



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

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HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW: AN INTRODUCTION

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ABSTRACT: The legal governance of historical memory in Eastern and Central Europe has grown exponentially over the past two decades. This development runs parallel to the region's reckoning with its communist legacies at the national level, where national identity has been harnessed and sometimes instrumentalised to adopt revisionist interpretations of the past. Mnemonic governance in these States has also been heavily influenced by their proximity or membership to the European Union, which upholds the rule of law as a fundamental value. At the same time, the region's Soviet legacies have been projected by a newfound Russian assertiveness in the area, which has resulted in a phenomena known as memory wars. Those developments are accompanying the ongoing process of democratic transition in Eastern and Central European States. This introductory *Article* sets out the premises of the *Special Section* on historical memory in post-Communist Europe and the rule of law, by showing that these democratization processes are far from linear. It does so by first outlining the trajectory of memory governance in Western Europe, which has focused on the Holocaust as a foundational European narrative. It then outlines the tensions emerging between this account and the historical specificities of post-communist States which experienced different forms of totalitarianism. Finally, the introduction shows that the embrace of the rule of law

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in post-communist Europe in the form of the European Union project, transitional justice or democratic values has also been at odds with the region's mnemonic governance.

KEYWORDS: memory laws – rule of law – East and Central Europe – memory governance – mnemonic governance – memory wars.

I. INTRODUCTORY REMARKS

This two-part *Special Section* addresses historical memory and the rule of law in the particular context of post-communist Europe. Historical memory has played a significant role in the aftermath of communism as Eastern European countries come to terms with their past. But the euphoria of the 1990s has been followed by the realization that communist legacies – in their legal, historical and political dimensions – might be more entangled with national politics than has hitherto been acknowledged. The contributions in the *Special Section* engage with how Eastern European countries are dealing with their past, as they undergo the process of democratic transition and integration with the European Union.

The region is not homogenous in its history and the way it is approached.¹ The differences between post-communist countries concern the severity of the regime(s) that were in place, how communism ended, and the way in which the communist legacy is perceived today.² However, the common dominator is that the contemporary politics of memory in post-communist Europe are heavily dominated by the legacies of World War II and the Nazi and Soviet regimes.³ The memory of communism and its political contestation through legal means has thus become one of the central concerns of the analyzed countries in recent years.⁴ Interethnic conflicts, which had been suppressed during communism and reappeared fiercely after 1989, are an additional important cause explaining the surge in memory laws, especially in the post-Yugoslav countries.

¹ On a division of Eastern Europe into four “meso-regions” with distinctively different cultures of remembrance, see S. TROEBST, *Halecki Revisited: Europe’s Conflicting Cultures of Rememberance*, in P. MEUSBURGER, MICHAEL HEFFERNAN, E. WUNDER *Cultural Memories. The Geographical Point of View*, Springer 2011.

² V. PETTAI, E.-C. PETTAI, *Transitional and Retrospective Justice in the Baltic States*, Cambridge: Cambridge University Press 2015; N. KOPOSOV, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2018; U. BELAVUSAU, A. GLISZCZYNSKA, *The Remarkable Rise of ‘Law and Historical Memory’ in Europe: Theorizing Trends and Prospects in Recent Literature*, in *Journal of Law and Society*, 2020, p. 1 et seq.

³ N. KOPOSOV, *Memory Laws, Memory Wars*, cit., pp. 129-148.

⁴ U. BELAVUSAU, A. WÓJCIK, *La criminalisation de l’expression historique en Pologne: la loi mémorielle de 2018*, in *Archives de politique criminelle*, 2018, p. 175 et seq.; A. WÓJCIK, U. BELAVUSAU, *Posponer los cambios de nombre de las calles tras la transición de la democracia: lecciones legales de Polonia*, in J. GUIXÉ et al. (eds), *Diez años de leyes y políticas de memoria (2007-2017)*, 2019, p. 27 et seq. See also on the criminalization of communism L. NEUMAYER, *The Criminalization of Communism in the European Political Space after the Cold War*, New York: Routledge, 2018.

