



ARTICLES

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

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

HISTORIANS, MEMORY LAWS, AND THE POLITICS OF THE PAST

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ABSTRACT: This *Article* examines historians' protests against memory laws that criminalize certain statements about the past. Most typically, historians protest these laws in the name of freedom of research. However, the chronology of their protests, which became widespread only in the 2000s, a decade and a half after the adoption of the first bans on Holocaust denial, suggests that their opposition to memory laws had other reasons as well. The Author argues that these reasons had to do with the evolution of the legislation of memory, namely, the expansion of such prohibitions on topics other than Holocaust denial, which many historians interpreted as a manifestation of the "competition between victims" and of the decay of democracy as a universal project. The *Article* further considers the changes that occurred in this legislation as a result of the rise of national populism, especially in Eastern Europe, where bans on certain statements about the past are increasingly used to promote national narratives. The 2014 Russian memory law, which criminalizes "the dissemination of knowingly false information on the activities of the USSR during the Second World War" and protect the memory of the Stalin regime, is an extreme example of this tendency. The author suggests that the memory laws' focus on concrete historical events that function as sacred symbols of national and other communities, has facilitated their emergence as a preferred instrument of populist history politics based on particularistic memories rather than on the cosmopolitan memory of the Holocaust.

KEYWORDS: memory laws – historical memory – holocaust – communist crimes – populism – particularism.

I. HISTORIANS AGAINST MEMORY LAWS

In 2006, a group of Belgian historians published a petition against memory laws, in which they posited: "[u]ne judiciarisation croissante du débat historique constitue une atteinte à

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la liberté d'expression et de la recherché".¹ On multiple occasions, similar statements were made by different historical societies and groups of historians all across the world. The French-based association *Liberté pour l'Histoire* has played a crucial role in making historians aware of the potential problems that criminalization of claims about the past may create for historical research and public debates. The American Historical Association has also been remarkably persistent in protesting memory laws drafted and/or adopted in different countries. Although some historians do support their governments' banning certain interpretations of history, my impression is that most colleagues in Europe and North America are strongly opposed to memory laws or, at the very least, are sceptical of them. Even in such countries as Russia and Ukraine, some historians have been deeply concerned, respectively, about the 2014 statute that has penalized any criticism of Stalin's policy during World War II (WWII)² and the 2015 "de-communization laws" that have forbidden insults to the memory of "fighters for Ukraine's independence", even though some of those "fighters" had been involved in crimes against humanity.³

Historians' initial reaction to the criminalisation of certain statements about the past was very different. In France, the 1990 Gayssot Act (a classical Holocaust denial law) was welcomed by most historians, with few dissenting voices. The situation changed in the 2000s, especially with the debates about the 2005 Mekachera Act, which provided that "les programmes scolaires reconnaissent [...] le rôle positif de la présence française outre-mer" (that is, of French colonialism).⁴ Public protests forced President Jacques Chirac to repeal this clause a year later. Nevertheless, the episode triggered a broader discussion of whether memory laws (both criminal and declarative) are acceptable in a democratic society. In 2008, the *Liberté pour l'Histoire* association convinced the French parliament that regulating historical memory is not parliament's legitimate function.⁵ Notwithstanding, several memory laws were passed after 2008. Historians' petitions against memory laws that I am aware of appeared after 2005 (e.g., in Belgium in 2006, Italy in 2007, Russia in

¹ *Pléthore de mémoire: quand l'État se mêle d'histoire...*, in *La Libre Belgique*, 25 January 2006, lalibre.be, also published on *Le Soir*, 25 January 2006, lesoir.be.

² Federal'nyi zakon N 128-FZ ot 5 maya 2014 O vnesenii izemeniy v otdel'nyie zakonodatel'nyie akty Rossiyskoy Federatsii, Article 1. For a French translation of one of the 2009 petitions against the first draft of the law see "Appel aux citoyens de Russie, à son président et à la Douma": www.lph-asso.fr.

