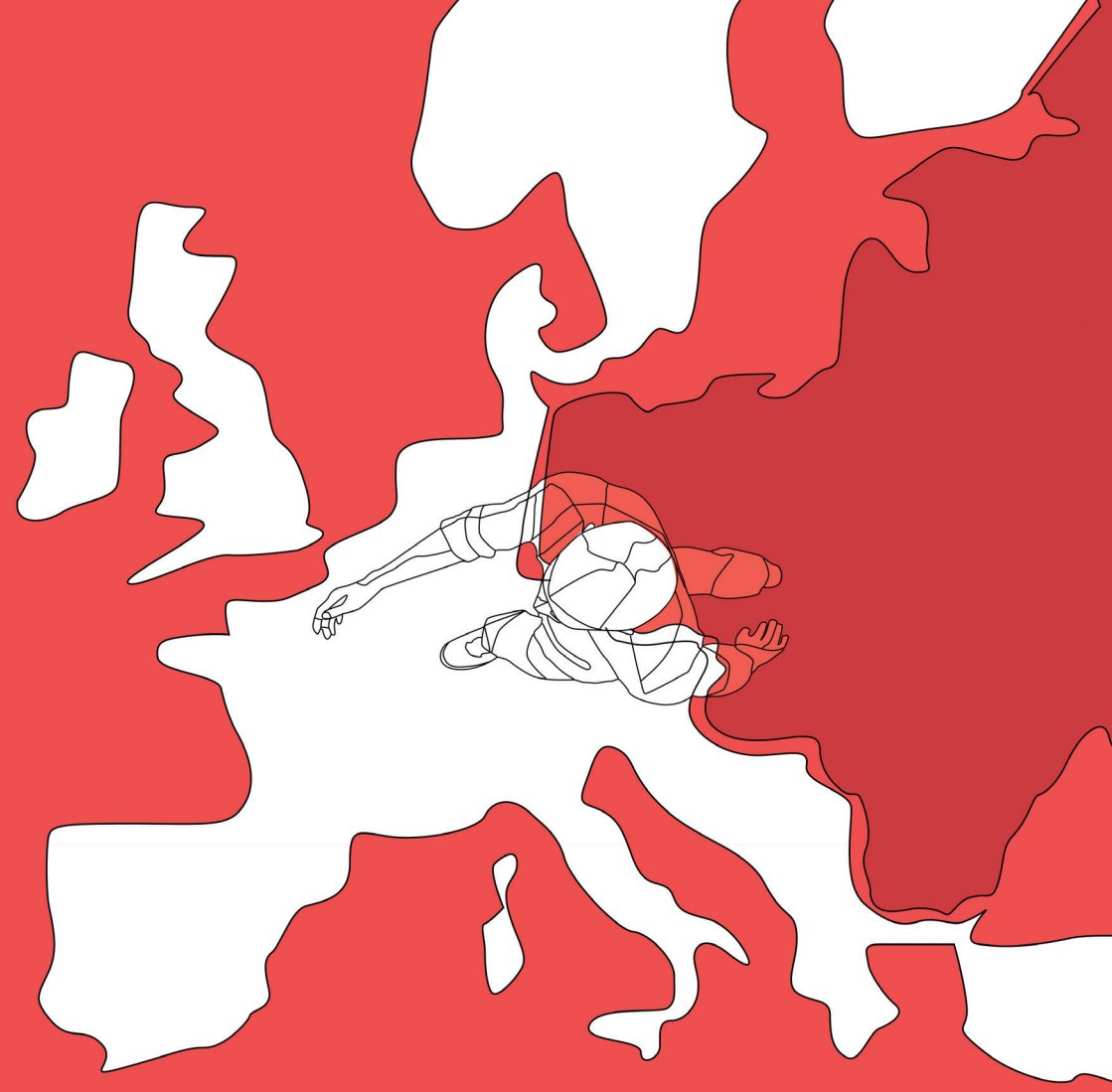


Memory Laws in Post-Transitional Democracies: Case Studies from Post-Communist States Conference

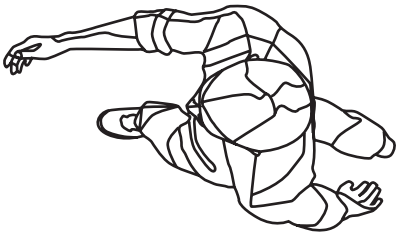
Warsaw, 5 October 2018

Memory Laws in European and Comparative Perspectives (MELA) research consortium

Memory Laws in European and Comparative Perspectives (MELA)

is a four-nation, EU-sponsored research consortium gathered to examine memory laws throughout Europe and the world, organised with the generous support of Humanities in the European Research Area (HERA). MELA participating academic institutions are: Queen Mary University of London, T. M. C. Asser Instituut – University of Amsterdam, University of Bologna and Institute of Law Studies of the Polish Academy of Sciences.

