



**MEMORY LAWS IN POLAND AND HUNGARY
REPORT BY THE RESEARCH CONSORTIUM
'THE CHALLENGES OF POPULIST MEMORY
POLITICS AND MILITANT MEMORY LAWS
(MEMOCRACY)'**

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I. INTRODUCTION

1.1. Mnemonic constitutionalism, memory laws and memory wars

Legal governance of history and memory aiming to legitimise a socio-political order has been a part of modern history. Its presence is global, with varying thematic, geo-political and ideological settings.¹ One such setting is the area of constitutionalism, understood as a coherent system of limitations of governmental powers, where the authority and legitimacy of the government are recognised only if such limitations are respected.² Placed in this context, mnemonic constitutionalism can be broadly defined as a process of embedding specific historical paradigms in the structures and framework of European law, national constitutional law, memory laws (understood as provisions of the law shaping, imposing or even sanctioning the collective understandings of historical events), as well as judicial assessments of the attitude to the past, ranging from the evaluation of the constitutionality of specific provisions of the law by the courts to judicial reasoning dictated by ideological and political pressure, such as the April 2022 judicial decision ordering the dissolution of Memorial, Russia's oldest and most prominent non-governmental organisation, fearlessly revealing the crimes of Soviet regime and defending historical truth.³

In this context, Poland and Hungary – the two states under review in this Report – are model examples of not only legal governance over history with the tools of mnemonic constitutionalism, but also states pursuing memory wars to impose certain state-sponsored narratives on the past.

In Viktor Orbán's Hungarian Fundamental Law of 2011, even the Preamble exclusively acknowledges the positive aspects of Hungarian history, presented in a self-exculpatory manner.⁴ By self-exculpatory memory laws we understand provisions that intend to excuse a state or nation from blame of guilt of the past. In the case of Poland, the 2018 Amendment of the Act on the Institute of National Remembrance, partly repealed in June 2018, penalised the defamation of the Polish state and the Polish nation, attributing responsibility, or co-responsibility to Poles for crimes committed by German Nazis in occupied Poland. Although the idea of opposing the falsification of history appears valid, the structure of the law has also left room for bringing those daring to ask uncomfortable questions challenging the heroic vision of Poland's past to trial. Simultaneously, more legal tools and policies of this kind have been employed, leading to a particular national historical policy.⁵

The recent proliferation of mnemonic constitutionalism, in particular, in many Central and Eastern European (hereinafter 'CEE') states, is closely linked to the rise in prominence of yet another phenomenon, often referred to as 'memory wars'.⁶ Such wars are frequently fought in defence of an idealized vision of the past, with particular states and nations being portrayed only as victims or saviours of others and never as

¹ See, among others, Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge: 2017; Angelika Nußberger and Caroline von Gall (eds.), *Bewusstes Erinnern und bewusstes Vergessen. Der juristische Umgang mit der Vergangenheit in den Ländern Mittel- und Osteuropas*, Mohr Siebeck, Tübingen 2011.

² See Wil Waluchow, "Constitutionalism". In: Edward Nouri Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2018. Available online: <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism> [25.04.2023].

³ Official information posted by the International Historical Educational Charitable and Human Rights Society "Memorial", "Russia's Supreme Court Approves Liquidation of International Memorial". Available online: <https://www.memo.ru/en-us/memorial/departments/intememorial/news> [25.04.2023].

⁴ Gábor Halmai, "National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism". *EUI Working Papers* 2017/08. Available online: https://cadmus.eui.eu/bitstream/handle/1814/46226/LAW_2017_08.pdf?sequence=1&isAllowed=y [25.04.2023].

⁵ Aleksandra Gliszczyńska-Grabias, "Deployments of Memory with the Tools of Law – the Case of Poland. *Review of Central and East European Law* 44(4), 2019, pp. 464–492. Available online: <http://www.doi.org/10.1163/15730352-04404002>.