³ Zakon Ukraini 314-VIII vid 09.04.2015 Pro pravovoy status ta vshanuvannya pamyati bortsiv za nezalezhnist' Ukraini u XX stolitti. See also *Open Letter from Scholars and Experts on Ukraine Re. the So-Called 'Anti-Communist Law'*, published on lph-asso.fr. On the memory laws in Ukraine see also A. CHERVIASOVA, *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.

⁴ Loi no 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés.

⁵ *Assemblée Nationale. Rapport d'information no 1262: Rassembler la Nation autour d'une mémoire partagée* (Paris: Assemblée Nationale, 2008), p. 181. See *Liberté pour l'histoire: Une pétition pour l'abrogation des articles de loi contraignant la recherche et l'enseignement de cette discipline*, in *Libération*, 13 December 13 2005, liberation.fr, and *Appel de Blois*, in *Le Monde*, 10 October 2008, lemonde.fr.

2009, Ukraine in 2015, and so on). It is hard to measure the efficiency of these protests but, at least in some cases (in Italy in 2007 and in Belgium in 2006), the historians' resolute stand against the criminalization of statements about the past contributed to their countries' decisions not to pass (at least for a while) such statutes.

Without exception, all such petitions argue that establishing an "official truth" about the past limits the freedom of historical research. By contrast, those historians who support memory laws insist that such enactments do not limit their freedom because they only ban intentionally untrue and insulting statements. This is also the position of the authors of memory laws. Moreover, some of these acts clearly state that they do not apply to *bona fide* historical research (although without specifying who will decide whether a given historical claim is sufficiently well-documented). Moreover, memory laws are used very infrequently. It is exceptional for a professional historian to be accused of violating them, the failed case against Olivier Pétré-Grenouilleau in France in 2005 being perhaps the best-known example of such accusations.⁶ Even in Putin's Russia, the 2014 "Stalinist" law has been used only a handful of times and not against professional historians.⁷

In other words, there is little evidence to suggest that memory laws actually have limited the freedom of historical research, although their adoption has undoubtedly endangered it. But this potential danger does not sufficiently explain the historians' mobilization against memory laws, especially in France.

What changed historians' attitudes to these laws? I would argue that this was largely due to the changing nature of this legislation and the changing political and cultural climate. In this *Article*, I will focus on *ad hoc* statutes criminalizing certain claims about the past.⁸

II. HISTORICAL MEMORY AND CRIMINAL LAW

To date, twenty-eight European countries (as well as Israel and Rwanda)⁹ have passed *ad hoc* memory laws that criminalize certain statements about the past, including Germany (1985/1994), France (1990/2016), Austria (1992), Switzerland (1993), Belgium

⁶ D. KHAPAEVA, *Des lois historiques aux lois mémorielles: 19 historiens français pour la liberté de l'histoire*, in *Le Banquet*, 2007, pp. 131-148; S. LÖYTÖMÄKI, *Law and the Politics of Memory: Confronting the Past*, London: Routledge, 2014, pp. 97-98; M.O. BARUCH, *Des lois indignes? Les Historiens, la politique et le droit*, Paris: Talendier, 2013, pp. 15-17.

⁷ For example, in June 2016, Russian blogger Vladimir Luzgin was sentenced to a fine of 200,000 rubles (about 3,300 US dollars) for reposting an article claiming that WWII began with the German and Soviet invasion of Poland.

⁸ On memory laws, see R.A. KAHN, *Holocaust Denial and the Law: A Comparative Study*, New York, Basingstoke: Palgrave Macmillan, 2004; U. BELAVUSAU, A. GLISZCZYNSKA-GRABIAS (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017; and N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017.

⁹ See Israel's Denial of Holocaust (Prohibition) Law 5746-1986 of July 8, 1986 and Rwanda's Law No. 33bis/2003 on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes.