In Sanskrit, the word mela means 'meeting' or 'gathering'. That image recalls the pan-European role of memory laws, but also elicits a paradox. State-constructed memory 'gathers' citizens under a mantel of symbolic unity, yet, in a multicultural society, precariously threatens that unity. Thus, the core questions we are trying to answer are: When do memory laws conflict with values of democratic citizenship, political pluralism, or fundamental human rights? Are the punitive laws inevitably abusive? Are the non-punitive ones mostly benign? Are there optimal ways for states to propagate historical memory?



MELA
Memory Laws in European and Comparative Perspective

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INP PAN

ASSER INSTITUTE

Queen Mary University of London
School of Law

ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA

CONFERENCE PROGRAM / 9:00 - 17:00

Memory Laws in Post-Transitional Democracies: Case Studies from Post-Communist States Conference

9:50 - 10:50

Keynote: Memory Laws and Memory Wars in Russia – prof. Nikolay Koposov, Emory University

11:00 - 12:30

I PANEL: THE PAST ON TRIAL

- Misjudging history at international criminal trials: legal justice vs. historical truth
  - dr Nevenka Tromp, University of Amsterdam
- The Katyń case at Strasbourg. Is the ECtHR actually a court of (legal) conscience?
  - prof. Ireneusz Kamiński, Polish Academy of Sciences
- The Soviet past: the jurisprudence of the ECtHR in cases against Lithuania
  - dr Nika Bruskina, Vilnius University

13:30 - 15:00

II PANEL: SHAPING HISTORICAL AND POST-TRANSITIONAL NARRATIVES THROUGH LAW

- Production of the public knowledge and dealing with the past: beyond post-Communism
  - prof. Jiří Přibáň, Cardiff University
- Citizenship law as memory law in post-transition Latvia and Estonia: a useful concept?
  - dr Eva-Clarita Pettai, University of Jena
- Memory laws in times of (memory) war: Ukraine's militant democracy problem
  - dr Maria Mälksoo, University of Kent, Brussels School of International Studies

15:30 - 16:45

III PANEL: CHALLENGING HISTORICAL FACTS AND NATIONAL TRUTHS

- From Fascist dictatorship to popular democracy: law, revolution and constitutional identity
  - dr Cosmin Sebastian Cercel, University of Nottingham School of Law
- The past in Hungary's Fundamental Law
  - dr Miklós Könczöl, Hungarian Academy of Sciences
- "National untruth". Controversial Law on the Polish Institute of National Remembrance
  - prof. Mirosław Wyrzykowski, University of Warsaw
- The Balkans: past, nation and Europeanisation
  - drs. Anna Milosevic, University of Leuven

KEY NOTE

Paper Author:
prof. Nikolay Koposov, Emory University

Paper Title:
Memory laws and Memory Wars in Russia

Paper Abstract:

The paper discusses the role of the legislation of memory in the culture wars within Russia and between Russia and its East European neighbors.
I will examine the 2014 Russian statute that in the midst of the Ukraine crisis criminalized the dissemination of the "knowingly false information about the politics of the USSR during the Second World War" and gave legal protection to the narrative that presents Russia's opponents in memory wars as "Nazi allies." I will also consider the cases of its application as well as several recent bills that introduced criminal penalties for Holocaust denial, insults to war veterans' feelings, rehabilitation of Stalin, denial of the deportations of the repressed peoples under Stalin and so on. I will compare the 2014 Russian enactment to other recent memory laws and argue that it is almost unique among them in that in protects the memory of an oppressive regime (Stalinism) against that of its victims. It can be considered an extreme case of the East European tendency of white-washing national narratives. The only similar case is the 2005 Turkish law, which was passed to prevent calling the extermination of Armenians in the Ottoman Empire a genocide.

