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The Diversity of Legal Governance of Memory in Europe

Looking Back on the MEMOCRACY Country Studies



Memory laws pose a set of distinct challenges for modern democracies, including in the realm of human rights law. In four conducted studies during the MEMOCRACY project (2021-2025), we took stock of the dynamics, trade-offs, and effects of legal governance of historical memory in a region ridden with mnemonic conflicts. The reports collect and categorise legislative outputs concerning the historical past in Germany, the three Baltic States, Hungary and Poland, Russia and Ukraine, and situate this legislation in the context of the respective domestic memory politics. The common effort also sheds light on the question of the compatibility of these countries' memory laws with human rights law standards enshrined in the European Convention on Human Rights (ECHR) and the law of the European Union (EU).

In this chapter, we distil the most interesting comparative findings of the reports, namely the fact that the countries' own and foreign experiences with totalitarianism are legally and politically approached very differently (1). On this basis, we sketch the consequences and challenges of these fundamental differences, both for the establishment of a "European memory" (2) and the various states' approaches to modern geopolitics (3).

Our analysis demonstrates that, at the moment, there is a disharmonious myriad of understandings of the past in the official discourse of the European countries, reflected in various legal measures. It varies too greatly to serve as a common basis for a European memory. Rather, to some extent, a diversity of memories should be recognised, and historical dialogue seems better suited than laws to foster mutual understanding of history.

Fundamentally different: varying approaches to historical memory and totalitarianism

One of the most difficult issues in memory politics in Europe in the current day is the question of the different responses to the totalitarian past. Each country has its own relationship with the Nazi and/or Soviet past: some states were victims of these crimes, others were perpetrators or bystanders; some put forward their different faces depending on the evolving geopolitical situation, oftentimes to the detriment of their own citizens, in principle the minorities. Some countries experienced both totalitarianisms (those in Central and Eastern Europe), while others only one (those in Western Europe). Especially the latter difference further complicates the dialogue on the past between the different European countries, leading to a feeling of disconcert between Western and Eastern states, made visible in such cases as, for example, the ECtHR rulings on the bans of certain symbols, finding the prohibition of those related to fascism and Nazism as passing the standard of the Convention, but not those relating to communism.

The struggle of different experiences is perhaps most visible in Germany, the country in which one part of the population experienced "only" one totalitarianism, while the other saw both. When it comes to remembering the Nazi past, there are a number of explicit memory laws (e.g., Holocaust denial ban, ban on the use of Nazi symbols, assembly restrictions at memorial sites for victims of National Socialism), centred around the "negative founding myth" of the Federal Republic of Germany, that is the overcoming of the Holocaust and other Nazi crimes,

in place. In turn, there is only one explicit memory law relating to both totalitarian pasts: the German Judges Act, which obliges the teaching about both regimes during legal studies (§ 5a (2)). The remembrance of the GDR dictatorship is thus much less visible in law.

By contrast, Hungary presents a different approach to its past: fully embracing its dualism while simultaneously whitewashing the country's government collaboration with Nazi Germany until the 1944 coup.[1] While less visible in the Hungarian memory laws,[2] which, like the ban on symbols that prohibits the public display of fascist, Nazi and communist symbols or the Holocaust denial ban, which also prohibits the negation of communist crimes, the policy of Hungary as the victim – and only victim – of the two totalitarianisms seeps into the country's cultural policy.[3] While references to the Horthy regime (collaborating with the Nazis) keep popping up throughout the country, the "only victimhood" narrative dominates in the museum displays or the authorities' rhetoric.[4]

Similarly, the memory politics of the Baltic countries address both totalitarian experiences in their national narrative, with several common threads identifiable: all three were absorbed into the USSR in 1940 and remained under the Soviet occupation regime until the 1990s – only interrupted by the Nazi occupation from 1941 to 1944. As such, the Baltic countries' memory laws have as their goal the preservation of memory of past injustices, the promotion of social harmony and cohesion, and the seeking of ensuring the accurate representation of historical facts. These are not without tensions though: the removal of certain vestiges of the Soviet memory, e.g., in the form of monuments, often leads to very difficult reactions from

the Russian minority living in the countries, as in the case of Latvia and Estonia in particular.

Ultimately, Ukraine and Russia have a particular relationship with their totalitarian pasts. Ukraine has experienced a "deferred" type of engagement in regard to its Soviet past,[5] historically stressing the remembrance of the Nazi crimes and only more recently acknowledging the Holodomor (2006) or the victims of Soviet oppression (2018). Ukrainian memory laws have been used to shape national identity,[6] focusing on Soviet-era crimes between 1917 and 1991 and the struggle by the Ukrainian nationalists during World War II. This dynamic of a distinct Ukrainian memory as compared to the former "Soviet memory" has intensified particularly with Russia's first aggression against Ukraine in 2014, becoming even more pronounced since the full-scale invasion. In Russia, the focus is still solely on the Nazi atrocities and the heroic role of the Soviet Union in defeating Nazism. Despite the initial attempts, such as the 1991 law on victims of repressions,[7] the political impetus to memorialise the Soviet-era victims withered out with time in Russia.