(1995), Spain (1995/2015), Luxembourg (1997/2012), Poland (1998/2018), Liechtenstein (1999), the Czech Republic (2000/2009), Slovakia (2001/2005), Romania (2002/2015), Slovenia (2004/2008), Macedonia (2004), Andorra (2005), Cyprus (2006/2011), Portugal (2008), Albania (2008), Malta (2009), Latvia (2009/2014), Hungary (January 2010/June 2010), Montenegro (2010), Lithuania (2010), Bulgaria (2011), Croatia (2011), Greece (2014), Russia (2014), and Italy (2016).¹⁰ In addition, the Netherlands, Ukraine, and Turkey have norms that can be viewed as borderline cases within the same category.¹¹

One can distinguish two stages in the evolution of memory laws. During the initial period, which lasted approximately from 1985 to 1998, those acts were adopted almost exclusively in “old” continental democracies such as Germany, France, Austria, and Belgium, which had been directly implicated in the Holocaust. Unsurprisingly, then, the memory of Nazi crimes was their main focus. The second period began in the late 1990s. It was characterized by further “internationalization” of memorialization; the role of the EU in promoting it;¹² the extension of memory laws to new subjects (e.g., the Armenian genocide, communist crimes, the slave trade); and their expansion in Southern and Eastern Europe.

The growing popularity of memory laws resulted in a gradual change of their character. Initially conceived as a means of maintaining peace, they have tended to become a weapon of choice in the ensuing “memory wars” fought within and/or between many European countries, of which Eastern Europe and France are the most obvious examples.

At the turn of the 1990s, the international political climate was largely determined by the fall of communism and the seemingly decisive triumph of liberal democracy, for which the formation of the humanistic, victim-centered culture of memory was an important aspect. The first Holocaust denial laws expressed those nations’ repentance for their participation in that crime.

Soon, there emerged a tendency toward expanding the ban on denialism to crimes against humanity in general, of which the 1993 Swiss and the 1995 Spanish laws were the earliest examples. In 1997, Luxembourgian legislators created a “two-part” model and

¹⁰ In brackets, I give the dates of those countries’ first laws that have criminalized certain statements about the past and the dates of their substantial amendments.

¹¹ The Netherlands has a Supreme Court ruling of 1997 that Holocaust denial is punishable as defamation of Jews. Between January 2014 and April 2015, Ukraine had a law criminalizing the denial of fascist crimes; currently, Ukraine has two acts that outlaw the denial of the Holodomor (since 2006) and insults to the memory of “fighters for Ukraine’s independence” (since 2015), but neither of them provides any penalties for violating those bans. Turkey has (since 2005) Art. 301 of its Penal Code, which forbids insults to the Turkish state. Without technically being a memory law, this article is used against those who recognize the Armenian genocide. Common law countries such as the USA, Canada, and Great Britain do not have *ad hoc* statutes criminalizing statements about the past, nor do Scandinavian countries whose legal systems have been influenced by the common law tradition.

¹² See Art. 6, para. 1, Additional Protocol to the 2003 Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, and Art. 1, 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.

prohibited the denial of both Nazi crimes and all other genocides recognized by a Luxembourgian or by an international instance.¹³ This model was later reproduced in the European Council Framework Decision of 2008 and in several national enactments.¹⁴

Simultaneously, different communities of memory began claiming legal protection for their historical narratives. In France, this resulted in the adoption, in 2001, of two declarative memory laws, the first of which (the “Armenian” law) “[l]a France reconnaît publiquement le génocide arménien de 1915” in the Ottoman Empire, while the second (the Taubira Act) “[l]a République française reconnaît que la traite négrière [...]et l'esclavage [...] constituent un crime contre l'humanité”.¹⁵ Immediately after their adoption, memory activists began working to criminalize the denial of those crimes on the model of the Gayssot Act. I am aware of about fifteen such drafts introduced into the French parliament since 2001. Along with the Mekachera Act, these drafts have informed the immediate context of the French historians’ protests against memory laws.

III. UNIVERSAL VALUES AND PARTICULARISTIC MEMORIES

These protests suggest that many French historians consider the expansion of memory laws a manifestation of the “competition of victims” and of the fragmentation and crisis of the French national identity.