Nikolay Koposov has identified three main factors which led Eastern Europe to become an important center for legislative activity concerning the past in his groundbreaking monograph *Memory Laws, Memory Wars*, published in 2018. First, the overly-optimistic expectations about the future gradually gave way to a more complex perception of history, which resulted in a growing nostalgia for the communist period. Second, the EU's official Holocaust-centered politics expanded eastwards as post-communist countries entered the EU. Within the EU integration processes, these countries adapted those memory policies, and added their own distinctive features. Third, Putin's neo-imperial rule in Russia put forward an interpretation of the war focusing on the Soviet Union's decisive role in the victory over fascism.⁵ Russia's increasing assertiveness on the world stage over the past decade has exacerbated this problem significantly, thus leading to what Koposov terms "memory wars".

As identified by Koposov, it is important to consider the role of EU politics and integration in the region's memory governance in more detail to understand the specificities of post-communist States' engagement with the past in East and Central Europe. Before post-communist European countries could influence pan-European memory politics, the EU and Council of Europe built their normative frameworks upon the value of acknowledging past crimes and avoiding future ones, with the Holocaust being the central element of this policy.⁶ The post-communist countries which joined the Union later had to accept and adopt that policy as a matter of conditionality.⁷ However, as Eva-Clarita Pettai argues, pushing the young post-communist democracies towards confronting the Holocaust had counterproductive effects.⁸ Central to the introduction of memory laws in many post-communist countries was the European Council's 2008 Framework Decision on Racism and Xenophobia⁹, which required States-members to introduce genocide denial bans and other measures relating to the governance of historical memory.¹⁰ Problematically, this Decision has sought to provide a uniform narrative that has sometimes clashed with the diverse historical experiences in the vast Eu-

⁵ *Ibid.*, pp. 126-127.

⁶ A. SIERP, *History, Memory and Trans-European Identity: Unifying Divisions*, New York: Routledge, 2014, pp. 125-127.

⁷ On this point, see U. BELAVUSAU, *Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning*, in *EUI Law Working Papers*, no. 12, 2013, p. 1 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008.

⁸ E.-C. PETTAI, *Protecting Memory of Criminalizing Dissent? Memory Laws in Lithuania and Latvia*, in E. BARKAN, A. LANG, *Memory Laws: Criminalizing Historical Narrative* (forthcoming).

⁹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹⁰ L. CAJANI, *The Implementation of the Framework Decision by the EU Member States*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017, pp. 136-138. See also U. BELAVUSAU, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in A. KOLTAY (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest: Wolters Kluwer, 2015, p. 537 *et seq.*

ropean legal space. While the EU's politics thus aimed at creating a common European historical memory, which would strengthen the political community, the way this was perceived and shaped domestically in Eastern Europe did not always serve the purpose.

Pursuant to the 2008 Framework Decision, the EU's memory politics aim at creating a common European narrative centered on the Holocaust as a pivotal element of European identity and integration that is also invoked to combat racism and prevent national and ethnic conflicts.¹¹ Nevertheless, the Decision's reception in domestic law has been uneven, as Emanuela Fronza notes that "the crimes gradually implemented in countries with different legal traditions and political histories do not seem to reflect the universal values the EU Framework Decision intended to promote".¹² This is especially true in post-communist countries, as the adopted memory laws are not always aimed at combating racism or preventing national and ethnic conflicts, and do not serve this purpose in practice. Indeed, they often reinforce one-sided and Manichean national narratives which, although harmless at first blush, may have disproportionate effects on minority groups. A Lithuanian law adopted in 2010 to criminalize the denial of Nazi and Soviet crimes can serve as a vivid example. As the initial case law shows, Lithuanian courts have gone to great lengths to sanction the denial of Soviet crimes either because these statements have incited public disorder or were clearly defamatory. However, in cases concerning the Holocaust, the courts only assessed whether the accused actually denied the Holocaust without accounting for other societal aspects of their statement's implications. Consequently, in practice, the Lithuanian memory law does not protect minorities and instead validates the views of majority populations, protecting them against certain historical reinterpretations.¹³

II. THE GOVERNANCE OF HISTORICAL MEMORY IN EUROPE

Throughout the 2000s, memory laws have been adopted by governments in post-communist States to forward political agendas.¹⁴ While the term "memory laws" is not unambiguous, we adopt the broad approach proposed by Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias in *Law and Memory*, their seminal volume mapping the

¹¹ K-G. KARLSSON, *The Uses of History and the Third Wave of Europeanisation*, in M. PAKIER, B. STRATH (eds), *A European Memory? Contested Histories and the Politics of Remembrance*, New York: Berghahn Books, 2010.