⁶ Nikolay Kaposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, Cambridge 2017.

perpetrators of atrocities committed against ‘the Others’. For instance, the Belarusian Constitution amended in a 2022 sham national referendum distorts the past by omitting all elements of critical reading of Second World War and post-War Soviet engagement in the region.⁷ Such tools of rewriting history, which are prescribed by law, frequently go hand in hand with populist or even authoritarian tendencies, even though they are portrayed as a necessary attempt to secure the ‘historical truth’.

The extreme and tragic example of Russian distortion of history serves as the best proof of the hazardous potential of this dealing with the past.⁸ The reading of Vladimir Putin’s 2021 essay ‘On the Historical Unity of Russians and Ukrainians’ 24 February 2022⁹ proves that those who warned that it should be understood as a direct ‘call to arms’¹⁰ were not mistaken. Putin’s main claim can be summarised as follows: no separate, independent Ukrainian nation exists, Ukraine needs to be ‘denazified’, and the world order should return to the glorious Russian imperial and Soviet-era greatness. The same views were manifested long ago by the Kremlin by enacting constitutional amendments and memory laws with distorted historical narratives embedded in them.¹¹ Eventually, this Russian version of mnemonic constitutionalism and manipulation of historical truth served as a cynical justification for the brutal aggression against Ukraine.

Simultaneously, legal governance over collective remembrance of the past also encompasses other developments not involving historical distortions. These include: references to profoundly critical historical events in constitutional preambles, which are particularly significant in transitional justice and post-colonial contexts; the establishment of truth commissions and national remembrance institutions; citizenship laws that broaden the scope of eligibility for citizenship based on historic criteria; lustration laws; and various legal measures belonging to the militant democracy legal framework allowing for the restriction of freedom of speech and other fundamental rights and freedoms in order to protect liberal democracies from their enemies within.¹² Therefore, as highlighted in MEMOCRACY’s first report on Germany,¹³ the German Basic Law states that political parties seeking to undermine or abolish the free democratic order will be deemed unconstitutional.¹⁴ Mnemonic constitutionalism has also manifested itself in memory laws adopted in almost all European states as Holocaust denial bans, guided by the powerful post-Second World War call of ‘Never again!’¹⁵

1.2. Current socio-legal context and historic heritage in Poland and Hungary

An era of formally free historical debate began after 1989 in the former communist states of the CEE region, including Poland and Hungary, thanks to the freedom of speech, freedom of conducting and disseminating the results of scientific research and media freedom. A multi-voiced, pluralistic, and emotive historical

⁷ Uladzislau Belavusau, “The ‘Year of Historical Memory’ and Mnemonic Constitutionalism in Belarus. In: *Verfassungsblog*. Available online: <http://www.doi.org/10.17176/20220908-110646-0>.

⁸ One of the national case-studies Reports within Memocracy series will be dedicated to Ukraine and Russia.

⁹ Vladimir Putin, “On the historical unity between Russians and Ukrainians”, *Boris Yelstin Presidential Library*. Available online: [https://www.prlib.ru/en/article-vladimir-putin-historical-unity-russians-and-ukrainians_\[25.04.2023\]](https://www.prlib.ru/en/article-vladimir-putin-historical-unity-russians-and-ukrainians_[25.04.2023]).

¹⁰ Twitter comments by Anne Applebaum: Available online: <https://twitter.com/anneapplebaum/status/1421480489748254723> [25.04.2023].

¹¹ Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias and Maria Mälksoo “Memory Laws and Memory Wars in Poland, Russia and Ukraine”. *Jahrbuch des öffentlichen Rechts der Gegenwart* 69(1), 2021, pp. 95–116. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806091 [25.04.2023].

¹² András Sajó, *Militant democracy*, Eleven International, Utrecht 2004. Available online: <https://doi.org/10.1093/icon/mol015>.

¹³ Paula Rhein-Fischer and Simon Mensing, *Memory Laws in Germany. How Remembering National Socialism Is Governed through Law*, a report by the research consortium “The Challenges of Populist Memory Politics and Militant Memory Laws (Memocracy)”, Torkel Opsahl Academic EPublisher, Brussels 2022.

