution’ and the Holy Crown as symbols of the independence and continuity of the Hungarian state. The fourth section condemns Hungary’s foreign occupations – both Nazi and communist. It claims the state lost its self-determination on 19 March 1944, the date of Hungary’s German occupation, and regained it after the fall of the communist dictatorship on 2 May 1990, the assembly day of the first freely elected Hungarian parliament. This section rejects the 1949 constitution of Hungary as unlawful and as the basis of a ‘tyrannical rule’. The last section of the National Avowal finishes with representing the Fundamental Law as a contract between Hungarians of the past, present and future. However, the fourth amendment of 2013 changed the wording to ‘alliance’, to avoid any legal interpretations of the word ‘contract’. The Fundamental Law was intended to serve not only as a constitutional document, but also as a ‘narrative that summarizes social reality’.

979 Horkay Hörcher Ferenc: A Nemzeti Hitvallásról (n 7) 289
980 Magyarország Alaptörvénye Hetedik Módosítás (September 2018)
981 The rejection of the communist constitution presented an interpretation challenge to Hungarian constitutional lawyers as it had been the basis of the 1989 democratic constitutional amendments as well as several decisions of the HCC. Thus, most scholars agree this is a symbolic statement, rather than one bearing actual impact on constitutional law.
982 Smuk Péter: Nemzetfogalom és történeti narratíva az Alaptörvényben. Doktori Műhelytanulmányok, SZE Deák Ferenc Állam- és Jogtudományi Kar, 2013, 283
Furthermore, while not in the National Avowal, Article D of the Fundamental Law reiterates Hungary to be a united nation, and as such declares responsibility for Hungarians beyond the country’s borders.
983 Fekete Balázs: Az Alaptörvény Preambulumának Szövegközi Dimenzióiról. In: Jogi Iránytű 2012/2. sz., 23
law between our present-day republican constitutional form of government and the period of the historical constitution.  

5.3.2.2.2 Relevance of History in Ostensibly Legal Measures: Changing Perceptions via Memorials and Political Rhetoric

The way WWII and the authorities’ role in the war’s atrocities is commemorated in Hungary has led to a narrative that contradicts what several prominent Hungarian historians consider to be historical facts. In this respect, non-punitive memory laws have been used to create and support historical narratives that are questioned by professional historians, thus causing concerns over the arbitrary decision-making of the second and third Fidesz governments (2010-2018).

For example, the Fundamental Law’s National Avowal specifies Hungary’s loss of self-determination as being between 19 March 1944 and 2 May 1990. This statement quite fits the pattern of Hungary presenting itself solely as a victim, and never as complicit in any World War II atrocities.

The theme of escaping responsibility has found its way into public discourse around the establishment of monuments. In 2013, plans were revealed to erect a monument dedicated to the ‘victims of Hungary’s German occupation,’ timed for the 60th anniversary of the occupation the following year. The plans were met with widespread criticism because they were seen as shirking Hungarian responsibility. The monument was dedicated overnight, without an official ceremony in July 2014. Protests have continued against its existence ever since.

Such arbitrariness in the official historical narratives may justify further unpredictable choices in subsequent memory laws. One such case is Fidesz’s crackdown on any names connecting to totalitarian regimes. In 2012, the Hungarian Academy of Sciences was asked to provide a list assessing the activities of individuals and their relationships to totalitarian regimes. Based on the Academy’s list, a memory law was introduced prohibiting the naming

985 The House of Terror is also criticized as being overly focused on communist atrocities and hardly featuring the Holocaust in Hungary: Kolozsi Ádám: Szétcincálta a politika a holokauszt emlékezetét, 2016. január 27., Index
987 2056/2013. (XII. 31.) A Magyarország német megszállásának emléket állító, Budapest V. kerületben felállításra kerülő emlékmű megvalósításával összefüggő egyes kérdésekről (Decree on the Establishment of the Memorial Dedicated to the Victims of Hungary’s German Occupation)
988 The campaign of Eleven Emlékmű (Living Memory) continues to protest the memorial by bringing personal stories which contradict its symbolism. See: <https://hu-hu.facebook.com/ElevenEmlekmu/> accessed 15 June 2020
989 On the memorial, see:

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of any public place, company, organization, corporation after someone associated with a totalitarian regime. However, the widespread changes in street names have been criticized for inconsistency in application, often eliminating street names of the communist past, but not those of the Nazi past.

In addition to the distortion of the narrative on Hungary’s participation in WWII via memorials, in the 2010s, the second and third Fidesz governments attempted to change the historical perception on certain topics of historical memory through the use of political rhetoric. These historical topics include communist deportations, Hungary’s democratic transition, and subsequently the 1956 Revolution, which provides the symbolic basis of the transition. While this aforementioned political rhetoric does not directly affect the rule of law, similarly to the narrative creation of the Fundamental Law, it provides the justification for further statutory memory laws and ostensibly legal measures.

In addition to the transformation of the narrative around Hungary’s war participation, the official narrative around the democratic transition and the 1956 Revolution has changed as well. In recent years, keeping in line with the anti-communist government narrative, the Prime Minister and several politicians close to him started to omit the role of the progressive communists and left-wing liberals from the narrative of the 1956 revolution. The previous iconic figure of the Revolution - communist politician Imre Nagy - has been increasingly replaced with the myth of the ‘Boys of Pest’ - often-nameless young boys who fought on the barricades of Budapest against Soviet tanks. The recognition and commemoration of their role in the Revolution is admirable, yet the official commemoration ceremony speeches increasingly place emphasis only on the revolution of the street, ignoring important events which occurred in the parliament. In contrast, the figure of Imre Nagy was widely glorified before 2010. He became acting Prime Minister in 1956 at the urging of the Hungarian crowds. Between 1953 and 1955, he had already served a term as Prime Minister, when he implemented certain reforms to soften the communist dictatorship over the Hungarian people, using the power vacuum left by the death of Stalin. However, years before that, he was an active member of the ruling communist party. Therefore, the role of him and his peers (who were executed with him in 1958) in the revolution as moderate reformers, should be recognized alongside the commemoration of the street fighters.

Another recent transformation of rhetoric includes the treatment of President Árpád Göncz’s legacy. He was the first President of the Third Hungarian Republic between 1990 and 2000. He participated in the 1956 revolution, for which he was initially sentenced to life imprisonment, but he was amnestied and released in 1963. Before becoming president, he was a member of SZDSZ (Alliance of Free Democrats), the liberal political party crucial to the success of the democratic transition. As President, he became an iconic figure, the ‘grandfather of Hungary’ or ‘Uncle Árpi’. His legacy is founded on the myth of his surreptitious defense of
constitutional values and fundamental rights against the arbitrary decision-making of parliament. He often drew the ire of his own party with his ferocious independence, while he was in office. Árpád Göncz died in 2015. Since his death, his role in the democratic transition and as the first president of Hungary has been forgotten and questioned by the Fidesz governments. In 2017, the municipal government of Angyalföld, the 13th district of Budapest, led by the Socialist Party, initiated the renaming of a metro station from Árpád-bridge, named after ancient Hungarian conqueror Árpád, to Árpád Göncz City Center. The local organization of Fidesz immediately protested the idea and claimed that it showed disrespect towards a ‘great hero of Hungarian history’. By early 2020, the station has been renamed to commemorate him, the conflict between the narratives of local and national governments persists.

The last development in the Hungarian government’s changing public discourse is the comparison of the ‘oppression of Brussels’ (the European Union) to historical totalitarian oppressions of Hungary. In the last year, Prime Minister Orbán has several times compared the conduct of the EU to the conduct of the Soviet troops occupying Hungary in the 1950s and their brutal crackdown of the 1956 Revolution. In October 2018, at the commemoration ceremony of the 1956 Revolution, he claimed that his government was waging a war against ‘Brussels’. He equated himself with the revolutionaries and likened the EU to the Soviet oppressors, claiming that the organization ‘is on its way towards collapse because the bureaucrats of Brussels represent the views of global governance instead of national interests.’ According to this rhetoric, Brussels was forcing their oppression on Hungary, and its government was standing up against it. Although the aforementioned examples of transformation in political rhetoric do not possess direct impact on legality, they remain problematic because such ostensible legal measures lead to the codification of controversial versions of historical narratives.

5.3.2.3 History in Research, Museums and Education: Governmental Capture of Institutions

Another issue to be addressed under the umbrella of legality is the circumvention of proper legal measures in the governmental capture of institutions – including historical research institutions, museums and schools through the transformation of the curriculum. These happen through the elimination of funding, changes in leadership positions and the establishment of new institutions supporting the official governmental narratives.

Before 2010, only one research institution, the 1956 Institute, had been commissioned by a government to map certain historical issues. The 1956 Institute was founded by the first socialist government in 1994, and was tasked to closely examine the legacy of the communist regime with special regard to the 1956 Revolution and War of Independence. In addition, two museums, the House of Terror and the Holocaust Museum, opened their doors in the early

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993 On the life of Árpád Göncz, see for example: Kim Dae Soon: Göncz Árpád: Politikai életrajz, Budapest, 2012, Scolar Kiadó
2000s. While the Holocaust Museum is not often subject to criticism, the House of Terror (Terrorháza) is regularly implicated in the narrative of downplaying the role of the Hungarian authorities in the war’s atrocities. Although the museum is supposed to present the ‘dictatorships of the 20th century’, it dedicates a mere two rooms out of 23 to wartime atrocities, while all other rooms focus on the crimes of the communist regime. Another institution, a mix between a museum and a monument park was conceptualized immediately after the transition and opened in 1993 as the Statue Park Museum. The Statue Park serves as an open-air exhibition of the communist monuments previously located on the streets of Budapest with memorials dedicated to the Soviet liberation of Hungary in 1945 and statues of prominent communist figures, such as Karl Marx and Lenin. It was renamed Memento Park or ‘A Sentence about Tyranny’ Park in 2006. While it is advertised as a museum, and claims to show the downfall of the communist system, the exhibition does not offer any critical explanations about the communist period, and mostly rides the train of nostalgia, recalling tropes such as driving a Trabant car during the expo and the opportunity to make friendly phone calls to dictators.

However, since 2010, several new research institutes and museums have been established as a result of governmental interventions in academic research. The Fundamental Law created the Committee of National Memory, which started its work in 2013. The same year, a governmental decree conceived the Veritas Institute whose mission aims at the research of 19th-20th century Hungarian history, including dualism (the period of Austria-Hungary), the Horthy-regime (the interwar period) and the post-1945 period. In May 2019, the 1956 Institute was incorporated into the Veritas Institute. This alarmed the academic community, as the 1956 Institute, beside the Hungarian Academy of Sciences, was considered one of the last fairly independent bastions of Hungarian historical research.
In 2013, the first Fidesz government further established the Research Institute of the History of the Democratic Transition. Unfortunately, both this institution and the Veritas Institute are regularly criticized for biases towards the governmentally-supported historical narratives. In 2019, a new research institute was established, dedicated to investigating Hungarian history in the pre-conquest era, before the Hungarian tribes conquered the Carpathian basin and settled on the territory of modern Hungary. The creation of the institute was inspired by a popular debate between two theories of the genetic and linguistic origin of the Hungarian tribes. During the 19th century, the Turkic origin theory clashed with the Finno-Ugric origin theory. Due to the discovery of archeological and linguistic evidence, the Turkic origin theory had officially been disproved. In the 2010s, the government narrative started to move towards legitimating this previously dead theory.

The last controversial government-funded museum, still awaiting its official opening, is the House of Fates (Sorsok Háza), a second Holocaust Museum established in Budapest. While its construction was finished in 2015, its exhibitions remain empty, and the museum still has not opened to the public due to the opposition of a large part of the Hungarian Jewish community. They accuse the museum of perpetuating the belief of the innocence of Hungarian authorities in the Holocaust, and of oversimplifying the complex context of Hungarian Anti-Semitism leading to the atrocities of the war. The biggest Hungarian Jewish organization, Mazsihisz (Alliance of Hungarian Synagogues – Magyar Zsidó Hitközségek Szövetsége) is vocally critical of the museum. However, the House of the Fates enjoys the support of EMIH (Unified Hungarian Synagogue - Egyeséges Magyarországi Izraelita Hitközség), a newer organization whose leaders have a close relationship with government representatives.

Finally, historical education was prioritized by transition governments. The first National Curriculum became the subject of intense debate in 1989. Three successive governments struggled to reach a compromise, a process that involved a nationwide consultation throughout 1993-1994. The Curriculum was eventually adopted in 1995. The first

This law has been surrounded by controversy and protest and it strips the Hungarian Academy of Sciences form its independence to organize and control its own research, thus severely harming the academic freedom of the organization.

See more:
Áder János aláírta az MTA-törvényt, 2019. július 12.

On the work of the Research Institute of the History of the Democratic Transition:
<http://www.retorki.hu/rovat/koszonto> accessed 15 June 2020

Created by the following decree: 83/2013. (III. 21.) Korm. Rendelet a Rendszerváltás Történetét Kutató Intézet és Archívum létrehozásáról

For example, the director of Veritas, historian Sándor Szakály has previously questioned the Hungarian responsibility in the Holocaust (Interview of 17 January 2014 with MTI):
‘… we need to talk about the fact that, contrary to the image Hungary is known for, the local Jewry has not been prominently disadvantaged when the German army entered Hungary, stripping the country from its sovereignty after 19 March 1944. It indicated that, according to several historians, the first deportation to Kamianets-Podilskyi from Hungary in WWII in 1941 can rather be regarded as an immigration-related process, because only those who did not have Hungarian citizenship were deported. When it became known that many of those deported were killed, Minister for Interior Affairs Ferenc Fischer-Keresztes allowed them to return to Hungary…’

Orban’s visit to Kyrgyzstan and speech at the Nomadic games:
Boros Juli: Megérkeztek az első fotók a Kirgizisztánban tárgyaló Orbán Viktorról, 2018. szeptember 3., 444.hu

Mazsihisz represents liberal Jews while EMIH is more leaning towards conservative, orthodox branches of Judaism
Fidesz government (1998-2002) initiated an educational reform to replace the national curriculum with ‘framework curricula’, however, they did not have sufficient time and majority to execute their vision. The Socialist Party returned to government in 2002, eliminating the framework curricula and starting the reevaluation of the National Curriculum in light of the awaited EU accession.\(^\text{1011}\)

When Fidesz came to power for the second time in 2010, the government initiated a comprehensive reform of the Hungarian education system, encompassing the complete reformulation of the entire curriculum of which history and literature experienced the deepest transformation. The field of select able books for history and literature teachers narrowed considerably, as ‘experimental textbooks’ were created to replace older textbooks on the market. They all remain under the supervision of a single national schoolbook publisher.\(^\text{1012}\)

The experimental books have not found success neither with pupils nor with teachers, as they are regularly accused of oversimplification and even intentional historical inaccuracy.\(^\text{1013}\)

Furthermore, as of 2012, the national curriculum for literature features the works of several controversial 20th century writers, known to have possessed seriously anti-Semitic opinions and actively participated in totalitarian regimes, such as Albert Wass or József Nyíró. Therefore, numerous independent research institutions and museums have been discontinued and the school curriculum is currently under government control. A reformulated version of the national curriculum has been issued in 2019, criticized for the same mistakes, such as prioritizing questionable public figures, while failing to provide a pluralist selection of material.\(^\text{1014}\)

5.3.2.4 Legality and the Self-Inculpatory and Self-Exculpatory Approaches

The approach towards the measures affecting legality can be described as self-exculpatory rather than self-inculpatory. The Heineken law is clearly surrounded by political controversy, accused of being tailored solely to fit a conflict between the Hungarian government and a corporation. The Heineken law thus presents a direct threat to legal certainty. Furthermore, the seemingly self-inculpatory approach of reckoning with Hungary’s communist past and the protection of victims is utilized as a political tool – thus ultimately not serving the purpose self-inculpatory measures should, demonstrating how self-inculpation can be misused.

The self-exculpatory approach is detectable around the transformation of the constitution and the legal system. The official narrative heavily leans towards presenting Hungary as either flawless hero or innocent victim in its history. Not only is this approach

\(^{1011}\) Eszterág Ildikó: Tantervi változások 1989 és 2010 között. (Changes in the Curricula between 1989 and 2010)
In: Új Pedagógiai Szemle 2010/5. sz., 88-89

\(^{1012}\) The takeover of the textbooks made its way to the ECtHR in the case of Könyv-tár Kft and others v Hungary (App no 21623/13, ECHR 16 October 2018) – the Court decided that the Hungarian government overtaking of the textbook publishing business is detrimental to competition and threatens the independence of education (paragraphs 58-59)

\(^{1013}\) On complaints about the new centralized textbooks:
Kálmán T. Attila: Hemzsegnek az ostoba hibáktól a kísérleti tankönyvek, most kétmilliárdból kijavítják, 2016.szeptember 19., Népszabadság Online

\(^{1014}\) The new curriculum can be found at: <https://www.oktatas.hu/kozneveles/kerettantervek/2020_nat> accessed 15 June 2020
Analysis of the new curriculum:
<https://index.hu/belfold/2020/01/31/megjelent_az_uj_nemzeti_alaptanterv/> accessed 15 June 2020
prevailant in legal documents, but ostensibly legal measures aid in its transmission to research, museums and education through the capture of these institutions. The politically motivated arbitrariness in the establishment of historical narratives does not directly impact the rule of law, but they provide justification for further infractions and intrusive measures. For example, the National Avowal of the Fundamental Law bears no immediate impact on legality. Nevertheless, it creates an official narrative justifying new statutory memory laws and ostensibly legal measures – both of which do affect the rule of law. In fact, every narrative mentioned in the National Avowal recurs in this chapter and contributes to rule of law problems. Finally, the capture of institutions where history should be independently assessed (research institutions, museums and schools) demonstrates how the increase of governmental control is achieved by circumventing legal routes via ostensibly legal measures, further strengthening the narrative based on self-exculpation.

5.3.3 Equality before the Law

This section engages with the legal governance of historical memory’s impact on equality before the law through the assessment of two problems. The first problem focuses on how narrative making on a historical basis can be potentially harmful for the activities of political parties and threaten their general equality. An article in the Fundamental Law uses the past to attack the image and reputation of a current opposition party, enabling historical legacies to be used for political means. In this sense, the impact of memory laws on general equality resides in using them to shrink political space and shame political opponents.

A different issue is outlined through the impact of memory laws on the Hungarian minority protection regime. On the one hand, memory laws inspired by the legacy of the Trianon Treaty affect equality before the law by contributing to the definition of minority groups on a historical basis, resulting in favorable treatment if they are regarded to have been contributed to Hungarian history, or being ignored and discriminated against if they cannot integrate in the official historical narrative. On the other hand, the assessment of minority protection also includes the historical overtones appearing in policy areas such as bilateral relations and the treatment of refugees. Such ostensible legal measures affect equality before the law as they provide justification for the discrimination of minorities. The final subsection deals with the presence of the self-inculpatory and self-exculpatory approaches around the measures affecting equality before the law.

5.3.3.1 General Equality: Codifying the Legacy of Communism: The Transitional Decrees and Article U of the Fundamental Law

The first problem with the legal governance of historical memory and equality before the law relates the differentiation between political forces on a historical basis. These stem from the text of Article U (previously known as the Transitional Decrees - Átmeneti Rendelkezések) of the Fundamental Law. The Transitional Decrees were enacted by parliament on 31 December 2011 and were regarded as ‘supplements’ to the Fundamental Law. They were named transitional because they intended to ‘transition from communist dictatorship to democracy.’ The decrees contain a harsh condemnation of the communist regime as well as references to the culpability of the Hungarian Socialist Workers’ Party and the foundation of the Committee of National Memory. The decrees were referred to the HCC which

1015 Magyarország Alaptörvénye Átmeneti Rendelkezések
invalidated them in 2012.\textsuperscript{1016} However, a rewritten but rather similar version found its way into the Fundamental Law in 2013 within the fourth constitutional amendment and became known as Article U.

Article U provided the legal basis for the foundation of the Committee of National Memory, tasked to investigate crimes committed during Hungary’s totalitarian regimes.\textsuperscript{1017} The Committee works in some ways similarly to a truth commission. It possesses the power to refer certain individuals to the Chief Public Prosecutor on suspicion of crimes against humanity. It follows a trend in the establishment of such institutions in Central and Eastern Europe, and several neighboring states possess similar commissions.\textsuperscript{1018} However, the Hungarian institution is unique in that it is enshrined in the constitution. This has made it very difficult to disregard, even though the Committee’s work has been criticized as being one-sided, unscientific and partial to governmental narratives.\textsuperscript{1019}

Article U further specifies that the ‘political organizations that gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers’ Party continue to share the responsibility of their predecessors as beneficiaries of their unlawfully accumulated assets’. This paragraph is interpreted as implicitly referring to the MSZP (Hungarian Socialist Party), a party formed in the immediate aftermath of the democratic transition. Historically, the MSZP was comprised of the progressive ex-members of the Hungarian Socialist Workers’ Party. Today, it is the most significant opposition power against the second and third Fidesz governments. Until the enactment of Article U, the legitimacy of this party had not been questioned. Article U leaves the MSZP open to accusations of illegitimacy or corruption. The formulation of Article U, while it does not ban its activities. However, such reference, especially considering that MSZP’s role as the Fidesz governments’ opposition, puts Article U into questionable light from the perspective of equality before the law because it silently implies that the party is influenced by the communist ideology. Thus, it targets Fidesz’s greatest opposition with the inference of communist roots and ideologies.