Thus, the first president of the *Liberté pour l'Histoire* association, René Rémond, gave the following answer to the question about the potential dangers of the “legitimate recognition of diversity” (read: the expansion of memory laws): “[l]e processus devient dangereux quand l'attachement à la particularité prend le pas sur l'adhésion à la généralité et devient un obstacle à l'ouverture sur l'universel”.¹⁶ Rémond's successor, Pierre Nora, criticizes particularistic memories and memory laws that protect them for emphasizing past tragedies, which deprives France of its “positive relation” to its history and stimulates a “national masochism” in the name of multiculturalism.¹⁷ This is, of course, linked to Nora's understanding of present-day historical memory, which he views as an “artificial

¹³ Loi du 19 juillet 1997 complétant le code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme [...], Art. 3.

¹⁴ See the 2005 Slovak law, the 2008 Slovenian law, the 2010 Lithuanian law, the 2014 Greek law, and the 2015 Romanian law. In contrast, the 1999 Lichtenstein's law, the 2004 Macedonian law, the 2004 Slovenian law, the 2005 Andorran law, the 2007 Portuguese law, the 2008 Albanian law, the 2009 Maltese law, the 2009 Latvian law, the 2010 Montenegrin law, and the 2015 Spanish law forbid to deny any genocide, while the 2002 Romanian law, the Hungarian law of January 2010, the 2014 Ukrainian law, the 2014 Russian law, and the 2016 Italian law focus on the denial of Nazi crimes.

¹⁵ Loi no. 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 and Loi no. 2001-434 du 21 mai 2001 tendant à la reconnaissance, par la France, de la traite et de l'esclavage en tant que crime contre l'humanité.

¹⁶ R. RÉMOND, *Quand l'Etat se mêle de l'histoire: Entretiens avec François Azouvi*, Paris: Stock, 2006, p. 86.

¹⁷ P. NORA, *Malaise dans l'identité historique*, in P. NORA, F. CHANDERNAGOR (eds), *Liberté pour l'histoire*, Paris: CNRS Editions, 2008, pp. 20-23.

hyper-reality" created by various agents of memory in the interests of political manipulation. Outside France, proliferation of particularistic memories ("a new focus on narrow ethnicity") is often assessed in equally negative terms as a sign "of a retreat from transformative politics" and from "progress toward civic enfranchisement and growing equality".¹⁸ As a Finnish scholar has recently claimed, "[l]egal engagements in memory and identity politics tend to give rise to competition between victims [...], leading to further polarization of particular groups against each other and the state".¹⁹

These formulas are very different from the language of the historians' petitions, which typically emphasize the danger of memory laws for democratic freedoms. However, the arguments concerning the freedom of research and the competition of victims naturally complement each other, especially insofar as both express the historians' sense of their diminishing control over the collective representations of the past. The afore-mentioned Belgian petition demonstrates this logic: "[p]lutôt que le devoir de mémoire tant invoqué, nous aimerions voir plus souvent invoquer le devoir d'histoire et de savoir".²⁰ Indeed, in contrast to collective memory, historical knowledge seems to be much more compatible with "l'adhésion à la généralité et devient un obstacle à l'ouverture sur l'universel", in other words, with democracy viewed as an essentially universalistic project.

The problem of particularistic memories is linked to the uniqueness of the Holocaust. Although the *Liberté pour l'Histoire* association calls for the abrogation of all memory laws, it seems to consider the Gayssot Act far less damaging than other statutes. Indeed, the Shoah is often perceived as "a generalized symbol of human suffering and moral evil".²¹ In other words, the memory of the Holocaust can be opposed to those of other past atrocities as a "future-oriented cosmopolitan memory"²² significantly different from particularistic memories of national communities and other constituencies. Unsurprisingly, the partisans of *ad hoc* statutes protecting those memories argue that all memory laws "have been adopted in the name of universal values".²³

Today, however, it may be difficult to insist on the uniqueness of the Holocaust in exactly the same terms as during the 1986-1987 German *Historikerstreit*. Trivializing the Shoah by comparison with other cases of mass atrocities was then rightly viewed as an

¹⁸ C.C. MAIER, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, in *History and Memory*, 1993, pp. 136-52. See also A. HUYSEN, *International Human Rights and the Politics of Memory: Limits and Challenges*, in *Criticism*, 2011, pp. 607-624.