Or united in diversity? Reconciling conflicting historical narratives in the context of Europeanisation of memory

The demonstrated differences regarding mnemonic approaches to totalitarianism have not remained without impact on the attempts to establish a common "European memory".

The efforts to reconcile Europe in the post WWII era economically by establishing the European Coal and Steel Community in 1951[8] during the following decades gradually extended to the search of a shared "European historical

memory"[9], mainly shaped by the Holocaust legacy in the West.[10] However, Holocaust remembrance remained underdeveloped in Eastern Europe from 1945 to 1989, as it conflicted with the communist historical narrative there.[11] The communist regime in the region did not want to distinguish the Jewish victims of the Second World War. The wartime victims, who included Jews and far more non-Jews, were presented by the communists as citizens of the Soviet Union. The "Europeanisation"[12] of Holocaust memory, as the integration of diverse national memories into a cohesive, pan-European framework, began in the mid-1990s with the efforts of European institutions (European Parliament, the Council of Europe), and was transmitted to Central and Eastern Europe with the membership to the EU.

With the alarming vandalism against a synagogue in Cologne in 1959,[13] the West German Republic emerged among the first European states to attempt to prosecute for the incitement to hatred against Jewish communities, however, the legislative proposal to explicitly ban Holocaust denial in a separate offence succeeded only in reunified Germany in 1994. Germany's memory politics, especially regarding the Holocaust, since the 1980s focus on the singularity of this atrocity, resisting comparisons with other historical crimes and genocides under other totalitarian regimes.[14] This approach, which is increasingly questioned by intellectuals on the political left (emphasising, in particular, Germany's changed society, including many people with immigrant roots who have other historical experiences), has created extra tensions with Central and Eastern European countries, which joined the EU in 2004[15] and originally emphasised Soviet-era atrocities rather than the Holocaust after the collapse of the USSR in the 1990s.

The German model of emphasising primarily the remembrance of the Holocaust was reflected in the (binding) EU Framework Decision 2008/913/JHA on "Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law" (EU FD[16] 2008[17]), initiated under German EU Council presidency. It obliges member states in a separate paragraph to criminalise, under certain conditions, the condoning, denial, and gross trivialisation of Nazi crimes ("crimes defined in Article 6 of the Charter of the International Military Tribunal", Art 1 (1) (d)). Not only did Eastern European member states fail in convincing the framework decision's authors to add a direct reference also to Soviet crimes; these crimes were not even covered by the general obligation to criminalise hate speech through condoning, denying or trivialising genocide, crimes against humanity, and war crimes (Art. 1 (1) (c) EU FD 2008). This is because the requirement that the statement must be directed against a group of persons defined by race, colour, religion, descent or national or ethnic origin largely excludes communist crimes, which were mainly aimed at political enemies and wealthy people. Art. 10 of the preambular of EU FD 2008 simply allows states to also include other criteria such as social status and political conviction. As a result, the three Baltic states, Estonia, Latvia and Lithuania, which faced both Nazi rule (1941-1944) and Soviet occupations (1940-1941, 1944-1990), had to reconcile their focus on the Soviet Union's role in the Molotov-Ribbentrop Pact of 1939[18] and on Soviet crimes with the integration of Holocaust memory into their national narratives.[19] As the tension on the recognition of the Soviet victims' countries remained,[20] Lithuania (2010[21]) and Latvia (2009[22]) criminalised the denial of both Nazi and Soviet crimes.[23]

Hungary, being focused on linking its present with over five hundred years of the legal past under the concept of "historical constitution"[24], often to the annoyance of its neighbours, also deviates from EU FD 2008. The Hungarian provisions include the denial of communist crimes since 2012[25] and do not have a direct reference to the Holocaust in the article,[26] in turn focusing on Nazi – and communist – crimes in general. These regulations contrast with the EU's broader objective of fostering a shared European memory.

Meanwhile, Ukraine's developments pose a challenge to the broader European memory framework.[27] In the context of Europeanisation, Ukrainian memory politics and laws created tensions with Poland, where some Ukrainian historical figures and actions (e.g., the Volyn massacre in World War II[28]) are viewed negatively and ultimately seen as Nazi collaborators. The disagreement remains politically relevant even after the full-scale attack of Russia in 2022[29] and Ukraine's aspirations for closer alignment with European institutions, especially since Maidan 2013-2014[30] and Russia's annexation of Crimea.

In contrast, Russia's memory politics is entirely in contradiction[31] with the European framework,[32] as it focuses on the Soviet Union's role in defeating Nazi Germany and heroism that excludes the reconciliation with the former USSR-occupied countries on the issue of the USSR's co-responsibility for the start of WWII. Moreover, Russia's use of historical revisionism[33] to justify its territorial ambitions further sabotage any attempt at the Europeanisation of memory, as in Russia, history is used to assert its influence in former Soviet-occupied territories rather than a narrative to be harmonised with Europe.

Memory in modern geopolitics

The outlined fundamental differences in the domestic memory schemes of the examined European states are also reflected when it comes to these states' positioning in modern geopolitics.