5.3.3.2 Minority Protection and Non-Discrimination

5.3.3.2.1 The Legacy of the Trianon Treaty in Memory Laws

The second problem relating to equality before the law involves the treatment of Hungary’s minorities, which is fundamentally connected to the legacy of the Treaty of Trianon. The Hungarian minority rights regime can be assessed from two approaches. First, it can be considered through the treatment and protection of minorities within the state’s borders. In 2011, the second Fidesz government enacted a new quasi-memory law on the rights of nationalities in Hungary.\textsuperscript{1020} In its explanation of the law’s motives, the government specified that the term ‘nationality’ possesses a unique meaning in Hungary. It covers all ethnic groups resident in Hungary for at least one century which are ‘in numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established

\begin{itemize}
  \item \textsuperscript{1016} By the 45/2012 HCC decision (45/2012 (XII. 29.) AB határozat, ABH 2012,347)
  \item \textsuperscript{1017} Its powers established in the 2013/CCXLI törvény a Nemzeti Emlékezet Bizottságáról
  \item \textsuperscript{1018} For example, Poland and Ukraine have similar institutions
  \item \textsuperscript{1020} 2011/CLXXIX. törvény a nemzeti ségek jogairól
\end{itemize}
communities’. Therefore, groups that are protected under the law include Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serbian, Slovak, Slovene and Ukrainian minorities. The law is very progressive in the rights it provides. It designates these national minorities as being part of the Hungarian nation, but they have the right to their own self-determination and to the preservation of their language, culture and traditions. The law guarantees that members of national minorities can study and access official documents in their own language and elect their own representatives in the Hungarian parliaments, among rights.

While the Venice Commission praised this law as progressive from a rights perspective, it was concerned with the exclusivity of the groups receiving its benefits. The narrow definition of the term minority excluded certain groups that appeared later in Hungary, such as people of Asian and African descent. Further, it does not protect those who arrived in Hungary during the 2015 refugee crisis. The Venice Commission further expressed its disapproval of the term ‘nationality’ instead of ‘national or ethnic minority’, which are terms that are more grounded in international law. The law is selective on a historical basis, compromising the equality before the law of the minorities it ignores.

The second aspect of the Hungarian minority rights regime concerns the treatment of ‘Hungarians beyond the borders.’ This approach was inspired by the legacy of the Treaty of Trianon and the significant efforts of various Hungarian governments to combat the discrimination of Hungarian-speaking minorities in the neighboring states. The post-transition treatment of the Treaty of Trianon presents multiple problematic aspects. The extent to which the Treaty is commemorated may affect neighborly relations, especially if Hungarian organizations were to commemorate and/or mourn the treaty in formerly Hungarian territories now belonging to other states. Moreover, Hungary is limited in how protective it can be of ‘Hungarians beyond the borders’ in terms of awarding economic benefits and citizenship. These questions touch on several delicate issues. For example, several organizations with extreme political views have advocated for a revision of the Trianon Treaty. It remains unclear how militant the state reaction can be towards these organizations’ activities. The HCC has refused to rule against these extreme right-wing organizations. Most of them are allowed to carry out their activities unhindered, and an outright ban is very rare.

The status of monuments and commemorative ceremonies has also proven to be sensitive. In 2008, the National Election Office, tasked with authorizing referendum initiatives, refused one that sought to ask citizens whether parliament should make 4 June the National

1021 Ibid Art I
It echoes the definition of the previous Act on the rights of Hungarian Minorities from 1993.
1023 2011/CLXXIX. törvény a nemzetiségek jogairól – the appendix of the law specifies which minorities are entitled to its protection
1024 Ibid. preamble
1026 Since the 1970, Hungary has quite significant Asian (mostly Chinese and Vietnamese) and well as African (mostly from East and Central-African) minorities
1027 Ibid. preamble
1028 Most extreme-right organizations can work freely (such organizations include the Magyar Igazság és Élet Pártja – Party of Hungarian Justice and Life as well as the Hatvannégy Vármegye Mozgalom – Sixty-four Counties Movement). The most notorious example is the Hungarian Guard, which was actually banned, for incitement of violence against the Roma (the ban was upheld in the aforementioned ECtHR case of Vona v Hungary) However, if the organization is not found to be a ‘clear and present danger’ to public peace, they are allowed to assemble, see: 14/ 2016 (VII. 18.) AB határozat, ABH 2016, 293
Trianon Remembrance Day. The Election Office refused on the reasoning that such a law would require Hungary to take steps towards the re-examination of the treaty which would contradict the country’s international obligations. However, the HCC disagreed and reversed the Election Office’s decision, claiming that a remembrance day had a mere commemorative function and it was not a revisionist tool.\textsuperscript{1029} While this specific referendum attempt did not materialize, 4 June did eventually become the remembrance day of Trianon in 2010. It was named as the Day of National Unity as part of the Act on the Testimony of National Cohesion, enacted by the second Fidesz government to coincide with the 90th anniversary of the Treaty.\textsuperscript{1030} The Act on the Testimony of National Cohesion further commemorates those who aided in ‘rebuilding Hungary after the Treaty of Trianon.’ It further proclaimed 4 June as Trianon Remembrance Day and made a much more substantive commitment towards the protection of Hungarians beyond the borders.\textsuperscript{1031} This commitment was later codified in the Fundamental Law under Article D. Since 2010, Trianon memorials have spread throughout Hungary.

Even though the Fidesz governments introduced laws with more nationalistic interpretation of the legacy of Trianon, the treatment of its legacy found quite widespread agreement over the political spectrum. Jobbik joined Fidesz in voting for all the related legislation, and many socialist representatives followed suit. The memory of Trianon has spurred the Hungarian governments to strengthen their stance on minority protection, especially for national minorities. This has included awarding certain minorities with financial support, citizenship and voting rights. Hungarian governments have also become avid supporters of the protection of national and language-based minorities.\textsuperscript{1032}

In addition to commemoration ceremonies, the non-discrimination of Hungarian minorities living abroad touches on issues of equality before the law. The term ‘Hungarians beyond the borders’ (határon túli magyarok) could, at face value, include any Hungarian who lives abroad. Instead, the term specifically describes (ex-) Hungarian citizens and their descendants who live in territories that used to belong to pre-Trianon Hungary: now in Felvidék (Hornia – Slovakia), Kárpátalja (Karpaty – Ukraine), Erdély (Transylvania – Romania), Délvidék (Vojvodina – Serbia/Croatia), and parts of Burgenland (Austria).\textsuperscript{1033} The 1989 constitutional amendments specified Hungary’s responsibility towards these communities.\textsuperscript{1034} In the 2000s, two issues emerged in connection to the Hungarians beyond the borders: whether they should have easier access to Hungarian citizenship and, if they became citizens, whether they should be allowed to vote in the Hungarian elections, even without an address in Hungary. Fidesz took up the representation of these questions during their first governing cycle. In 2001, the first Fidesz government introduced the ‘Status Law.’\textsuperscript{1035} This law was justified on the two bases of fostering ‘neighborly relations’ and strengthening international obligations regarding the protection of minorities. It guaranteed several opportunities for Hungarians living in

\textsuperscript{1029} 48/2008 (IV. 22.) AB határozat, ABH 2008, 479
\textsuperscript{1030} 2010/XLV törvény a Nemzeti Összetartozás melletti tanúságtételről Art 4
\textsuperscript{1031} 2010/XLV törvény a Nemzeti Összetartozás melletti tanúságtételről Art 3
\textsuperscript{1033} The HCC defined who this covers in its 9/2003 decision (9/2003 (IV. 3.) AB határozat, ABH 2003, 89)
\textsuperscript{1034} But the 9/2003 HCC decision interprets such ‘responsibility’ on a rather moral basis, and does not require the Hungarian state to provide any practical aid (such as financial aid etc.)
\textsuperscript{1035} 2001/LXII. Törvény a szomszédos államokban élő magyarakról
This law was dubbed in the media and academic scholarship as the ‘Status law’ (as it instructs on the status of Hungarians beyond the borders)
See also Laure Neumayer, ‘Symbolic Policies versus European Reconciliation: The Hungarian ‘Status Law’’ in Georges Mink et al. (eds.), History, Memory and Politics in Central and Eastern Europe (Palgrave Macmillan 2013)
neighboring countries, such as access to scholarships, travel discounts and financial aid to local organizations among others. The most controversial point of the law included the provision of a ‘Hungarian identity card’, a document that would prove the eligibility of the holder to the opportunities guaranteed by the law. Hungary’s neighbors, especially Slovakia, Romania and Ukraine reacted to this law harshly, claiming that issuing identity cards for their citizens is their sole right.

After losing the election of 2002, Fidesz continued its efforts from opposition to provide for Hungarians beyond the borders. In 2004, they introduced the notion of ‘dual citizenship’ (kettős állampolgárság) to the public debate. They further tabled a referendum on the possibility of Hungarians beyond the borders to obtain fast-track citizenship. While the referendum ultimately failed, it has left parliament and the public bitterly divided. Once Fidesz won the elections in 2010, they immediately enacted an amendment to the 1993 Citizenship Law and introduced dual citizenship. The Law instructed simplified access to Hungarian citizenship for those who: (1) can prove that they speak Hungarian and (2) can either prove or presume descent from a Hungarian citizen. The following year, these new Hungarian citizens also received voting rights. In the months before the 2014 and 2018 elections, new Hungarian citizens beyond the borders received encouraging letters from the

1036 2001/LXII. Törvény a szomszédos államokban élő magyarokról
1037 Ibid Art 4
1038 ‘The identity card was regarded as ‘quasi-citizenship.’
See, for more information: Alexandra Maatsch, Ethnic Citizenship Regime: Europeanization, Post-War Migration and Redressing Past Wrong (Palgrave Macmillan, 2011)
1039 The HCC has allowed the referendum question to stand in its 40/2004 decision (40/2004 (X. 24.) AB határozat, ABH 2004, 512)
1040 It did not reach the 25% threshold of voters (those who voted chose ‘yes’ to dual citizenship)
Report on the result of the referendum: <https://index.hu/befold/nszvs1205/> accessed 15 June 2020
The citizenship and voting rights of dual citizens of the ex-Trianon territories is subject to a wild debate in Hungary: left-wing party, DK, argues that these people do not pay taxes in Hungary, thus should not be able to vote. On the one hand, dual citizens of the ex-Trianon territories can vote by letter while those who simply live abroad has to go to Hungarian embassies. The HCC deemed this is not discriminatory conduct, but many do not agree with this decision. On the other hand, dual citizens can only vote on the party lists, whereas those living in Hungary can vote for individual candidates and lists – causing further problems as it breaches the idea of ‘one person – one vote’. In the 2018 election, DK promised the retraction of voting rights from Hungarians beyond the borders.
1041 2010 XLIV Törvény a magyar állampolgárságról szóló 1993. évi LV törvény módosításáról
According to a 2015 report from the Central Statistics Office, most people taking the dual citizenship came from the Trianon territories:
1042 Introduced in 2011/CCIII Törvény az országgyűlési képviselők választásáról
Furthermore, in the same legal package, the second Fidesz government (2010-2014) introduced the ‘minority mandate’, available for the minorities listed in the 2011 Act on Nationalities. This enables members of minorities to vote for a minority list, if they wish, instead of voting for the regular party lists. However, the minority mandate is controversial because (1) if a representative is elected, they cannot vote in parliament and (2) the minority list is created by the nationality self-governments, who are dependent on the central government therefore voters have no influence over their person. Such questionable representation have invited criticism that the existence of the minority mandate is actually a tool by Fidesz to stay in power (as the minority representative could take a place that would otherwise be gained by an opposition candidates), instead of true empowerment of minorities.
government, urging them to vote. In fact, receiving citizenship and vote from Fidesz have been regarded as an honor by Hungarian communities abroad.1043

These laws greatly angered Hungary’s neighbors, with Slovakia going as far as introducing a counteracting legal measure, which would strip any Slovak citizen who applies for Hungarian citizenship from their own Slovakian citizenship.1044 The protection of Hungarian-speaking minorities abroad continues to be a source of conflict between the current government and its neighbors.

5.3.3.2.2 The Treatment of Refugees and Bilateral Relations with a Historical Bias via Ostensibly Legal Measures

Historical memory has appeared and, in some cases, has evolved to drive various policymaking decisions affecting equality before the law. The first policy area affected by historical memory is the treatment of Muslim refugees arriving to Hungary in early 2015. The narrative codified in the Fundamental Law – namely that Hungary is a Christian nation that has defended Europe for centuries – spread through the rhetoric of government officials over the past years and has found its way to policies relating to the treatment of refugees.1045

Through the following examples, the policy decisions relating to the refugee crisis and to helping Christian communities abroad raise issues concerning equality before the law. In recent years, on the one hand, Hungarian governments have prioritized the humanitarian aid of Christian communities. On the other hand, both domestically and on the international stage, the same governments have either implemented discriminatory policies towards non-Christian refugees and have attempted to evade international responsibilities and prevent the creation of EU policies.1046

To understand the emphasis on Christianity in Hungarian narratives, one must consider that the Fundamental Law traces the roots of the Hungarian nation in the state foundation of king Saint Stephen I and his unification of the Hungarian tribes under the wings of Western Christendom.1047 The first Fidesz government intentionally introduced the first law of the new

1043 Péter Kállai et al. “‘Only Fidesz’: Minority Electoral Law in Hungary’” (n 1037)
1044 Reports on the backlash in Slovakia:
ELECTION 2012: Some Slovak voters prevented from voting by officials, 10 March 2012
1045 See for example:
Gábor Halmai, ‘Fidesz and Faith: Ethno-Nationalism in Hungary’ (Verfassungsblog, 29 June 2018)
1047 On the life and legacy of King Stephen I, see:
Kristó Gyula: Szent István Király, Budapest, 2002, Neumann Kiadó
millennium in commemoration of the achievement of Saint Stephen I. In addition to the memory of King Stephen, the Holy Crown (Szent Korona in Hungarian) has played a crucial role in the construction of the myth. Hungary was a kingdom for many centuries, though between 1920 and 1944 Hungary’s statehood was defined as a ‘kingdom without a king’, where the governor ruled as head of state and ‘holder of temporary power.’ Since there was no king, the Holy Crown continued to symbolize the kingdom. In addition, the identity of ‘Hungary as a Christian nation that defends Europe from invasion’ has further been cemented into the historical narrative due to the impact of the early modern Turkish Wars. As an element of this narrative, the heroes of the border castles have been glorified in their efforts to withstand the invasion of the Ottoman Empire, their legacy commemorated in law, literature, film and museums.

This narrative has been emphasized as the justification of particularly harsh and discriminative measures enacted against refugees. In 2015, the second Fidesz government ordered the building of a 175 km fence on the Serbo-Hungarian border to close off the Balkan migration route. That September, the European Council passed a Decision implementing ‘refugee quotas’ in order to help Italy and Greece cope with the massive influx of people from Turkey and Africa. The Hungarian government refused to implement the Decision, and, along with Slovakia, challenged it before the European Court of Justice. In September 2017, the CJEU ruled against them. Meanwhile, the third Fidesz government continued its rhetoric against refugees through a billboard campaign called ‘National Consultation on Immigration and Terrorism’. This campaign featured billboards that broadcasted such messages as ‘If you come to Hungary, you need to respect our culture!’ The campaign was seen as heavily xenophobic and capitalized on several stereotypical ideas about immigration that lacked a factual basis. By summer 2016, the third Fidesz government introduced the sixth amendment to the Fundamental Law, allowing them to declare a national emergency due to the threat of

1048 This is the 2000/I törvény Szent István államalapításának emlékéről és a Szent Koronáról
1050 In law see for example: 2014/CIII Törvény a hűség falvairól
1051 The representatives of Fidesz and KDNP use such language regularly. See for example in parliamentary debates:

This particular view is also shared by Jobbik (as seen in parliamentary debates):

See, in addition, opinions on the government reaction to the Court of Justice’s decision:

Kerner Zsolt: Mit jelent, hogy Magyarország elvesztette a kvótapert?, 2017. szeptember 6., 24.hu

terrorism.\textsuperscript{1053} This provided the opportunity to arrest several people on the Southern border who tried to illegally enter Hungary and brand them as terrorists.\textsuperscript{1054}

Furthermore, in the summer of 2016, the same government initiated a referendum on whether Hungary should continue to implement EU refugee policies.\textsuperscript{1055} This referendum took place in October 2016. The only result it achieved was to compound xenophobia within Hungarian society.\textsuperscript{1056} Whereas the turnout was less than 50%, making its result invalid, 98% of voters were in favor of the government’s standpoint. Despite this, the government billed the referendum as a success. On this basis, Fidesz representatives initiated a proposal for yet another - seventh - constitutional amendment addressing Hungarian self-determination and sovereignty. The seventh amendment initially failed in autumn 2016. However, after Fidesz won the elections with supermajority for the third time, the amendment was pushed through parliament in June 2018.\textsuperscript{1057} As a result, it adds to the duty of state organs to protect Hungarian self-identity and Christian culture. It further includes a supplemental clause on state sovereignty in order to stop the EU from meddling in Hungarian domestic affairs. Finally, the amendment introduces an article on the prohibition of ‘forced settlements’ of foreign populations to Hungary.\textsuperscript{1058}

Consequently, the seventh amendment questions Hungary’s compliance with international obligations. The codification of this mythical narrative into the Fundamental Law is one factor among several controversial policy decisions. The use of the ‘Hungary as the defender’ narrative demonstrates considerable xenophobia and has led to non-compliance with international obligations, such as the UN Refugee Convention.\textsuperscript{1059} The country is also coming dangerously close to breaching the principle of sincere cooperation, one of the fundamental values of the EU.\textsuperscript{1060} In fact, in June 2017, the European Commission initiated infringement proceedings against Hungary ‘for non-compliance with their obligations under the 2015 Council Decisions on relocation.’\textsuperscript{1061}

\textsuperscript{1053}Magyarország Alaptörvénye Hatodik Módosítás, 2017
\textsuperscript{1054} The most well-known case concerns Ahmed H. who, on the first instance, was sentenced to ten years imprisonment for an act of terrorism (actually, he allegedly threw stones towards police officers defending the border)
\textsuperscript{1055} The referendum has been announced on 26 February 2016: <https://index.hu/belfold/2016/02/24/orban_varatlanul_bejelentest_tesz_a_parlamentben/> accessed 15 June 2020
\textsuperscript{1056} Report and opinion polls which show that due to the aggressive billboard campaign managed to turn around 50% of the population completely against immigration: <https://index.hu/belfold/2016/09/30/a_terorpara_megigezte_a_magyar_tarsadalmat/> accessed 15 June 2020
\textsuperscript{1057} On the journey of the constitutional amendment: <https://index.hu/belfold/2018/05/03/orban_alkotmanymodositasossal_kezdi_az_uj_ciklust/> accessed 15 June 2020
\textsuperscript{1058} The seventh amendment failed to materialize as Fidesz lost its parliament supermajority in early 2016 (due to midterm election losses). Therefore, with all the opposition voting against the proposal, it did not make it through parliament. On the parliamentary vote: <http://www.parlament.hu/irom40/12458/12458.pdf> accessed 15 June 2020
\textsuperscript{1059} Hungary has ratified in 1989
\textsuperscript{1060} The principle of sincere cooperation is founded in TEU Article 4 (3), it requires the ‘fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’
\textsuperscript{1061} Hungary’s lack of cooperation: András Jakab and Dimitry Kochenov, Enforcement of EU Law and Values: Ensuring Member States’ Compliance (OUP 2017)
\textsuperscript{1062} Hungary has amassed a previously unseen amount of infringement proceeding in the last few years. The list of these can be found here: <http://europa.eu/rapid/press-release_IP-17-1607_EN.htm> accessed 15 June 2020

This particular infringement singles out Hungary with Poland and Czech Republic. After the lack of reaction to the reasoned opinion a month later of the Commission, the case was referred to Court of Justice December 2017 for the breach of TFEU Art. 258.
Thus, the introduction of the duty to protect the self-identity and Christian culture of Hungary reflects negatively on equality before the law. The second and third Fidesz governments have openly used inciting rhetoric towards Muslim refugees as well as implemented discriminatory practices in their treatment at Hungary’s southern border. Although Article R does not call for the discrimination of non-Christian minorities, it potentially lends basis for symbolic endorsement of such practices by framing the coming of non-Christian refugees as an invasion and supporting state authorities to get away with discrimination.

Further exploiting the narrative on the defense of Christianity, in 2018, the office of the Prime Minister created a new position called the Minister Responsible for Aiding Persecuted Christians and the Implementation of the ‘Hungary Helps’ Program. The Hungary Helps Program aims to provide humanitarian assistance to various Christian minorities throughout the world, such as the Yazidi in Iraq and Syria and Christian communities living in Ethiopia, Kenya and the Democratic Republic of the Congo. Although the program’s aims are admirable and it has received some international praise, its results have been surrounded by rhetoric relating to ‘combatting migration.’

These examples demonstrate that policy decisions relating to the refugee crisis and helping Christian communities abroad could cause issues with equality before the law. As Hungary refuses to implement international initiatives and obligations, refugees arriving to the border continue to be mistreated. Furthermore, these communities are excluded from the scope of the 2011 Law on Nationalities, which, as mentioned in a previous section, awards its benefits on a historical basis. It is important to note from a symbolic perspective how Hungarian governments have prioritized in recent years the humanitarian aid of Christian communities, whereas, both domestically and on the international stage, the same governments have implemented discriminatory policies towards non-Christian refugees, have attempted to evade international responsibilities and to prevent the creation of further EU policies in this area.