¹⁹ S. LÖYTÖMÄKI, *Law and Memory: The Politics of Victimhood*, in *Griffith Law Review*, 2012, pp. 1, 19.

²⁰ See *supra*, note 1.

²¹ J.C. ALEXANDER, *On the Social Construction of Moral Universals: The Holocaust from War Crime to Trauma Drama*, in *European Journal of Social Theory*, 2002, p. 6.

²² D. LEVY, N. SZNAIDER, *The Holocaust and Memory in the Global Age*, Philadelphia: Temple University Press, 2006.

²³ Quoted in M.O. BARUCH, *Des lois indignes?*, cit., p. 319.

attempt to whitewash Germany's past.²⁴ Thirty years later, this explanation remains largely valid with regard to numerous similar cases, especially in Eastern Europe (we will return to that in the next section). Nonetheless, claiming a unique status for the Shoah is now increasingly considered insulting to other memory communities because of a "hierarchy of victims" that the focus on the memory of the Holocaust is said to entail. Expanding the ban on denialism to other topics is typically justified by the need to bring the "memorial apartheid" to an end.

That is why the opponents of the expansion of memory laws now tend to refer to the unique status of the memory of the Holocaust rather than to the uniqueness of the Holocaust itself. This position manifests itself in particular in a series of recent decisions made by the European Court of Human Rights and the French Constitutional Council. A legal scholar summarizes the position of the European Court of Human Rights in the *Perinçek v. Switzerland* case in the following way: "Whereas the denial of the Holocaust is presumed to be a subtle form of anti-Semitism – as such warranting an *ad hoc* legal regime – other types of denialism do not necessarily entail comparable harm, thereby calling for a case-specific analysis".²⁵

A ruling of the French Constitutional Council of 8 January 2016 is another example of the same logic. The Council stated that Holocaust negationism is different from that of all other genocides in that it "constituent en eux-mêmes une incitation au racisme et à l'antisémitisme" not least because the extermination of the Jews "commis [...] en partie sur le territoire national."²⁶ That is why "aucune autre négation d'un crime contre l'humanité [...] ne serait porteuse, dans notre société, d'une violence symbolique équivalente".²⁷ In other words, what has to be compared are the discourses about genocides rather than the genocides themselves, and this comparison suggests that the memory of the Shoah must have a special legal status. Both decisions were intended to put limits on the "legitimate recognition of diversity", in line with the afore-mentioned historians' stand on the issue.

The opposition to memory laws was thus initially conditioned at least as much by the attempts to limit the explosion of particularistic memories as by broader concerns about the freedom of expression. In other words, it was a reaction to the content of some memory laws as well as to the very fact of their adoption. The evolution of the leg-

²⁴ C.C. MAIER, *The Unmasterable Past: History, Holocaust, and German National Identity*, Cambridge, Mass., London: Harvard University Press, 1988.

²⁵ P. LOBBA, *A European Halt to Laws Against Genocide Denial?*, in *European Criminal Law Review*, 2014, p. 60. In 2015, the European Court of Human Rights overruled the 2007 sentence of a Swiss court that had found Turkish nationalist Doğu Perinçek guilty of racially motivated denial of the Armenian genocide.

²⁶ French Constitutional Council, judgment of 8 January 2016, no. 2015-512 QPC.

²⁷ See French Constitutional Council, judgment of 8 January 2016, no. 2015-512 QPC – Commentaire, p. 23.

isolation of memory and its expansion onto Eastern Europe have made concerns over their content even more serious.