¹⁴ *Ibid.*

¹⁵ Israel Gutman, *Denying the Holocaust*, Study Circle on World Jewry in the Home of the President of Israel, 3. Shazar Library, [Jerusalem] 1985.

debate has emerged, even though it has been mostly limited to the academic, expert, and social elites' circles, not encompassing larger parts of the societies. It was one of the consequences of focusing, within the process of debating the past, on the mnemonic constitutionalism, while mostly disregarding alternatives based on participatory, deliberative methods of memory governance (i.e. truth commissions) that could supplement the existing framework of dealing with the past.

Nonetheless, the last thirty years have seen a change in the parameters of collective memory in the two states serving as case studies in this Report. This was a contrast to half a century of communist historical propaganda, which imposed a top-down understanding of the past, instrumentalised to achieve current political goals, both domestically and in the international arena. Moreover, the communist propaganda did not allow national and ethnic minorities to speak up or at least extremely restricted the public expression of historic memory.

At the same time, both societies and states had to face certain historical myths that have bound together their national communities for centuries. Even though the historical developments and contexts were different in the case of Poland and Hungary, the general overtone of being the 'chosen' nation, as well as other aspects of historical exceptionalism were to be noticed, with profound consequences for the future 'dealing with the past' by both states.

In the case of Poland, the confrontation with the historical truth about the guilt of a significant portion of Polish society with respect to the minorities living in the historical Polish lands, especially Jews, but also Ukrainians, Belarusians, Lemkos, Silesians and Roma, was harrowing and challenging. The reaction to the voices of historians, journalists or artists demanding the acknowledgement of this guilt in the hope of working through it and later reconciliation, was mixed, including the denial of the problematic past by a part of Polish society.¹⁶ This strong emotion was instrumentally exploited by politicians, as reflected in the drafting of criminal memory laws to protect the 'good name' of the Polish nation, introducing state sanctions for many for speaking uncomfortable truths about the past.

Simultaneously, the majority of controversies in Hungary are related to the heritage of the 1920 Treaty of Trianon, which confirmed the transfer of large territories then belonging to the Hungarian part of Austria-Hungary to the neighbouring countries, including present-day Romania and Slovakia. Such narrative of the post-WWI border changes is particular to Hungary, and it is not part of shared European memory of the WWI and its aftermath. The year 2020 marked the 100th anniversary of the signing of the Treaty, perceived in Hungary as one of the most tragic events in its history and treated as a tension-raising instrument in domestic and international relations. This historic conflict focuses on the region of Transylvania (Romanian *Ardeal* or *Transilvania*, Hungarian *Erdély*), traditionally inhabited by both Hungarians and Romanians and of great identity-building importance for both nations. The current Hungarian government has been openly nostalgic about the pre-Trianon Hungary and has projected strong political messages around it, both domestically and abroad.

At the same time, also in the case of Hungary, the Holocaust-related past¹⁷ raises controversies and provokes political – and legal – responses from the government. One of the most telling examples was the announcement by the Hungarian government of the year 2014 as being the Holocaust Memorial Year, as well as the erection of the Monument of the German Occupation and the initiation of a Memorial to the Child Victims of the Holocaust (the House of Fates). These and many other efforts were meant to establish a standard Hungarian narrative about the Holocaust past and, as claimed by some authors, to distort the

¹⁶ Kornelia Kończal, "Politics of Innocence: Holocaust Memory in Poland". *Journal of Genocide Research* 24(2), 2022, pp. 250–263. Available online: <https://doi.org/10.1080/14623528.2021.1968147>.

¹⁷ For the selection of the most relevant topics within the Holocaust memory realm in Hungary, see the excellent edited volume: Randolph L. Braham and András Kovács (eds.), *The Holocaust in Hungary: Seventy Years Later*, Central European University Jewish Studies Program and Central European University Press, 2016.

memory of what happened during the genocide of European Jews.¹⁸ Andrea Petö calls this phenomenon the ‘non-remembering of the Holocaust in Hungary’.¹⁹

