Final Thoughts on Mnemonic Constitutionalism

Uladzislau Belavusau

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Yesterday's essay by Ionna Tourkochoriti about recent memory politics in Greece marks the conclusion of our first online symposium on memory laws, jointly conducted by the T.M.C. Asser Institute (The Hague) and Verfassungsblog. Twelve scholars from eight countries have offered their critical perspectives on the legal governance of historical memory, categorised under the common heading of "memory laws". One aspect crystalized by this symposium is that despite their multiple forms (punitive and declarative, constitutional and administrative, legislative and judicial, etc.), the adoption of such memory regulations has been on a tremendous rise in Europe. Furthermore, their mushrooming in Central and Eastern Europe, as vividly demonstrated by several of our authors (Bán, Belavusau, Gliszczyńska-Grabias, Halmai, Koncewicz, Koposov, Přibáň), has been intertwined with a certain decline of rule of law in the region. "Illiberal democracies" seem to be particularly eager to revert to populist identity-formation under the guise of memory politics, mainstreaming nationalist historiography while marginalizing and, at times, supressing alternative historical memories of minorities. Likewise, the controversial decision of the European Court of Human Rights in Perinçek (2015), an impressively voluminous judgement challenging the prohibition to deny Armenian genocide, has in recent years sparked an unprecedented attention to invoking law in the context of historical memory.

Evolution of Memory Laws: from "German" Legal Fashion to Memory Wars

It is nonetheless symbolic that this symposium is run on the German Verfassungsblog, since Germany has undoubtedly become a trend-maker in the world of comparative law regarding legal governance of memory and wider Erinnerungspolitik, being the first in Europe to introduce the crime of Holocaust denial into its Criminal Code in the 1980s. As is well described in recent literature (in particular, here and here), German criminal practices have resulted in a spill-over effect for the adoption of penal memory laws elsewhere as well as for a gradual extension of their scope beyond pure Holocaust denial towards a broader prohibition of genocide denialism, epitomised by a secondary EU law adopted during then-German presidency of the Council (2008).

During the 1980s and 1990s, and even partially in the early 2000s, legislative memory provisions and historical trials in Europe and elsewhere were largely a matter of targeting revisionist and denialist narratives about Shoah, Armenian genocide, colonial atrocities, etc., raising painful questions about the past and its lessons for a hopefully more emancipated and tolerant future. In contrast, from 2000s and especially 2010s onwards, we can observe a pretty vivid turn in memory laws which are being converted into an instrument of memory wars, especially in the region of Central and Eastern Europe. Anna Wójcik has explained how the concept of mnemonic security has been instrumentalised to advance justifications for memory laws in a number of countries in this region to fortify their sovereignty in light of Russian propaganda. The process of legal rehabilitation of Stalinism along with the white-washing of Soviet expansionism of the epoch is described by Nikolay Koposov. Putin's Russia has taken a dangerous rhetoric of stirring up (post-)Soviet imperialism to cover up military interventions in the region via a peculiar vindication of communism – ever more contradictory in light of its parallel rehabilitation of the "good tsar" killed by Bolsheviks and revival of religious Orthodox obscurantism, once successfully supressed by the same communists.

Why Ukrainian Memory Laws Stand Out as Possibly Only Justifiable at the Moment?

In this respect, Ukrainian de-communization laws were clearly adopted as an attempt to counteract Russian media propaganda and military aggression, as is convincingly outlined by Maria Mälksoo. In this respect, I will certainly agree with Maria, who – unlike more blatant opponents of Ukrainian memory laws – demonstrates that the "criticism of Ukraine is implicitly of the Orientalizing and infantilizing kind. The proponents of decommunization have a point in sorting out Ukraine's belated Vergangenheitsbewältigung with the Soviet past." Nonetheless, Maria suggests that "Ukraine cannot escape the basic dilemma of 'defending democracy' whilst tilting the ever-elusive balance between security and liberty".

Despite me arguing elsewhere against memory laws (e.g. here and here), I will actually make a paradoxical statement to suggest that Ukrainian decommunization provisions are at the moment probably the only memory laws that can be justified in light of mnemonic security. Let's not forget that Ukraine has to counteract a heavy machinery of Russian media propaganda, under the dramatic state of annexation and military occupation in Crimea and Donbass, with monthly casualties on its battlefields. This is precisely the point that makes 2016 Polish memory law on the Volhynia massacre (while I am not denying the clearly shameful side of the Ukrainian involvement in this ethnic cleansing of 1943-1944) absolutely untimely, unneighbourly and even contradicting the logic of mnemonic security, the major current task of which should be to counteract Putin's propaganda instead of shaming weaker neighbours. Likewise, as I argue in my seminal blogpost for this symposium, the attack on the figures of the early 20th-century Belarusian intelligentsia in Poland via a memory law is rather of an ill-timed mauvais ton and puts the legal governance of memory into serious conflict with minority protection.

Memory Laws, Right to Truth and Rule of Law

Polish-Russian battles over historical justice are also at the centre of Grażyna Baranowska's analysis of the Katyn affair in Strasbourg. By placing this judgement in the comparative context of parallel developments in Latin America and Spain, Grażyna demonstrates how ECtHR's jurisprudence on this matter is rather a missed opportunity than convincing reasoning, certainly undermining the "right to truth" in Europe. The matter of this undermined right to truth has been singled out also with regard to the Spanish memory law, *Ley de Memoria Histórica* (52/2007), which marked its 10th anniversary last year, with rather modest and largely declaratory results regarding right to truth. Gábor Halmai, Jiří Přibáň and Tomek Koncewicz further unfold how the legal governance in Hungary, Czechia and Poland respectively centres on a certain fixation on „truth about past", or on what Jiří has eloquently formulated as „neurotic collective memory of postcomunism".