¹² E. FRONZA, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: Springer, 2018, p. 19. See also pp. 55-62 on the Framework Decision 2008/913/JHA.

¹³ E.-C. PETTAI, *Protecting Memory of Criminalizing Dissent?*, cit. See also N. KOPOSOV, *Memory Laws: Historical Evidence in Support of the "Slippery Slope" Argument*, in *Verfassungsblog*, 8 January 2018, verfassungsblog.de.

¹⁴ See the database of the MELA project ("Memory Laws in European and Comparative Perspective"), compiling a database of relevant memory laws and judgements for future reference and comparative constitutional studies: melaproject.org.

field, and define them as acts that enshrine State-approved interpretations of crucial historical events.¹⁵ These legal and extralegal measures are often at odds with democratic values because they perpetuate official narratives, use exclusionary devices and, in some extreme cases, facilitate the waging of transnational memory wars.¹⁶ Some of these provisions even emphasize ethno-national identity in ways reminiscent of the succession of crises and democratic backsliding that marked the interwar period.¹⁷ Within the European Union, and in Poland¹⁸ and Hungary¹⁹ in particular, there has been an active engagement with the legal governance of historical memory as an euphemistic reason to protect national narratives, often to the detriment of racial, religious and linguistic minorities. Russia and Ukraine, for their part, have enacted a barrage of punitive laws which stifle any criticism or reformulation of their respective side's role in the Second World War, resulting in what Kaposov has termed memory wars between the two countries. In the Balkans, the phenomena of memory governance has been aimed at recasting the transitional justice narratives established in the judicial findings of the International Criminal Tribunal for the Former Yugoslavia. Serbia, in particular, has played an active role in reframing the transitional narrative according to which it bore the brunt of responsibility for atrocities committed against Bosnian Muslims, and has

¹⁵ U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017. See also the debate on memory laws in *Verfassungsblog*, in particular: A. GLISZCZYŃSKA-GRABIAS, *Law and Memory*, 4 January 2018, verfassungsblog.de; E. HEINZE, *Law and Historical Memory: Theorising the Discipline*, 7 January 2018, verfassungsblog.de. For a narrower definitions see N. KOPOSOV, *Memory Laws, Memory Wars*, cit., p. 6.

¹⁶ M. MALKSOO, *Memory Must Be Defended: Beyond the Politics of Mnemonical Security*, in *Security Dialogue*, 2015, p. 221 *et seq.* I NUZOV, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review*, 2019, p. 231 *et seq.* On how security concerns are used to justify the adoption of memory laws see also: A. WÓJCIK, *Memory Laws and Security*, in *Verfassungsblog*, 5 January 2018, verfassungsblog.de. See also Model Declaration on Law and Historical Memory proposed by the MELA research consortium, melaproject.org. The Model Declaration on Law and Historical Memory will be printed in the second part of this *Special Section*.

¹⁷ M. BUCHOLC, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, in *Hague Journal on the Rule of Law*, 2018, p. 85 *et seq.* On the interwar period see E.H. CARR, *The Twenty Years' Crisis, 1919-1939*, London: Palgrave Macmillan, 1939.

¹⁸ On memory laws in Poland, see: U. BELAVUSAU, *The Rise of Memory Laws in Poland*, in *Security and Human Rights*, 2018, p. 36 *et seq.*; A. GLISZCZYŃSKA-GRABIAS, *Deployment of Memory with the Tools of Law – The Case of Poland*, in *Review of Central and Eastern European Law*, 2019, p. 464 *et seq.*; A. GLISZCZYŃSKA-GRABIAS, G. BARANOWSKA, A. WÓJCIK, *Law-secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 59 *et seq.*; A. WÓJCIK, *Laws Affecting Historical Memory from the Perspective of Human Rights*, PhD dissertation (on file with authors).