IV. POPULISM AND MEMORY IN EASTERN EUROPE

There are striking differences between the contexts in which memory laws emerged in the 1980s and 1990s in the “old” Western European democracies and in which they further developed in the 2000s and 2010s, when Eastern Europe became the main centre of legislative activity regarding the past. The beginning of the new century witnessed a crisis of democracy in many countries, a rise of national populism, and the formation of the authoritarian regimes in Russia, Turkey, Hungary,²⁸ and (to some extent) Poland. In the former communist states, the rise of nationalism was largely conditioned by the difficulties of the transition period, which exacerbated their century-old complex of inferiority *vis-à-vis* the West as well as their historical grievances against their neighbours. Some of the memory laws adopted in Eastern Europe faithfully reflected the emergence of a culture of memory that differed substantially from the democratic memory based on the sympathy toward the victims of history and on the notion of state repentance for the crimes of the past (genocide being, by definition, a state-sponsored crime).

To be sure, several Eastern European countries (e.g., Slovakia, Slovenia, Romania, Croatia, and Bulgaria) adopted memory laws on the EU model. But some other countries, including Poland, the Czech Republic, Hungary, Lithuania, and Latvia criminalized the denial of both Nazi and communist crimes. The countries in this second group clearly differ from the first: they have a stronger record of anti-Soviet resistance, feel more vulnerable because of Putin’s neo-imperial ambitions, and are involved in harsh disputes with Moscow about the past.

In Eastern Europe, memories of WWII could not be the same as in the West or in Russia, because at the end of the war, the region was occupied by one of the victors with the consent of the others.²⁹ Communist regimes are normally seen here as a result of foreign conquest. In addition, some of these countries were Hitler’s allies, and parts of their population were actively involved in the Holocaust. Unsurprisingly, the culture of victimhood in the region has taken a special form of self-victimization of national communities that view themselves as victims of the Soviets, the Nazis, and even the West – but not as co-perpetrators of Nazi and communist crimes.³⁰ The promulgation of the Western-style memory laws did not quite match the specificity of the region’s historical experience.

²⁸ For a thorough analysis of historical references in the constitution of Hungary, see 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.*

²⁹ T. SNYDER, *Bloodlands: Europe between Hitler and Stalin*, New York: Basic Books, 2010.

³⁰ J.-P. HIMKA, J. B. MICHLIC (eds), *Bringing the Dark Past to Light: The Reception of the Holocaust in Post-communist Europe*, Lincoln, London: University of Nebraska Press, 2013.

The problem with these typically Eastern European memory laws is not so much that they envisage fascism and communism as two equally criminal regimes – which is understandable in light of these countries' historical experience – but that they shift the blame for historical injustices entirely onto others (Nazi Germany and the USSR), victimize the past for the nation-states' sake, and use history as a means of nationalist mobilization. This is the exact opposite of what memory laws were meant to achieve in Western Europe and what the EU sought to ensure by promoting such legislation. None of these East European laws mentions that significant parts of these countries' populations participated in both Nazi and communist atrocities.

Thus, the 1998 Polish memory law prohibited the denial of “crimes perpetrated against persons of Polish nationality and Polish citizens of other [...] nationalities” (the word “nationality” is here used in the sense of ethnicity). This was an obvious attempt to downplay the importance of the Holocaust and present the Poles rather than the Jews as Hitler's main victims. The law passed over in silence the participation of Poles in the Shoah.³¹ Lithuania's memory law of 2010 forbids the denial of crimes “committed by the USSR or Nazi Germany in the territory of the Republic of Lithuania or against the inhabitants of the Republic of Lithuania”,³² as if Lithuanians themselves had committed no crimes against humanity. Such laws follow the logic of competition between victims far beyond the limits to which it is normally confined in the West.

Indeed, as Jan-Werner Müller reminds us,³³ there are different kinds of populism, including national (or ethno-) populism, the rise of which has deeply marked the turn of the twenty-first century, especially in Eastern Europe. In contrast to Western Europe, several Eastern European memory laws are products of national populism.

