

## Introduction

# Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice

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### 1 Preface

Legislative and judicial practice in recent years abounds with attempts to regulate historical discussion and collective memory through law. Legal regulation of memory is by no means a remnant of the past. In the twenty-first century it remains a vivid reality.

The legal governance of history is often addressed under the tag of *memory laws* (French *lois mémorielles*; German *Erinnerungsgesetze*, etc.). Such laws enshrine state-approved interpretations of crucial historical events. They commemorate the victims of past atrocities as well as heroic individuals or events emblematic of national and social movements. They date back centuries and continue to spread throughout Europe and the world.

Memory laws affect us in various, often controversial ways. They sometimes impose criminal penalties on speech or conduct deemed offensive to the plight of heroes or victims. In that punitive form, memory laws impose limits on democratic freedom of expression, association, the media, or scholarly research. Yet memory laws reach beyond the bounds of criminal law. Children everywhere grow up reading state-approved texts designed to impart not merely a knowledge, but an interpretation of history. Governments everywhere designate national memorial ceremonies or authorize the construction of public monuments.

Curiously, most analyses of memory laws have been written by political scientists, sociologists, and historians rather than *law-yers*.<sup>1</sup> Social

<sup>1</sup> See for example, M. J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction, 1997); P. Vidal-Naquet, *Assassins of Memory. Essays on the Denial of the Holocaust* (New York: Columbia University Press, 1992); S. Moyn, *Human Rights and the Use of History* (New York and London: Verso, 2014).

scientists often scrutinize memory laws as central to the *politics* of memory, that is to the political means by which events are classified, commemorated, or discarded to influence community values and attitudes.<sup>2</sup> Accounts written by lawyers, by contrast, rarely examine memory laws as a global phenomenon. They focus instead on geographically limited laws and judgments.<sup>3</sup> In this regard, the issue of Holocaust denial largely dominates the literature on memory laws by legal scholars, followed by country-specific memory laws and legal practices.<sup>4</sup>

In consolidating accounts by both lawyers and non-lawyers, this volume seeks to fill the “comparative” gap in the literature, revisiting memory laws as a phenomenon of global law and transitional justice. The book offers accounts from various national jurisdictions and from transnational law. The authors ask how law certifies historical narratives, entails claims about historical truth, prescribes commemorative practices, and excludes ineligible accounts.

This introductory chapter aims, in its second section, to systemize the genesis and history of memory laws, and to explain the proliferation of this Western phenomenon within diverse legal systems. It traces the role of the Holocaust in the turn to law within both international and national regimes after World War II. We also examine the mechanics of that spillover in various legal settings. The third section summarizes accounts presented in this book, and explores claims about the benefits and flaws of legal intervention into the marketplace of historical ideas. In conclusion, we ponder the current place and prospects of memory laws as a dynamic

<sup>2</sup> E.g., S. Löytömäki, *Law and the Politics of Memory: Confronting the Past* (Oxford and New York: Routledge, 2014); A. De Brito et al. (eds.), *The Politics of Memory and Democratization* (Oxford: Oxford University Press, 2011); M. Mälksö, ‘The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe’, *European Journal of International Relations* 15:4 (2009), 653–80.

<sup>3</sup> E.g., J. M. Tamarit-Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Cambridge: Intersentia, 2013). A. Sarat and T. R. Kearns, *History, Memory, and the Law* (Ann Arbor, MI: University of Michigan Press, 1999). L. Hennebel and T. Hochman (eds.), *Genocide Denial and the Law* (Oxford University Press, 2011); C. Joerges and N. S. Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford: Hart, 2003).

<sup>4</sup> See R. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Basingstoke and New York: Palgrave, 2004). The exceptions are some Italian and French publications, e.g. G. Resto and V. Zeno-Zenkovich (eds.), *Riparare Risarcire Ricordare: Un Dialogo tra storici e giuristi* (Naples: Editoriale Scientifica, 2012); D. Losurdo, *Il Revisionismo Storico: Problemi e miti* (Rome-Bari: Laterza, 1996). A. Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah* (Paris: Odile Jacob, 2008).

subject of both law and transitional justice. That subject is driven by continuous inter-disciplinary input from lawyers, historians, and scholars from various branches of social sciences.