First, the specific stance that states adopt vis-à-vis their and Europe's past influences the way states make their geopolitical choices. This is most obvious regarding Russia. The Kremlin, as has become obvious in Putin's numerous and widely commented "lessons of history" (Miklasová[34], Cherviatsova[35] and Hirsch[36]), specifically draws on the alleged historical linkage between Russia, Ukraine and surrounding states to justify its violent attempt to subjugate these states to its regime. In turn, the Baltic states' political reactions to Russia's annexation of Crimea in 2014 and the full-scale invasion of Ukraine, resulting, *inter alia*, in an extraordinary increase in their defence expenditure,[37] demonstrate how deeply rooted memory of the Soviet past is ingrained in Baltic's societies.

Things are more ambiguous when it comes to Hungary and Germany. Hungary's anti-communist memory politics clash with its current pro-Russian stance in the Russo-Ukrainian war, creating particular contradictions when Viktor Orbán is instrumentalising[38] Hungarian memory about its 1956 revolution against the Soviet rule[39] (see also the upcoming post by Andrea Pető in this edited volume) and at the same time criticising the EU when adopting sanctions against today's Russia. This contradiction was made famously visible by allowing the monument to the Red Army to remain in the centre of Budapest.[40]

The German government, with its proclaimed "Zeitenwende", renouncing its historically-rooted military restraint, is forced to perform a delicate split between, on the one hand, supporting Ukraine, especially in view of Germany's responsibility for German Nazi's colonial war of annihilation against Ukraine,[41] and on the other hand, the concern, also historically rooted, to avoid German weapons being turned against Russian territory again. It is striking that support for Ukraine is much weaker in the German East, which experienced Soviet influence, than it is in the German West.

Second, current conflicts clearly demonstrate that memory laws and politics have themselves become crucial instruments of geopolitics. Since the 2010s, the official historical discourse and the "rehabilitation of Nazism" trope of the Russian parliament have embraced an outward-looking projection of the Soviet memory of WWII onto Russia's neighbours, signalling an increased mnemo-political aggressiveness of official historical discourse. Disinformation campaigns telling the Russian historical narratives are widely disseminated in social media abroad. Developments like the astonishing success of the pro-Russian party Bündnis Sahra Wagenknecht in Germany indicate that these efforts are not without effect.[42] Precisely to oppose Russian attacks on domestic memory, the Baltic states have introduced administrative measures banning Russian media outlets as well as restrictions in relation to Russian and Belarusian citizens, pertaining to the transmission of Russian narratives. These memory laws reflect the attempted defence of the states' ontological security, as Maria Mälksoo[43] and Kathrin Bachleitner[44] have put it, which addresses the need to create and preserve a particular identity, especially in times of crisis

and war. In this way, the quest for a "stable" memory becomes a means of defence.

Conclusion

The legal governance of memory varies greatly across the region. On the one end of the spectrum, recognising the nation's perpetrator role unequivocally, the German approach to the past is strongly defined with a pursuit of "politics of regret" regarding the memory of WWII. The German Holocaust denial ban has become a paradigmatic case for the legal discourse of memory laws itself. On the other side, Russia comes across as practising mnemonic repression via a set of problematic memory laws domestically.[45] A denial of mnemonic sovereignty of Central-Eastern European nations and of Ukraine especially is pronounced in the Russian case.

The attempts to align these various visions in a Europe-wide legal and mnemonic space should not necessarily mean transposing a single, closed-ended understanding of the past. The very different attempts to regulate the past legally presented in the MEMOCRACY reports show that this understanding varies widely. Deeper knowledge of each country's backgrounds and contexts could foster mutual understanding via a historical dialogue, unless there is extreme rejection of the notion of the historical dialogue per se as well as interlocutors in the dialogue. In the latter respect, in case any pathway for Russia's re-integration into the Council of Europe (CoE) arises, the incompatibility of Russian memory laws with CoE standards will have to be addressed. At large, historical dialogue is paramount for shaping common European memory as a transnational memory, a memory-in-dialogue.[46]

Finally, mnemonic divisions reflect the open-ended character of the pursuit of a sense of historical justice. The Lithuanian quest for legal qualification of some Soviet crimes as genocidal,[47] as well as Ukraine's move to recognize the Holodomor famine of 1932-1933 as a genocide,[48] are examples in the latter regard. Recognizing mnemonic diversity instead of transposing any particular historical theme or historical narrative to the European level is advisable. The quality of legal governance of memory should be made certain across countries, in particular, by ensuring democratic legitimacy, necessity and proportionality of legal regulation to set standards.

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Owning the Past

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Edited by:
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Verfassungsbooks

ISBN 978-3-565017-06-5
DOI 10.17176/20250831-122341-0
URN urn:nbn:de:0301-20250831-122341-0-3

Verfassungsbooks

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2025.
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Cover design by Till Stadtbäumer. The cover was partially created using AI.

This publication was created as part of the project "Memocracy: The Challenge of Populist Memory Politics for Europe" (2021-2025), funded by the Volkswagen Foundation.

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