LAW AND MEMORY

Legal governance of memory has played a central role in establishing hegemony of monumental history, and has forged national identities and integration processes in Europe and beyond. In this book, a range of contributors explore both the nature and role of legal engagement into historical memory in selected national, European, and international law. They also reflect on potential conflicts between legal governance, political pluralism, and fundamental rights, such as freedom of expression. In recent years, there have been numerous monumental commemoration practices and judicial trials about correlated events all over the world, and this is a prime opportunity to undertake an important global comparative scrutiny of memory laws. Against the background of mass re-writing of history in different parts of the world, this book revisits a fascinating subject of memory laws from the standpoint of comparative law and transitional justice.

ULADZISLAU BELAVUSAU is Senior Researcher in European Law at the T.M.C. Asser Institute (The Hague), University of Amsterdam, the Netherlands.

ALEKSANDRA GLISZCZYŃSKA-GRABIAS is Senior Researcher in Human Rights at the Institute of Law Studies of the Polish Academy of Sciences, Poland.

LAW AND MEMORY

Towards Legal Governance of History

Edited by

ULADZISLAU BELAVUSAU T.M.C. Asser Institute – University of Amsterdam

ALEKSANDRA GLISZCZYŃSKA-GRABIAS Polish Academy of Sciences



CAMBRIDGE

Cambridge University Press 978-1-107-18875-4 — Law and Memory Edited by Uladzislau Belavusau , Aleksandra Gliszczyńska-Grabias Frontmatter More Information

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom One Liberty Plaza, 20th Floor, New York, NY 10006, USA 477 Williamstown Road, Port Melbourne, VIC 3207, Australia 4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India 79 Anson Road, #06-04/06, Singapore 079906 Cambridge University Press is part of the University of Cambridge. It furthers the University's mission by disseminating knowledge in the

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781107188754 DOI: 10.1017/9781316986172

© Cambridge University Press 2017

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2017

Printed in the United Kingdom by Clays, St Ives plc

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Belavusau, Uladzislau, editor. | Gliszczyńska-Grabias, Aleksandra, editor.

- Title: Law and memory : towards legal governance of history / edited by Uladzislau Belavusau, T.M.C. Asser Institute, University of Amsterdam [and] Aleksandra Gliszczyńska-Grabias, Polish Academy of Sciences.
- Description: Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2017. | Includes bibliographical references and index.

Identifiers: LCCN 2017035931 | ISBN 9781107188754 (hardback)

Subjects: LCSH: Libel and slander—Europe—Criminal provisions. | Political crimes and offenses—Law and legislation—Europe. | International crimes. | History—Research—Law and legislation—Europe. | Collective memory—Government policy—Europe.

Classification: LCC KJC8465 .L39 2017 | DDC 345.4/025—dc23 LC record available at https://lccn.loc.gov/2017035931

ISBN 978-1-107-18875-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

CONTENTS

List of Contributors	page ix
Acknowledgements	xi

Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice 1 ULADZISLAU BELAVUSAU AND ALEKSANDRA GLISZCZYŃSKA-GRABIAS

PART I International Law 27

- 1 The United Nations Human Rights Committee's View of the Past 29 ANTOON DE BAETS
- 2 The Role of International Criminal Tribunals in Shaping the Historical Accounts of Genocides 48
 MARINA AKSENOVA
- The 'Right to Truth' in International Law: The 'Last Utopia'? 70
 PATRICIA NAFTALI

PART II European Law (Council of Europe and the European Union) 89

 4 Kononov v. Latvia as an Ontological Security Struggle over Remembering the Second World War 91
 MARIA MÄLKSOO

CAMBRIDGE

Cambridge University Press
978-1-107-18875-4 – Law and Memory
Edited by Uladzislau Belavusau , Aleksandra Gliszczyńska-Grabias
Frontmatter
More Information

vi

CONTENTS

- Testing the 'Uniqueness': Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights 109
 PAOLO LOBBA
- 6 Legislating History: The European Union and the Denial of International Crimes 129
 LUIGI CAJANI

