NOTES ON NEW BOOKS

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Law and Memory: Towards Legal Governance of History Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.)

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Legal governance of memory has played a central role in establishing hegemony of monumental history and has forged national identities and integration processes in Europe and beyond. In this book, edited by Uladzislau Belavusau (T.M.C. Asser Institute – University of Amsterdam) and Aleksandra Gliszczyńska-Grabias (Polish Academy of Sciences), a range of contributors explore both the nature and role of legal engagement into historical memory in selected national, European, and international law. They also reflect on potential conflicts between legal governance, political pluralism, and fundamental rights, such as freedom of expression. The legal governance of history is often addressed under the tag of memory laws (French *lois mémorielles*; German *Erinnerungsgesetze*, etc.). Such laws enshrine state-approved interpretations of crucial historical events. They commemorate the victims of past atrocities as well as heroic individuals or events emblematic of national and social movements. They date back centuries and continue to spread throughout Europe and the world.

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In consolidating accounts by both lawyers and non-lawyers, the book has filled the "comparative" gap in the literature, revisiting memory laws as a phenomenon of global law and transitional justice. It offers accounts from various national jurisdictions as well as from European and international law. The contributors ask how law certifies historical narratives, entails claims about historical truth, prescribes commemorative practices, and excludes ineligible accounts.

The main body of the book is divided into four parts, supplemented by an introduction and an epilogue. The introduction jointly written by Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias maps the genesis and history of memory laws and explains the proliferation of this Western phenomenon within diverse legal systems. It traces the role of the Holocaust in the resort to law within both national and international regimes after the Second World War. It also explores claims about the benefits and flaws of legal intervention into the marketplace of historical ideas, as well as the current place and prospects of memory laws as a dynamic subject of both law and transitional justice.

The introduction is followed by the first part that focuses on questions related to historical memory in the assessment of international bodies and tribunals. Antoon De Baets reconstructs the view of history as depicted in the United Nations Human Rights Committee with a special attention to the view of history as a right and a craft, cases of Holocaust denial, right to mourning and commemoration and the right to historical truth and protection of historical opinions. Maria Aksenova examines the role of the International Criminal Tribunal in shaping historical accounts of genocides. She concludes that the goal of setting the historical record straight may clash with other objectives of trials before the Tribunal, such as deterrence, retribution, restorative justice, and reconciliation. Patricia Naftali addresses the concept of the right to truth, and studies whether this "right" (explicitly recognized by some non-European jurisdictions, for instance by the Inter-American Court of Human Rights [IACtHR]) has percolated into the case law of the European Court of Human Rights (ECtHR).

The second part focuses on the ways European law has been dealing with Europe's past, both in the European Union (EU) and the Council of Europe's legal and political settings. Luigi Cajani's chapter examines the EU Council Framework decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Cajani explores the admission of this instrument in light of the impact of the EU enlargement upon the post-Communist States of Central and Eastern Europe and the resulting clash of collective memories in Western and Eastern Europe. The other chapters in this part explore the special role of the ECtHR as Europe's top, quasi-constitutional court. Maria Mälksoo examines the Strasbourg case of *Kononov v. Latvia* and shows how the legitimate efforts at transitional justice in post-authoritarian Latvia clashed with the Russian narrative about the role of USSR in the Second World War. Through his analysis of the ECtHR's case law, Paolo Lobba confirms the notorious fact that the memory of the uniqueness of the Holocaust – as a special evil in recent European history –

is perhaps one of the few fixed points in the collective memory of the continent. Lobba further proposes the adoption of a strongly civil-libertarian approach by the ECtHR, where restrictions upon the freedom of expression of negationists can be upheld only when tangible symptoms of harm (such as threats to public order) can be shown as properly addressed by the legislation.

The third part presents comparative, national perspectives within the EU taken from various EU Member States. Several contributors analyse recent pieces of legislation concerning memory laws, including the Czech Republic, France, Greece, Hungary, Latvia, Poland, Romania, and Spain. Ioanna Tourkochoriti examines some recent memory laws in France, Greece, and Canada, and then compares these national approaches with those adopted by the ECtHR. Tourkochoriti distinguishes between the laws meant to impose a dominant version of historical truth aimed at the formation of national identity, and the laws against denial of crimes against humanity. She postulates applying the same considerations of respect for freedom of expression to both categories of cases. Spain is the subject-matter of Alfons Aragoneses's chapter in which he traces an evolution from "the pact of silence" (at the early stages of Spain's transition to democracy) to the "revolt of the grandchildren" aimed at determining the truth and awarding reparations to the victims of the Franco dictatorial rule. Aragoneses discusses the Historical Memory Act of 2007 and concludes that it has not produced any tangible effects (other than regarding reparations) as far as the collective memory of Francoism is concerned. In his chapter on dealing with the past through the "politics of public knowledge and legal justice" in the Czech Republic, Jiří Přibáň observes various pathologies of the Czech legal approach to the past, as depicted by a recent "Kundera case" where the famous novelist was accused of politically discrediting behaviour in the 1950s. Using this case study, Přibáň argues that the official system of purging those guilty of political collaboration with a system of oppression may, unexpectedly, inhibit public discussion about the totalitarian past. Ieva Miluna discusses the issue of adjudication in deportation cases that took place in Latvia in the light of international law. The main argument of Miluna's chapter is that national courts, in their war crimes trials, found themselves manoeuvring between the nationally stipulated definitions of international crimes and the international law in force concerning international crimes. In this regard, the role played by the references to international law in Latvia's criminal code was one of the decisive aspects. Cosmin Sebastain Cercel describes the rarely studied case of post-Second World War Romania trials dealing with the Romanian participation in the war and in particular during the Holocaust. Cercel looks into the theoretical shallowness of Stalinism as an ideological framework for dealing with the past, and its inability to properly address the history of the Holocaust. A recent attempt to cope with the criminal past of a post-Communist nation is discussed in the chapter by Miklós Könczöl, who examines, against a background of memory laws concerning Hungarian history since the end of the 19th century, the Fundamental Law (the Constitution) of 2011 which construes itself as marking a radical caesura between the past and