The second relevant policy area influenced by historical memory is the bilateral relations between Hungary and its neighbors, and occasional diplomatic scuffles over the treatment of the Hungarian-speaking minority by Slovakia, Romania and, most recently, Ukraine. As mentioned before, Hungarian efforts to offer dual citizenship to people of Hungarian heritage in Slovakia have caused tension in Hungarian-Slovak relations. In 2011, Slovakian representatives brought the issue to the European Parliament, which determined the matter to be of a domestic nature. For its part, the Ukrainian government has introduced various measures that were criticized by the Venice Commission as detrimental to minorities. First, Ukraine restricted the use of minority languages in official documents. Moreover, the Ukrainian government abolished education in minority languages above the primary school level. Lastly, it proposed a law on the loss of voting rights for citizens who take

1062 On the work and results of the Hungary Helps Program:
Az üldözött keresztények segítésére hozott létre hivatalát a kormány, 2016. szeptember 7.
<https://index.hu/belfold/2016/09/07/az_udolozott_keresztenyekSegitesere_hozott_lette_hivatalt_a_kormany/> accessed 15 June 2020

1063 A series of cases initiated by the Hungarian Helsinki Committee on the mistreatment of refugees are currently pending at the ECtHR.

1064 Debate in European parliament:

1065 Opinion on the provisions of the law on education of 5 September 2017 which concern the use of the state language and minority and other languages in Education (Adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017) 21-23.
Chapter 5

a second citizenship (such as benefitting from the Hungarian dual citizenship law). This led the Foreign Minister of Hungary to express on multiple occasions his government’s disapproval of Ukraine’s recent conduct towards local minorities. The Minister for Foreign Affairs declared that the introduction of such measures ‘would hurt Ukraine’, as the Hungarian government would do everything in its power to block both the dialogue between Ukraine and the EU and the application of Ukraine to NATO. The Hungarian government kept its word, and in December 2018, the proposed NATO meeting on the Ukrainian membership was postponed on the request of Hungarian representatives.

As a result of these tensions, the territory of Ukraine with a significant Hungarian minority – Karpaty – is increasingly in the center of symbolic memory battles. Ukrainian extreme right-wing movements have thwarted local Hungarian organizations’ efforts to commemorate 15 March, a Hungarian national holiday, by threatening to harm visiting Hungarians. In addition, Ukraine has threatened to investigate state officials in Karpaty with dual Hungarian citizenship, based on lists authored by the owners a of nationalist, right-wing internet site. The Ukrainian government has promised to follow up on the names. The general attitude towards minorities in Ukraine encounters equal if not more assertive reactions from the part of Hungary, thus perpetuating the memory war between the two nations.

In contrast, Hungarian governments sometimes alter policy on historical events in order to appease a foreign state as well. Hungarian policy on the Armenian genocide is a particularly fascinating example in this regard. On the one hand, no Hungarian government has ever issued an official opinion or introduced a law recognizing the Armenian genocide. Prime Minister Orbán has repeatedly refused to provide his views on the status of the Armenian genocide. This

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1066 Ukraine has recently modified several laws aiming at education and the use of minority languages, increasingly discriminatory towards minority groups. While these measures are mostly aimed at the Russian minority in Crimea, they also disproportionately impact the Hungarian minority as well.

See on the Hungarian reaction to these initiatives:


1067 In the mid-2000s, the Hungarian (socialist) and Ukrainian governments’ relationship was much more balanced. Hungary event recognized the Holodomor: H/6288 Országggyűlési határozati javaslat az 1932-33. évi nagy ukrainai éhínség 70. évfordulójára

1068 Quotes from the Minister for Foreign Affairs in reaction:


1069 On the failure of the NATO meeting:


1070 On the controversy around March 15:


1071 On the controversy around listing Hungarian citizens in Ukraine:

Herczeg Márk: Kárpátalján több száz állami tisztségviselő és képviselőt világítanak át magyar üléveleket keresve, 2018. október 9., 444.hu accessed 15 June 2020

1072 On the controversy around listing a second citizenship (such as benefitting from the Hungarian dual citizenship law). This led the Foreign Minister of Hungary to express on multiple occasions his government’s disapproval of Ukraine’s recent conduct towards local minorities. The Minister for Foreign Affairs declared that the introduction of such measures ‘would hurt Ukraine’, as the Hungarian government would do everything in its power to block both the dialogue between Ukraine and the EU and the application of Ukraine to NATO. The Hungarian government kept its word, and in December 2018, the proposed NATO meeting on the Ukrainian membership was postponed on the request of Hungarian representatives.

1073 On the controversy around listing Hungarian citizens in Ukraine:
conforms to Hungarian foreign policy, which has recently aimed for a closer relationship with Turkey. In 2015, as a political gesture, Hungarian President Pál Schmitt participated in a commemoration ceremony of the 100th anniversary of the battle of Gallipoli, which Turkey intentionally timed to take place on the 100th anniversary of the Armenian genocide. On the other hand, representatives of the coalition partner party of Fidesz, KDNP (Christian Democratic Peoples’ Party) have openly condemned and recognized the genocide.1072

Furthermore, a softer approach surrounds the remembrance to the early modern Turkish Wars. The renovated museum of the Ottoman dervish Gül baba has opened in 2018 in the Buda Castle, on the initiative of the Hungarian government. This museum commemorates contemporary Turkish architecture as well as the history and cultural aspects of the Turkish occupation of Hungary in the 16th-17th centuries. The museum was dedicated in the presence of President Erdoğan, and has been criticized by historians as portraying the Turkish Wars as a ‘cultural festival rather than a massacre’, downplaying the loss of around 70% of the Hungarian population in the war-torn territories, while overemphasizing topics such as the introduction of Turkish products to Hungary.1073 These examples demonstrate how ostensibly legal measures are justified by political rhetoric, leading to the mistreatment of minority groups. While such mistreatment of refugees cannot exclusively be pointed at the legal governance of historical memory, the narratives created by these measures affect communities in tangible ways. For example, the seventh amendment to the Fundamental Law inserted into Article R comprises a duty for all state bodies to protect Hungary’s self-identity and Christian culture. This formulation differs significantly from other constitutions around the world in how it centers the role of Christianity in nationhood as no other document contains duties related to Christianity. The constitutions that possess reference to religion, either recognize the achievement of a specific church, or address Christian heritage, without inscribing a duty element.1074 This paragraph of Article R has not generated any case law from the HCC yet, but scholarly commentary on its meaning and intention have already appeared. Gábor Halmai claims that the adoption of such provision is an ‘opportunistic tool’ in the hands of the fourth Fidesz government (2018-present) to enable the exclusion of non-Christians from the conception of the Hungarian nation and thus, it discriminates on the basis of religion.1075 In contrast, Balázs Schanda proposes that Article R (4) is not discriminatory, but it is as an interpretation of selected cultural values – in this case, providing the historic connection between the Hungarian nation and Christianity.1076

1072 Analysis on the attitude of Hungarian political parties on the Armenian genocide: Nyílas Gergely: Együtt gyávul a Fidesz és a Jobbik, 2015. április 24., Index

1073 On the controversy around the commemoration of the Turkish wars in Hungary:
Földes András: Történelemátírás: A törökök nem hódítók voltak 150 évig, hanem barátok, 2018. november 30., Index
<https://mult-kor.hu/20010915_a_maszel_evszazadnyi_torok_uralom_merlege> accessed 15 June 2020

1074 For example, in the constitutions of Georgia, Paraguay, Peru certain churches’ achievements are singled out. In the constitutions of Norway and Poland, Christian heritage is mentioned.
1075 Halmai, ‘Fidesz and Faith’ (n 1039)
5.3.3.3 Equality before the Law and the Self-Inculpatory and Self-Exculpatory Approaches

Both the self-inculpatory and self-exculpatory approaches appear in the laws and ostensible measures affecting equality before the law. In some respects, the protection of selected minorities is very advanced, demonstrating that the Hungarian state espouses the self-inculpatory approach by offering protections and benefits to some historically oppressed minorities, as well as towards the special group of Hungarians beyond its borders. However, the selective implementation of the measures, and the introduction of a historical bias in minority protection ultimately lead to a situation detrimental for certain minorities. In addition, the treatment of refugees demonstrates how the current official viewpoint of the Hungarian government directly opposes the expectations and standards of European institutions.

The self-exculpatory approach appears in the reformulation of Hungarian nationalism, defining the country as the heroic defender of Christian Europe. Such glorification of heroics is not aimed at historical accuracy and reckoning with the past. Through this practice, the self-exculpatory approach instead works as the means to support the identity of the nation. This would not necessarily be problematic as using history to define the nation is present in every country of the world and is not confined to states where governmental control over history is particularly strong or aggravating. Nonetheless, when the use of historical narratives serves as a justification for exclusionary measures, as codified in memory laws, the self-exculpatory approach becomes precarious from the perspective of equality before the law.

5.3.4 Impartiality of the Judiciary

This section examines the impact of the legal governance of historical memory on judicial impartiality by studying how memory laws provide Hungarian judges with opportunities to shape narratives in an activist or restrained manner. The first problem assesses a particular article of the Fundamental Law. Article R gives the HCC a mandate to determine the ‘achievements of the historical constitution’, providing a select group of judges with the power to interpret legal concepts with a particular historical background. However, the current capture of the judiciary in Hungary has caused the HCC to lose much of its independence, affecting the impartiality of the judges in evaluating such concepts. Thus, the impartiality of the judiciary is compromised. While one might not consider the sole power of the HCC judges to decide what constitutes ‘achievements of the historical constitution’ as problematic, their deliberations cannot always be impartial due to their incentive to agree with the government’s narrative.

The second issue considers non-constitutional decisions. In these decisions, for now, Hungarian judges retain more independence, thus their verdicts reflect less their compromised impartiality due to memory laws. Instead, in these judgments, the personal restraints, activism and consideration of European standards can be traced. Nevertheless, all judicial decisions indirectly reflect the approach employed by the state. Therefore, the final section focuses on the presence of the state’s self-inculpatory and self-exculpatory approach in memory laws impacting judicial impartiality and how these approaches of the state can trickle down to court decisions, even without the opportunity provided by the legal governance of historical memory.
5.3.4.1 The Judiciary and Mnemonic Constitutionalism: The Achievements of the Historical Constitution in Article R of the Fundamental Law

Article R of the Fundamental Law outlines this document’s relationship with the Hungarian legal system. As of the entry into force of the seventh amendment in June 2018, Article R contains four paragraphs, two of which significantly influence the historical narrative of Hungary. The first of these is paragraph (3) requiring the interpretation of the Fundamental Law’s provisions ‘in light of the achievements of the historical constitution.’ Scholars have struggled to interpret this paragraph for two reasons. Firstly, it is a matter of debate what the historical constitution actually is. Secondly, Article R introduced the new concept of ‘achievement’ of the historical constitution, a term that had not existed in Hungarian constitutional law before 2011.

The HCC has yet to define ‘achievement of the historical constitution’ but it has developed the concept in its recent case law (in cases from the last decade). The Court has clarified where one might look for these ‘achievements’ by determining their legal sources in domestic law. ‘Achievements’ can be identified either from documents that were previously determined to be part of the historical constitution, such as the April Laws of 1848, or from legal provisions that were re-discovered by the Court. For example, in 2012, when the Court examined a case touching on the legal standing of judges, it decided that certain laws of the late 19th century that initiated the ‘bourgeois transformation’ of Hungary are actually the sources of the current laws concerning the legal standing of judges and are part of the historical constitution.

Furthermore, the Court has provided examples of ‘achievements’, by designating various concepts as such. These include freedom of the press, freedom of religion, judicial independence, judicial impartiality, administrative courts, the interpretation of the term ‘home’, and the lawmaking scope of municipal governments. The Court also described several concepts as specifically not an achievement of the historical constitution, such as data protection rights, the right to participate in a referendum and right to access public data.

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István Kukorelli: Az Alaptörvény es az Európai Unió. Presentation at conference organized by the Law Institute of the Hungarian Academy of Sciences (15 May 2012)

1078 Ibid.

1079 3002/2018 (I. 10.) AB határozat, ABH 2018, 13 and 28/2014 (IX. 29.) AB határozat, ABH 2014, 813 – These specify that 1848 Press Act is part of historical constitution

1080 This means that that political and judicial power moved from the privileged noblemen to a wider group of society, introduced in 33/2012 (VII. 17.) AB határozat, ABH 2012, 99.


1081 Introduced in 34/2017 (XII. 11.) AB határozat, ABH 2017, 794.

1082 Introduced in 6/2013 (III. 1.) AB határozat, ABH 2013, 194.


1086 Introduced in 3100/2015 (V. 26.) AB határozat, ABH 2015, 137.

1087 Introduced in 29/2015 (X. 2.) AB határozat, ABH 2015, 742.

1088 Introduced in 29/2014 (IX. 30.) AB határozat, ABH 2014, 829.

1089 Introduced in 31/2013 (X. 28.) AB határozat, ABH 2013, 909.

1090 Introduced in 21/2013 (VII. 19.) AB határozat, ABH 2013, 643.
The HCC is the judicial body with sole competence to determine what may constitute an achievement of the historical constitution. In this function, the Court has been criticized for its choices. Justice Béla Pokol articulated his concerns in a dissenting opinion in 2013:

“A definitive interpretation on the ‘achievements of the historical constitution’ so far has not been properly established in the Constitutional Court’s case law, the term is rather engulfed in widespread debate. [We should] avoid the arbitrary selection of any suitable laws from Hungary’s last centuries as an achievement of the historical constitution, only in order to legitimize our capricious interpretations.”

Because judicial impartiality in Hungary is in a state of decline, the sole ability of the HCC to determine such fundamental legal concepts as ‘achievements of the historical constitution’ is worrying. The formulation of Article R, as well as the case law, suggests that concepts identified as achievements of the historical constitution carry more weight during the Court’s argumentation. By 2016, all of the Court’s judges had been nominated by Fidesz governments, through their parliamentary supermajority. This cannot be separated from the observation that the Court has refused, on occasion, to engage with cases whose potential outcomes that might contradict the government’s wishes. Thus, the arbitrary interpretations on the achievements of the historical constitution, considering the current state of the judiciary in Hungary, can result in interpretations comfortable for the government. Gábor Schweitzer argues that because of this, Article R should remain symbolic and its use in case law should be minimized. Unfortunately, it seems that the HCC disagrees, and continues to engage with this provision.

5.3.4.3 Impartiality of the Judiciary and the Self-Inculpatory and Self-Exculpatory Approaches

In this case, self-inculpatory and self-exculpatory approaches are not as relevant, but they can be reflected in the courts’ behavior. On the one hand, the self-inculpatory approach towards reckoning with the legacy of communism is treated similarly by Hungarian judges and the state – awarding protection to the victims. The notable exception is the HCC. On the other hand, the increasing control over historical memory by the state, utilized through the self-exculpatory approach, manifests itself in the behavior of the HCC in defining the ‘achievements of the historical constitution’. The HCC behaves in an activist manner when attempting to define this legal concept, but its activism is aggravated through its capture by the government. Similar to the practice of defining the nation on a historical basis mentioned in the previous section on equality before the law, deliberations on legal concepts with regard to their historical context would not necessarily be problematic in itself. Unfortunately, under the current situation in Hungary, such practice threatens the possibility of courts to enforce and reinforce the inaccurate and politically motivated narratives employed by the state. Nevertheless, the self-inculpatory and self-exculpatory approaches can be detected in the examination of judicial impartiality to the least extent, as their use by the state is only indirectly present.

1091 Dissenting opinion of Judge Béla Pokol to 28/2013 (X. 9.) AB határozat, ABH 2013, 865.
1092 For example, in the cases of laws targeting the activities of NGOs and the so-called Lex CEU
5.3.5 Protection of Fundamental Rights

This section investigates how selected fundamental rights are affected by the legal governance of historical memory through the identification of two problems. The first problem revolves around the balancing of the right to freedom of expression and assembly with the human dignity and access to justice of victims through the acknowledgement of their status. This problem is analyzed with the examples of Hungary’s bans on genocide denialism and totalitarian symbols. These punitive memory laws elevate the human dignity of victim communities and in favor of restricting the right to freedom of expression and freedom of assembly, even at the cost of opposing some standards of the European institutions.

The second issue concerns the freedom of research, through the assessment of access to state archives and sensitive historical documents. These non-punitive memory laws restrict freedom of academic research as their formulation contains severe and politically motivated strictness, with lack of conformation to both domestic constitutional and European standards.

The final aspect of this element analyzes how self-inculpatory and self-exculpatory approaches to memory laws affect fundamental rights. The increase of self-exculpation, coupled with expanding political influence (of whom) and restriction of fundamental rights, demonstrates how this approach accompanies the memory laws’ rising negative impact on citizens.

5.3.5.1 Freedom of Expression and Assembly v Human Dignity of Victims: Prohibiting Genocide Denialism and Totalitarian Symbols

The issue of totalitarian symbols in Hungary has been marred in legal a controversy over the restriction of fundamental rights due to the human dignity of the victims of communism – generating conflict between Hungary and the ECtHR. As mentioned in previous sections, the HCC examined the prohibition on the public display of five totalitarian symbols, and found the prohibition constitutional on the basis of the protection of the rights of the victims of the communist regime. However, a series of judgements from the ECtHR found that the HCC’s interpretation violated Article 10 of the ECHR on freedom of expression. This led the HCC to conduct a second review in 2013. In this decision, the Court concluded that the provision is unconstitutional because it is too broad, badly formulated and infringes on predictability. The government proved very resistant to the HCC’s decision, Prime Minister Orbán even proposed the idea of a constitutional amendment to include the ban on totalitarian (communist, in particular) symbols in the Fundamental Law. The constitutional amendment was eventually abandoned in favor of a reformulation of the prohibition in the Criminal Code. This intended to satisfy the HCC by limiting the ban’s application to conduct where the totalitarian symbols’ display breaches public peace. The prohibition currently stands, although the ECtHR rejected it again in 2014. The amendments and reformulations of the symbols ban fit with other drastic changes in the treatment of the memory of the communist regime throughout the 2010s. The focus of recent memory laws has shifted increasingly to condemning communism and stamping out the nostalgia that appeared in Hungarian society by the early 2000s. This has shown itself in various ways. Days after the 2010 parliament was formed, Fidesz rephrased the recently enacted Hungarian Holocaust denial ban to include the ‘genocide...
and crimes against humanity committed by…..the communist regime.' The provision was used in the only major political prosecution of a communist leader - the former Minister for Interior Affairs, Béla Biszku, who also played an active part in the post-1956 crackdowns. He was first accused of denying communist crimes and later charged with participation in crimes against humanity. After years of lengthy prosecution proceedings, he was convicted in late 2015. He appealed the decision but died in March 2016, before his appeal was decided. The condemnation of communism is included in a general purge of totalitarian legacies, justified by considerations over the victim’s recognition and dignity. However, the government has been criticized of purging the memory of extreme left-wing dictatorship much more thoroughly than the legacy of the extreme right-wing political regimes. For example, throughout the 2010s, street renaming took place throughout Hungary resulting in the removal of references to totalitarian regimes. Additionally, several memorials dedicated to controversial, right-wing interwar figures have been amended to rehabilitate their legacies, such as governor Miklós Horthy and author Albert Wass. Meanwhile, the statues of left-wing, social democrat politicians have been removed, such as the statue of former Prime Minister Mihály Károlyi which stood in front of the parliament building until 2013. Károlyi played a significant role in Hungary’s independence in 1918, but his failure to consolidate his power led to the first takeover of the communist party. His memory, in the current government rhetoric, is closely associated with that of a communist dictatorship.

Regarding, Hungary’s genocide denial ban, while it restricts the right to freedom of expression, it conforms to the requirements and examples originating from the European institutions, and thus its existence is not particularly disputed. The 2008 Framework Decision adopted by the European Union requires Member States to establish genocide denial bans, and Hungary complied with this requirement almost immediately. Until the introduction of the prohibition, Holocaust denial in Hungary was prosecuted under Article 269/A of the Criminal

1098 In its 16/2013 review, the HCC has found this to be in line with the Fundamental Law and simultaneously made significant comments on defining the crime of genocide. The case originated from a doubtful lower court judge who questioned the prohibition whether the minimization of the crimes of the communist regime infringes on the ‘nullum crimen sine lege’ principle (ergo communist leaders would incriminate themselves if they did not minimize the crimes). However, according to the HCC, the terms genocide and crimes against humanity cover more than just their international legal definition, it covers ‘all horrors committed by these regimes that can be considered historical facts and similar weight to genocide and crimes against humanity’. Also not minimizing totalitarian crimes does not equal a confession of crimes, it is not required from anyone to incriminate oneself, only to not deny historical facts

1099 This was brought by representatives of Jobbik but was dismissed (Budapesti Kerületi Bíróság 11.B.I.194/2011/2)

1100 Sajtóközlemény Budapest, 2015. december 17., Fővárosi Törvényszék (Press release of the Budapest Regional Court on the case)


1102 2012. évi CLXVII. Törvény egyes törvényeknek a XX. századi önkényuralmi rendszerekhez köthető elnevezések tilalmával összefüggő módosításáról

1103 The Hungarian Academy of Sciences has created a list with their official viewpoint on all persons after whom public places were named in Hungary and whether those people can be connected to the totalitarian regime. The review was led by the Humanities Institute of Hungarian Academy of Sciences. The list is titled Összefoglaló A XX. Századi Önkényuralmai Rendszerekhez Köthető Elnevezések Tílalmával Összefüggő Módosításáról (Summary on the Expert Analysis of Naming of Public Places Connected to 20th century Totalitarian Regimes)

1104 In the 2008 FD, Member States are required to prosecute the Public condoning, denial, gross trivialization of genocide, crimes against humanity and war crimes defined in Charter of the International Military Tribunal (Art 1/c) and in the Rome Statute of the International Criminal Court (Article 1/d) directed against group of persons in a manner likely to incite violence and/or hatred

Hungary has introduced its Holocaust denial ban in 2010 to comply with the Framework Decision
Chapter 5

Code concerning ‘incitement against a community’. The first genocide denial ban was introduced in 2010, motivated by compliance with the requirements of the 2008 Framework Decision. The initial provision only penalized Holocaust denial, minimization and trivialization. It was one of the last legal measures adopted by the third socialist government (2006-2009). The subsequent second Fidesz government (2014-2018) changed its formulation almost immediately after coming to power.