At the turn of the millennium, the time ‘after the end of history’,²⁰ conservative intellectual circles in CEE spoke of the need to use history to guide policy at home and abroad.²¹ As Simon Mensing and Paula Rhein-Fisher highlight in their report on Germany, these ideas were inspired, among other things, by the comprehensive German state history policy, considered as part of the ‘soft power’ of a united, democratic Germany.²² At the same time, at international level, the period that started with the fall of communism brought many positive examples of reconciliation between Poles and Hungarians with their former and current neighbours, which was part of an orientation described as a ‘return to Europe’, an end to the isolationism and hostility forced on both states during the communist era, and a perception of the realisation of their interests in cooperation, dialogue and agreement with partners and the friendly family of European nations. This involved the road to the Council of Europe and the European Union, institutionalising their membership of the European structures. A European memory and identity have also emerged over the past eighteen years as an increasingly important and interesting phenomenon in the context of the attitudes of Polish and Hungarian populist rulers to the EU.

On the other hand, Poland and Hungary have been involved in several ‘memory wars’ in the last thirty years, causing a temporary deterioration of their relations with various states, notably with Israel, Russia, Ukraine, and Germany. The confrontational politics of remembrance, arising from the different parts of the historic experience and the divergence of the national policies of remembrance of these countries, were also often pursued by legal means.

However, there have been no ‘memory wars’ in Polish-Hungarian relations. Both nations and states, in various forms of their statehoods, have been friends and partners since the Middle Ages, and some historical events have profoundly strengthened this close bond. For instance, the Hungarian revolution of 1848–1849 met with the support of the Polish national government in exile – a Polish legion of 3,000 soldiers led by General Józef Wysocki took part in the fighting on Hungary’s side; during the Polish-Bolshevik war of 1920, Hungary was the only country in the region that offered military aid to Poland under the attack of the Bolsheviks; under Communist rule, inspired by the events in Poznań where the workers’ protests were bloodily suppressed, the Hungarian revolution of 1956 was enthusiastically supported by Poles who donated blood *en masse* to wounded Hungarian fighters. These close ties and mutual loyalty were not harmed, even during the Second World War, when Hungary allied with the Nazis: Hungarian Prime Minister Pál Teleki flatly denied Hitler the possibility of invading Poland from Hungarian territory. After the invasion, over a hundred thousand Polish refugees found shelter in Hungary.

Therefore, history and the past tend not to burden Polish-Hungarian relations and usually do not lead to tensions and pretensions, which would or could have been translated into the militant memory laws or policies directed against each other. In recent years, the closeness and alliance between the current Polish and Hungarian populist, anti-liberal governments have also manifested in dismantling democratic standards, including, notably, the rule of law.²³ These developments strongly influence Poland’s and Hungary’s mnemonic narra-

¹⁸ Henrietta Kovács and Ursula K. Mindler-Steine, “Hungary and the Distortion of Holocaust History: The Hungarian Holocaust Memorial year 2014”. *Politics in Central Europe* 11(2), 2017, pp. 49–72. Available online: <https://doi.org/10.1515/pce-2015-0010>.

¹⁹ Andrea Petö, “Hungary 70: Non-remembering the Holocaust in Hungary”. *Culture & History Digital Journal*, 3(2), 2014. Available online: <http://doi.org/10.3989/chdj.2014.016>.

²⁰ Fukuyama has famously coined ‘the end of history’. In: Francis Fukuyama, *The End of History and the Last Man*, Free Press, New York 1992.

²¹ Balazs Trencsényi, “Beyond Liminality? The Kulturkampf of the Early 2000s in East Central Europe”. *Boundary 2*, 41(1), 2014, pp. 135–152. Available online: <https://doi.org/10.1215/01903659-2409703>.

²² Rhein-Fischer and Mensing, 2022, see above note 13.

²³ For one of the most comprehensive academic accounts of this process, see Wojciech Sadurski, *A Pandemic of Populists*, Cambridge University Press, Cambridge – New York 2022. Available online: <https://doi.org/10.1017/9781009224543>.

tives, new memory laws' mechanisms, which are removed from European human rights law standards, and the new law's content which is often nationalistic and supporting well-embedded majoritarian narratives. Moreover, they are also reflected in policy against all those who protest against the abuse of the law to establish and secure the state-proposed visions of the past.