the present. As is known, constitutional changes in Hungary post-2010 have caused a lot of concern about the rule of law in Europe and worldwide, and Könczöl's analysis is particularly useful in helping understand these changes in the light of constitution-makers and legislators' attempts to construct their own, consistent, narrative about the recent past. In the concluding chapter for this part, Tomasz Tadeusz Koncewicz considers a new historical narrative, which became *de rigeur* after the presidential and parliamentary elections in Poland, in 2015. Koncewicz shows how harmful it may be to adopt a rhetoric, supported by criminal law and operated through violations of the Constitution, which falsely interprets the past in which Poles are always portrayed as the victims and never co-perpetrators of historical crimes.

The final part focuses on perspectives beyond the EU. The contributors present various legal provisions governing historical memory in Canada, Israel, Peru, Russia, and Ukraine. Nikolay Koposov subjects the Russian historical memory law of 2014 to a harsh criticism, showing that the Russian criminal provision, rather than protecting memories of the victims of state policy, in fact protects the memory of the Stalinist State from that of its victims. Koposov provides an insight into the divergences among Russian law-makers, as evident in the conflict between the two houses of the Parliament: the project of the Council of Federation was more in line with the European standards, but the project of the State Duma, developed along the traditional Soviet approaches, prevailed. Similar controversies, though introduced from the Ukrainian perspective, are analysed in Lina Klymenko's chapter on the narrative of the national past and future in the 2015 de-communization laws of Ukraine. Presenting the subject within the context of the ongoing geo-political conflict between Ukraine and Russia, Klymenko focuses on, as she puts it, "interpretive approaches to policy-making that emphasize the role of narratives constructed by political actors in policy-relevant situations". Klymenko also shows how dealing with the Soviet past, through the means of different laws and policies, resonates with Ukrainian aspirations to join the EU. In his chapter on the geography of banning genocide denial, Robert A. Kahn critically examines the nexus between a legitimate prohibition and the place where the crimes to which the prohibition applies were committed. While the "nexus argument" may superficially benefit from the support of the context-sensitivity principle, Kahn provides a thought-provoking debunking of the argument, and shows that it is vulnerable to at least three criticisms: from the revolution in global communications, from demographical dispersal of the survivors and descendants of the victims, and from geopolitics which indicates that there may be global risk arising out of the glorification of mass crimes, even if committed in a relatively discrete part of the globe. Jeremie M. Bracka discusses the collective memories of the Israelis and Palestinians focused upon the events of 1948, and their role in shaping separate national identities. Bracka advocates for the need to forge a bridging narrative, based on an honest and full account of the past, in order to transcend a conflict-based culture rooted in polarized, clashing narratives. After the volume was published, Bracka received the Monash Law School Students' Publication Prize

for this chapter in 2018. The Canadian experience of dealing with the treatment of its Indigenous peoples is the topic of the chapter by Michael Mordon. Looking at the work and impact of three commissions charged with attainment of truth and reconciliation, Mordon explores the impact of these bodies upon Indigenous narratives but concludes that their impact upon the non-Indigenous narratives was negligible. Finally, Salvador Herencia Carrasco scrutinizes the impact of the decisions of the IACtHR on the prosecution of grave human rights violations perpetrated by military regimes in Latin America. Looking in particular at the experience of Peru, the author considers many of the challenges for the restitution of memory, going beyond traditional measures of transitional justice, such as the construction of sanctuaries in the places of mass graves or the opening of the National Museum of Memory.

The book concludes with an epilogue by Eric Heinze where he develops a taxonomy of memory laws, distinguishing between non-regulatory and regulatory laws, and suggests that the latter need not necessary be punitive. Heinze indicates a distinction between substantive and expressive weight of law and uses this distinction to emphasize the expressive significance of memory laws.

A number of common themes emerge throughout the book. The contributors identify some dangers of allowing politicians and law-makers to authoritatively manage the collective memory of a given community. It is clear that many States become engaged in serious dispute for the control of collective memory. They often use law as the weapon in these battles, in order to "protect" some particular memories of the past and the suffering of the nation. Likewise, various "Institutes of Memory" or "Remembrance", established as administrative promoters of memory laws and which have been mushrooming in particular in Central and Eastern European States, became instruments for shaping the contours of collective memory. Their role as depositors of sources about history is invaluable but on the other hand, they are often used and misused by politicians who access documents in the "lustration" processes. There are also various phenomena of emulating some paradigm cases of negationism prohibition (for example, Holocaust denial bans) in order to justify nationalist memory constructivism. In such narratives, supported by criminal law sanctions, citizens are solely victims or saviours of others. Their own faults in the past must be erased from the memory of future generations while the memory of their victimhood is to be continuously amplified.

In sharp contrast to the effectiveness of memory laws "legal silence" has in some circumstances proved equally significant in constructing historical memory, parallel and often in contrast to zealous remembrance. The silence in forgetting about some dates, events, or persons effectuated by permitting only one version of the past may be deafening. It occasionally results from some "pacts of memory" between ancient regimes and new elites, in the process of transition. Against the background of mass re-writing of history and denialism of historical facts in different parts of the world, this book revisits the subject of memory laws from the standpoint of comparative law and transitional justice.