The current text of the provision prohibits ‘the denial of the genocide and crimes against humanity committed by the National Socialist and communist regimes.’ However, the inclusion of ‘National Socialist crimes’ has been criticized as misleading with regard to Hungary’s responsibility in war atrocities and the Holocaust. The HCC examined the constitutionality of the provision in 2013 and found it to be in line with the Fundamental Law. Based on European and international practice, the HCC proclaimed that the prohibition is well-formulated and respectfully defensive of the dignity of victim communities. Thus, genocide denial in Hungary is duly prosecuted.

In contrast, the ban on totalitarian symbols, especially when directed towards specific symbols of communism, has been prominently questioned, both domestically and abroad by the European institutions. Such question still lacks a definitive answer as the Hungarian governments insist on retaining the prohibition, while the ECtHR has condemned it on multiple occasions. The treatment of totalitarian symbols, particularly the red star, and the comparison of Nazism and communism, have generated conflict between Hungary and European institutions. Various EU institutions have advocated for the equal condemnation of Nazism and communism. The European Parliament has issued several resolutions on this topic. The European Commission appears to support Hungary’s attempt to expand the scope of its totalitarian symbols ban in order to prosecute public display for commercial gain, albeit with the condition that the provision cannot discriminate within the internal market.

1105 More on this article: András Sajó, ‘Hate Speech for Hostile Hungarians’ (1994) 3 East European Constitutional Review 82, 83.
1106 Introduced by 2010/XXXVI Törvény a Büntető Törvénykönyvről szóló 1978. évi IV törvény módosításáról Art 1
1107 Introduced by 2010/LVI Törvény a Büntető Törvénykönyvről szóló 1978. évi IV törvény módosításáról Art 6
1108 National Socialism was never connected to Hungary, the Nazi-spirited party was named Arrow Cross. Thus, it can strengthen the victim narrative of Hungary. See for example: Smuk: Nemzetfogalom és történeti narratíva az Alaptörvényben (n 976)
1109 16/2013 (VI. 20.) AB határozat, ABH 2013, 544.
1110 Several Jobbik politicians have been prosecuted by Hungarian Regional Courts for Holocaust denial as were several citizens due to the nature of their comments on Facebook
Examples of such cases from Hungarian regional courts:
From the Szeged Tribunal:
From the Debrecen Tribunal:
From the Tatabánya Tribunal:
From the Budapest Tribunal:
1112 See for example, on the opinion of the Commission:
Court of Justice decided on the use of the communist coat of arms as trademark within the internal market.\textsuperscript{1113} The Court found that the historical sensitivity towards communist symbols in a few Member States can override the overall interest of the EU to broaden the internal market. Thus, according to the CJEU, the local perspectives on historical issues must be considered in every Member State, even if they might not cause similar controversy in the majority of them.\textsuperscript{1114}

In the meantime, within the Council of Europe, the ECtHR tends to introduce a hierarchical ranking of historical atrocities. It has maintained the supremacy of the Holocaust over the crimes of the communist regimes. This has caused both the third socialist government at the time of \textit{Vajnai v Hungary} in 2008, and the Fidesz governments at the time of the follow-up cases, to ignore the Court’s decisions.\textsuperscript{1115} In fact, once the ECtHR handed down its second decision finding against Hungary in relation to the public display of the red star in \textit{Fratanoló v Hungary} (2011), the President of the Parliament, László Kövér, called the ECtHR judges ignorant for failing to recognize the trauma that the communist regime has inflicted upon Hungary.\textsuperscript{1116} When the HCC agreed with the conclusion of \textit{Vajnai} and reversed the symbols ban’s constitutionality, Prime Minister Orbán declared that ‘the time will not come to lift the prohibition from the use of totalitarian symbols, until there is at least one person in Hungary who is still alive and had been tortured by the representatives of such dictatorships.’\textsuperscript{1117} The government has conceded slightly by introducing small changes in the formulation of the prohibition, but continues to reject the relevant decisions of the ECtHR.

The hostility of the Hungarian governments towards ECtHR judgments suggests the governments’ particular emphasis on the rights of victims. Both the Council of Europe and the EU have previously provided standards in this area. The European Parliament regularly stresses the importance of remembering, honoring and commemorating the experience of victims of mass atrocities.\textsuperscript{1118} The ECtHR approaches the topic slightly differently. In its cases dealing with Holocaust negationism, the Court prioritizes the victims’ experience as higher than the offender’s right to freedom of expression, but the Court’s attitude is less generous towards the victims of other mass atrocities. In \textit{Vajnai} and \textit{Perinçek v Switzerland} (2015), which dealt with communist symbols and the denial of the Armenian genocide, the Court ruled that respect to
the dignity of victims cannot trump the right to freedom of expression.\footnote{As established in \textit{Vajnai v Hungary} App no 33629/06 (ECHR, 8 October 2008) and \textit{Perinçek v Switzerland} App no 27510/08 (ECHR, 15 October 2015)} Thus, the Hungarian approach opposes the ECtHR, but the government’s views on victims’ rights conforms to those of EU institutions.

With regards to freedom of assembly and association, the HCC opposes bans on the activities of political parties or other organizations. The latest related decision of the HCC originated in 2016. The Hungarian Dawn Movement (\textit{Magyar Hajnal Mozgalom}) wished to commemorate the ‘heroic defenders of Buda Castle in 1945’, the Hungarian fascists fighting the advancing Red Army between February and April of that year. While the Court accepted that the views of the organization may have caused injury to certain victim groups, such as those whose family fell victim to the purges and deportation by the Arrow Cross Party in 1944-45, it ruled that so long as the commemoration ceremony remained peaceful, it could not be restricted.\footnote{14/2016 (VII. 18.) AB határozat, ABH 2016, 293.} In fact, the HCC used the occasion to direct attention to the inconsistent formulation of the Hungarian Assemblies Act of 1989, and instructed the government to introduce reforms.\footnote{However, these reforms have been questioned and criticized. The new Hungarian Assembly Act (adopted in September 2018) imposes significant difficulties on the organization of political demonstrations, such as more complicated permit requirements, longer process of announcement to the police and more opportunities for the police to restrict the demonstration. On the analysis of the new assembly law: Balanyi Daniella: Az új gyülekezési törvény következményei – tüntetési kisokos, 2018. október 11., Ars Boni <https://arsboni.hu/az-uj-gyulekezesi-torveny-kovetkezmenyei/> accessed 15 June 2020} While the Court usually displays permissiveness towards extreme organizations, it did support the ban on the Hungarian Guard due to its violent demonstrations and inciting hate-mongering against Hungary’s Roma minority.\footnote{The Hungarian Guard used to be a paramilitary organization supported by the Jobbik Party, organizing regular fearsome and violent demonstrations in villages inhabited by prominent Roma minorities. The most notorious demonstrations occurred in Tatárszentgyörgy, Nyírkáta and Pátka, which initiated the proceedings towards the eventual ban on the organization. As mentioned above, even the ECtHR upheld the ban on the organization’s activities. See more: Jámbor András: A pátkai megegyezés a Magyar Gárda kárára valósulhatna meg, 2008. június 15., Kettős Mérice <https://kettosmerce.blog.hu/2008/06/15/a_patkai_meggegyezes_a_magyar_garda_karara_valosulhatna_meg/> accessed 15 June 2020} However, the Hungarian Guard is currently the only such organization whose activities are banned, while several others with openly revisionist (with respect to the Trianon borders) and hateful (with respect to minorities) views are allowed to operate, such as the Sixty-Four Counties Movement (\textit{Hatvannégy Vármegye Mozgalom}) and the Army of Outlaws (\textit{Betyárserég}).\footnote{The Sixty-Four Counties Movement aims to recruit young people. Its name originated from the incorrect numbering of Great Hungary’s (revisionist name of pre-Trianon Hungary) historical counties (there 72 instead of 64 in reality) The Army of Outlaws is active mostly on the internet, their organization is similar to Anonymous. Their names recalls the outlaws of the 19th Hungarian countryside (betyárók), who became the symbol of Hungarian resistance to Austrian rule in the aftermath of the Revolution of 1848049}
5.3.5.2 Freedom of Research: Access to Archives

Both the ECtHR and the EU require open access to sensitive historical documents, but Hungarian practices in doing so are quite disappointing. After the transition, the Hungarian governments did not touch the 1969 regulations on archives for decades. In 1994, the HCC invalidated several passages of the 1969 law relating to the protection of restricted documents, and called on the government to provide wider openness and accessibility in light of the regime change. In 1995, a new law was adopted to satisfy the requirements of the HCC. However, in 2003, the second socialist government created a new provision on the ‘Investigation of the Activities of the Secret Service of the Previous Regime and the Foundation of the Historical Archives of State Security Services’. This law intended to publicize previously restricted documents in order to support academic research on the inner workings of the previous regime and to provide information on political persecutions. In 2017, the third Fidesz government introduced its own modifications on the 2003 law, restricting considerably the scope of the accessible documents. Despite the efforts of the early 2000s to provide transparency, Hungary has been reprimanded by the ECtHR on multiple occasions for prohibiting access to state archives and documents. In recent years, transparency about researching the past has gradually narrowed and historians’ job has become increasingly difficult in accessing sensitive documents.

5.3.5.3 Protection of Fundamental Rights and the Self-Inculpatory and Self-Exculpatory Approaches

The self-inculpatory and self-exculpatory approaches can be discovered behind the memory laws and ostensible measures through their impact on fundamental rights. Self-inculpation drives the introduction of the symbols and genocide denial bans. The aim of these measures entails an opportunity of demonstrating respect and extending protection to the victims of historical atrocities and their descendants. The treatment of these memory laws shows how Hungarian governments are willing to reject standards and requirements of European institutions in favor of victim communities. Problems around the prohibitions originate from these measures being formulated in an inaccurate manner and infringing on freedom of expression and freedom of business for political reasons.

In contrast, the treatment of access to archives exemplifies self-exculpation since the democratic transition, as all subsequent governments engaged in this practice. Historical documents concerning totalitarian regimes, especially communism, are very difficult to access, and despite the misgivings of the HCC, the regulations become ever more restrictive. This happens because relevant political figures today may be implicated in those documents, damaging the rhetoric and credibility of their respective political forces.

1125 The original law: törvényerejű rendelet a levéltári anyag védelméről és a levéltárakról
1127 1995. évi LXVI. Törvény a közzétéveknél, a közlevéltárakról és a magánlevéltári anyag védelméről
1128 2003. évi III. Törvény az elmúlt rendszer titkosszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról, preamble
1129 2017. évi XCIV Törvény az elmúlt rendszer titkosszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról szóló 2003. évi III. törvény és egyes kapcsolódó törvények módosításáról
1130 See for example: Kenedi v Hungary App no 31475/05 (ECHR, 26 August 2009)
1131 As debate on the National Socialist regime and what it means for Hungary illustrates in Section 5.2.2.2
1132 As evidenced by the discussion of the Heineken law in Section 5.3.2.1
Chapter 5
5.4 Case Study Findings

In this chapter, I have examined the effect of Hungarian legal governance of historical memory on the rule of law – on legality, equality before the law, impartiality of the judiciary and the protection of fundamental rights. Firstly, I provided context to the legal governance of historical memory in Hungary, including its conformation to the standards of European institutions. On the surface, many of these standards are replicated in Hungarian legal provisions, with respect to the introduction of a genocide denial ban, support for the victims of mass atrocities and refraining from banning certain organizations. Upon further analysis, the developments of recent years have revealed a tendency towards disregarding certain standards, such as the regulation of archives. In addition, though European institutions have expressed approval of Hungary’s recent memory laws, many are in fact problematic when situated in Hungary’s domestic political context. The rule of law analysis has revealed that the legal governance of historical memory in Hungary shows disturbing tendencies from the perspective of legality, equality before the law, judicial impartiality and fundamental rights protection as well as the presence of the self-inculpatory and self-exculpatory approaches in all these areas.

5.4.1 The Legal Governance of Historical Memory in Hungary vis-à-vis the Selected Rule of Law Elements

Regarding the first rule of law element, legality is affected in three manners by the legal governance of historical memory. First, unpredictable consequences resulting from the formulation of Hungarian memory laws appear in the provisions directed towards dealing with the communist past. The declaratory laws of the 1990s have not brought a true reckoning with the past, and the sweeping nostalgia that surrounded the communist regime in the 2000s has been replaced with aggressive condemnation. While recent laws claim to be honest attempts to come to terms with the past, their means remain controversial from the rule of law perspective. Most of the measures are the creation of the Fidesz governments of the 2010s, having been adopted without proper debate and several are singled out for perpetuating the government’s political vision. The attempted introduction of the Lex Heineken is emblematic of complete uncertainty under the scope of the current law and the formulation of legal provisions satisfying political gain.

Second, the Fidesz government’s inconsistent and arbitrary conduct on the replacing of monuments and the changing street names is equally alarming. The historical narratives seem to be influenced purely by the political situation of the moment, and they are continuously used as justification in foreign policy (the protection of Hungarians beyond the borders), the treatment of refugees (exclusion on the basis of Hungary being a historical defender of Christian Europe), and the vilification of European institutions (equating the EU to the Soviet occupiers and thus the government as the hero reminiscent of the revolutionaries of 1956). This creates a narrative exculpating the Hungarian state of any wrongdoing and provides a sufficient picture of an ‘enemy’ of the people.

The third problem involves the state capture of historical research, museums and education through ostensibly legal reforms, the revocation of funding and the establishment of new institutes loyal to official narratives. This presents a problem for legality, as these measures fall increasingly outside the realm of actual law, and thus present an easier opportunity to control Hungarian historical memory.

Regarding the next rule of law element, equality before the law, the Hungarian minority rights regime has become increasingly selective on the basis of historical narratives as well as the distribution of citizenship for political gain (votes in elections). The protection of national and ethnic minorities in Hungary depends on the time when these groups first arrived settled
in the country, strictly during or before the 19th century. Other minorities, especially if they happen to be non-Christian and arrived later to the country, become targets of hate campaigns initiated by Hungarian governments, resulting in their discrimination domestically as well as non-compliance with international obligations. In turn, Hungarians beyond the borders are given extensive benefits, and their interests are continuously protected even at the price of diplomatic estrangement, by citing special duties of the Hungarian state towards them as a consequence of the 1920 Treaty of Trianon. Equality before the law is significantly affected by ostensibly legal measures as well, providing a basis for further legal provisions.

Another problem regarding equality before the law relates to the general equality of political forces, independent from minority status, an issue appearing during the examination of Article U of the Fundamental Law. The current fundamental law provides the opportunity of detrimental treatment of some political forces due to the pronouncement of the criminal nature of their association with the previous communist regimes.

In the case of impartiality of the judiciary, since 2010, the Fidesz governments gradually increased their influence over local courts. The governmental takeover is most noticeable at the highest levels of judicial authority. The complete panel of both the HCC and the Kúria was appointed via the majority of Fidesz, a fact worrying experts on judicial independence and impartiality. Several judges were forced to retire due to the lowering of mandatory retirement age. The government further established its own authority over Hungarian courts (the National Judicial Office), who can eliminate judges who are considered ‘too reckless’. Consequently, the government has gained even greater control over the judiciary, providing an opportunity to transmit governmental narratives through their verdicts.

The capture of the HCC is made more alarming because the Court has the sole power to determine Article R of the Fundamental Law’s ‘achievements of the historical constitution’. With such stress on the role of the historical constitution in the Fundamental Law, the government introduced a controversial concept to Hungarian constitutional law. The HCC continues to select certain legal concepts as achievements of the historical constitution, while refusing to elevate others to this level. Since the capture of the tribunal, this development may conceivably result in the definition or re-definition of legal concepts suiting the interpretation of those in power. The power of legal concepts can change by linking them to the historical constitution and some concepts may receive less attention because they are not considered as rooted in national history.

Finally, the impact of the legal governance of historical memory is easiest to discover on the last element of the rule of law, the protection of fundamental rights. Punitive memory laws have been introduced on genocide denialism and the public display of totalitarian symbols. The victims of communism enjoy enormous respect in Hungary, as evidenced by the ardent attitude of the government on totalitarian symbols. Hungarian governments across the board are willing to refuse to implement decisions from the ECtHR and oppose the Court’s standing on the fact that punitive measures on communist symbols infringe on the right to freedom of expression. Both the socialist and Fidesz governments repeatedly recommitted themselves towards the protection of the victims of communism. From the perspective of access to archives, the restrictive impact of memory laws is clear, as it becomes increasingly more difficult to access historically sensitive documents in Hungary, particularly infringing on the freedom of research.
5.4.2 The Presence of the Self-Inculpatory and Self-Exculpatory Approaches in the Analysis of the Elements

The self-inculpatory and self-exculpatory approaches are both present in the legal governance of historical memory – carrying both positive and negative connotations. On the positive side, self-inculpation of Hungarian memory laws in criminalizing the denial of the atrocities of the communist regime and the public display of totalitarian symbols offers respect and protection to the victims, even at the price of non-compliance with some requirements of the European institutions. On the negative side, the formulation and implementation of these measures is politically motivated, threatening legality, in particular. Self-exculpation appears in the increasing glorification of Hungary’s Christian past, and in the diminishing emphasis on the state’s responsibility for historical atrocities. These practices lead to arbitrariness in the choice of historical narratives and selectiveness in the protection of minorities and victim communities, threatening equality before the law.

In addition, although the Hungarian government has not yet criminalized dissent with certain historical questions as the Polish government did, mnemonic securitization and memory wars have appeared in bilateral relations and the treatment of minorities. Furthermore, through the capture of institutions (such as research institutions, museums and schools) the work of journalists, professional historians and other citizens have been affected by quasi-memory laws and ostensibly legal measures. The space for free expression of opinion is continuously shrinking, and historical research is overtaken by the government through diminished funding opportunities and the elimination of independent research institutes in favor of new government-funded spaces. All of this creates an official historical narrative prioritizing the voice of the government instead of factual accuracy and historical enquiry. It is clear the use of self-exculpatory, nationalistic and Christianity-based narratives prioritize a factually questionable version of Hungarian history, aggressively asserted through official government rhetoric.1133

5.4.3 Final Remarks

In conclusion, the legal governance of historical memory is the product of the transition to democracy in Hungary, but memory laws were only sparsely adopted before 2010. In the last eight years, the policies of Fidesz reoriented such laws to concentrate on a particular purpose – to finally come to terms with the past.1134 Through deeper analysis, however, it becomes clear that the three Fidesz governments of the 2010s constructed the reorganization of Hungary’s constitutional system around history, resulting in the capture of Hungary’s historical memory. Tomasz Tadeusz Konczewicz has defined memory capture as “a systemic weakening of the inclusive approach to the past, which allows all voices to be heard. It offers a more flattened and one-dimensional explanation of where (the nation) came from and what makes up (its) national identity. “Memory capture” is vindictive: the state ha(s) suffered so much in the past that they are now entitled to a greater respect and recognition for their

1133 These narratives are often interconnected as the Hungarian perception of Christianity is not particularly based on religious doctrines, but rather on the mix of nationalistic narratives. See: Halmai, ‘Fidesz and Faith’ (n 1039)
1134 According to the mission of the Committee of National Memory, it intends to: ‘contribute to the revelation of the losses of Hungarian society and to present the traumas (both individual and collective) of the communist period...’ See at: <https://www.neb.hu/hu/koszonto> accessed 15 June 2020
He formulated his conception with respect to Poland, but it applies to Hungary as well because, as this chapter demonstrated, the governmental control over historical narratives and the implementation of a nationalistic, exclusionary interpretation of the past is prevalent. In fact, the Hungarian government has gone further in memory capture than that of Poland, because (1) Fidesz has possessed power for several years, providing the opportunity to transform the existing system and introduce new measures more extensively. (2) The governments enjoy a continuous supermajority in parliament, enabling measures being pushed through the legislative process without much consultation and opposition.

The Hungarian memory capture is marked by superficial aims to dealing with the past and reinvent the nation. The motivation behind recent memory laws reveals only political gain and opportunism. For example, while the Hungarian government presents itself as the defender of Christianity and Christian European values, it keeps transforming historical narratives in order to suit upcoming political goals. In 2014, Prime Minister Orbán declared his intentions to lead Hungary on the path of illiberal democracy. At that time, he did not define what illiberal democracy might mean for the country. Four years later, he has elaborated much more significantly on Hungary’s new regime. In time, the political language has transformed from illiberal democracy to Christian democracy. By 2018, he declared the intention of creating a ‘new constitutional order rooted in national and Christian foundations’.