## 2 Genealogies and Rise of Memory Laws

That there shall be on the one side and to others a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilities have been practis'd . . . That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writing, and Outrageous Actions, in Violence, Hostilities, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.

[Treaty of Westphalia, 1648]<sup>5</sup>

The political deployment of memory traces back to the origins of the modern, “post-Westphalian” state, where we discover patterns still at work in today’s world. In the aftermath of the Thirty Years’ War, even the rigorously fanatic John Calvin preached Christian forgiveness. He demanded that rivals cast off hatred and revenge, and banish all remembrance of injustice.<sup>6</sup> That kind of sermon may well inspire awe, but it is above all military security and social pragmatics that will favour Calvin’s approach. What emerges might generously be called a forgiveness model, or more shrewdly an *oblivion* model. In the Treaty of Westphalia (1648), a stepping-stone in the development of modern international law, states are expressly obliged to enforce amnesties and pardons for all wartime wrongdoings. Public rituals surrounding local and national hostilities will, to safeguard the emerging nation states, remain vigilantly prudent. Hence, the possibilities of collective public practices of remembrance and commemoration in the seventeenth century – the age of classical political rationalism of Thomas Hobbes – were essentially limited.<sup>7</sup> That politics

<sup>5</sup> Title II. *Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies [Treaty of Westphalia]*, Avalon Project: Documents in Law, History and Diplomacy, available at: [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp).

<sup>6</sup> B. Vivian, *Public Forgetting: The Rhetoric and Politics of Beginning Again* (University Park, PA: Penn State University Press, 2010), 43.

<sup>7</sup> C. Volk, ‘Struggle, Dissent and Debate: Politics and Memory in Europe’, *Eutopia: Ideas for Europe Magazine*, 18 July 2014, available at: [www.eutopiamagazine.eu/en/christian-volk/columns/struggle-dissent-and-debate-politics-and-memory-europe](http://www.eutopiamagazine.eu/en/christian-volk/columns/struggle-dissent-and-debate-politics-and-memory-europe).

of sheer silence, aimed at preventing public discord, haunts much of our world today.<sup>8</sup>

A century later, we nevertheless find the French Revolutionaries introducing an approach ostensibly opposite to that model. Austerely rationalist Jacobins orchestrate a nation's march into an enlightened future. That future ends up defined in express opposition to France's past. Earlier institutions – indeed the entirety of the *ancien régime* – came to be presented as ignorant and antiquated. In contrast to medieval Christian oblivion,<sup>9</sup> we now find a model of *zealous remembrance*, which, to this day, will compete with, yet will also interweave with the oblivion model.<sup>10</sup> Among the revolutionaries' mnemonic novelties we discover prescribed rituals of civic remembrance, comprehensive museum reforms (including state appropriation of church property),<sup>11</sup> and the creation of republican state archives.<sup>12</sup> The state modernized the very concepts of “past” and “future” through its new republican calendar (*calendrier républicain français*), and by decreeing a clock divided into one hundred hours of one hundred minutes.<sup>13</sup> Twentieth-century revolutions will replicate those simulacra of modernity, notoriously those of Kim II-Sung's North Korea and Pol Pot's Cambodia. Throughout the eighteenth century, museums evolved from “cabinets of curiosity” towards the sites of glory and podiums of state achievements. Rather than displaying their collections in random order,

<sup>8</sup> See in particular, chapter by Alfons Aragoneses in the present volume, explaining the role of silence in the legal governance of memory in post-Francoist Spain.

<sup>9</sup> On the Medieval forms of commemoration, see E. Brenner, M. Franklin-Brown and M. Cohen (eds.), *Memory and Commemoration in Medieval Culture* (Burlington, VT: Ashgate, 2013).