Russia and Turkey are extreme cases of this deplorable tendency. In May 2014, in the midst of the Ukraine crisis, Russian government criminalized “the dissemination of knowingly false information on the activities of the USSR during the Second World War”.³⁴ Any criticism of Stalin's policy can be subsumed under this formula. In 2005, Turkey amended its Penal Code by introducing Art. 301, which criminalized insults to the Turkish state and which is normally used against those who recognize the extermi-

³¹ Law No. 155 of December 18, 1998, On the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Arts 1 and 55.

³² Law No. VIII-1968 of 26 September 2000, on the Approval and Entry into Force of the Criminal Code, consolidated version valid as of 1 April 2016, Art. 170.2. See 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.*, for an analysis of how “genocide” has been interpreted in this context.

³³ J.-W. MÜLLER, *What Is Populism?*, Philadelphia: University of Pennsylvania Press, 2016, pp. 7-9.

³⁴ See *supra*, note 2.

nation of the Armenians in the Ottoman Empire as a genocide.³⁵ These laws do not just silence, but openly protect the memory of the perpetrators of state-sponsored crimes.

The much-debated 2018 Polish memory law is similar to the 2014 Russian and the 2005 Turkish statutes in that it introduced criminal sanctions for “publicly and contrary to the facts” ascribing to the Polish people or government the “responsibility or co-responsibility for Nazi crimes” or “other offenses that constitute crimes against peace, crimes against humanity, or war crimes”.³⁶ The law in fact protects the memory of Polish nationalists and ordinary Poles, who killed or denounced to the Nazis tens of thousands of Jews hiding in the so-called “Arian zones” (that is, outside the ghettos). In other words, the law protects the memory of the perpetrators, although differently from Russia and Turkey, these perpetrators were individual Poles rather than the government. This 2018 statute has considerably deteriorated Poland’s legislation of memory, which was already problematic after the adoption of the afore-mentioned 1998 act. However, its most scandalous provisions have been repealed under international pressure in June 2018.³⁷

V. CONCLUDING REMARKS

Memory laws came into being to promote peace and overcome self-congratulatory national narratives. Over time, however, they have become one of the preferred instruments of national populists. Old democracies ill-advisedly set the example of infringing freedom of expression, and some new democracies and authoritarian regimes have enthusiastically followed suit. The proliferation of memory laws and their expansion on topics other than the Holocaust were, notwithstanding their authors’ intentions, the first steps in this direction, which arguably explains why historians have withdrawn their initial support for this legislation.

Since historical memory first became an object of criminal law about three decades ago, many things have changed in our societies.³⁸ Two important lessons that the history of memory laws teaches us are that we need to re-invent our strategies for the epoch of the rise of populism and that historians should more consistently invoke “the duty of history and knowledge” rather than the duty of memory, which is being increasingly misused by populist memory entrepreneurs.

³⁵ T. NAAMAT, N. OSIN, D. PORAT (eds), *Legislating for Equality: A Multinational Collection of Non-Discrimination Norms*, Leiden, Boston: Martinus Nijhoff, 2012, p. 478.

³⁶ Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [...]. For more on the law and its subsequent amendments see 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.

³⁷ Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [...].

³⁸ I. KRASTEV, *The Unraveling of the Post-1989 Order*, in *Journal of Democracy*, 2016, pp. 5-15.

The ease with which memory laws have been overtaken by nationalistic history politics (and by particularistic memories in some Western countries) can hardly be viewed as purely contingent, and not only because anti-democratic forces can only profit from the growing punitive trend initiated by democratic countries. I believe that the memory laws' cultural form has been crucial for this transformation. Indeed, all such laws without exception ban "heretical" interpretations of concrete (typically, traumatic) historical events that function as sacred symbols of national and other communities. Since the end of the twentieth century, Western historical consciousness has become focused on those events rather than on future-oriented philosophies of history commonly dismissed as master narratives. Memory laws operate in the realm of symbolism, memory, and myth, in which nationalism may be more at home than is democracy, whose main strength lies in its universalistic future-oriented character. This is why the very first memory laws, inspired as they were by the emerging democratic culture of memory, already signified a changing political dynamic that few observers could then foresee.

