

Legal Frames of Memory. Transitional Justice in Central and Eastern Europe

Veranstalter: Genealogies of Memory Project, European Network Remembrance and Solidarity

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In his well-known book on collective memory, Maurice Halbwachs suggests the dialectical relationship between law and memory. It is not only that law shapes and institutionalizes a certain legitimate framework for social memory, but it also has to build on some already existing strata of social memory to be able to command authority. As such, law and memory relationship is subject to the broad sociopolitical and economic processes that make up our common past, present, and future. It is a domain of unceasing social struggle around issues of social identity, justice, and power.

Drawing on this perspective, this year's *Genealogies of Memory* conference explored the „legal frames of memory“ in the context of „transitional justice in Central and Eastern Europe.“ The conference brought together about thirty papers presented by academic researchers and activists from different parts of the world, including Estonia, Romania, Hungary, Poland, Ukraine, Slovakia, Germany, Turkey, Czech Republic, and the United States of America. The participants engaged a number of themes related to conflicting national memories and competing narratives of victimhood, and the kind of memory work fostered by various so-called „transitional justice“ procedures such as, criminal prosecution of crimes, truth commission, restitution, compensation, and rehabilitation. In particular, the conference stimulated productive discussions on the problem of juridification of memory and politics by law as well as, the instrumentalization of law by party politics. It also raised questions related to the possible drawbacks of employing a clear-cut moralistic victim-perpetrator framework and uncritically treating „transitional justice“ instruments as neutral and given by overlooking their particular (Western) sites of production.

The Genealogies of Memory conference was spread over three days. The first day provided a brief overview of the national and regional features of transitional justice in Central and Eastern Europe from a comparative perspective. The second day complemented this overview with panels on more specific forms of justice (for example retributive justice) and particular questions of civil society, archival management, and public-private demarcation of the past. Building on these discussions, the third and the final day of the conference reflected on the educational role of courts in constructing historical truth and moral narratives of accountability by focusing on human rights, international and national legal institutions and their symbolic and practical aspects.

The first panel of the conference provided an entry point to the role of law and legal policies in the context of radical political change. COSMIN SEBASTIAN CERCEL (Nottingham) underlined the legal continuities between post-1918 Romanian government, fascist military dictatorship, and post-war communist government by focusing on the legal articles on the „state of siege“ (state of exception). His paper discussed the legal means by which communists sought to demarcate the present from the past, and concentrated on the curious question of why many Jewish communists did not prosecute the crimes of the Holocaust even if many of them had been victimized by Romanian fascists. EVA-CLARITA PETTAI (Tartu) lucidly laid out the general field of transitional justice instruments in the Baltic states and underlined what each of these procedures were supposed to mean to the victims and perpetrators. In a similar vein, ELA ROSS-MILLER (Washington, DC) described the numerous „subject positions“ inscribed in different Polish transitional justice laws and emphasized that these laws had been objects of contentious public debates. Similarly, ANA LULEVA (Sofia) underlined the current highly volatile debates in Bulgaria concerning legal and memory policies on communism.

The following panel addressed aspects of restorative justice in Germany and Poland with regards to conflict over property. While MARCIN ROMANOWSKI (Warsaw) dis-

cussed the recent contentious legal-political disputes over the return of the land property confiscated during the Soviet zone of occupation in Germany (1945-1949), KATARZYNA KATANA (Krakow) analyzed the way the Warsaw decree justified the expropriation of real estate by communist authorities in Poland. In a similar vein, MARCIN WRÓBEL (Krakow) described the communist expropriation of land in the Tatra Mountains National Park and pointed to this policy's adverse effects on natural environment and the livelihood of former owners and co-owners of the land. Finally, KATE KORYCKI (Toronto) offered general reflections on the role of law in property disputes by highlighting law's tendency to uphold the principle of continuity. This then results in privileging those claims that were protected in the former regime.

In his keynote address, ELAZAR BARKAN (New York) highlighted the importance of the figure of the victim and especially, the victim's right to truth in formulating and assessing the appropriate legal responses to mass atrocity and genocide. However, this is not an easy matter to settle when there are competing claims of victimhood and when suffering becomes the main yardstick of recognition in a new polity. To resolve the problem of competing victimhood claims, Barkan suggested, victimhood must be stripped of its usual moralistic meanings. This would then allow us to treat victims not as „equals,” but privilege certain claims of victimhood over others. He also argued that historical truth must not be reduced to legal truth. Different from the truth established by courts or other legal institutions, historical truth, Barkan suggested, must be collectively produced. In a similar vein, Dariusz Stola (Polish Academy of Sciences) commented that building historical monuments needs to be done responsibly and avoid inscribing wooden ideological narratives, as these structures will be inherited by the future generations. The lecture has become a common reference point for the rest of the conference.