PART IIINational Perspectives within the European
Union149

- 7 Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece 151
 IOANNA TOURKOCHORITI
- 8 Legal Silences and the Memory of Francoism in Spain 175
 ALFONS ARAGONESES
- 9 Politics of Public Knowledge in Dealing with the Past: Post-communist Experiences and Some Lessons from the Czech Republic 195
 JIŘÍ PŘIBÁŇ
- 10 Adjudication in Latvian Deportation Cases: References to International Law 216
 IEVA MILUNA
- 11 Judging the *Conducător*: Fascism, Communism, and Legal Discontinuity in Post-War Romania 228
 COSMIN SEBASTIAN CERCEL
- 12 Dealing with the Past in and around the Fundamental Law of Hungary 246 MIKLÓS KÖNCZÖL
- 13 On the Politics of Resentment, Mis-memory, and Constitutional Fidelity: The Demise of the Polish Overlapping Consensus? 263
 TOMASZ TADEUSZ KONCEWICZ

	CONTENTS	vii
PART	IV Perspectives beyond the European Union 2	91
14	Defending Stalinism by Means of Criminal Law: Russia, 1995–2014 293 NIKOLAY KOPOSOV	
15	Cutting the Umbilical Cord: The Narrative of the National Past and Future in Ukrainian De-communization Policy 310 LINA KLYMENKO	
16	Banning Genocide Denial – Should Geography Matter? 329	
	ROBERT A. KAHN	
17	"From Banning Nakba to Bridging Narratives": The Collective Memory of 1948 and Transitional Justice for Israelis and Palestinians 348 JEREMIE M. BRACKA	
18	Historical Revisionism and the Settler State: The Canadian Experience 374 MICHAEL MORDEN	
19	Defense of Democracy and the Preservation of Collective Memory through Criminal Legislation: The Challenges of Reconciliation in Peru 395	
	SALVADOR HERENCIA CARRASCO	
Lav	ilogue: Beyond 'Memory Laws': Towards a General Theory o w and Historical Discourse 413 c HEINZE	of

Index 435

CONTRIBUTORS

MARINA AKSENOVA is a postdoctoral researcher at iCourts, the Faculty of Law – University of Copenhagen (Denmark).

ALFONS ARAGONESES is a lecturer at Universitat Pompeu Fabra (Barcelona, Spain) and an affiliate researcher at the Max Planck Institute for European Legal History (Frankfurt, Germany).

ANTOON DE BAETS is Professor of History, Ethics and Human Rights at the University of Groningen (the Netherlands).

ULADZISLAU BELAVUSAU is Senior Researcher in European Law at the T.M.C. Asser Institute (the Hague) – University of Amsterdam (the Netherlands).

JEREMIE M. BRACKA is a PhD candidate and a lecturer at the Law Faculty of Monash University (Melbourne, Australia). He is also a visiting scholar at Tel Aviv University (Tel Aviv, Israel).

LUIGI CAJANI is Lecturer in Modern History at the Università La Sapienza di Roma (Italy).

COSMIN SEBASTIAN CERCEL is Assistant Professor of Law at the Faculty of Social Sciences, the University of Nottingham (UK).

ALEKSANDRA GLISZCZYŃSKA-GRABIAS is Senior Researcher in Human Rights Law at the Polish Academy of Sciences (Warsaw, Poland).

ERIC HEINZE is Professor of Law and Humanities at Queen Mary University of London (UK).

SALVADOR HERENCIA CARRASCO is a PhD candidate and Director of the Human Rights Clinic – Human Rights Research and Education Centre of the University of Ottawa (Canada).

ix

х

CONTRIBUTORS

ROBERT A. KAHN is a Professor at the School of Law at the University of St. Thomas (USA).

LINA KLYMENKO is a researcher at the Karelian Institute at the University of Eastern Finland (Finland).

TOMASZ TADEUSZ KONCEWICZ is Professor of Law and Director of the Department of European and Comparative Law at the University of Gdańsk (Poland); 2017–18 Fellow at the Program in Law and Public Affairs (LAPA), Princeton University; attorney-at-law.