Due to their overwhelming supermajority, the three Fidesz governments have not had to consult on or debate memory laws since 2010. This holds especially true for the amendments to the Fundamental Law. The lack of consultation with the opposition or citizens makes the Fundamental Law very one-sided, as the supermajority stripped the opposition from the opportunity to influence the drafting process in any way. The Hungarian regime on the legal governance of historical memory since 2010 has moved beyond the traditional area of statutory memory laws, appearing prominently in the Fundamental Law and ostensibly legal measures. Introducing definitive, albeit questionable, narratives into the constitutional system has added historical interpretation into the entire Hungarian legal system. In addition, the use of ostensibly legal measures enables greater impact of official historical narratives in areas previously unassociated with it: citizenship, minority rights, foreign policy, international obligations, among others. Miklós Könczöl argues that the Fundamental Law manages to ‘keep silent on a number of sensitive issues in order to avoid being divisive, but also to be explicit about matters they considered to be essential for the shaping of citizens’ identity’.

Ultimately, the legal governance of historical memory, through its inclusion and operationalization in the Fundamental Law, statutory memory laws and ostensibly legal
measures, has become the foundation of the control of the Hungarian constitutional order. It asserts an adverse impact on legality, equality before the law, judicial impartiality and fundamental rights protection. This case study further demonstrates the exacerbation of the self-exculpatory approach in the legal governance of historical memory, which, coupled with the deteriorating situation of the rule of law, points to a correlation between them. Therefore, the transformation of the legal governance of historical memory, as well as the introduction of new measures without constraints, especially motivated by self-exculpation, contributes to the backsliding of the rule of law in Hungary.
In Chapter 1, I posed the principal research question as follows: ‘How does the legal governance of historical memory affect the rule of law?’. In Chapter 2, I argued that states regulate historical memory with self-inculpatory and self-exculpatory approaches, and the extent to which these approaches are used matters significantly for how the rule of law is affected. Chapter 3 elaborated on the rule of law as a method of examination because it has become identified as a benchmark in safeguarding democracy and a tool with which political power can be restrained. I undertook to answer this broad question by focusing on two case studies. In Chapters 4 and 5, the analysis on the relationship between the legal governance of historical memory and rule of law in France and Hungary were carried out to demonstrate the relevance of the argument and how the distinction between the self-inculpatory and self-exculpatory approaches, – fairly recently introduced concepts in relation to memory laws, – have become essential due to the employment of the rule of law lens.

The purpose of this chapter is to outline the thesis’s findings. Section 2 highlights the particularities of findings as well as emerging questions, patterns and tendencies on the basis of the national cases of France and Hungary. It reveals how the development of the self-inculpatory and self-exculpatory distinction refines and explains the rule of law as an analytical framework, especially regarding state control over historical memory. Furthermore, I provide the overview of problems the case studies have revealed within each individual rule of law element that has been examined. Finally, Section 3 concludes the thesis with considerations about the future, and how the legal governance of historical memory may be better used in the assessment of the rule of law.

6.1 How Does Legal Governance of Historical Memory Affect the Rule of Law?

In several previous academic endeavors, the legal governance of historical memory has been analyzed until recently merely from a human rights perspective. I have opted for the present thesis structure, building on the rule of law because the human rights perspective lacks an explanatory tool. In particular, it exposes some problems that memory laws cause but cannot disclose the full extent and consequences of the state interfering in historical memory via law. Such analysis of the legal governance of historical memory and human rights should not be abandoned, because it reveals the fascinating dynamic and state priorities in balancing – foremost, although not exclusively – freedom of expression and the rights of others (the victim and minority communities) relating to different historical events. Examining the 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 addition, the rule of law has been operationalized by European institutions and leading scholars as a benchmark to assess and safeguard the democratic health of states. The inclusion of the legal governance of historical memory as an area of the rule of law analysis sheds light on the importance of the rule of law’s substantive interpretation. The use of a substantive conception of the rule of law has become particularly important because some countries, particularly those experiencing rule of law backsliding, tend to refer to a very formal, minimalist interpretation to avoid and reject criticism of their democracies. These states claim the contested nature of the rule of law to reject its use as a democratic benchmark and refuse the inclusion of equality or human rights in rule of law conceptions.\footnote{For example, Judit Varga, Hungary’s Minister for Foreign Affairs, has articulated on multiple occasions how the rule of law is a contested concept and every country has its own interpretations. Prime Minister Orbán has also} This happens despite
the fact that although it still remains a somewhat contested concept, the European institutions and several leading scholars have recently defined the rule of law on very practical terms.\textsuperscript{1141} Selected memory laws, such as the preamble of the Hungarian Fundamental Law and the Polish law of 2018 have been considered during the assessment of the rule of law in individual states, but no detailed analysis has been afforded to a possible contribution of the legal governance of historical memory to the national rule of law backsliding.\textsuperscript{1142} Instead, among indicators of the rule of law, European institutions and leading scholars have examined the situation of the judiciary, the media or the constitution as a whole.\textsuperscript{1143} The legal governance of historical memory should be considered as an area to evaluate the fulfilment of rule of law standards because the case studies of this thesis have revealed how memory laws and ostensibly legal measures may eventually contribute to a situation where the rule of law is either reinforced or weakened.\textsuperscript{1144} In fact, the legal governance of historical memory affects the rule of law significantly, so much that the thesis concludes that satisfactory fulfillment 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

expressed how he finds the EU’s rule of law conception too wide and, in reaction to the Article 7 process initiated by the European Parliament, added that assessments of the rule of law should be carried out by the Member States, not the EU institutions.

Reports in the Hungarian press:
’Rule of Law Assessments are Fine, but only by the Member States, not the EU – says Judit Varga in Brussels’ (16 September 2016) <https://azonnali.hu/cikk/20190916_a-jogallamisag-vizsgalat-oket-ne-az-eu-csinalja-hanem-a-tagallamok-mondta-varga-judit-brusszelben> accessed 15 June 2020;

See further:
Kim Lane Scheppele ‘On Being the Subject of the Rule of Law’ (n 345) 467-469.
János Kornai ‘Hungary’s U-Turn’ (n 345), 35.
On the Polish situation: Bucholc, ‘Commemorative Lawmaking’ (n 19) 85–110.
Halmay, ‘Fidesz and Faith’ (n 1039)
Discussed in Section 2 of Chapter 1
The rule of law is currently experiencing a global renaissance.
often works to the detriment of this essential democratic benchmark. This dissertation has offered and demonstrated a framework to analyze the legal governance of historical memory through the rule of law lens, in order to examine and emphasize the aforementioned developments.
6.2 The Legal Governance of Historical Memory and the Selected Rule of Law Elements in the Case Studies

Chapters 3 and 4 shed light on the similarities and differences between the treatment of the past in France and Hungary. The case studies have found how these states are considered fundamentally different from the rule of law perspective – France as relatively stable and Hungary as backsliding – yet the examination’s results on the impact of memory laws on the selected rule of law elements revealed similar results in multiple areas that have gone largely unnoticed.

Nevertheless, the greatest difference between these states remains the extent to which their governments are able to control the legal governance of historical memory. French governments possess less extensive control, thus the impact on the rule of law remains smaller, whereas the Hungarian governments' capture of historical memory results in a greater effect.

6.2.1 Self-Inculpation and Self-Exculpation: Emerging Patterns and Tendencies from France and Hungary

Chapters 4 and 5 have revealed that – despite care or control, governments almost inevitably have been interfering in the creation of historical narratives and cannot possibly avoid governing their historical memory via law. Western states traditionally approach the legal governance of historical memory with different motivations, depending on the extent to which governments intend to project constructed images and control the narrative around the nation’s historical traditions. The literature has proposed the distinction between self-inculpation and self-exculpation to explore these dynamic approaches. The French and Hungarian cases have determined how this distinction is relevant to the discussion of the legal governance of historical memory. The designation of ‘self’ in the formulation of these two approaches does not necessarily indicate the current government but all its predecessors and the constructed image still lingering about the state’s history.

The examination of France and Hungary has revealed how the opposing nature of this distinction is problematic as both these approaches can result in the introduction of memory laws detrimental to the work of historians, journalists and citizens. Until recently, self-inculpation has been considered beneficial. For example, in Chapter 2, I have cited how Germany is alluded to as an exemplary model in self-inculpation (at least in relation to WWII atrocities). Whereas self-exculpation has been identified as detrimental, for example, Poland and Russia are often cited to demonstrate the hindrances of this mode of memory governance, specifically in relation to punishing historians who are critical of official narratives. However, states can exhibit both self-inculpation and self-exculpation in the legal regulation of different historical issues. The French situation explores how too excessive a zeal in self-inculpatory efforts to recognize mass atrocities as genocides and criminalize their denial can result in an undue influence and chilling effect on the work of historians.

The Hungarian case, for its part, shows how the use of nationalist heroic narratives via memory laws that manufacture and sustain a community myth are not necessarily harmful to researchers, journalists and citizens, but only becomes so when employed as a basis for the discrimination of minorities.

The analysis conducted of the French case demonstrates that governmental control over the legal governance of historical memory remains less pervasive but interference in memory

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1145 This was discussed in the ‘Relevance of Research’ section of Chapter 1
1146 This is discussed in the Concluding Remarks section of both Chapters 4 and 5
1147 See the Concluding Remarks section in Chapter 4 on the French case study
1148 Discussed in the Concluding Remarks section in Chapter 5 on the Hungarian case study
laws or attempts to control official historical narratives still occurs. The state’s approach of self-inculpation appears in the introduction of punitive measures, in the case of WWII atrocities, amounting to the recognition of French responsibility in the Holocaust. Furthermore, French lawmakers from time to time attempt to recognize other historical events such as genocide and ban their denial, leading to protracted conflicts with the historical research community. In contrast, the approach towards colonial atrocities is modelled on self-exculpation.1149

The way historical memory is governed in France exhibits a unique aspect in the extensive involvement of non-state actors in the shaping of such regulation, resulting in less interference from state authorities in the legal governance of historical memory, and a considerable debate of measures which eventually make it through parliament. These non-state actors are usually non-governmental organizations. They either represent various minorities lobbying for recognition and additional memory laws, or they consist of French historians who express hostility towards memory laws, especially if these laws contain criminal sanctions. The aims of these organizations may conflict because lobbying for the introduction of punitive memory laws in order to, for example, penalize the denial of historical atrocities (with the intention of protecting minorities) may lead to self-censorship and a chilling effect on the work of historians.1150 Their interests can further conflict with state authorities (NGOs lobby the state for recognition and push against self-exculpatory memory laws, whereas historians’ organizations oppose punitive memory laws). As a result, state interference, and impact on the rule of law is present but is not overwhelming or comprehensive.

Analysis of the Hungarian situation unveils a different picture. Hungary is often regarded as the black sheep of Europe, but laws singled out and criticized in the Hungarian context (for example, relating to citizenship), are not rejected in the French context.1151

In the last decade, an almost complete capture of historical memory has occurred by successive Fidesz governments, and unfortunately such capture has led to the shrinking of space for independent and pluralist debate about history as well as the strengthening of a self-exculpatory approach to the legal governance of historical memory. The gravity of the situation is exacerbated by the lack of involvement of non-state actors because, contrary to France, they barely participate in the lawmaking process. In addition, the supermajority of the government enables an easy introduction of memory laws.1152

1149 Analyzed in the Equality before the Law section of Chapter 4 on the French case study
1150 This issue is discussed in detail in the Legality section of Chapter 4 on the French case study
1151 Such results are not surprising if one recalls a case cited in Chapter 3, Faurisson v France (1996). The dissent of judges Evatt and Kretzmer highlights the similarity of criticism towards the French genocide denial ban in 1999 and concerns alleviated against the Polish memory law of 2018 due to its effort to silence dissent and criticism of controversial historical issues – how they both intended to impose, to some extent, an official, government-endorsed reading of history and punish those disagreeing with it. Such similarity remains ever more striking considering the general endorsement of the French genocide denial ban by institutions and scholars. The law is hailed as an effort to combat racism and anti-Semitism lingering in French society. Whereas the Polish law encountered condemnation from these same sources, branded as an effort of the state to interfere into the perception of history, employing restrictions on the right to freedom of expression. The French law was inspired by a perceived consensus that genocide denialism immediately equates discriminatory attitudes. The Polish law builds instead on the political belief that people arguing for a pluralist outlook on historical events damages the state’s official historical narratives. Nevertheless, both these measures gain their legitimacy from the state-established narrative around history and governments’ intentions to transfer such narratives to its citizens, including the silence and punishment of those who disagree with the official viewpoint. The most significant difference between the motivation of these two laws is that the Loi Gayssot was inspired by factually accurate consensus (also known as the nature of the Holocaust as a genocide is and its denial is at least unreasonable and most, anti-Semitic and misleading). In contrast, the justification behind the Polish law has been proved to be inaccurate by professional historians (aka, contrary to the law’s suggestion of Polish citizens being blameless in WWII atrocities, actual historical evidence exists disputing this claim).
1152 See the Concluding Remarks section of Chapter 5 on the Hungarian case study
A further difference between the Hungarian and French situations involves the use of the proportionality test in the assessment of punitive memory laws. While the French courts follow the practice of the ECtHR in prioritizing only the Holocaust over the right to freedom of expression. Whereas in Hungary, the interests of the victims of communism and their protection through punitive memory laws is prioritized through legislative and governmental decrees. In both countries, the 2010s brought an increased emphasis on historical traditions. National values strengthen the contribution to the shaping of citizenship and the amount of protection awarded to non-Christian minorities in particular. From this perspective, a self-exculpatory language became prominent, and, in Hungary, evolved into a quasi-authoritarian and exclusionary approach. These practices targeted groups who do not fit the official historical narrative of the government because of their ostensible failure to integrate into the historical traditions of the country. The Hungarian situation leads me to the conclusion that such instrumentalizations of historical memory in the country have contributed to the deterioration of the rule of law.

On the basis of the similarities and differences between the two case studies, some consequences can be drawn in terms of how the legal governance of historical memory affects the rule of 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 be broader 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 an attack and defense 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.\textsuperscript{1153}

The presence of such approaches in France and Hungary supports the conclusion that self-inculpatory policies are less invasive towards the health of democracies, whereas self-exculpation often results in more damage to the rule of law. Furthermore, a self-exculpatory approach to the past has gradually gained increasing traction in states struggling to uphold the rule of law, for example, in Hungary. It should also be mentioned that the formulation of laws displaying self-exculpation is much more reliant on phrases such as ‘protecting the nation’ or ‘protecting the culture’ that display tendencies of aggressive nationalism, authoritarianism and control.\textsuperscript{1154}

The most profound difference between the self-inculpatory and self-exculpatory approaches pertains to their aim. Self-inculpatory arises from public debates which 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.\textsuperscript{1155} 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 can aid in establishing 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.\textsuperscript{1156}

\textsuperscript{1153} This is discussed in the Concluding Remarks section of Chapter 5 on the Hungarian case study
\textsuperscript{1154} See, for example, discussion in the Equality before the Law section in Chapter 5 on the Hungarian case study
\textsuperscript{1155} Discussed in the Concluding Remarks section in Chapter 4 on the French case study
\textsuperscript{1156} This was discussed in the Concluding Remarks section of both Chapters 4 and 5.
Finally, chapters 4 and 5 showed how the legal governance of historical memory affects the rule of law, depending on the presence of national pride and identity in the memory laws. The French and Hungarian situations demonstrate how historical memory and national historiographical traditions are considered very sensitive topics in national politics, and government’s zeal to protect and uphold them can result in the detriment of the rule of law. Memory laws, especially if they are approached with a self-exculpatory outlook, reinforce the imagined community of the nation, evolving beyond the constraints of the state but becoming an essential tool in the symbolic inclusion and exclusion of various groups in national historical traditions. The occasional rejection and backlash to the integratory efforts of the EU and the Council of Europe is often justified by the difference of historical traditions, employing memory laws to further strengthen polarization in society. 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. Each of these problems is revealed through the examination of the selected rule of law elements that are presented in the following sections.

Despite all problems that memory laws pose to the rule of law, they should not and cannot be completely abandoned. Instead, their formulation should strive to remain proportional, avoiding double standards. Better formulated laws help to prevent governments employing inconsistent interpretations of the past to impose controlling, self-exculpatory measures. In consequence, if unchecked, the legal governance of historical memory can easily become the empowering tool of a xenophobic majority. These elaborations on the self-inculpatory and self-exculpatory approaches in the case studies highlight the blurred lines...
between them, and justify this thesis’s development of a more nuanced understanding of how state’s attitudes towards their past may be influenced by memory laws.

**6.2.2 Legality: Democratic Participation in Independent, Pluralist Debates about History**

In Chapter 3, I defined legality as incorporating legal certainty and lack of arbitrariness in the decisions of the executive. With this in mind, each case study examined how legality is affected by memory laws in three different ways: first, the analysis shows how accidental or intentional hierarchical ranking of historical atrocities (either by recognizing their existence or by criminalizing their denial) results in uncertainty for those researching such events. Second, the examination of legality further reveals tendencies to control historical narratives via ostensibly legal measures. The third issue relating to legality highlights how governments transmit the official narratives through state-controlled institutions such as museums, schools and other types of research institutes. For such control, governments arbitrarily select historical events for inclusion in the official narratives, thus creating legal uncertainty for those involved in the research of contested histories. The results show how such state interference hinders pluralist debates about history and may restrict participation in them.

The public acknowledgement of atrocities seemingly remains the most harmless manner of state self-inculpation. Although punitive genocide denial bans can suppress extremist rhetoric and demonstrate the commitment of the state towards the protection of victim communities, their ranking of atrocities results in legal unpredictability. The self-exculpatory approach, for its part, involves the popularization of historical narratives projecting an image about the state which forwards the ideas of a political regime. The codification of the self-exculpatory approach can lead to efforts to discredit, fine or otherwise punish (through criminal sanctions or the elimination of resources) anyone who opposes or debates the official historical narrative.

As demonstrated in Chapters 4 and 5, the legal governance of historical memory affects legality in different ways. The most noticeable puzzle around legality involves the unpredictable consequences facing historical research and the discussion of sensitive historical events. Memory laws, particularly those with criminal sanctions, often diminish legal certainty, and even non-punitive measures can result in unintended confusion around predictability. Furthermore, punitive memory laws often impose severe punishments for genocide denialism. The Holocaust enjoys universal significance whereas the selection of other atrocities singled out for criminal sanctions remains inconsistent. Consequently, the existence of punitive memory laws covering other themes, such as the Armenian genocide, depends on the priorities of different governments.

These considerations lead to the second issue relating to legality, namely the inconsistent selection and recognition of atrocities, revealing a conflict between the priorities of four different actors involved in lobbying for the legal governance of historical memory: NGOs and minorities, historians and the state’s political elite. Non-governmental organizations representing minorities fight endlessly for the recognition and eventual punishment of the denial of mass atrocities affecting their respective groups, including but not limited to, the Armenian genocide, the transatlantic slave trade, etc. Some historians oppose the lobbying for the expansion of punitive memory laws because they perceive them as a threat for their freedom of expression. A further conflict emerges between the political elite and

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1164 This issue is discussed in detail in the Legality section of Chapter 4 on the French case study
1165 Ibid.
1166 See the Concluding Remarks section of Chapter 4 on the French case study
1167 Discussed in the Legality section of Chapter 4 on the French case study
independent historians. Governments often prioritize their own agenda to characterize their state’s official historical traditions and may recognize and punish speech and research opposing such views. Consequently, the attempts of historians to engage with sensitive historical topics can result in jail time, fines or public humiliation.

The final problem stemming from the effect of the legal governance of historical memory on legality relates to how governments attempt to create an official image about the history of the state. In addition to the silencing of independent research, such efforts can take the form of gaining control over the public spaces in which national history is debated, including universities, museums and schools. The debates within these spaces can be influenced by rewriting the history curriculum, opening new research institutes and museums to highlight the selected narratives as well as cutting funding for research of the existing opposition to the official government viewpoint. These techniques are not as direct and/or drastic as introducing punitive memory laws, but can be, nonetheless, more threatening and harmful as their effect remains for longer term and cannot be easily retracted or reversed. All of these aforementioned problems inspire a significant chilling effect for historical research and encourage self-censorship and the avoidance of controversial research topics, thus hampering open debate about sensitive historical issues.

6.2.3 Equality before the Law: Access to Justice and Citizenship

Chapter 3 defined equality before the law as entailing both the requirement of non-discrimination and general equality. The primary problem relating to the way historical memory affects equality before the law revolves around the definition of legal concepts and public policy on the basis of history, particularly the conceptualization and awarding of citizenship in line with national values and national historical traditions. This eventually results in the unequal treatment of minorities. The case studies therefore demonstrate how the definition of minorities on a historical basis can influence their access to justice, citizenship and other basic protections.

The legal governance of historical memory affects equality before the law, both in France and Hungary, for example, through the use of the language of nationalism, national values and historical definitions to award protections to minorities, and in the way citizenship has been constructed and awarded overtime. These tendencies lead to a differentiation between the majority and minorities, with difficulties affecting the access to justice for historically persecuted or disadvantaged groups.

The self-inculpatory treatment of historical memory by the state entails the equal treatment of groups and individuals under memory laws as well as the lack of tailoring memory laws to specific situations. For example, the French Conseil Constitutionnel has weighed the impact of genocide denial bans on the equal application of the law. The court examined whether the French genocide denial ban may create a hierarchy between the atrocities, thus, whether some deniers will imminently not be punished due to the nature of the specific atrocities they negate. However, the Conseil Constitutionnel claimed that the differentiation originates from the racist and anti-Semitic overtones which are specific to Holocaust denial, and concluded that

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1168 This can include the Polish memory law of 2018, but the Hungarian developments of trying to emphasize the state’s lack of responsibility of Holocaust atrocities also qualify as an example. Belavusau ‘The Rise of Memory Laws in Poland’ (n 19) 36-54.