I PANEL

Paper Author:
dr Nevenka Tromp, University of Amsterdam

Paper Title:
Misjudging History at International Criminal Trials: Legal Justice vs. Historical Trut

Paper Abstract:

December 2017 the International Tribunal for Former Yugoslavia (ICTY) closed its doors after 24 years of existence. Its closure begs for a thorough quantitative and qualitative research of ICTY's intended and unintended achievements since its foundation in 1993. Despite the fact that a number of important scholarly evaluations of the ICTY have ben already published, a lot of research still has to be conducted. For example, we still do not know how to evaluate its impact when it comes to justice, accountability and reconciliation process in the region or globally. There is still not enough studies to help us understand if the ICTY has contributed - and still can contribute - in establishing facts and in shaping a historical interpretation of last decade of the 20th century that was marked by the wars waged on the territory of the former Yugoslavia, in the backdrop of which the ICTY had been created. This paper will argue that the international criminal trials do not necessarily produce a reliable historical interpretation of the past events. Moreover, if a trial based historical narrative is to be reduced to that what has been written in the trial judgment, there is a danger that the international criminal courts such as the ICTY might produce a partial, incomplete and one-sided historical narrative. To examine this proposition , this paper will identify the ICTY trials that covered the crimes that were committed on the territory of Bosnian and Herzegovina (B-H) in the period between 1992 and 1995. Selecting ICTY trials with the high level indictees from all three warring sides – the Serbian, the Croatian and the Bosniak side - this paper will compare historical narrative as set out in the judgments of these trials. Comparing these historical narratives this article seeks answers to the following questions: (1) why did the war in B-H start? (2) what did each of the three warring parties try to achieve (3) which side(s) – and which leaders – come(s) out as the most responsible for unleashing ethnic violence and for commission of crimes (4) how does international community as a "fourth party" in the war in B-H feature in the judgments.

I PANEL

Paper Author:

prof. Ireneusz Kamiński, Institute of Law Studies, Polish Academy of Sciences

Paper Title:

The Katyn case at Strasbourg. Is the ECtHR actually a court of (legal) conscience?

Paper Abstract:

The Strasbourg Court was set up as a court of conscience and in reaction to large scale human rights violations committed by two authoritarian systems: Nazism and communism. The Katyn massacre case, heard by the Court as a chamber and then as a Grand Chamber formation, is illustrative of a number of key legal issues. Although these mass killings were perpetrated in 1940, and therefore the Court is not competent ratione temporis to deal with them directly because the European Convention on Human Rights was enacted only in 1950, the question of the Court's competence to control if the domestic investigation was effective remained open. The Court's case law on that latter matter was first contradictory and then referred to several unclear tests requiring that there existed "a genuine connection" between the killing in question and the ratification of the Convention by the respondent state. The Katyn case was the first one in which the "triggering killing" preceded the Convention's enactment. The presentation shows how the Court (chamber and Grand Chamber) approached the issue and how the resulting (complex) standards look like. The Court's position is confronted with that adopted by other international courts and bodies in ratione temporis cases (UN Human Rights Committee, Inter-American Court of Human Rights, Permanent Court of International Justice, International Court of Justice).

I PANEL

Paper Author:
dr Nika Bruskina, Vilnius University

Paper Title:
The Soviet past: the jurisprudence of the ECtHR in cases against Lithuania

Paper Abstract:

The paper provides an analysis of certain selected recent cases against Lithuania before the European Court of Human Rights (hereinafter – the ECtHR) in which the Soviet past was somehow relevant. The paper begins with the cases wherein the fact of the Soviet occupation of Lithuania had an impact on the protection of the property rights. Next, the other group of cases analyzed in this paper relates to the legal regulation of Lithuania on criminal responsibility for the genocide committed during the Soviet occupation regime. These cases reflect the relevance of historical facts for establishing criminal responsibility and demonstrate whether the Judges of the ECtHR share the understanding of the history of Lithuania with the Lithuanian courts. Last, the paper concludes by the analysis of the recent case wherein the ECtHR considered the factual accuracy of certain disputed statements in the book of the applicant's late father. Those statements were related to the acts of a third person during the Nazi and Soviet occupation regime. The same case also focused on the obligation of the applicant as a heir of her late father (the author of that book) to prove during the domestic judicial proceedings that the disputed statements were not erroneous.