<sup>10</sup> Even in France itself, this competition between zealous remembrance and oblivion will be present through much of the nineteenth and twentieth centuries. For a most vivid episode of the post-Napoleonic restoration of monarchies and propagated politics of forgetting in France and the Netherlands, see *inter alia*, M. M. Lok, “Un oubli total du passé? The Political and Social Construction of Silence in Restoration Europe (1813–1830)”, *History & Memory* 26:2 (2014), 40–75.

<sup>11</sup> A. McClellan, *Inventing the Louvre: Art, Politics, and the Origins of the Modern Museum in Eighteenth-Century Paris* (Berkeley, Los Angeles, London: University of California Press, 1994).

<sup>12</sup> About the role of archives in mnemonic policies, see P. Nora, ‘Between Memory and History: Les Lieux de mémoire’, *Representations* (Special Issue “Memory and Counter-Memory”) 26 (1989), 7–24.

<sup>13</sup> The calendar was adopted by the Decree of 24 October 1793 and abolished on 1 January 1806 by Emperor Napoleon I. It was used again briefly during the Paris Commune of 1871. A new clock was also decreed with a day divided into one hundred hours of one hundred minutes. The decimal system eventually became the world standard for all other measures except time.

museums gained a sense of organization and taxonomy. On 10 August 1793, the first anniversary of the monarchy's demise, the Louvre opened its doors, enabling free access to the former French royal collection for all citizens.<sup>14</sup> From that moment forward, French republicanism will dictate not only the nation's future, but also its past. This effectively transformed museums and public collections from elite trifles into instruments of republican citizenship and social management, engineering national unity, or rather cultural homogeneity, along with encouraging active political participation and a strong invitation to commemorate and remember the heroes and victims.<sup>15</sup> That monumental invitation to remember was part and parcel of imagining a new community of national states that highlighted heroism and willingness to sacrifice for the sake of state. Such chief collective virtues were later translated into the duties of the citizen under the republican citizenship paradigm. History has been represented as the struggle of citizens for the glory of imagined civic communities, embraced by states.<sup>16</sup> It has thus played a strong didactic function in setting role models, prescribing mourning for victims and assigning a dichotomist sense of guilt to all the rivals of a nation state. The 1776 Declaration of Independence, promulgated in Philadelphia by peoples' representatives within the North American colonies, fashions the *history of the present King of Great Britain as a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states*.<sup>17</sup> Those words will shape the minds of countless Americans. In reality, however, the colonies were paying lower taxes and enjoyed an average quality of life higher than their old-world counterparts, not to mention that they were inflicting on their own indigenous peoples and African slaves a "tyranny" more devastating than any wrought under George III.<sup>18</sup> Prescription of collective memory via legal instruments has served as a means to legitimize socio-political reality and to homogenize a group.<sup>19</sup>

<sup>14</sup> A. McClellan, *Inventing the Louvre: Art, Politics, and the Origins of the Modern Museum in Eighteenth-Century Paris* (University of California Press, 1999).

<sup>15</sup> For a popular account of museums and citizenship, see T. Bennett, *The Birth of Museum* (London and New York: Routledge, 1995).

<sup>16</sup> B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

<sup>17</sup> The text is available at: [www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html).

<sup>18</sup> See G. G. Norquist, 'Tea, Taxes, and the Revolution', *Foreign Policy* (3 July 2012), available at: <http://foreignpolicy.com/2012/07/03/tea-taxes-and-the-revolution/>.

<sup>19</sup> See Z. Meral, 'A Duty to Remember? Politics and Morality of Remembering Past Atrocities', *International Political Anthropology* 5:1 (2012), 29–50; For the arguments against duty to remember, see A. De Baets, *Responsible History* (New York and Oxford: Berghahn, 2009), 147–57.