1169 This is analyzed in the Legality Section of Chapter 5 on the Hungarian case study Furthermore: Dovid Katz ‘Is Eastern European ‘Double Genocide’ Revisionism Reaching Museums?’ (2016) 30 Dapim: Studies on the Holocaust 3, 191-220.

1170 Majtényi, ‘A Game of Values’ (n 1151)
therefore, the legislator is allowed to punish it more harshly.\textsuperscript{1171} Legal governance of historical memory encompassing a self-exculpatory outlook brings an example from Hungary, as the official narrative of ‘defending Christian Europe’ justifies the ignorance of international obligations as well as the mistreatment and vilification of refugees.\textsuperscript{1172}

The first aspect of how equality before the law is affected by the legal governance of historical memory relates to the treatment of minorities on the basis of political views and goals. The hierarchical ranking of atrocities can hinder their recognition, while negationists can avoid punishment due to a lack of consensus about some historical events in society. Although, as witnessed in the previous section, punitive memory laws do not necessarily solve this problem, but the encouragement of open debate might discourage negationism and support the experience of persecuted minorities.

Second, memory laws hamper equality by aiming to define which groups may be considered minorities on a historical basis, and by casting national identity around Christianity in opposition to the waves of immigration to Europe. Certain values are upheld as historical traditions in the state, mostly including those rooted in Christian traditions. According to this view, the minorities considered refusing to or being unable to be part of the national historical community can be stripped of protections. A policy area where this tendency can be foremost observed deals with access to citizenship. Some groups may find the naturalization process more difficult, if they are labelled as being unable to assimilate to historical and traditional values.\textsuperscript{1173}

On the other hand, the awarding of citizenship on the basis of national attachment can grant easier access for irredentist groups living outside the state’s border which are historically connected to the ‘mother’ country. Such practice is either introduced to right a historical wrong: for example, Spain and Portugal have been offering access to citizenship to descendants of expelled Sephardi Jews.\textsuperscript{1174} Furthermore, it also reinforces old historical ties with communities outside the borders: for example, Hungary awards easy access to citizenship for ethnic Hungarians who live beyond the borders, especially in the pre-Trianon territories. However, such an approach may well lead to a significant conflict with neighboring states who may interpret these efforts as being part and parcel of a nationalist historical revisionism.\textsuperscript{1175}

\textsuperscript{1171} Discussed in the Impartiality of the Judiciary section in Chapter 4 on the French case study
\textsuperscript{1172} Detailed in the Concluding Equality before the Law section in Chapter 5 on the Hungarian case study
\textsuperscript{1173} See the discussion on Equality before the Law in Chapters 4 and 5
\textsuperscript{1174} Discussed in the Spanish example on Section 2.3 of Chapter 2
\textsuperscript{1175} This is analyzed in the Equality before the Law section in Chapter 5 on the Hungarian case study
6.2.4 Impartiality of the Judiciary: Involvement of Judges in Political Debates about History

Chapter 3 examined judicial impartiality through the interference of judges in historical debates. The aforementioned chapter concluded that such interference may be aggravated by the capture of the judiciary, thus compromising its independence. The case studies also revealed how memory laws give power to judges to pronounce judgments on historical debates.

Analyzing how historical memory is governed and how it impacts the impartiality of the judiciary unveils two principal problems. First, the thesis showed governments’ ability to capture the judiciary and their subsequent influence over the formulation of legal concepts containing a historical basis. Second, the case studies deduced that memory laws enable judges to act as arbiters of history, a responsibility reserved for professional historians, questioning whether in a delicate rule of law situation, such as a state undergoing democratic backsliding, judges can become involved in politicized debates around history, thereby compromising their impartiality. This facilitates judicial capture, and the strengthening governmental control over history.

Memory laws provide judges with an responsibility to shape historical narratives, judgments may reflect the self-inculpatory or self-exculpatory priorities of the government. Consequently, the situation of the judiciary is essential because its capture may influence interpretations of important legal concepts that impact the lives of inhabitants. If the judiciary is fairly free and independent, such as in France, even if memory laws attempt to restrict freedoms in the spirit of self-exculpation, they can be invalidated by the judicial branch. In contrast, the Hungarian case shows how a self-exculpatory interpretation of history creates a situation where legal concepts can be differentiated on the basis of the government’s wishes.1176

The involvement of judges in the legal governance of historical memory inevitably raises the concern about empowering their judicial activism, akin to whether they are expected to act as arbiters of history. Memory laws can provide judges with the opportunity to arbitrate historical disputes, although it ought not to be their role in a liberal democracy with a strong respect for academic freedom and the productions of knowledge based on academic examinations. Therefore, judges’ activities can put them at odds with historians, who should discharge such responsibility.1177

Judges may eventually act as arbiters of history in various manners. On the one hand, memory laws may empower national tribunals to recognize historical events such as genocides or crimes against humanity and possibly consider them under the scope of other punitive memory laws.1178 This process – additional to the aforementioned discussion on the hierarchical ranking of historical atrocities in the legality section – may cause legal burdens on the work of historians. While some memory laws incorporate reliance on the opinion of experts, judges still should not evaluate historical events. Instead, their task in a liberal democracy under a proper rule of law is to appraise existing laws neutrally and impartially.

On the other hand, the effect of the legal governance of historical memory on judicial impartiality can be exacerbated by a governmental capture of the judiciary and a stalemate in public discourse around important aspects of social life. Possessing the power to evaluate historical events or give historical meaning and priority to some legal concept compromises the impartiality of the judiciary and enables its capture by governments to enforce their official

1176 See the Concluding Remarks section of both Chapters 4 and 5
1177 Antoon de Baets, Responsible History (n 505) 24
See also: Carlo Ginzburg, The Judge and the Historian: Marginal Notes on a Late-Twentieth Century Miscarriage of Justice (n 418)
1178 This is discussed in the Impartiality of the Judiciary section in Chapter 4 on the French case study
yet opportunistic narratives. Importantly, this can happen through both self-inculpatory and self-exculpatory policies and measures, as shown in Chapter 5 on Hungary.

6.2.5 Protection of Fundamental Rights: Balancing Free Speech and Human Dignity

Chapter 2 outlined the protection of fundamental rights through the selection of three particular rights – freedom of expression, freedom of assembly and association and the notion of human dignity. The case studies examined the balancing of these rights and concepts. Their results demonstrate the priorities of states regarding free speech and assembly versus the dignity of victim and minority communities.

The introduction and subsequent evaluation of memory laws may result in tailoring a balancing exercise to fit the established historical narrative through balancing fundamental rights including freedom of expression and the rights of others. In these terms, the problems in fundamental rights protection trigger deficiencies in legality as well because restrictions on such rights can create legal unpredictability. Therefore, the problem of balancing rights can strengthen state control on national narratives and aid in shrinking the space for independent, pluralist and historical debates.

In the process of fundamental rights protection, the effects of self-inculpation and self-exculpation are effortlessly found. In fact, some punitive memory laws are either accepted and validated or rejected on the basis of these approaches. Thus, genocide denial prohibitions, despite their criminal sanctions, are considered to be an acceptable restriction on the freedom of expression in a democratic society, and reflect the self-inculpatory outlook. Whereas other punitive laws whose introduction is inspired by self-inculpatory motivations, such as the prohibition on communist symbols in Hungary is not considered tolerable in a democratic society. Yet, restricting freedom of expression to silence opposition and criticism of official historical narratives, occurring, for example, in Poland, Russia and Ukraine is repudiated due to its adverse impact on the right to freedom of expression. Therefore, self-exculpatory punitive memory laws are generally rejected in a democratic society.

The way the legal governance of historical memory affects the protection of fundamental rights is particularly vivid whenever punitive memory laws are introduced. Different fundamental rights, including freedom of expression, freedom of assembly as well as human dignity are inevitably affected by memory laws, both in positive of negative ways.

First, regarding the right to freedom of expression, controversy emerges around the punishment of negationism. Although freedom of expression is considered as one of the most foundational democratic values, its restriction as a result of genocide denialism has been extensively accepted in democratic societies since the late 1990s. In contrast, the denial of other mass atrocities, such as the Armenian genocide, have not been as widespread, and become the subject of continuous debates on whether freedom of expression should protect other events from historical negationism. While Holocaust denialism has been a political mainstay in the continental legal tradition since the end of 1980s, its punishment has been regularly questioned in academic circles, as the loss of freedom of expression has been justified with a connection between racism and negationism. Curbing the right freedom of expression to eliminate

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1179 Detailed in the Impartiality of the Judiciary section in Chapter 5 on the Hungarian case study
1180 Ibid
1181 Discussion in Section 6 of Chapter 1
1182 This problem is analyzed in Section 8 of Chapter 1 as well as in the Protection of Fundamental Rights section in Chapter 4 on the French case study
denialism in line with self-inculpatory policies is also problematic due to the potential facilitation of more extreme and exclusionary discourses.\footnote{See discussion of Section 6 in Chapter 1}

Moreover, protecting the fundamental right to freedom of expression in independent research from the interference of memory laws presents other important challenges. Contrary to genocide denialism, whose prohibition is almost universally accepted (at least politically), laws intending to punish dissent on historical questions are considered undemocratic. Restricting the research of sensitive historical topics has been rejected around Europe and has been identified as a sign of authoritarian tendencies, because these regimes usually aim to silence their critiques, that is, those who question the official historical narratives.\footnote{Discussed in Chapter 1}

The final issue regarding freedom of expression is connected to the previous discussion and concerns the access to archival material around sensitive historical issues. The restriction of such access can also signal authoritarian tendencies, although it occurs in reasonably healthy democracies as well, because the historical traditions and image of the nation are often prioritized by non-authoritarian governments.\footnote{See discussion on archives in Chapters 3 and 4 on the French and Hungarian case studies}

Other affected rights include those relating to freedom of assembly and association. Organizations espousing extreme right-wing ideologies can be banned under national law with the legal and political backing of European supranational institutions.\footnote{Discussion in Section 6 of Chapter 1} This can lead to contradictions, since the restriction of organizations extreme left-wing views can often operate without restrictions in democratic states. A double standard between safeguarding the memory of the Holocaust, on the one hand, and the restriction of freedom of assembly and association, on the other, is present.\footnote{Furthermore: Natalie Alkiviadou, The Far Right in International and European Law (Routledge 2019)}

Finally, the protection of minorities and the recognition of their heritage constitutes an important element of governance in most European states, including France and Hungary. Holocaust survivors are particularly protected by memory laws. In contrast, in situations where memory laws favor the protection of freedom of expression, such as in the case of the Armenian genocide, members of these minorities are not protected from the disparaging effects of negationism. However, even without the criminal sanctioning of genocide denialism, on several occasions, recognition via non-punitive memory laws can signify a symbolic step in the protection of the minority and the dignity of its members.

In summary, the effect of the legal governance of historical memory on the protection of fundamental rights often depends on the result of a balancing exercise. With the exception of Holocaust denial, which remains universally condemned throughout the EU, in all other situations, the right to freedom of expression, assembly and association are balanced against the rights of others (referring often to respect for the human dignity of victims and minorities, despite human dignity not being codified as a fundamental right). This balancing exercise produces either the endorsement or rejection of different punitive memory laws. As evidenced by the emerging double standard in the treatment of mass atrocities, the balancing may cause inconsistencies in the assessment of the legal governance of historical memory.\footnote{See the analysis of cases from the European Court of Human Rights in Section 7 of Chapter 1}

\footnote{This is discussed in the Protection of Fundamental Rights section of both Chapters 4 and 5}
6.3 The Legal Governance of Historical Memory and the Rule of Law: The Road Ahead

The final remarks of this dissertation consider the extent to which the legal governance of historical memory affects the rule of law, in light of how neglected this area of lawmaking remains in rule of law assessments. In the Hungarian case, particularly, I have found that the capture of historical memory through law by the governments of the last decade has contributed to rule of law backsliding. This gives the opportunity for researchers and institutions analyzing the fulfilment rule of law standards in Europe to take the legal governance of historical memory into account in their evaluations.

The European institutions have yet to study and consider the relationship between the legal governance of historical memory and the rule of law in any detail. For instance, the European Parliament warned on 12 September 2018 of the existence of a clear risk of serious breaches to EU fundamental values in Hungary. Its report provided a factual explanation for the state’s rule of law backsliding, but the legal governance of historical memory was not among the reasons and contributors to this unfortunate development. To help understand and ultimately counter these pernicious trends, the EU should incorporate the legal governance of historical memory into all rule of law assessments.

The recent crisis of the rule of law backsliding in some EU Member States could justify a stronger position on what may be incorporated to memory laws and commemorative practices, despite the accorded respect to national identity. In Hungary and Poland, both prominent examples of backsliding, the deterioration of the rule of law has been accompanied by a certain transformation and centralization of the legal governance of historical memory. In consequence, the European institutions ought to carefully examine their perspective on the legal governance of historical memory and discover their limits. Since the legal governance of historical memory can be used as a tool to aid and rationalize the deterioration of the rule of law, if the Union itself acts within its competences, it could be justified to have more influence on interfering in the memory policies of Member States.

It must be added that some aspects of the transformation of historical narratives have been scrutinized in the Hungarian and Polish contexts. However, in light of the concerns over the national situation of the rule of law, the legal governance of historical memory as a whole has not been considered as an especially relevant factor. In the Hungarian case, historical memory appears prominently in the project of constitutional reform, in initiatives to rename streets, in the replacing of certain public monuments, and in the planning of a historical education. Reforms in all these areas commenced immediately after Fidesz’s victory in the 2010 elections. Although the previous governments also introduced their own laws on historical memory, the transformations initiated by Fidesz are exceptionally well-organized and centralized. In the Polish case, due to the lack of a supermajority, the PiS takeover of historical memory happens at a slower pace, but the path of the ‘Polish Holocaust law’

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1190 Several scholars have deliberated on what the EU could possibly try to combat Member State backsliding (albeit not in the area of historical memory). See for example: Jan Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’ (n 406): Closa and Kochenov (eds), Reinforcing Rule of Law Oversight (n 350).

1191 For example, the Venice Commission assessed several laws of Hungary, including the Fundamental Law, its Fifth Amendment and the Law on Nationalities. All of these provisions are memory laws. Although the Venice Commission flagged the worrisome developments regarding historical memory in these laws, simultaneously declaring its concerns over the national situation of the rule of law. However, the Commission did not establish a connection between the legal governance of historical memory and rule of law backsliding.
demonstrates growing politicization in the legal governance of historical memory. Unlike in Hungary, PiS was not able to carry out a constitutional reform, which led the government to resort to criminal law in order to assert its official version of history. This law aimed at punishing individuals, including researchers, who disagreed with it. The president of Poland signed the law despite widespread protests, but sent it to the Constitutional Court for review immediately after signature. Furthermore, PiS initiated a street renaming campaign in 2016 under the pretense of ending the decommunization process. Apart from these instances, the legal governance of historical memory has been strikingly absent from research addressing rule of law backsliding. There is no guarantee that even states with robust rule of law standards can guarantee democratic, pluralistic and free legal governance of historical memory. To date, state interference in memory laws and the legal governance of historical memory have not been identified as an area in assessments of the rule of law. Instead, such assessments have concentrated on identifying various other areas signaling its deterioration, including disabling the judiciary, capture of the media, capture of some institutions (such as the public prosecutor) to prevent future reprisals against governmental wrongdoing and changing electoral laws. Although Hungarian and subsequent Polish situations have spurred various European institutions and several legal scholars to develop certain criteria to determine the level of deterioration of the rule of law, these criteria have not yet considered the legal governance of historical memory. Among the scholars who have considered the issue of rule of law backsliding, Kim Lane Scheppele and Laurent Pech deserve mention for having identified the governmental capture of several key institutions, the elimination of dissenting views and the reformulation of election laws as signs of rule of law backsliding. For his part, Wojciech Sadurski, assessing the Polish context, identified rule of law backsliding in the disabling of the judiciary, takeover of the media, attacks against non-governmental organizations (NGOs), transformation of the electoral law and the restriction of several fundamental rights (such as freedom of expression and freedom of assembly). Renáta Uitz flagged, in the Hungarian context, interference in constitutional reform, the targeting of NGOs, the curtailment of academic freedom and the independence of higher education institutions and the transformation of the judicial system (specifically the forced early retirement of judges) as signs of rule of law decline. The latest list on the legal and policy areas indicating deterioration of the rule of law is provided by the European Parliament; in preparation for its final vote on Hungary and Article 7 of the Treaty on the European Union in September 2018. The report, prepared by Member of Parliament Judith Sargentini, notes several areas where backsliding of the rule of law can be observed, such as the functioning of the constitutional system; the independence of the judiciary; corruption; privacy and data protection and the protection of certain fundamental rights.

Amendment to the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation

7 Law of 1 April 2016 on prohibiting propagation of communism or other totalitarian regime through names of buildings, objects, and public facilities (the Journal of Laws of the Republic of Poland, 1 June 2016. With amendments from 22 June 2017 and 14 December 2017)

On street renaming in Poland, see Wójcik and Belavusau, ‘Street Renaming after the Change of Political Regime’ (n 290)

Discussed in the Concluding Remarks section in Chapter 4 of the French case study


Pech and Scheppele, ‘Illiberalism within’ (n 947) 8-9.

Sadurski, ‘How Democracy Dies (in Poland)’ (n 22) 17-64;

Wojciech Sadurski, Poland’s Constitutional Breakdown (OUP 2019)

Uitz, ‘Can You Tell When an Illiberal Democracy Is in The Making?’ (n 944) 285-288

Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))
Due to the observations of this thesis, the impact of memory laws in France and Hungary on rule of law elements, coupled with the presence of serious backsliding in one of these cases, the legal governance of historical memory should play a role in the assessment of the rule of law in specific states. Because, if such considerations remain neglected, the legal governance of historical memory can lead to the capture of historical memory, as the Hungarian case study demonstrates. The Hungarian situation further reveals how a systematic re-organization of memory laws can impact legal certainty, increase arbitrariness and adversely affect fundamental rights protection. As the legal governance of historical memory’s effect on the rule of law proved to be fairly significant in both the French and Hungarian contexts, as well as being present in other states (such as Poland, Russia and even Spain), it would be beneficial if rule of law assessments consider the perspective of the legal governance of historical memory.

In conclusion, the rise of the legal governance of historical memory has begun with the intention to fight extremism in the 1990s through the introduction of genocide denial prohibitions. By the late 2000s, the instrumentalization of historical memory via law has resulted in memory wars and mnemonic securitization, particularly in Central and Eastern Europe. Due to the interference of law in history, instead of historians, governments and judges have started to act as the guardians of national history. Thus, they have employed memory laws as tools in the abuse of both the noble and the dark past. The instrumentalization of historical memory has strengthened narratives rooted in national values, be they self-exculpatory, Christianity-based and populist or self-inculpatory, liberal and democratic. In Hungary, whose current government has embraced the self-exculpatory, Christianity-based populist narrative of national history, such approach has been accompanied by rule of law backsliding.

Therefore, the legal governance of historical memory should be an area of consideration in academic or institutional assessments whether states fulfil rule of law standards. Interference of law into historical memory, while unavoidable, if too invasive, makes a poor imitation of historical debate. Instead, it ‘omits facts, neglects contexts and simplifies the plots because national narratives are less about facts than about justifying them’. That is why the legal governance of historical memory is a crucial area to defend democratic values like the rule of law, especially in times when they are under such an expansive attack.

The exact categories cited in the report are: fundamental rights include freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities, the fundamental rights of migrants, asylum seekers and refugees and social rights.


1201 Stefan Couperus and Pier Domenico Tortola, ‘Right-Wing Populism’s (Ab)use of the Past in Italy and the Netherlands’ (2019) 4 Debats. Journal on culture, power and society (special issue 2), 105-118.