The second day of the conference tackled with the issue of retributive justice in „dealing with perpetrators” and the role of civil society. RIVKA BROTH (Tel Aviv) offered another perspective to the seemingly „unmarked” ab-

stract considerations of transitional justice by suggesting a „Jewish way” of pursuing justice, as was the case in the trials of Jewish collaborators in Jewish Displaced Camps, 1945-1950. While AGATA FIJALKOWSKI (Lancaster) discussed the lack of any substantial criminal prosecutions of the abuses of Enver Hoxha rule of Albania, MARCIN WARCHOŁ (Warsaw) pointed to the central role of the statute of limitations in blocking the prosecution of the crimes committed before 1989 in today's Poland. One leading point that ties all the papers together was the question of the political aspect of transitional justice. Challenging the common liberal perceptions of the rule of law as apolitical, Lavinia Stan suggested that any pursuit of transitional justice is always already political and so is the consideration of different victim groups. This statement, in turn, resonated well with Barkan's remark on the inequality or asymmetry between competing victimhood claims.

To a remarkable extent, the following panel engaged this relationship between politics and law in writing history and regulating public access to the former state archives. TOMASZ STRYJEK (Warsaw) provided a brief overview of the main political problems encountered in the work of the recently founded Ukrainian National Memory Institute in addressing the Soviet legacy. Similarly, STANISLAV LABJAK (Bratislava) presented the work of the Slovak Nation's Memory Institute in documenting the crimes of communism. Finally, SAYGUN GÖKARIKSEL (New York) critically examined the social effects of the law regarding lustration and the Institute of National Remembrance, which runs the former Polish secret service archives and prohibits access to it by those who were accused of collaboration with the former secret service. Focusing on the experience of one family who were denied access, he explored the sociopolitical and visceral dimensions of this experience and the space between remembering and forgetting.

The next panel engaged with the social and normative role of civil society in transitional justice contexts. NADYA NEDELSKY (Saint Paul, MI) addressed the issue of „civility” of civil society institutions and what that means in the context of Slovakia. Along the same

line, LAVINIA STAN (Antigonish, NS) suggested taking into account the decisive role of non-state actors in shaping and pursuing justice in Romania. In particular, she reflected on how civil society is marked by political antagonisms articulated by various interest groups (that is the beneficiaries of communist housing policies or nationalization of property). ELENA GLUSHKO (Moscow) showed that lustration has become another name for accountability politics in post-communist Russia, invoked by different opposition groups to address political and economic corruption.

The final day of the conference focused on the pedagogical role of the courts in naming crimes and writing history. It put forward important questions concerning the tension between legislation and court, electoral democracy and constitutionalism, and the production of legal truth and historical truth. The first panel dealt with the relations between courts' proceedings and decisions and their public response. It started with JOACHIM SAVELSBERG's (Minneapolis, MN) discussion of the impact of criminal trials against human rights perpetrators on the collective representation of massive violations of human rights. His theoretical considerations drew on Western media reports regarding atrocities in Africa. The question of the reception was similarly the subject of IVOR SOKOLIĆ's (London) presentation which dealt with how domestic war crimes trials have influenced norm building in Croatia. Finally, MAGDALENA SARYUSZ-WOLSKA (Warsaw) discussed how images of the Third Reich were used in the denazification and reeducation processes in Germany after 1945. The second panel was concerned with how asymmetrical East-West power relations are generated through law and how national collective memories are shaped by the work of international courts. While ALEKSANDRA GLISZCZYŃSKA-GRABIAS (Warsaw) underlined the lack of the European Court of Human Rights' constructive engagement or recognition of the Katyń massacre, CHRISTIANE WILKE (Ottawa, ON) discussed the generation of „the East“ as the lawless other of the „civilized West Germany.“ The civilized West then claimed to have the moral justification to impose its own

political and legal standards, against which it sat in judgment over the lives and fates of East German legal personnel. MARK OSIEL (Iowa City, IA) remarked the importance of judicial review and inter-American court and HANNES PÜSCHEL presented a paper on the denial of historical atrocities and public use of Soviet symbols in European penal law.

As for the closing remarks of the conference, ISTVÁN RÉV (Budapest) underlined that many dissidents' vision of the democratic future and their relationship to 1989 revolutions were largely shaped by their reassessment of the French Revolution, especially the problem of terror and political violence. ADAM CZARNOTA (Oñati) highlighted the increasing „colonization of memory by law“ and suggested thinking beyond the tools offered and sometimes, imposed by the global transitional justice industry. EVA-CLARITA PETTAI (Tartu) and YAROSLAV PASKO offered general reflections on the problems of common memory work and dialogue between contending social groups with different attachments to the Soviet legacy in the Baltic states and Ukraine.