The Hungarian case is particularly emblematic for Verfassungsblog because, as Gábor demonstrates, legal governance of memory has been embedded within Fidesz's constitutional reform which is packed with references to history and portrays Hungary as an innocent victim of the two 20th century totalitarian regimes. Likewise, the Polish obsession with counteracting the parlance of "Polish concentration camps" and its mainstream downplaying of anti-Semitic violence towards Jews on behalf of the "virtuous Poles" during World War II is emblematic of memory laws as central in shaping citizenship populism in the region.

Memory Laws beyond Pure Symbolism: Towards „Law and History"

Yet mnemonic paranoia is not always necessarily of a purely symbolic nature for constitutional identity formation. It can actually have a commercial impact, too. As Marina Bán demonstrates, "lex Heineken" is pending its possible adoption in Hungary, liable to affect purely commercial interests via prohibiting the "communist" red star. This leads us to think about "law and history" as a new self-standing legal discipline, encompassing political, historical, sociological, linguistic, economic and even artistic facets meritorious of comparative study. Eric Heinze convincingly argues why the "field of law and historical memory –

which is nothing other than a society's matrix of discussion on its origins and values – can come to assume a premier place among the objects of legal analysis". This account reads as complimentary to the attempts of taxonomy and chronicle of memory laws, suggested by Aleksandra Gliszczyńska-Grabias and Nikolay Koposov.

Within the MELA project ("Memory Laws in European and Comparative Perspective"), we seek to provide policy recommendations for the ethical use of memory provisions and jurisprudence, and are compiling a database of relevant memory laws and judgements for future reference and comparative constitutional studies. By no means does this project follow the objectives national institutes of remembrance – a recent mushrooming phenomenon in Czech Republic, Hungary, Poland, Ukraine, and a number of other countries – seek to achieve. Instead of necessarily popularizing or justifying memory laws as such, we offer a critical analysis beyond national narratives of truths, also postulated by these national institutions. The latter essentially mimic each other in their remembrance of the totalitarian past despite their varying (sometimes mutually contradictory) engineering of national identities. At times, this academic task requires standing up to state myths that proclaim "our" nations to always perform as either innocent victims or glorious fighters for freedom against evil aggressors. In this respect, Ioanna Tourkochoriti's account of recent affairs in Greece captures how crucial it could be to rise above the dichotomy of "virtuous Greeks" and "atrocious Turks", as no nation is immune from past or future injustices towards others.

Mnemonic Constitutionalism

Going beyond the theoretical accounts of Aleksandra Gliszczyńska, Eric Heinze and Nikolay Koposov, I would further suggest that law and history drive us into the fascinating area of what I term "mnemonic constitutionalism". This type of constitutionalism encompasses, yet transcends pure measures against genocide denialism and declarative memory laws postulating or commemorating certain historical events. The Hungarian constitutional project reveals how history can be embedded into the Basic Law but it is not the only precedent of largely simplistic historical myths being inscribed into constitutional texts and major statutes. On a more positive side, one could think of the whole constitutional project of Israel, for example. In the absence of the actual constitution, this project has been based on the proclamation of the state as an act addressing historical injustice and finding its constitutional foundation in deep antiquity. Furthermore, the way citizenship – a central subject of constitutional texts – is distributed in many states is dependent on historical lineage. For instance, recently Spaniards and Portuguese even began granting citizenship to the descendants of the Sephardic Jews expelled in the Medieval period. From the way we teach history in schools to the way we impose national holidays, street names and monuments, this mnemonic constitutionalism surrounds us from our childhood and shapes our identities through various legal measures, only a tiny fraction of which is actually criminal prohibitions. The majority of such regulations amount to the soft governance of memory. This area of mnemonic constitutionalism, therefore, undoubtedly leaves plenty more food for thought and fascinating legal enigmas for further research and critical exploration.

…Last but Not Least: Remerciements

Concluding this debate on Verfassungsblog, let me in the first place express warm gratitude to all the authors who joined this online symposium after my seminal blogpost here, with their splendid essays written over Christmas holidays! I am equally very grateful to my T.M.C. Asser Institute's colleagues in The Hague, Aylin Gayibli, Faten Bushehri and Ruud Stevens, for all their precious assistance during the last two weeks. Last but not least, thanks to Max Steinbeis, the founder and the tireless editor of Verfassungsblog who made this symposium possible, for his interest, support and prudent reading! This was the first jointly organized project between T.M.C. Asser Institute and Verfassungsblog. I hope many others will follow soon.

ABOUT THE AUTHOR

Uladzislau Belavusau

Dr. Uladzislau Belavusau is Senior Researcher in European Law at the T.M.C. Asser Institute (The Hague) - University of Amsterdam, where he is currently leading the Dutch team in the international research consortium MEMOCRACY ("The Challenge of Memory Politics for Europe: Towards Effective Responses to Militant Legislation on the Past", 2021-2024).Dr. Uladzislau Belavusau is Senior Researcher in European Law at the T.M.C. Asser Institute (The Hague) – University of Amsterdam, where he is currently leading the Dutch team in the international research consortium MEMOCRACY ("The Challenge of Memory Politics for Europe: Towards Effective Responses to Militant Legislation on the Past", 2021-2024).

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