¹⁹ G. HALMAI, *Memory Politics in Hungary: Political Justice without Rule of Law*, in *Verfassungsblog*, 10 January 2018, verfassungsblog.de; M. BÀN, *The Legal Governance of Historical Memory and the Rule of Law*, PhD dissertation (on file with authors).

relied on politically-appointed commissions to highlight the plight of ethnic Serbians during that conflict in a manner that furthers its geopolitical interests.

The past has therefore become a powerful tool in the furtherance of current political agendas in East and Central Europe. One obvious reason for this newfound interest around memory governance in the region is related to the fact that these countries have been coming to terms with the legacies of their communist past. However, it also obeys to parallel developments in Western European States, where the legacies of victimhood resulting from the Holocaust have attained a hallowed character in mainstream national politics and within the normative framework of the European Union. Among the first instruments to address this was the 1996 Joint Action to Combat Racism and Xenophobia, which defined genocide denial as a form of anti-Semitic and anti-democratic behavior and required Member States to introduce legislation prohibiting it.²⁰ In 2008, the Joint Action was expanded by a Council Framework Decision which reiterated the importance of genocide denial bans.²¹

The initial enthusiasm with which memory laws were adopted in Western Europe during the 1990s has changed markedly over the years. The first academic discussions about memory laws emerged in France, where the term '*lois mémorielles*' was coined in the context of the freedom of historical research.²² Soon thereafter, the debate centered on the prohibition of the denial of the Armenian genocide and issues of equal status between this tragedy and the Holocaust.²³ The ensuing debates have revealed the tensions between the competing interests of the various national minorities in the European legal space, and have been framed in terms of the right to freedom of expression, matters of public remembrance and issues regarding the inclusion or exclusion of historical material in educational curricula. Over the past decade, memory laws have elicited deeper fractures within the European project. This is because the explosion of the legal governance of historical memory in the Eastern European States that acceded to the Union from 2004 onward has brought fundamental European values under

²⁰ Council Joint Action 96/443/JHA of 15 July 1996 adopted by the on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

²¹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal.

²² P. NORA, *Malaise dans l'identité historique*, in *Liberté pour l'histoire*, Paris: CNRS Éditions, 2008.

²³ V. DUCLERT, *Faut-il une loi contre le négationnisme du génocide des Arméniens ? Un raisonnement historique sur le tournant de 2012*, in *Histoire@Politique*, 2013, p. 281 et seq.; U. BELAVUSAU, *Armenian Genocide v. Holocaust in Strasbourg: Trivialisation in Comparison*, in *Verfassungsblog*, 13 February 2014, verfassungsblog.de. In the Eastern European context, some memory laws have been compared to certain provisions in the Turkish criminal code which are used to penalize statements affirming the Armenian genocide. For a discussion on those comparisons and on different provisions used in Turkey to penalize such statements see G. BARANOWSKA, *Penalizing Statements about the Past in Turkey*, in P. GRZEBYK (ed.), *Responsibility for Negation of International Crimes. Memory Law – International Crimes – Denial*, Warsaw: The Justice Institute, 2020, (forthcoming).

threat, particularly as regards the much-vaunted notion of the rule of law. While not all of the European post-communist countries are members of the European Union, developments in Eastern Europe have become a major challenge for the EU because most of the relevant countries have acceded to the Union. Additionally, the EU regulation of memory has been used locally by all Member States as an opportunity to structure and renegotiate ideological conflicts.

The identification of an asymmetry resulting from the different approaches to memory governance adopted in East and Central Europe, on the one hand, and Western European States, on the other, constitutes the starting point of this Special Section. This dislocation has also led to so-called democratic backsliding in the region and threats to the rule of law in the eyes of European institutions, as populism and nationalism gain a foothold in East and Central European politics.