1202 Chiara De Cesari and Ayhan Kaya, European Memory in Populism: Representation of Self and Other (Routledge, 2020) 213

1203 Harris ‘What is New about “Eastern Nationalism”?’ (n 1154) 350.
International Instruments and Case Law

Council of Europe

Statute of the Council of Europe, 1949

European Convention on Human Rights, 1950

Treaty N. 189 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 2003


Joint interim opinion on the law of Ukraine on the condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their Symbols (CDLAD(2015) 041), adopted by the Venice Commission at its 105th Plenary Session, Venice, 18-19 December 2015


Opinion on the provisions of the law on education of 5 September 2017 which concern the use of the state language and minority and other languages in Education, adopted by the Venice Commission at its 113th Plenary Session, 8-9 December 2017

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Non-Punitive

Arrêté du 11 mars 1993 portant création d'un comité d'histoire du ministère de la culture

Loi n° 93-915 du 19 juillet 1993 portant extension du bénéfice de la qualité de pupille de la Nation et modifiant le code des pensions militaires d'invalidité et des victimes de la guerre

Loi n° 94-488 du 11 juin 1994 relative aux rapatriés anciens membres des formations supplétives et assimilés ou victimes de la captivité en Algérie

Loi du 18 octobre 1999 relative à la substitution, à l'expression « aux opérations effectuées en Afrique du Nord », de l'expression « à la guerre d'Algérie ou aux combats en Tunisie et au Maroc »

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Loi du 23 février 2005 portant reconnaissance de la nation et contribution nationale en faveur des Français rapatriés

Décret n° 2005-547 du 26 mai 2005 instituant une journée nationale d'hommage aux « morts pour la France » en Indochine, le 8 juin de chaque année

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Loi n° 2012-273 du 28 février 2012 fixant au 11 novembre la commémoration de tous les morts pour la France
Loi n° 2012-1361 du 6 décembre 2012 relative à la reconnaissance du 19 mars comme journée nationale du souvenir et de recueillement à la mémoire des victimes civiles et militaires de la guerre d’Algérie et des combats en Tunisie et au Maroc

Décret n° 2012-1447 du 24 décembre 2012 portant dissolution de la Maison de l'histoire de France

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Loi n° 2015-892 du 23 juillet 2015 autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement des États-Unis d'Amérique sur l'indemnisation de certaines victimes de la Shoah déportées depuis la France, non couvertes par des programmes français

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Failed Proposals

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Proposition de loi 479 tendant à modifier les articles 24 bis et 48-2 de la loi du 29 juillet 1881 sur la liberté de la presse, de façon à interdire la contestation de la réalité de tous génocides et crimes contre l’humanité, 18 décembre 2002

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Proposition de loi 1643 sanctionnant la négation du génocide arménien, 8 juin 2004

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Intended Non-Punitive

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Hungary

Memory Laws

Fundamental Law provisions

National Avowal

Articles D, R and U of Foundation

Punitive

Criminal Code Article 269/B (pre-2012) or 335 (post-2012) and 269/C (pre-2012) or 333 (post-2012)

Non-Punitive

1990/XXVIII törvény az 1956 októberi forradalom és szabadságharc jelentőségének törvénybe iktatásáról

1991/XXV törvény a tulajdonviszonyok rendezése érdekében, az állam által az állampolgárok tulajdonában igazságtalanul okozott károk részleges kárpótlásáról

1992/XXIV a tulajdonviszonyok rendezése érdekében, az állam által az állampolgárok tulajdonában az 1939. május 1-jétől 1949. június 8-ig terjedő időben alkotott jogszabályok alkalmazásával igazságtalanul okozott károk részleges kárpótlásáról

1992/XXXII törvény az életüktől és szabadságuktól politikai okból jogtalanul megfosztottak kárpótlásáról

1994/LXXXI törvény az Ideiglenes Nemzetgyűlés megalakulása emlékének megőrkítéséről

51/1995 (V. 15.) OGY határozat a II. világháborús nemzeti ellenállási mozgalom emlékének megőrkítéséről

1995/LXVI törvény a köziratokról, a közlevéltárakról és a magánlevéltári anyag védelméről

1996/XXX törvény a honfoglalás 1100 éves évfordulójának emléknapjáról

1996/LVI Nagy Imre mártírhalált halt magyar miniszterelnök és mártírtársa emlékének törvénybe iktatásáról

1020/1999 (II. 24.) Korm. határozat a Közép- és Kelet-Európai Történelem és Társadalom Kutatásaért Közalapítvány létrehozásáról

2000/I törvény Szent István államalapításának emlékéről és a Szent Koronáról

267/2000 (XII. 26.) Korm. rendelet az egyes, tartós időtartamú szabadságelvonást elszenvedettek részére járó juttatásról
2001/XVII törvény az ország szabadsága visszaszerzésének jelentőségéről és a magyar szabadság napjáról

2001/LXIII törvény a magyar hősök emlékének megőrkítéséről és a Magyar Hősök Emlékünnapéről

2001/LXII törvény a szomszédos államokban élő magyarokról

2003/III törvény az elmúlt rendszer titkosszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról

2005/XXXIX törvény „Civitas Fortissima” - Balassagyarmat, a legbátrabb városról

H/6288 Országgyűlési határozati javaslat az 1932-33. évi nagy ukrajnai éhínség 70. évfordulójára

2006/V törvény a cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról

2008/LXIV törvény „Communitas Fortissima” - Kercaszomor a legbátrabb faluról

2010/XLV a Nemzeti Összetartozás melletti tanúságtételről

2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról

2010/CLXXXV törvény a médiaszolgáltatásokról és a tömegkommunikációról

2011/CXXXVI törvény „Civitas Invicta” - Szigetvár, a leghősiesebb városról

1064/2011 (III. 23.) Korm. határozat Az 1956-os Magyar Forradalom Történetének Dokumentációs és Kutatóintézete Közalapítvány megszüntetéséről

2011/CCIII törvény az országgyűlési képviselők választásáról

2011/CLXXIX törvény a nemzetiségek jogairól

2011/CLXI törvény a bíróságok szervezetéről és igazgatásáról

2011/CLXXXI törvény a civil szervezetek bírósági nyilvántartásáról és az ezzel összefüggő eljárási szabályokról

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88/2012 (XII. 12.) OGY határozat a magyarországi németek elhurcolásának emléknapjáról

2012/CLXVII egyes törvényeknek a XX. századi önkényuralmi rendszerekhez köthető elnevezések tilalmával összefüggő módosításáról
2012/XCIII törvény a járások kialakításáról, valamint egyes ezzel összefüggő törvények módosításáról

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373/2013 (X. 25.) Korm. rendelet A VERITAS Történetkutató Intézet létrehozásáról

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Pre-1990

1896/VII Törvény a honalapítás évezredes emlékének törvénybe iktatásáról

1898/V Törvény Az 1848. évi törvények megalkotása emlékének ünnepléséről

1906/XX Törvény II. Rákóczi Ferencz és bujdosó társai hamvainak hazahozataláról

1907/XXVII Törvény a nem állami elemi népiskolák jogviszonyairól és a községi és hitfelekezeti néptanítók járandóságairól

1917/I Törvény Dicsőült Első Ferencz József király emlékének törvénybe iktatásáról

1922/XXIX Törvény a soproni népszavazás emlékének törvénybeiktatásáról

1927/XXXII Törvény Kossuth Lajos örökördemeinek és emlékének törvénybeiktatásáról

1948/XXIII Törvény az 1848/49. évi forradalom és szabadságharc emlékének

Proposals

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2011/CLI törvény az Alkotmánybíróságról

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Other Countries

Albania
Article 74a of the Criminal Code

Andorra
Article 458 of the Criminal Code

Belgium
Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale
Bulgaria
Article 419a of the Criminal Code

Cyprus
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Czech Republic
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Gesetz zur Änderung des Strafgesetzbuches der Strafprozessordnung und anderer Gesetze (28 Oktober 1994)

Greece
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Italy
Law 115/2016 (modifies Article 3, para. 3bis of Law 654/1975 by introducing the aggravating circumstance of denialism)

Latvia
Article 74/1 of the Criminal Code

Liechtenstein
Article 283 of the Penal Code (amended in December 1999)

Luxemburg
Loi du 19 juillet 1997 complétant le code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme

Malta
Article 82b of the Criminal Code

Montenegro
Article 370/2 of the Criminal Code

North Macedonia
Article 407a of the Criminal Code

Poland
2018 Amendment on the Polish Institute of National Remembrance - Druk nr 806 Rządowy projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej
Romania  
Law 217 of 23 July 2015  

Russia  
Laws 374-FZ and 375-FZ of 29 April 2014  

Slovenia  
Article 297 of the Criminal Code  

Switzerland  
Criminal Code Article 261bis  

Spain  
Article 607/2 of the Criminal Code  
Ley 57/2007 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  

Turkey  
Article 301 of the Turkish Criminal Code  

Ukraine  
Law 317-VIII: ‘On condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols’  
Law 314-VIII: ‘On the legal status and honoring the memory of fighters for Ukraine’s independence in the twentieth century’  
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Summary

The Legal Governance of Historical Memory and the Rule of Law

The thesis demonstrates that state-based instrumentalizations of history through law and ostensibly legal measures have an impact on the rule of law. Ever since memory laws were adopted in Europe during the early 1990s to stem Holocaust denialism, their breadth has expanded considerably. Increasingly, memory laws have been resorted to by governments to impose interpretations of historical events, that impact minorities, influence history education and even shape citizenship on the basis of historical values and legacies. Since the 2010s, some governments have taken near complete control over the legal governance of historical memory and have used pervasive memory laws to disseminate historically inaccurate and revisionist narratives about past events, including World War II. In addition, these laws often punish those who challenge such narratives or hamper the work of dissenters.

Until now, academic scholarship has assessed the memory laws of the last three decades through the lens of fundamental rights, by demonstrating, for example, how these laws may restrict the right to freedom of expression. However, as nationalist, populist and authoritarian regimes increasingly engage in the legal governance of historical memory, many areas of governance have become affected by mnemonic regulation. Consequently, the use of fundamental rights as the sole analytical framework to understand and rationalize the problem of memory laws has become insufficient. To understand and analyze the full implications of memory laws and their use, this dissertation employs the broader lens of the rule of law.

In addition to using the rule of law to measure the effects of memory laws, the dissertation also expands on the understanding of the legal governance of historical memory by including ostensibly legal measures within its scope. The analysis of these elements shows a correlation between states’ treatment of their past and rule of law decline. The thesis illustrates these processes through case studies on France and Hungary, which are chosen to show the range of positive and negative effects of memory laws on the rule of law. Ultimately, the thesis intends to illustrate how the legal governance of historical memory is a neglected area where rule of law deterioration can and should be traced.

Chapter 1 – General Introduction: States’ Treatment of Their Past and Its Effect on the Rule of Law

Chapter 1 introduces and defines the main concepts which the thesis engages with, namely, the legal governance of historical memory and the rule of law. The chapter also outlines the problématique, which takes the parallel between the rise of memory governance and rule of law deterioration in Europe as its starting point. The resulting discussion shows that this parallel is under-researched, given that previous scholarship has focused almost exclusively on how memory laws affect fundamental rights.

Following the conceptual introduction of the thesis, the chapter introduces the research question, which asks how the legal governance of historical memory affects the rule of law. The answer to the question, it is argued, is dependent on the approaches to history resorted to by states. Two such approaches have been identified in the state-of-the-art scholarship: self-inculpation and self-exculpation. These approaches reflect opposing motivations towards the way history is governed via law: self-inculpation has been perceived as embracing accountability and the rights of victims, whereas self-exculpation has become synonymous with historical selectivity and arbitrariness. The self-inculpation/self-exculpation paradigm
provides the starting point for the thesis to examine how the legal governance of historical memory can affect the rule of law.

The latter half of the chapter introduces the relevance and topicality of the two case studies used to answer the research question and demonstrate the argument: France and Hungary. As Member States of both the Council of Europe (CoE) and the European Union (EU), France and Hungary are influenced and bound by pan-European developments in the legal governance of historical memory. The chapter details how the judgments of the European Court of Human Rights have shaped standards regarding national memory laws, as well as how EU institutions have created a memory framework which Member States are obliged to conform to. The chapter finally explains how the different constitutional contexts, historical experiences and rule of law situations in France and Hungary justifies their analysis as case studies for the thesis.

Ultimately, and as illustrated by the case studies, the thesis shows that self-inculpation and self-exculpation can have similar outcomes, both positive and negative. The thesis therefore proposes expanding the understanding of these two approaches in this chapter, which concludes with a description of the dissertation’s structure.

Chapter 2 – Scope of Research: From Memory Laws to Legal Governance of Historical Memory

Chapter 2 charts the expansion of memory governance from the 1990s to the 2010s by following its progression from issue-specific laws to wide-ranging policies. The chapter traces this problematic evolution of memory laws beginning with their ambiguous relationship with fundamental rights. The chapter argues that these unresolved ambiguities culminated in the harnessing of memory laws as instruments of authoritarian and populist politics in the 2010s.

In order to explain this phenomenon, the chapter offers a definition of memory laws and presents their taxonomy. The chapter first examines the terminology of memory laws developing from the early 1990s into the 2010s. It then expands on the definition of self-inculpatory and self-exculpatory approaches through country-specific examples.

The chapter then identifies the sources that the thesis relies on by identifying a taxonomy of the legal governance of historical memory. The sources include mnemonic constitutionalism (that is, the way history is governed through national constitutions), memory laws (namely, rules legally prescribed by governments, ranging from criminal law to administrative acts, regulations and decrees regulating historical discourse) and ostensibly legal measures (that is, political debates and policy decisions leading to or stemming memory laws). As the dissertation utilizes sources beyond the strictly legal, it defines the legal governance of historical memory broadly in order to engage with the wide variety of legislative, policy and regulatory materials.

Chapter 3 – Analytical Framework: The Rule of Law in Europe

Chapter 3 outlines how the rule of law operates as the analytical framework of the thesis. This framework offers the first comprehensive analysis of the legal governance of historical memory through the rule of law lens. The necessity to use such a framework is further justified due to the evolution from memory laws to the more expansive legal governance of historical memory. Thus, and commensurately, this chapter expands from the traditionally employed human rights framework to the rule of law lens.

First, the chapter identifies rule of law conceptions introduced by scholars as well as international and non-governmental organizations in order to identify the doctrinal and institutional elements of the rule of law. Throughout this analysis, the chapter observes that the
rule of law has evolved into a benchmark of a healthy democracy through substantive concepts such as equality, fundamental rights and justice. During the 2010s rule of law crisis in certain European countries, however, some states rejected substantive rule of law conceptions to avoid criticism. To assess the role of memory laws in the aforementioned crisis, the chapter endorses the contemporary understanding of the rule of law in its substantive rather than its formal conception.

Second, relying on the works of European institutions and scholars, the chapter identifies four rule of law elements: legality, equality before the law, impartiality of the judiciary and the protection of fundamental rights. These elements are used to analyze the legal governance of historical memory in France and Hungary, demonstrating how the impact of memory laws and associated measures appear in these two countries. These four elements are then defined. According to the identified framework, legality involves the examination of legal certainty and the prohibition of arbitrariness in the decisions of the executive power. Equality before the law examines the notion of general equality and the non-discrimination of minorities. Further, impartiality of the judiciary focuses on how judges may be involved in historical debates and whether it is an appropriate task to do so by the judicial branch. The protection of fundamental rights is examined through the lens of the right to freedom of expression, freedom of assembly and the concept of human dignity.

Finally, the chapter outlines how the four rule of law elements guide criteria in the case studies of France and Hungary. It details how memory laws can both strengthen and undermine foreseeable consequences to the laws and arbitrary decision-making by states and explains how such laws can work to the advantage or detriment of minorities. The chapter also examines how memory laws may provide power to judges to unjustly interfere in historical debates. Lastly, it outlines how memory laws can be used to balance freedom of expression and assembly with human dignity.

Chapter 4 – Case Study: The Legal Governance of Historical Memory and the Rule of Law in France

The focus of Chapter 4 is the case study of France. This country is analyzed for several reasons, including its pioneering tradition of introducing memory laws around topics such as genocide denialism and colonial atrocities. The chapter highlights the impact of the legal governance of historical memory on the rule of law in a state where the rule of law is considered, by scholars and European institutions, as quite stable and robust.

The first part of the chapter analyzes the national context of the legal governance of historical memory in France. The sources of French memory governance and relevant case law on which the subsequent rule of law analysis is built are summarized. The chapter then identifies that memory laws of the 1990s and 2000s and the judgments of the Conseil Constitutionnel are the most influential sources to be considered in the French context. However, in France, mnemonic constitutionalism is less present among the memory governance sources. The political and societal context affecting the legal governance of historical memory in the country is also discussed. The chapter identifies the active role that French historians and broader civil society play in either supporting or opposing new and existing memory laws.

The second part of the chapter conducts with the rule of law analysis, demonstrating how the legal governance of historical memory in France affects the four rule of law elements identified in Chapter 3. In short, legality is foremost affected through the arbitrary selection of the legislator regarding which historical event may be recognized as genocide, and whose denial may be penalized. For example, the French parliament has recognized old atrocities as genocide, such as the massacre in the Vendée in the 18th century - far predating the creation of
genocide as an international legal concept. As a consequence, such laws create unpredictable and unforeseeable consequences for researchers and journalists who engage with sensitive historical issues. Equality before the law is also affected through the shaping of French citizenship. Citizenship applications may be rejected due to lack of assimilation, which is increasingly reliant on the secular value of the laïcité, which has been identified by French governments as a historical value and an aspect of national heritage. In relation to judicial impartiality, French memory laws provide extensive opportunities for judges to rule on historical debates. Judges may act en lieu of historians and their impartiality becomes crucial to their ability to proclaim their verdicts. However, as the judiciary is considered to be fairly independent in France by European institutions, the judgments of French courts have not truly transmitted any approach of the state towards the past. With regard to the final element of the rule of law, French memory laws have attempted to balance freedom of expression and assembly with protection of human dignity and often prioritize free speech over the sensitivity of victim communities. The Conseil Constitutionnel, for instance, identifies the protection of free speech as necessary in a democratic society and the rights of others – the protection of the victims’ dignity – cannot trump this foundational democratic value.

In conclusion, the chapter finds that both the self-inculpatory and self-exculpatory approaches are present in the memory laws affecting the rule of law in France. Whereas France’s World War II-related past tends to be treated by governments with self-inculpation, citizenship regulations and laws governing the colonial past tend to prioritize national glorification and self-exculpation. The chapter concludes that the nature and extent to which the legal governance of historical memory affects the rule of law in France depends on the use of the self-inculpatory and self-exculpatory approaches. However, due to the involvement and opposition of historians and civil society as well as the satisfactory fulfilment of rule of law standards in the country, the occasional invasive forays by French governments into the legal governance of historical memory have been significantly mitigated.

Chapter 5 – The Legal Governance of Historical Memory and the Rule of Law in Hungary

Chapter 5 focuses on Hungary and is structured in the same way as the preceding French case study. The mirroring structure serves to demonstrate the similarities and differences between these two countries in their historical experiences and rule of law situations. Similar to France, Hungarian memory laws engage with the legacy of World War II but focus also on the country’s past communist regime. The chapter sheds light on the impact of the legal governance of historical memory and the rule of law in a state which, according to scholars and European institutions, currently experiences a deterioration in rule of law standards.

The first half of the chapter discusses the context of the legal governance of historical memory in Hungary. It summarizes and classifies the sources of memory governance as well as the relevant case law, in order to provide a solid foundation for the subsequent analysis of the rule of law. Importantly, and in contrast to the French case study, it identifies mnemonic constitutionalism as a crucial emerging source of memory governance, whereas traditional memory laws play a lesser role in the Hungarian context. The chapter also analyzes the political and societal context of how Hungarian law regulates historical memory, including the most sensitive historical events.

The second half of the chapter engages with the rule of law analysis, demonstrating how the legal governance of historical memory affects the four rule of law elements identified in Chapter 3, especially in view of the capture of democratic institutions in Hungary by the current government, in power since 2010.
The chapter identifies that legality is affected by tailoring memory laws by the Hungarian government to political situations, thus creating unpredictable and unforeseeable consequences for those engaging with sensitive historical issues. Unpredictability in decision-making and constitutional interpretation have increased due to the government’s increasing control over spaces where history is debated (such as schools, research institutes, museums and public memorials). This has hindered the ability of researchers and journalists participate in public discourse and narratives. Further, equality before the law is affected through the regulation of citizenship. For instance, the provision for dual citizenship ensures easy access for ethnic Hungarians living in the territories that previously belonged to Hungary before the Treaty of Trianon in 1920, but also stokes political conflict with neighboring states. Second, minority protection is defined on a historical basis, thus only minorities established in Hungary for over 100 years are eligible for protection under the law.

Impartiality of the judiciary is affected by constitutional provisions, which require judges to decide cases in light of the achievements of Hungary’s historical constitution, a controversial and arbitrary legal concept according to judges and scholars. As far as fundamental rights protection is concerned, freedom of expression and assembly is balanced by the Constitutional Court and the government against the notion of human dignity. Thus far, the government has valued the latter more, especially in relation to debates around symbols of the communist past. Contrary to the French case study, the current Hungarian government considers the rights of others as a legitimate aim to restrict free speech.

Both the self-inculpatory and self-exculpatory approaches are present in the legal governance of historical memory in Hungary and have extensively impacted the rule of law. Unfortunately, the government has captured the public spaces where history is debated and thus professional actors such as historians have not been able to engage with memory laws by providing expert opinions for lawmaking processes, contrary to the prominent role that researchers and civil society have played in the shaping of French memory laws. The chapter concludes that the legal governance of historical memory has contributed to the backsliding of the rule of law in Hungary.

Chapter 6 - Conclusions

The final chapter presents the major findings of the thesis. It reiterates the importance of using a substantive rule of law conception to bring into view negative developments such as the backsliding of equality or human rights.

The chapter also identifies patterns and tendencies emerging from the two case studies, showing that the binary approach to understanding the self-inculpatory and self-exculpatory approaches is insufficient to capture the full spectrum of the effects of memory laws. The case studies demonstrated how over-reliance on the self-inculpatory approach may result in harmful consequences for the rule of law, and how, although self-exculpation is often present and damaging, such an approach is not exclusively harmful to the rule of law. The deficiencies in legal governance of historical memory in both states are similar, despite differences in the fulfilment of rule of law standards. For example, the impact of memory laws on equality before the law displays similar results. Both in France and Hungary, the treatment of minorities is influenced by selected historical narratives and national values. However, in France the involvement of professional actors, such as historians, has mitigated the potentially harmful impact that the legal governance of historical memory asserts over the rule of law. In contrast, in the Hungarian case, the government’s capture of historical memory has contributed to rule of law backsliding.