II PANEL

Paper Author:

prof. Jiří Přibáň, Cardiff University

Paper Title:

Production of the Public Knowledge and Dealing with the Past: Beyond Post-Communism

Paper Abstract:

Different forms of historical justice – restitutions, rehabilitations, retributions and preventive lustrations are then briefly discussed to highlight underlying differences between the symbolic and pragmatic need of dealing with the past. I argue that the lustration process handled by state bureaucrats paradoxically inhibited the public discussion of the totalitarian past, its political impact and responsibility. Political uses of the lustration law and other legal acts, such as The Act of Public Access to Files Connected to Activities of Former Secret Police, contributed to the postcommunist political neurosis and continue to operate as significant objects of party politics and ideological conflicts in the Czech political and public sphere. The establishment of The Institute for the Study of Totalitarian Regimes in the Czech Republic in 2007 is another example of this political neurosis and party politics selecting and administering particular public interpretations of modern political history. What is important is knowledge rather than memory and morality rather than law. If we accept Michel Foucault's claim that sovereignty was typical of the rule of absolutist monarchy while modernity created new forms of governmentality based on policing and social discipline, we have to conclude that the Institute's organization and functions, rather than legal justice typical of courts, are closer to the policing and disciplinisation of public morality.

II PANEL

Paper Author:

dr Eva-Clarita Pettai, Imre Kertész Kolleg, University of Jena

Paper Title:

Citizenship law as memory law in post-transition Latvia and Estonia: a useful concept?

Paper Abstract:

Estonia's and Latvia's citizenship legislation from 1992-1993 was a logical consequence of a process that had started around 1987 in which a claim of specific legal continuity to the two countries' pre-war republics came to gradually dominate the pro-independence discourses. According to this powerful legal paradigm, Estonian and Latvian statehood had de iure never ceased to exist, but rather had fallen victim to foreign (Soviet) aggression in violation of international law. As a consequence, citizenship was also linked to this pre-war statehood, and in turn those who had moved to these territories of the former Soviet Republics after 1940 were excluded from the political community or subject to naturalization rules if they wanted to join. This definition of citizenship was clearly based on a historical-legalistic interpretation of events that quickly became part of a master narrative of both states according to which re-independence in 1991 marked the end of 50 years of illegal occupation. Nevertheless, to classify Estonia's and Latvia's citizenship principles as memory laws runs the danger of blurring important analytical and conceptual boundaries. The paper will discuss Baltic citizenship legislation as memory law as this provides an opportunity to engage both with normative considerations that link citizenship to ideas of identity, political culture and the 'duty to remember', and with analytical questions regarding the concept of 'memory law' and the extent to which a broad notion of this term actually adds any insights into Baltic societies and state policy.

II PANEL

Paper Author:

dr Maria Mälksoo, University of Kent,
Brussels School of International Studies

Paper Title:

Memory Laws in Times of (Memory) War: Ukraine's Militant Democracy Problem

Paper Abstract:

This paper explores the applicability of the notion of 'militant democracy' on memory laws on the example of Ukraine. Ukraine's decommunisation laws of 2015 raise a host of thorny questions about the legitimate defence of democracy in times of political transformation and war. Does the concept of 'militant democracy', coined in the 1930s in response to the rise of fascism to capture the variety of measures that democratic states could employ to prevent anti-democratic movements/political extremism acquire novel dimensions in the context of a mnemonical and physical conflict wherein the opponent is utilising a gamut of 'hybrid' means ('information warfare')? Is there a 'right' democratic response to confining antidemocratic legacies and their palpably present effects in the context of an active intrastate (if internationally instigated) conflict? Has Ukraine struck a good balance between protecting its 'national memory' and sustaining the claim of thus defending its nascent democracy through its legal regulation of the public memory of communism, Nazism and WWII? Or do the 2015 decommunisation laws rather undermine the country's democratisation efforts due to the challenge that banning the communist party and criminalising pertinent speech acts ('propaganda') present to such fundamental democratic values as freedom of speech and association, and political pluralism? Is militant democracy a more acceptable solution in the context of ongoing nation-building, regime change and active conflict as compared to consolidated democracies during more 'normal' times? What is the lesson of the Ukrainian post-Maidan truth and justice-seeking policies for the EU's policy on support to transitional justice?