III. THE RULE OF LAW

Despite its ubiquitous character in contemporary governance, the rule of law has been seldom applied to the legal governance of historical memory in post-communist Europe. This is perhaps because the liberal political tradition associated to the rule of law is a particular outgrowth of Western European thought.²⁴ Moreover, the West has often framed the political emphasis on cultural identity in Eastern and Central European States as being premised on the centrality of ethnicity in nation-building, thus relegating the liberal tradition to the background.²⁵ However, in recent years, the rule of law has gained traction as a barometer for the health of democratic societies that provides an indicative reading of good governance. Moreover, with the fall of communism and the accession of Eastern European States to the European Union, the rule of law has become a yardstick to be reckoned with.

The rule of law has been identified as bearing a distinct character in East and Central Europe during and after communism. Throughout the Cold War, law subverted democratic participation by sustaining authoritarian practices and institutions.²⁶ Today, it occupies an increasingly important position in multilateral and intergovernmental governance. The European Union has enshrined the concept of the rule of law in the Preamble to the Treaty on European Union and in Art. 2 of that instrument, according to which “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights

²⁴ T. BINGHAM, *The Rule of Law*, London: Penguin, 2011.

²⁵ M. SHAHABUDDIN, *The Ethnic Dichotomy of ‘Self’ and ‘Other’ Within Europe: Inter-war Minority Protection in Perspective*, in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge: Cambridge University Press, 2013 pp. 417-418.

²⁶ M. KRYGIER, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, in *Law & Social Inquiry*, 1990, p. 640.

of persons belonging to minorities".²⁷ In 2014, the European Commission published a working definition of the rule of law which comprises the following six elements: legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for human rights, and equality before the law.²⁸ Some of these legal elements had been culled from an influential report on the rule of law developed by the European Commission for Democracy Through Law (the Venice Commission) in 2011.²⁹

Recently, it has been argued that memory laws represent a potential threat to the rule of law in the European Union. Indeed, this assessment has been especially aimed at developments in Hungary and Poland, where post-communist legacies have been politicized, as noted in the *Articles* presented here by Könczöl and Kevevári, and Wyrzykowski, respectively.³⁰ The contested communist heritage has also been problematic in Ukraine and Lithuania, where proximity to Russia plays an important role as illustrated in the contributions to this *Special Section* by Chervastova and Bruskina. Moreover, in the Balkans, a region where States are angling for EU membership, governmental actors have engaged in revisionist politics that are challenging the well-established narratives instituted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), shifting the focus of victimhood in potential contradiction with the judicial findings of that Tribunal as outlined in the contribution by Tromp. In what follows we introduce the *Articles* comprising the *Special Section*, identify their overarching themes of mnemonic revisionism and contestation and explore their rule of law implications.

IV. MEMORY GOVERNANCE AND THE RULE OF LAW

The *Special Section* starts with Nikolay Kaposov's contribution, which examines historians' protests against laws criminalizing certain statements about the past.³¹ By analysing opposition to memory laws, he shows how both the laws and the resistance to them have evolved. The initial opposition was conditioned by broader concerns about the freedom of expression, accompanied by the attempts to limit the explosion of particularistic memories. This has changed with the evolution of memory laws, which made concerns about their content even more serious, in particular in Eastern Europe. Kaposov identifies the shifting of blame for historical injustices entirely onto others as the

²⁷ Art 2 TEU. The concept of the rule of law also features as the basis for the EU's external action and appears in the Preamble of the Charter of Fundamental Rights of the European Union.

²⁸ Communication COM(2014) 158 final/2 from the European Commission to the Parliament and the Council on a new EU Framework to strengthen the Rule of Law.

²⁹ Council of Europe, Venice Commission Report CDL-AD(2011)003rev of 25-26 March 2011 on the Rule of Law.

³⁰ M. BUCHOLC, *Commemorative Lawmaking*, cit, pp. 85-110.