The conclusion further explains how the legal governance of historical memory affects each of the four rule of law elements. Due to its significant impact on legality, the thesis finds
that governmental control over memory laws may influence democratic participation in pluralist historical debates by creating uncertain and unforeseeable consequences for engaging with sensitive historical topics as well as the selection of memory laws with political motivations. Equality before the law is affected through the engagement of memory laws with access to citizenship and the protection of minorities. Citizenship regulations increasingly rely on nationalistic values and the status of minorities can be defined on a historical basis, thus hindering minorities’ access to justice. In relation to judicial impartiality, memory laws can give disproportional power to judges to engage with historical issues. Regarding fundamental rights protection, freedom of expression and assembly are balanced against human dignity, and the result of this balancing depends on the priorities of the state with respect to different historical issues. In France, freedom of expression is prioritized in debates around the Armenian genocide but, in contrast, this right is restricted in favor of human dignity in Holocaust cases. The memory of the Holocaust is treated similarly in Hungary. Whereas in cases concerning the crimes of the country’s communist regime, the protection of human dignity prevails.

Finally, as the Hungarian case study demonstrates, the thesis provides an opportunity for scholars and institutions to examine the legal governance of historical memory as an area in which the decline of the rule of law can be traced. In order to achieve this, the dissertation offers a framework for the analysis of the legal governance of historical memory through the lens of the rule of law standards.
Samenvatting

Het Juridisch Reguleren van Historische Herinnering en de Rechtstaat

Hoofdstuk 1

Het eerste hoofdstuk introduceert de centrale concepten en probleemstellingen van de dissertatie. Het hoofdstuk beschrijft hoe de opkomst van het juridisch reguleren van historische herinnering gepaard ging met de Europese crisis van de rechtstaat. Daarnaast beschrijft het hoofdstuk wat de gevolgen van deze gelijktijdige ontwikkelingen inhouden. Er wordt gesteld dat er niet genoeg onderzoek is gedaan naar de relatie tussen het reguleren van historische herinnering en de rechtstaat. Eerder onderzoek richtte zich met name op de manier waarop herinneringswetten grondrechten beïnvloeden, bijvoorbeeld hoe herinneringswetten het recht op vrijheid van meningsuiting beperken. Een volledige academische analyse is echter afwezig in deze debatten – dit onderzoek streeft ernaar om dit gat in de kennis te dichten door ‘de rechtstaat’ te introduceren als analytisch kader. Om dit te realiseren presenteert hoofdstuk 1 de centrale onderzoeksvraag: Hoe beïnvloedt het juridisch reguleren van historische herinnering de rechtstaat? Ten slot sluit dit hoofdstuk af met een weergave van de structuur van de dissertatie.

Na het uiteenzetten van het doel van de dissertatie, presenteert dit hoofdstuk de centrale argumenten van de dissertatie. Het hoofdstuk bespreekt een nieuwe stroming in het onderzoek naar het juridisch reguleren van historische herinnering - namelijk, de verschillende benaderingen die staten kunnen gebruiken om hun verleden juridisch te reguleren. Eerder academisch onderzoek onderscheidt twee benaderingen: ‘zelf-beschuldigend’ (omgaan met het verleden middels een pluralistisch geschiedkundig debat gebaseerd op feiten) of ‘zelf-ontlastend’ (het verheerlijken van de nationale geschiedenis en het verzwijgen van alternatieve ideeën, ten koste van historische feiten en de bejegening van minderheden). De dissertatie beargumenteert dat de aard en reikwijdte van de invloed van het juridisch reguleren van historische herinnering afhangt van de door de staat gekozen benadering.

De tweede helft van het hoofdstuk duidt de relevantie en actualiteit van de twee landen-studies die zijn gekozen om de onderzoeksvraag te beantwoorden – Frankrijk en Hongarije. Als lidstaten van zowel de Raad van Europa als de Europese Unie, worden Frankrijk en Hongarije beïnvloed door pan-Europese ontwikkelingen op het gebied van het juridisch reguleren van historische herinnering. Dit hoofdstuk vat de belangrijkste en meest relevante ontwikkelingen binnen de Raad van Europa en de Europese Unie samen. Vervolgens wordt er uitgelegd hoe uiteenlopende constitutionele achtergronden, ervaringen uit het verleden en terugval van de rechtstaat de keuze voor de case studies Frankrijk en Hongarije rechtvaardigt.

Hoofdstuk 2

Het tweede hoofdstuk gaat in op het onderwerp van deze dissertatie – het juridisch reguleren van historische herinnering – door middel van een definiëring, categorisering en een beschrijving van de Europese context. Dit hoofdstuk bespreekt waarom herinneringswetten als enige informatiebron, zoals in eerder academisch onderzoek, geen volledig antwoord kunnen geven op de onderzoeksvraag. De dissertatie beroept zich daarop op een omvangrijkere selectie aan juridische en semi-juridische bronnen. Er is gekozen voor de term ‘juridische reguleren van historische herinnering’ omdat ook politieke debatten en gerechtelijke uitspraken een cruciaal onderdeel uitmaken van de bronnen waarop dit onderzoek is gebaseerd.
Vervolgens identificeert dit hoofdstuk een categorisering van het juridisch reguleren van historische herinnering. Deze categorisering omvat mnemonisch constitutionalisme (de manier waarop nationale constituties de geschiedenis reguleren), herinneringswetten (juridische bronnen lager dan de constitutie) en semi-juridische maatregelen (politieke debatten en beleid dat leidt tot, of zich afspeelt in relatie tot, herinneringswetten).

**Hoofdstuk 3**

Het derde hoofdstuk bespreekt het analytische kader van deze dissertatie: de rechtsstaat. Hoewel de dissertatie voor een groot deel is gebaseerd op de conceptualisering van de rechtsstaat door gerenommeerde academici en internationale en non-gouvernementele organisaties, deduceert dit onderzoek een eigen analytisch kader gebaseerd op deze opvattingen. Het hoofdstuk beschouwt hoe de rechtsstaat zich heeft ontwikkeld tot een maatstaf voor een gezonde democratie, door de ontwikkeling van een inhoudelijke conceptualisering van de rechtsstaat op basis van concepten zoals gelijkheid, grondrechten en gerechtigheid. Te midden van de Europese crisis van de rechtsstaat in de jaren 2010, verwierpen staten veelvuldig inhoudelijke opvattingen over de rechtsstaat om kritiek te vermijden. Om deze reden benadrukt dit hoofdstuk het belang van het ontwikkelen van een analytisch kader op basis van een inhoudelijke conceptualisering van de rechtsstaat, in plaats van een formele kader.

Om een dergelijk analytisch kader samen te stellen, bespreekt dit hoofdstuk de conceptualisering van de rechtsstaat van verschillende gerenommeerde academici en instituties. Met oog op de in hoofdstuk 1 besproken problemen met betrekking tot het juridisch reguleren van historische herinnering en de rechtsstaat, selecteert dit hoofdstuk vier elementen van de rechtsstaat: rechtsgeldigheid, gelijkheid voor de wet, onpartijdigheid in de rechtsspraak en de bescherming van grondrechten. Deze elementen demonstreren hoe de invloed van herinneringswetten en andere maatregelen een rol spelen in de case studies.

Het hoofdstuk definieert elk van deze vier elementen. Rechtsgeldigheid betreft onderzoek naar rechtszekerheid en het vermijden van willekeur in beslissingen van de uitvoerende macht. Gelijkheid voor de wet onderzoekt de notie van gelijkheid in het algemeen, en non-discriminatie van minderheden. Onpartijdigheid in de rechtsspraak richt zich op hoe rechters betrokken kunnen zijn in geschiedkundige debatten, en of dit een passende taak is voor de rechterlijke macht. De bescherming van grondrechten wordt benaderd door de lens van het recht op vrijheid van meningsuiting, vrijheid van vergadering en het concept menselijke waardigheid. Ten slotte beschrijft dit hoofdstuk hoe deze elementen worden toegepast in de case studies – hoe herinneringswetten voorzienbare gevolgen of willekeurige besluitvorming versterken of ondermijnen, hoe herinneringswetten kunnen werken in het voordeel of ten nadele van minderheden, hoe herinneringswetten rechters macht kunnen geven om zich onrechtmatig te kunnen mengen in geschiedkundige debatten, en hoe herinneringswetten gebruikt kunnen worden om vrijheid van meningsuiting en vergadering te balanceren met menselijke waardigheid.

**Hoofdstuk 4**

Het vierde hoofdstuk is de Franse case study. Het hoofdstuk bestaat uit twee delen. Het eerste deel bespreekt de politieke en maatschappelijke contexten die van invloed zijn op het juridisch reguleren van historische herinnering in Frankrijk. Het hoofdstuk presenteert de aanvang van herinneringswetten in de jaren '90 van de twintigste eeuw en de vroege jaren 2000, na de opkomst van anti-semitisme en anti-minderheden retoriek. Het hoofdstuk gaat verder in op de actieve rol die Franse historici, en in breder opzicht de burgermaatschappij,
spelen in het aanmoedigen ofwel tegenwerken van nieuwe en bestaande herinneringswetten. Het hoofdstuk somt ook de bronnen op van de Franse regulering met betrekking tot herinneren en relevante jurisprudentie waarop de daaruit voortvloeiende analyse van de rechtsstaat is gebaseerd.

De tweede helft van het hoofdstuk houdt zich bezig met de analyse van de rechtsstaat, aantonend hoe de manier waarop de historische herinnering wordt geregeleerd in Frankrijk de rechts geldigheid, de gelijkheid voor de wet, de onpartijdigheid van de rechterlijke macht en de bescherming van grondrechten beïnvloedt. De rechts geldigheid wordt uiteindelijk het meeste beïnvloed door de arbitraire selectie van de wetgever die bepaalt welke historische gebeurtenissen gezien kan worden als genocide, en wiens ontkenning van zo’n genocide gestraft kan worden. Zulke wetten creëren onvoorspelbare consequenties voor onderzoekers en journalisten die zich bezighouden met gevoelige historische kwesties.

De formatie van Frans burgerschap heeft invloed op de gelijkheid voor de wet. Burgerschapsaanvragen kunnen worden afgewezen op basis van een gebrek aan assimilatie, iets wat steeds sterker gestuwd is op Christelijke waarden. Met betrekking tot gerechtelijke onpartijdigheid, bieden Franse herinneringswetten uitgebreid mogelijkheden voor rechters om historische debatten te reguleren. Hoewel de rechterlijke macht in Frankrijk als vrij onafhankelijk wordt beschouwd, kunnen rechters de benadering van de staat tot het verleden niet daadwerkelijk overbrengen, en ze hebben dat ook niet gedaan.

Tot slot, Franse herinneringswetten dienen om vrijheid van meningsuiting en vergadering in balans te houden met de bescherming van menselijke waardigheid, terwijl ze vaak de vrijheid van meningsuiting prioriteren boven de gevoeligheden die leven bij slachtoffergemeenschappen.

In conclusie, het hoofdstuk laat zien dat in de herinneringswetten die de Franse rechtsstaat beïnvloeden twee benaderingen zichtbaar zijn, de zelf-beschuldigende en de zelf-ontlastende. Het Franse Tweede Wereldoorlogverleden is door de Franse regeringen benaderd als zelf-beschuldigend, terwijl regels omtrent burgerschap en wetten die betrekking hebben op het koloniale verleden vooral nationale verheerlijking voorop stellen en zelf-ontlastend zijn. Het hoofdstuk concludeert dat de aard en de mate waarin het juridisch reguleren van historische herinnering de rechtsstaat in Frankrijk beïnvloedt afhangt van het gebruik van zelf-beschuldigende en zelf-ontlastende benaderingen.

Echter, vanwege de betrokkenheid en de tegenwerking van historici en de burgersamenleving alsook de vervulling van de standaarden van de rechtsstaat in het land, zijn de incidentele, verreikende pogingen van Franse regeringen tot de regulering van historische herinnering aanzienlijk afgezwakt.

Hoofdstuk 5

Het vijfde hoofdstuk richt zich op Hongarije en gebruikt dezelfde structuur als de Franse case study. De eerste helft van het hoofdstuk bespreekt de politieke en maatschappelijke contexten oftewel hoe Hongaarse wetgeving de historische herinnering reguleert, inclusief de meest gevoelige historische kwesties, en de prominente stijging van mnemonisch constitutionaalisme, wat meer verreikende gevolgen draagt voor de regulering van de historische herinnering in het land. Het hoofdstuk somt ook de bronnen van het reguleren van herinnering en relevante jurisprudentie op en classificeert deze, als basis voor de daaruitvolgende analyse van de rechtsstaat.

De tweede helft van het hoofdstuk heeft betrekking op de analyse van de rechtsstaat. Dit deel toont aan hoe het juridisch reguleren van historische herinnering invloed uitoefent op de rechts geldigheid, gelijkheid voor de wet, de onpartijdigheid van de rechtsprekende macht en de bescherming van de grondrechten, met name in het licht van de democratische
achteruitgang in Hongarije. De rechtsgeldigheid wordt beïnvloed door herinneringswetten aan te passen aan politieke situaties om daarmee onvoorspelbare gevolgen te creëren voor diegenen die met gevoelige historische onderwerpen te maken hebben. In Hongarije groeide deze onvoorspelijkheid door de regeringen van de jaren 2010, regeringen die meer controle kregen over de ruimtes waarin en over geschiedenis gesproken wordt (scholen, onderzoeksinstituten, musea en publieke herdenkingsplaatsen). Hierdoor werd de bijdrage of de tegenstand van onderzoekers en journalisten om de herinneringswetten te vormen gehinderd.

Gelijkheid voor de wet wordt beïnvloed door de regulerings van burgerschap. Ten eerste, de dubbele nationaliteit biedt etnische Hongaren die in gebieden wonen die tot Hongarije behoorden voor het Verdrag van Trianon in 1920 eenvoudig toegang, maar inspireert ook politieke conflicten met buurstaten. Ten tweede, de bescherming van minderheden is gedefinieerd op basis van historische gronden, daaruit komt voort dat alleen minderheden die al langer dan 100 jaar in Hongarije wonen bescherming kunnen krijgen.

Onpartijdigheid van de rechtsprechende macht wordt beïnvloed door de grondwet die vereist dat rechters zaken wegen tegen het licht van de prestaties van Hongarije’s historische grondwet, een controversieel en willekeurig concept. In combinatie met de arrestatie van de rechterlijke macht in Hongarije kunnen de opvattingen van de regering over de geschiedenis gemakkelijk worden overgedragen via rechterlijke beslissingen. In het geval van bescherming van de grondrechten, vrijheid van meningsuiting en vergadering, worden deze in evenwicht gehouden door het Constitutionele Hof en de regering tegenover de bescherming van menselijke waardigheid, en vaak wordt de constitutionele bescherming van menselijke waardigheid hoger geacht, met name als het gaat om debatten rond symbolen uit het communistisch verleden.

In dit hoofdstuk wordt geconstateerd dat zowel de zelf-beschuldigende als de zelf-ontlastende benadering aanwezig is in het juridisch reguleren van historische herinnering in Hongarije. Echter, vanaf 2010 vond de terugval van de rechtsstaat plaats gelijktijdig met de opkomst van de zelf-ontlastende benadering. Bovendien heeft de regering de ruimtes overgenomen waar over geschiedenis wordt gesproken. Onafhankelijke actoren zoals historici kunnen zich dus niet bezighouden met herinneringswetten door deskundige adviezen te geven voor wetgevingsprocessen. Ze hebben geen enkele invloed op de invoering of transformatie van wetten. Daarom concludeert het hoofdstuk dat het juridisch reguleren van historische herinnering in Hongarije heeft bijgedragen tot de achteruitgang van de nationale rechtsstaat.

Hoofdstuk 6

Het laatste hoofdstuk presenteert de conclusies van de dissertatie. Het benadrukt nogmaals het belang van het gebruik van een inhoudelijke conceptie van de rechtsstaat omdat staten die de rechtsstaat ervaren als een proces van achteruitgang vaak bouwen op formele concepties van de rechtsstaat om kritiek te omzeilen met betrekking tot mensenrechten of gelijkheidsvraagstukken. Het hoofdstuk geeft vervolgens een opsomming van wat de dissertatie heeft uitgewezen over de manier waarop de vier elementen van de rechtsstaat worden beïnvloed door het juridisch reguleren van historische herinnering in Frankrijk en Hongarije. De twee case studies tonen patronen en neigingen die het argument verdedigen dat betrekking heeft tot de zelf-beschuldigende en zelf-ontlastende benaderingen. De problemen in beide staten zijn vergelijkbaar, ondanks hun verschillen in de vervolmaking van de standaarden van de rechtsstaat. In het Hongaarse geval draagt de overheidsbemoeienis bij historische herinnering bij aan de achteruitgang van de rechtsstaat. De juridische regulerings van de historische herinnering beïnvloedt elk van de vier elementen van de rechtsstaat.

Vanwege de impact op de rechtsgeldigheid, stelt de dissertatie vast dat overheidscontrole op herinneringswetten de democratische deelname aan pluralistische
historische debatten kan beïnvloeden door onzekere en onvoorspelbare gevolgen te creëren voor het omgaan met gevoelige historische onderwerpen en door de selectie van onderwerpen van herinneringswetten met een politieke motivatie. Herinneringswetten beïnvloeden de gelijkheid voor de wet doordat ze zich bezighouden met de toegang tot burgerschap en bescherming van minderheden. Burgerschapsreguleringen zijn in hogere mate afhankelijk van nationalistische waarden en de status van minderheden kan historisch worden gedefinieerd, waardoor minderheden de toegang tot het rechtssysteem kan worden ontzegd. In relatie tot rechterlijke onpartijdigheid kunnen herinneringswetten macht geven aan rechters om disproportioneel te engageren met historische kwesties. Echter, de staat van de rechterlijke macht maakt een verschil: hoe onafhankelijker de rechterlijke macht is, hoe minder de betrokkenheid van rechters zal zijn in historische vraagstukken.

Met betrekking tot de grondrechten, vrijheid van meningsuiting en vergadering worden gebalanceerd tegenover menselijke waardigheid. Het resultaat van dit balanceren hangt af van de prioriteit die de staat geeft aan verschillende historische onderwerpen. In Frankrijk is vrijheid van meningsuiting geprivilegieerd in debatten rondom de Armeense genocide. In contrast wordt vrijheid van meningsuiting juist beperkt ten behoeve van menselijke waardigheid in Holocaust-gerelateerde zaken.

De herinnering aan de Holocaust wordt op vergelijkbare wijze behandeld in Hongarije. Daarbij komt dat in zaken van oorlogsmisdaden onder de communistische regimes, de bescherming van menselijke waardigheid ook prevaleert.

Tot slot, stelt de dissertatie, op basis van de voorgaande analyse, dat het juridisch reguleren van historische herinnering dient te worden beschouwd als een gebied waarin de vervulling van de standaarden van de rechtsstaat kan worden beoordeeld. In academisch en institutioneel onderzoek naar de terugval van de rechtsstaat moet dit onder de loep worden gehouden, naast gebieden zoals de rechterlijke macht, de media, of de staat van de grondrechten.
Acknowledgements

In hindsight, if anyone asked me why they should embark on a journey towards the PhD, the most important insight I could give is twofold. On the one hand, 22 months of my PhD journey has provided me with the profound experience of fulfilling my dream of obtaining a doctoral title and generating the knowledge in preparation for the next step in life. On the other hand, this journey made me realize that if one would wish to really get to know oneself as a person, they should do a PhD. This journey revealed to me who I really am, with all its mistakes and triumphs. Therefore, I owe deep thanks to several people in my life who supported my rocky road as I kept falling and getting up again.

The first expression of gratitude is for my supervisors. Professor Janne Nijman and Dr Ulad Belavusau have put up with me for these last years, generously pushing me to my limits and providing invaluable contributions to make this thesis what it is. They were beside me in the best and worst times and challenged me in ways I never thought possible, to my own benefit. Professor Heather Kurzbauer has also advised me in shaping this thesis, without her insights, its completion would have been impossible.

This dissertation could not have been written without the generous support of the MELA grant. The Memory Laws in European and Comparative Perspective project gave me the opportunity with this PhD. My special thanks go to my colleagues Professor Eric Heinze, Dr Aleksandra Głyśczyńska-Grabias, Dr Grażyna Baranowska and Anna Wójcik.

The academic community in the Asser Institute fostered my PhD journey, and I owe my thanks to my colleagues who debated and challenged my endeavours as well as listened to my monologues about the difficulties of the thesis. The monthly meetings organized by Dr Geoff Gordon for me and my fellow PhD researchers, Yehonatan Elazar, Miha Marčenko, Lisa Roodenburg and Julia van der Krieke, gave me so much to think about.

I would also like to thank my colleagues, Bérénice Boutin and León Castellanos-Jankiewicz, with whom I shared my office during my time at the Asser Institute. Their mentoring helped me to orient myself in the complicated maze of academia and living in the Netherlands, for which I am profoundly grateful. My dissertation also could not have been complete without the support of my colleagues Aylin Gayibli, Cris van Eijk and Katharine Booth.

My family meant the world to me in the last years as they supported my efforts from the distance in Hungary. So thank you, dad, for being the only person interested to read my works outside my colleagues, mom, for calling me every week and sensing, on an instinctual level, whether I was feeling satisfied or frustrated with my work. And thank you, my dearest sister, Judit, for always being there with a shoulder to cry on or with a joke to laugh at.

Finally, my last word of thanks goes to my therapists, Maayan Ben Ami and Isha Chauhan. In her room, I could vent, rant and rave, and however hopeless and frustrated I felt, her advice always helped. Thank you for making me confront Dr Manhattan, the manifestation of my worst fears to reach the dreams I want to fulfil and become an actual doctor.