III PANEL

Paper Author:

dr Cosmin Sebastian Cercel,
University of Nottingham School of Law

Paper Title:

From Fascist Dictatorship to Popular Democracy: Law, Revolution and Constitutional Identity

Paper Abstract:

What is the legal and symbolic signification of constitutional and juridical statements describing historical events? What, if anything, such statements enshrined in constitutional texts, convey both as a matter of law and as ideological injunctions ? I shall try to approach these questions by focusing on the case of Romania and its transition from a regime of fascist allegiance to a socialist style 'popular democracy' within the orbit of the Soviet Union. This process, started with the toppling of the military dictator Ion Antonescu on the 23 August 1944, and arguably coming to an end with the instauration of the Republic on 30 December 1947, found its unlikely articulation in Article 2 of the Constitution of 1948 and as well as in the Preamble of the Constitution of 1952.

Both texts place at the core of the newly formed republic the struggle against fascism, ostensibly understood as a foundational event. While the reading of the past proposed by these texts is, of course, limited and imbued with a specific ideological luggage, it draws nonetheless the attention of the legal theorist with regards to the power and the limits of the law in re-writing history. Furthermore, as a matter of historiography, it begs for an analysis of the place played by law in the process of reconstructing the public sphere at the outcome of World War 2. The aim of my intervention is to take the measure of this shift brought within the sphere of the law by the vagaries of the interregnum of 1944-1948 and to reflect on the peculiar reading of history proposed by the new constitutional regime.

III PANEL

Paper Author:

dr Miklós Könczöl, Institute for Legal Studies, Hungarian Academy of Sciences

Paper Title:

The Past in Hungary's Fundamental Law

Paper Abstract:

This paper looks at how the past and history appear in the Fundamental Law of Hungary (enacted in 2011, and amended several times in the past seven years). It does so through two examples, religion and ethnic/national minorities, both mentioned in connection with Hungarian national culture. It is argued that both religious and minority cultures become relevant through their inclusion into Hungarian history. That inclusion, however, happens through the political decision of the constitution-maker, with the historical background remaining open to interpretation. The question, then, is whether and how competing interpretations of history shape the meaning of the constitutional text, and what is the expressive-pragmatic function of making these concepts part of the text.

III PANEL

Paper Author:

prof. Mirosław Wyrzykowski,
University of Warsaw

Paper Title:

"National Untruth". Controversial Law on the Polish Institute of National Remembrance?

Paper Abstract:

The most recent history knows few cases of national legal regulations, which would be reflected in such a broad and negative echo as the Act on the Institute of National Remembrance of 14 February 2018 amending the Act on the Institute of National Remembrance. The Act introduces criminal liability for public and, contrary to the facts, attributing to the Polish Nation or the Polish State responsibility or co-responsibility for Nazi crimes committed by the Third Reich. The perpetrator of such an offence is punishable by a fine or imprisonment of up to 3 years. One of the objectives of the Act was to create a mechanism to prevent the use of the term "Polish death camps" to describe Nazi death camps. This direct objective is at the same time - as it results from the justification of the Act - an element of the Polish authorities' persistent and consistent historical policy to prevent the falsification of Polish history and to protect the good name of the Republic of Poland and the Polish Nation.

One of the most bizarre aspects of the purely legal nature of the Act was the fact that the President of the Republic of Poland, without hesitation, signed the Act and, on the day of its promulgation, submitted a motion to the Constitutional Tribunal to consider its most important regulations as violating the Polish Constitution. However, the Constitutional Tribunal had no chance to consider the President's motion in the part concerning penal responsibility because the Sejm overturned the most controversial regulations concerning penal responsibility in June 2018.

The legislative process is over. The President's request for control of constitutionality of other parts of the Act is pending. The dispute over the essence of "historical policy" is ongoing.

III PANEL

Paper Author:
drs. Anna Milosevic, University of Leuven

Paper Title:
The Balkans: Past, Nation and Europeanisation

Paper Abstract:

This paper examines the concept and challenges of collective memory in a European context, processes of coming to terms with the past and contentious negotiation about what to remember and what to forget. It asks what the role of the past in the process of European integration is and whether as a result of the Europeanisation we can observethe emergence of a European memory. Scrutinizing the EU Accession process of Croatia and Serbia I ask why and under which conditions domestic actors pursue alignment with the EU memory politics, beyond formal conditionality, as well as what are the outcomes of these memory adjustments. Taking these questions on board, this paper unravels the mechanisms of Europeanisation of memory politics by examining the complex and multifaceted interaction between the EU and domestic actors which drives legal, institutional and normative change.