A century later, in Bismarck's Europe, we find the Prussian empire continuing that project of manufacturing myths of continuity from past heroism to present glory.<sup>20</sup> The French model – some might say “myth” – of citizenship had infiltrated the language of law to the degree that the Treaty of Versailles (1919) stipulated a specific “War Guilt Clause”, assigning full responsibility for all loss and damage incurred during World War I to Germany.<sup>21</sup> Far from Westphalian oblivion, Versailles constructed transnational law through a discourse of foundational guilt. Through the spread of national secular states and global colonialism, law's mnemonic narratives increasingly pervaded constitutional ideals of citizenship far beyond the Western world, as witnessed, for example, in post-Ottoman Turkey, with the cult of Atatürk,<sup>22</sup> or in post-imperial Japan, with censorship of militarist history,<sup>23</sup> or even in nowadays Portugal, with granting of citizenship to the descendants of the Sephardic Jews as acknowledgement of the memory of sufferings and exclusions.<sup>24</sup>

However, the truly universalized “duty to remember” emerged in the aftermath of World War II, with mediatized criminal proceedings, most famously during the international military tribunal in Nuremberg (1945–6),<sup>25</sup> the Israeli trials of Adolf Eichmann (1961)<sup>26</sup> and Ivan Demjanjuk

<sup>20</sup> The process that was eloquently captured by Friedrich Nietzsche in his “Ultimately Meditations”, in particular, in *Vom Nutzen und Nachteil der Historie für das Leben* [On the Use and Abuse of History for Life, 1874]. This is one of four essays written by Friedrich Nietzsche between 1873 and 1876 under the title of *Unzeitgemässe Betrachtungen* [Untimely Meditations].

<sup>21</sup> Article 231 of the Treaty of Versailles. This provision sets up later articles in the Reparations part of the Treaty. Germany was required to conduct war crimes proceedings against the Kaiser and other leaders for waging an aggressive war, which largely resulted in acquittals and were widely perceived as a sham, even in Germany. See R. B. Henig, *Versailles and After, 1919–1933* (London and New York: Routledge, 1995).

<sup>22</sup> B. Ince, *Citizenship and Identity in Turkey: From Atatürk's Republic to the Present Day* (London and New York: I. B. Tauris, 2012).

<sup>23</sup> L. Hein and M. Selden (eds.), *Censoring History: Citizenship and Memory in Japan, Germany and the United States* (Armonk, NY: ME Sharpe, 2000).

<sup>24</sup> The Parliament of Portugal has recently decided to grant citizenship to descendants of persecuted Sephardic Jews, whose ancestors were expelled in the fifteenth century. See *The Guardian*, 29 January 2015, available at: [www.theguardian.com/world/2015/jan/29/portugal-citizenship-descendants-persecuted-sephardic-jews](http://www.theguardian.com/world/2015/jan/29/portugal-citizenship-descendants-persecuted-sephardic-jews).

<sup>25</sup> See M. J. Bazylar, ‘The Holocaust, Nuremberg and the Birth of Modern International Law’, in D. Bankier and D. Michman (eds.), *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials* (Jerusalem, New York and London: Yad Vashem & Berghahn Books, 2010), 45–58. See also A. De Baets, ‘The Impact of the Universal Declaration of Human Rights on the Study of History’, *History and Theory* 48 (2009), 20–43.

<sup>26</sup> The trial has been particularly renowned due to the journalism and philosophical account of H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994; first published in 1963). See also C. Douzinas, ‘History Trials: Can Law Decide History?’, *Annual Review of Law and Social Science* 8 (2012), 273–89.