Overall, the conference was most stimulating in addressing the legal matters related to working through the „communist past,“ the past which is largely defined here by the crimes and abuses of power committed by the communist state. As JIŘÍ PŘIBANĚ (Cardiff) suggested, what is demanded here is always a collective „work“ rather than what is often coldly stated as „dealing with the past.“ However the conference offered less food for thinking further about social memory, the particular work of memory, and the specific effects of law on different political groups and social classes, for instance, on their self-identification or self-invention in the present day. It would also be fruitful to take into account how the social inequalities and injustices systematically produced by capitalist transformation over the last decades had been shaping the popular demands for accountability and historical justice in Central and Eastern Europe. Indeed, this is an issue closely related to the important question raised during the conference discussions: what does it mean to pursue „transitional justice“ twenty five years after the fall of com-

munism? What is the thin line that separates it from being a mere tool for party politics to discredit the opponent and suppress democratic criticism? What alternative procedures of truth and justice may be thought to those promoted by the global „transitional justice“ industry? And how is the common political future fashioned through particular workings through the past? In the ocean of memory and law, perhaps, these are mere rain drops, but nonetheless, they are the ones in which we are often soaked up. We hope that to the stimulating series of conferences on memory and solidarity, the conference organizers will add in the near future another one that explores these questions.

Conference Overview:

Cosmin Sebastian Cercel (Nottingham University), *Anxieties of the Nomos: Fascism, Communism and Legal Discontinuity in Post-War Romania*

Ela Rossmiller (American University, Washington, DC), *Subject Positions and Social Antagonisms in the Discourse of Transitional Justice in Poland*

Eva-Clarita Pettai (University of Tartu), *Transitional and Retrospective: Truth and Justice Processes in the Baltic States*

Anna Luleva (Bulgarian Academy of Sciences), *Justice Policy and Memory about Communism in Bulgaria. Dynamics and Current Debates*

Marcin Romanowski (Cardinal Stefan Wyszyński University in Warsaw), *Law and Politics Regarding Property in Germany – Disputes over Confiscations in the Soviet Zone of Occupation during 1945-49*

Katarzyna Katana (Jagiellonian University), *Legal Issues Related to Restitution of Nationalized Real Estate as Demonstrated by the Property Expropriated by the Warsaw Decree*

Marcin Wróbel (Jagiellonian University), *Expropriation in Tatra Mountains National Park as a „Lack of Restorative Justice“. Outline of a Social Conflict in Podhale*

Kate Korycki (University of Toronto), *Memory Conflict and Law – a Theory*

Elazar Barkan (Columbia University), *Justifying Atrocities: Contested Victims*

Rivka Brot (Tel Aviv University), *Transitional Jewish Justice: Jewish Collaborators on Trial in Jewish Displaced Persons Camps, 1945-1950*

Agata Fijalkowski (Lancaster University), *Legal Frames of Memory: The Albanian Experience*

Marcin Warchoń (Warsaw University), *Prescription of Communist Crimes*

Tomasz Stryjek (Collegium Civitas, Warsaw), *Between Transitional Justice and Politics of National Identity. The Role of the Ukrainian National Memory Institute in the State Policy towards the Soviet Legacy in Ukraine*

Stanislav Labjak (Nation's Memory Institute, Slovakia), *The Transformation Process and Current Problems of the National Memory Institute of Slovakia*

Saygun Gökarnksel (City University of New York), *Two Bodies of the Accused: Ethics of Knowledge and Memory and Polish Secret Service Archives*

Nadya Nedelsky (Macalester College in Saint Paul, Minnesota), *Transitional Justice and Civil Society in Slovakia*

Lavinia Stan (St. Francis Xavier University in Canada), *Civil Society and Post-Communist Transitional Justice: The Romanian Case*

Elena Glushko (Russian Academy of Sciences), *Hope for Justice: The Dream of Lustrations in Present-Day Russian Society*

Joachim Savelsberg (University of Minnesota), *Court Interventions against Human Rights Perpetrators: Between Current Representations and Memories of the Past*

Ivor Sokolić (University College London), *Heroes, Courts and Normative Clashes: How Are Domestic War Crimes Trials Affecting Norm Building in Croatia?*

Magdalena Saryusz-Wolska (Polish Academy of Sciences), *Reeducation, Denazification, Schuldfrage: Images of the Third Reich in the German Public Sphere 1945-1949*

Aleksandra Gliszczyńska-Grabias (Polish

Academy of Sciences), Communism equals or versus Nazism? Central and Eastern European Unwholesome Legacy in ECtHR

Mark Osiel (University of Iowa), Can Courts Deliberately Alter Collective Memory? Novel Remedies from the Inter-American Court of Human Rights

Christiane Wilke (Carleton University), East of the Rule of Law

Hannes Püschel, Coming to Terms with the Past through Penal Law? Denial of Historical Atrocities and Public Use of Soviet Symbols in (Central and Eastern) European Penal Law

Roundtable on Historical Justice and its Present Legislation:

Jiří Příbaň / Adam Czarnota (Oñati International Institute for the Sociology of Law) / Yaroslav Pasko / Eva-Clarita Pettai / István Rév

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