MIKLÓS KÖNCZÖL is Lecturer in Jurisprudence at Pázmány Péter Catholic University, and Research Fellow at the HAS Centre for Social Sciences, Institute for Legal Studies (Budapest, Hungary).

NIKOLAY KOPOSOV is a visiting professor at Emory University (Atlanta, USA).

PAOLO LOBBA is a postdoctoral researcher at the Department of Legal Studies at Bologna University (Italy).

MARIA MÄLKSOO is Senior Lecturer in International Security at the University of Kent–Brussels School of International Studies (Belgium).

IEVA MILUNA is Lecturer in International Law at the Riga Graduate School of Law (Latvia) and Member of the Advisory Council on International and European Law at the Latvian Ministry of Foreign Affairs.

MICHAEL MORDEN is a research associate at the Mowat Centre, at the University of Toronto School of Public Policy and Governance (Canada).

PATRICIA NAFTALI is FRS-FNRS Postdoctoral Researcher at the Université libre de Bruxelles (Belgium).

JIŘÍ PŘIBÁŇ is Professor of Law at Cardiff School of Law and Politics (UK).

IOANNA TOURKOCHORITI is a lecturer at the National University of Ireland, Galway (Ireland).

ACKNOWLEDGEMENTS

This book is the result of our fruitful cooperation with a number of distinguished institutions and individual scholars. Two of them, Eric Heinze (*Queen Mary University of London*) and Wojciech Sadurski (*University of Sydney*), deserve our special and infinite gratitude for their extraordinary support and invaluable advice throughout the whole process, from the book proposal to the final stage of publication. Much of our fascination with the subject of memory laws and freedom of expression has been, in fact, inspired by the outstanding work of these two leading philosophers of law.

While we were editing the chapters at a later stage, we received the splendid news that our project 'MELA' (*Memory Laws in European and Comparative Perspective*) – created as a research consortium in four EU countries – had been awarded a prestigious *HERA* grant for the next three years. We are indebted to the European Commission for this opportunity to transform our initial research into a wider international project. Apart from HERA, we would like to thank the Amsterdam Center for Contemporary European Studies (*ACCESS-Europe*) for their institutional support. In June 2016 they sponsored our international conference in Amsterdam, which gathered most of our authors and enabled a critical discussion of their draft chapters.

Furthermore, we are much obliged to a number of prominent scholars who have generously shared their precious advice on this book, including Antoon De Baets and Dimitry Kochenov (*Groningen*), Eva-Clarita Pettai (*Tartu*), Gábor Halmai (*EUI, Florence*), Luiza Bialasiewicz, Ester Herlin-Karnell, Magdalena Jozwiak, Matthijs Lok, Christian Noack and Claske Vos (*Amsterdam*), Grażyna Baranowska (*Poznań*), Sévane Garibian (*Geneva*), Armen Mazmanyan (*Yerevan*), Emanuela Fronza (*Bologna*), Amos Goldberg (*Jerusalem*), Yevgeni Klauber (*Tel Aviv*), Pavel Molek and Hubert Smekal (*Brno*), Thérèse O'Donnell (*Strathchlyde*), and Carlos Closa (*Madrid*). In addition, Uladzislau Belavusau would like to extend

xii

ACKNOWLEDGEMENTS

his gratitude to Eyal Benvenisti (*Cambridge*) and Daniele Gallo (*Rome*) for hosting him as a visiting scholar at, respectively, the *Tel Aviv University* and *LUISS Guido Carli University* in 2015–16, as well as to Janne Nijman (*the Hague*) for her indispensable academic backing. Likewise, Aleksandra Gliszczyńska would like to thank Roman Wieruszewski (*Poznań*) for offering his unremitting academic support and advice, and Wojciech Kozłowski (*Warsaw*) for stimulating exciting professional challenges.

Our special thanks also go to Bartosz Sucharski for donating his enchanting drawing for our book cover, crafted in the best traditions of the Polish placard school. Finally, thanks to everyone at Cambridge University Press and, in particular to Elizabeth Spicer, for their friendly and patient editorship. Last but not least, many thanks to our authors for their thoughtful contributions, advice, and endurance.

> Aleksandra and Uład January 2017