(1986–8),<sup>27</sup> or the French trial of Klaus Barbie (1987).<sup>28</sup> These trials gave sense to the new distinctly modern legal concept of “genocide”.<sup>29</sup> Such a concept became central to conceptualizing past horrors as criminal. The UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948 as a General Assembly Resolution 260.<sup>30</sup> Not only was it the first crime with a retro-active effect, the subsequent prohibition on Holocaust denial in various countries has set an arch-example of the contemporary legal regulation of memory. Denial, minimization, and gross trivialization of the fact of annihilation of 6 million Jews by Nazis has been criminalized by a number of Western democracies either as a form of hate speech (*Volksverhetzung*, or incitement to hatred) or as a distinct crime of genocide denial.<sup>31</sup> The list of subsequent trials beyond Germany included, for example, Canada’s proceedings against James Keegstra (1984)<sup>32</sup> and Ernst Zündel (1985),<sup>33</sup> or the Holocaust denier David Irving’s libel action brought in Britain against the American historian Deborah Lipstad.<sup>34</sup> In this regard

<sup>27</sup> T. Teicholz, *The Trial of Ivan the Terrible: State of Israel vs. John Demjanjuk* (New York: St. Martins, 1990, 2nd edn).

<sup>28</sup> T. Morgan, ‘Voices from the Barbie Trial’, *The New York Times Magazine*, 2 August 1987, available at: [www.nytimes.com/1987/08/02/magazine/voices-from-the-barbie-trial.html](http://www.nytimes.com/1987/08/02/magazine/voices-from-the-barbie-trial.html).

<sup>29</sup> G. Della Morte, ‘International Law between the Duty of Memory and the Right to Oblivion’, *International Criminal Law Review* 14 (2014), 427–40. Likewise, Louis Joinet’s 1997 Set of Principles to Combat Impunity prepared for the UN Sub-Commission on human rights expressly mentions a duty to remember as a State duty to avoid historical revisionism and denialism (E/CN.4/Sub.2/1997/20/Rev.1). See P. Naftali, ‘Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?’, *Penal Field* 13 (2016), available at <https://champpenal.revues.org/9245>.

<sup>30</sup> The notion of genocide was first introduced in the essay of Raphael Lemkin, ‘The Crime of Barbarity’, see J. T. Fussel, *Comprehensive Bibliography: Writings of Raphael Lemkin*, available at [www.preventgenocide.org/lemkin/bibliography.htm](http://www.preventgenocide.org/lemkin/bibliography.htm); See also A. Filipa Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’, *European Journal of International Law* 20:4 (2009), 1163–94.

<sup>31</sup> *Volksverhetzung* is a criminal offence under Section 130 of the Criminal Code (*Strafgesetzbuch*) in Germany. Similar provisions about incitement of group hatred have been enshrined in most of continental European criminal codes. In Germany, in can lead to up to five years’ imprisonment. For many years that criminal clause was interpreted as covering Holocaust denial, while in the 1990s special provisions on Holocaust denial as well as most recently, on justifying or glorifying the Nazi government were added. Similar self-standing (i.e. separate from “hate speech”) provisions on Holocaust denial exist these days in various countries, from Israel to France.

<sup>32</sup> S. Mertl and J. Ward, *Keegstra: The Trial, the Issues, the Consequences* (Saskatoon: Western Producer Prairie Books, 1985).

<sup>33</sup> R. Lenski, *The Holocaust on Trial: The Case of Ernst Zündel* (Decatur, AL: Reporter Press, 1990).

<sup>34</sup> Later on, Irving was convicted in Austria (2006). Dr. Lipstadt chronicled her five-year legal battle in *History on Trial: My Day in Court with David Irving* (New York: Ecco, 2005).

the most eminent precedent in international law is the 1996 decision of the UN Human Rights Committee, which upheld the conviction of the French scholar Robert Faurisson.<sup>35</sup> One of the most featured Holocaust deniers, Faurisson received a special award for “courage” from the Iranian President Mahmoud Ahmadinejad at an “academic” event in Teheran in February 2012, emblematic of the notorious political culture of Holocaust denialism in the Islamist world.<sup>36</sup>

Apart from demonstrating respect by acknowledging the suffering of millions of Jewish victims, criminalization of Holocaust denial after World War II has transformed social reality and led to a global spread of memory laws in three ways:

- (1) It advanced the Judaic version of repentance, in contrast to Christian rituals of “oblivion” and ideals of forgiveness, where only direct victims can pardon perpetrators and several generations provide extensive mourning<sup>37</sup>;
- (2) Together with prohibitions on displays or commerce in Nazi and other extremist memorabilia, symbols and literature,<sup>38</sup> anti-negationist laws have, some would argue, promoted a reductively binary vision of World War II, with absolutized guilt of Nazi Germans and their collaborators, in contrast to the mega-praise of the winning allies. This narrative commonly omitted inconvenient episodes. Thus, the tacit consent to transfer Sudetenland to Germany under the Munich Agreement (1938); the Molotov-Ribbentrop’s partition of Poland (1939); the Katyń massacre, which was long attributed to the Germans, while in fact committed by Soviet NKVD; the carpet bombing of Dresden in February 1945 under British and US orders; the massive rapes of German and Hungarian women by Soviet soldiers; the atomic bombings of Hiroshima and Nagasaki by the US forces in August 1945; and other *causes célèbres*

<sup>35</sup> *Faurisson v. France* (550/1993) 1996.

<sup>36</sup> J. Weissman, ‘Holocaust Denier Receives Award at Iranian Film Festival’, *Huffington Post*, 14 February 2012, available at: [www.huffingtonpost.co.uk/joseph-weissman/faurisson-iranian-film-festival\\_b\\_1274572.html](http://www.huffingtonpost.co.uk/joseph-weissman/faurisson-iranian-film-festival_b_1274572.html); See also M. Litvak and E. Webman, *From Empathy to Denial: Arab Responses to the Holocaust* (London: Hurst, 2009).

<sup>37</sup> See U. Belavusau, ‘Historical Revisionism in Comparative Perspective, Law, Politics, and Surrogate Mourning’, *EUI Working Paper* 12 (2013), 5–6. For the account of Judaic “apology”, see A. Momigliano, S. Berti and M. Masella-Gayley, *Essays in Ancient and Modern Judaism* (Chicago and London: University of Chicago Press, 1994), 58–66. For a general account of apology, see A. Lazare, *On Apology* (Oxford University Press, 2004).

<sup>38</sup> To give just one, out of many European examples, Section 86a (use of symbols of the unconstitutional organizations) of the German Criminal Code outlaws Nazi symbols and insignia.



before, during, and in the aftermath of World War II stand as tragically anti-heroic episodes. The binarist narrative ends up eagerly exploited by radical groups in such states as Austria, Germany, or Japan – on the right and the left – to advance their credo that European governments manipulate the past to prop up an elitist world;

- (3) These memory laws have proved instrumental to the politics of coming to terms with past (*Vergangenheitsbewältigung*) in Germany and other countries.<sup>39</sup> On the one hand, these monumental dichotomist “good-bad” of “victim-perpetrator” versions of history have been extremely successful in bringing up admirable generations of post-war German civil society, who not only acknowledge guilt for the massive annihilation but also always take into account this traumatic past in building a more emancipating and tolerant future.<sup>40</sup> On the other hand, such memory laws have been central to the concept of “militant” (*streitbare* or *wehrhafte*) democracy, which excludes incitement to hatred from constitutionally protected rights of free expression in order to preserve liberal democracy.<sup>41</sup>

Furthermore, the monumental legal prescription of historical truth has fulfilled a remarkable role in the project of Europe’s unification. Leading European (EU and Council of Europe) institutions have nonetheless built their normative concepts upon the value of acknowledging past crimes and avoiding future ones, precisely through their policies of political and cultural integration.<sup>42</sup> The Maastricht Treaty (1992) has reinforced this discourse as a foundational myth for EU competences in fundamental rights and the project of EU citizenship, both formalized since then as primary law.<sup>43</sup> Likewise, the soft law of the Union has shaped a strong legal invitation to remember via various resolutions of

<sup>39</sup> See T. Adorno, ‘What Does Coming to Terms with the Past Mean?’, in G. Hartman (ed.), *Bitburg in Moral and Political Perspective* (Bloomington, IN: Indiana University Press, 1986), 114–29.