³¹ N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 107 *et seq.*

stereotypical and most problematic aspect of Eastern European memory laws. At worst, these provisions have been weaponised by nationalist and populist governments. Kopolov argues that historians should invoke “the duty of history and knowledge”, rather than the “duty of memory”, which can be easily misused by populists. While being critical toward such laws, Kopolov also argues that “there is little evidence to suggest that memory laws actually have limited the freedom of historical research, although their adoption has undoubtedly endangered it”.

Memory wars have also been a salient feature of the relationship between Russia and Ukraine, as outlined in the *Article* by Cherviastova.³² The fall of the Soviet Union has prompted a reckoning with the past in Ukraine that has divided society and pitted the country against Russian narratives of Soviet glory supported by the neo-imperialistic policies of the Putin regime, and neighbouring countries such as Poland. Cherviastova focuses on the so-called decommunization package, a set of legislative measures adopted in 2015 to condemn the Nazi and Communist legacies and honour the memory of Ukrainian fighters for independence. This reading of history has conflicted with the Russian policy of glorifying Soviet victories during the Second World War. Problematically, however, these laws portray an uncritical and unequivocally positive picture of the Ukrainian resistance, which at times was responsible for the commission of crimes. This leads Cherviastova to conclude that these laws are ultimately whitewashing the past.

The *Article* by Nika Bruskina also examines the legacies of communist-era resistance to the Soviet regime by discussing the tension between characterizing Lithuanian narratives of victimhood and resistance as genocide, and the limits of international law and human rights in this regard which arose in the *Vasiliauskas* and *Drėlingas* cases before the European Court of Human Rights.³³ In particular, Bruskina shows how the domestic courts of Lithuania succeeded in upholding convictions for genocide while characterizing the partisan resistance – an eminently political group and therefore not protected by the definition of genocide – as part of the ethno-national group that is covered by the Genocide Convention.

Nevenka Tromp's *Article* on the recasting of Serbia from “principal wrongdoer” to “legitimate warring party” during the Balkan Wars of the 1990s shows that the legacy of international criminal tribunals and their findings can be challenged by post-transitional narratives to further strategic geopolitical goals. It highlights the vulnerability of international judicial institutions in the face of political and institutional revisionism and the limitations that transnational liberal networks may have in the shaping of post-conflict societies. Tromp argues that in relativizing the findings of the ICTY through the victimi-

³² See A. CHERVIASTOVA, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 119 *et seq.*

³³ N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 137 *et seq.*

zation of Serbians during the Balkan Wars, post-conflict *elites* in Serbia have reintroduced the politics of the past into contemporary debates. Not only that – by changing the transitional justice narrative, Tromp argues that Serbia's aim is “to provide the legitimisation for the return to the geopolitical designs of the predecessor regime that were not achieved during the war despite the commission of mass atrocities”.³⁴ The upending of the narrative established by the ICTY is a strategic move which involves very little risks from the EU's standpoint as far as Serbia is concerned. This is because the EU has limited itself to encourage judicial and other forms of cooperation between the ICTY and the States in which it enjoys jurisdiction, but has done little to frame the ICTY's legacy within a rule of law framework for the region's future. The fact that very little detracts the Serbian State from distorting the Tribunal's narrative shows that transitional justice frameworks can be vulnerable to manipulation via memory politics.

The re-framing of memory politics is also taking place in Poland and has been identified as part of the “democratic backsliding” taking place in recent years.³⁵ The most salient example of this phenomenon is the law on “defamation of the good name of the Polish State and nation” which was enacted in 2018 and initially attached criminal sanctions to the public assertion of the existence of “Polish death camps” during World War II. Although the criminal liability element was removed months after its enactment, the law stands as a testament to the pervasive consequences of memory legislation in the region. The law and the developments following its adoption are discussed by Mirosław Wyrzykowski in his *Article* for this *Special Section*.³⁶ Wyrzykowski, who is a former judge of the Polish Constitutional Tribunal, sheds light on the adopted Act outlining the process of its referral to the Constitutional Tribunal and the subsequent amendments which modified it. As the 2018 Act was not the first legislative initiative to criminalize the defamation of the good name of the Polish State in the context of history, Wyrzykowski compares it to an earlier law and shows the peculiarities of the new one. Among those differences is the broadening of the scope of the competences of the Institute of National Remembrance to also encompass crimes committed by “Ukrainian nationalists” and Ukrainian formations collaborating with the Third German Reich. This development shows how memory laws in Eastern Europe are not only tackling Soviet and Nazi crimes, but are starting to engage with historical conflicts between nations. The Act was amended just after six months, as Wyrzykowski argues, due to the very strong negative stance of international public opinion. However, the criticism primarily targeted the act's restrictions on open debates and objective research on the Holocaust, in particular as regards the co-responsibility of Poles for murdering Jews and looting their property during and immediately after World War II.