<sup>40</sup> D. Michman (ed.), *Remembering the Holocaust in Germany, 1945–2000: German Strategies and Jewish Responses* (New York: Peter Lang, 2002).

<sup>41</sup> For a scrutiny of the concept of militant democracy, see U. Belavusau, ‘Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant?’, *Israel Law Review* 47:1 (2014), 27–61.

<sup>42</sup> For a detailed analysis, see A. Sierp, *History, Memory and Trans-European Identity: Unifying Divisions* (New York: Routledge, 2014), 125–27.

<sup>43</sup> See Joerges and Ghaleigh (eds.), *Darker Legacies of Law in Europe*. See also S. Smismans, ‘The European Union’s Fundamental Rights Myth’, *Journal of Common Market Studies* 48:1 (2010), 45–66.

the Parliament and Commission.<sup>44</sup> Those legal initiatives capitalize on the rhetoric of the Holocaust as a mega-atrocity. They address the fiction of the common memory of EU citizens as a new specific element of pan-European identity, whose symbolical core is founded on the ethical lessons of the World War II.<sup>45</sup> In fostering a European *demos*, EU institutions have been capitalizing on moral commitment to the past as a promise of a better future. Central to this vision of EU citizenship and its core values has been the *Europe for Citizens Program* launched in December 2006 by Decision 1904/2006/EC of the European Parliament and of the Council.<sup>46</sup> The Program, initially established for the period from 2007 to 2013, was in itself an extensive transnational memory law supporting a series of activities and organizations that promoted “Active European Citizenship”. Driving on the activist paradigm of citizenship, seen as the encouragement of civil society to solemnize the Holocaust and other atrocities of totalitarian regimes, the Program has become an important aspect in fostering European integration and in “developing a sense of common identity among European citizens based on recognised common values, history and culture”. Furthermore, one of the Program’s four action lines is explicitly devoted to “Active European Remembrance”.<sup>47</sup> In the renewed *Europe for Citizens Program 2014–2020*, the “European remembrance” of totalitarianism was further reinforced with increased funds going towards action in this area, available for various research institutes, associations of survivors, museums, and organizations active in the promotion of human rights, as well as in the creation of additional channels of communication

<sup>44</sup> E.g., European Parliament Resolution of 23 October 2008 on the Commemoration of the Holodomor, the Ukraine artificial Famine (1932–33), Official Journal of the European Union, 21 January 2010, C 15 E/78; European Parliament Resolution of 2 April 2009 on European Conscience and Totalitarianism; Resolution on the Remembrance of the Holocaust, Anti-Semitism and Racism 2005; Resolution on a Political Solution of the Armenian Question, Doc. A2-33/87. These numerous soft laws illustrate the rise of the alleged right to have one’s memory recognized by others, at least, within a peer group, on transnational – in this case European Union – level.

<sup>45</sup> The European politics of memory are well discussed in literature by now, see for example, P. den Boer et al. (eds.), *Europäische Erinnerungsorte* (München: Oldenbourg, 2012); H. Rousso, ‘Das Dilemma eines europäischen Gedächtnisses’, *Zeithistorische Forschungen* 1 (2004), 363–78; T. Judt, ‘The Past is Another Country. Myth and Memory in Postwar Europe’, *Theoria: A Journal of Social & Political Theory* 87 (1996), 36–69.

<sup>46</sup> A detailed description of the program is available on the webpage of the EU Commission: [http://eacea.ec.europa.eu/citizenship/index\\_en.php](http://eacea.ec.europa.eu/citizenship/index_en.php).

<sup>47</sup> Action 4 “Active European Remembrance”, available at: [http://eacea.ec.europa.eu/citizenship/programme/action4\\_en.php](http://eacea.ec.europa.eu/citizenship/programme/action4_en.php).