³⁴ N. TROMP, *Misjudging History at Mass Atrocities Trials: Bosnian Genocide in the Courtroom, 1992-1995*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

³⁵ M. BUCHOLC, *Commemorative Lawmaking*, cit, pp. 85-110.

³⁶ M. WYRZYKOWSKI, “National Untruth”: *Controversial Law on the Polish Institute of National Remembrance?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

In this sense, public disapproval did not so much concern the part of the Act relating to “Ukrainian nationalists”, which was subsequently judged by the Constitutional Tribunal as failing to meet the requirements of to be a sufficiently precise legal regulation. As a result, the Constitutional Tribunal found that the reference to Ukrainian nationalists violated the principle of a democratic state of law and the constitutional requirement for the necessary determination of a criminal law norm. While the term “Ukrainian nationalist” was later eliminated from the Act, it still contains the introduced references to Ukrainian formations collaborating with the Third German Reich.

In Hungary, the other EU Member State in Eastern Europe where the rule of law standard is increasingly under threat, memory regulation is also of utmost relevance to the phenomenon of democratic backsliding. The historical references in the Fundamental Law of Hungary are closely analysed by Miklós Könczöl and István Kevevári, who show how these provisions can be regarded as an attempt to radically change the relationship between law and memory in society. Their *Article* explores the implications of introducing historical concepts to the Hungarian Fundamental Law on the basis of two distinct phrases.³⁷ First, that the provisions of the Law are to be interpreted in accordance with the achievements of the “historical constitution”, which comprises a collection of historical documents dating back to medieval times.³⁸ Secondly, they analyse the obligation of every organ of the State to protect “the constitutional identity and Christian culture of Hungary”. The authors show the tendency to increase the volume of historical references in the constitutional text, which are intended to emphasize the unifying historical narrative. Including “Christian culture” in the Fundamental Law is particularly interesting, as it appears to be triggered by recent events, in particular the perceived political and cultural conflicts at the European level. This might be both the increase non-Christian immigrants and European legislation changing cultural traditions. Könczöl and Kevevári conclude that the historicisation of constitutional concepts seems to be undertaken by the constitution-makers, as well as by those interpreting the text, in particular the Constitutional Court. To illustrate the societal implications of these attitudes, the book review by Marina Bán surveys the recent literature on the relationship between memorials and the State.

V. CONCLUDING REMARKS

This *Special Section* shows that the democratization process in Eastern and Central European States has been far from linear. Indeed, the political and legal voids left by the fall of communism have created spaces of contestation in respect to the historical legacies of totalitarianism, national identity, and, ultimately, the recognition of otherness.

³⁷ M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 161 *et seq.*

³⁸ K.L. SCHEPPELE, *The Constitutional Basis of Hungarian Conservatism*, in *East European Constitutional Review*, 2020, p. 51 *et seq.*

The political, economic and geographical proximity of the European Union and Russia have contributed to increasing the stakes for the States concerned. This is partially due to their attempt to reconcile a commitment with rule of law standards, on the one hand, with a robust assertion of national identity via the legal governance of historical memory, on the other, in contradistinction to Soviet legacies such as in Poland. At the same time, the increasing assertiveness of Russian influence in the region has caused governments to engage in historical revisionism through judicial measures, as shown in the Lithuanian context, or to resort to all-out memory wars, such as in Ukraine. Ultimately, these contributions aim at illustrating how the past has become an arena of contemporary political and legal contestation in post-communist States.