However, after Russia's invasion of Ukraine, the historical narratives of the Polish and Hungarian governments about Russia diverged. Poland's policy of helping Ukraine has been rooted in the historic struggle of the peoples and states of Central and Eastern Europe for sovereignty and security against imperialist Russia in its various historical forms of statehood, including the Soviet Union. Hungary chose the rhetoric of appeasement of Russia and dissent from the common European position. On the anniversary of the 1956 uprising bloodily suppressed by the Soviet Union's troops, the Hungarian Prime Minister preferred not to talk about Russia, but to attack the European Union.²⁴ The actual war shifted alliances and made the Polish-Hungarian alignment on key issues, including historical narratives, more difficult.

1.3. Reckoning with a different past(s)

In the CEE region, the ongoing 'reckoning with the past' applies to two pivotal historical settings: WWII (including the Holocaust), and the Stalinist and Communist past. The central element of the official narrative regarding both Nazi and Communist times is the victimhood status of Polish and Hungarian nations and states. As for WWII, by rejecting claims and accusations regarding their involvement in crimes committed against the Jews during Holocaust, both states emphasise the fact that they are victims of German Nazism, even though Polish claims are far better grounded.

Simultaneously, an equally visible 'tangent point' on the memory maps drawn by Poland and Hungary is their firm, critical position on the Western European states and societies' still prevalent attitudes to memory of Soviet, Stalinist and Communist's crimes in the Centre and East of the continent. It has been manifested in various ways, including in the European Parliament, during discussions over the commemoration efforts of CEE states aiming at somehow equating, in the European remembrance culture, the profoundness of the meaning and impact of Nazi and Communist totalitarian regimes' crimes.²⁵ Poland and Hungary have deplored a noticeable lack of understanding throughout Western Europe and on European level of the nature of crimes orchestrated by Soviet and local Communist regimes installed throughout CEE after WWII. The European project's remembrance culture has been built on common memory of the Holocaust. CEE states, including Poland and Hungary, have demanded this culture to be enlarged and also include the memory of the millions killed and persecuted by 'the other' brutal totalitarian regime of the 20th century. Yet, at least until recently, such memory remained largely outside the mainstream of the shared European identity. Perhaps, as Tony Judd claimed, the demand for 'equal treatment' of the suffering of the East 'carried uncomfortable implications for the West's past'.²⁶ This lack of sensitivity to the memory of CEE's suffering is used as an argument by those who rightly demand that crimes perpetrated in the name of diverse criminal ideologies be measured by the same yardstick. However, political and legal discourse have added fuel to arguments of those embittered by this dual optic.

²⁴ Jones Hayden, "Hungary's Orbán targets EU in speech marking 1956 anti-Soviet revolt". Available online: <https://www.politico.eu/article/hungary-orban-lashes-eu-marking-1956-anti-soviet-revolt/> [27.04.2023].

²⁵ Laure Neumayer, "Integrating the Central European Past into a Common Narrative: The Mobilisations Around the 'Crimes of Communism' in the European Parliament". *Journal of Contemporary European Studies*, 23(3), 2015, pp. 344–363. Available online: <https://doi.org/10.1080/14782804.2014.1001825>.

²⁶ Tony Judd, *Postwar: A History of Europe Since 1945*, Penguin, New York 2005, pp. 826. Available online: [https://scienzepolitiche.unical.it/bacheca/archivio/materiale/2467/Materiale%20didattico%20per%20corso%20magistrale%20Storia%20Integrazione%20Europa/Tony%20Judd-Postwar_%20A%20History%20of%20Europe%20Since%201945-Penguin%20Press%20\(2005\).pdf](https://scienze politiche.unical.it/bacheca/archivio/materiale/2467/Materiale%20didattico%20per%20corso%20magistrale%20Storia%20Integrazione%20Europa/Tony%20Judd-Postwar_%20A%20History%20of%20Europe%20Since%201945-Penguin%20Press%20(2005).pdf) [25.04.2023].

A quote from the European Court of Human Rights' (hereinafter: 'ECtHR') judgement from 2008 in *Vajnai v Hungary* provides an example of such antagonistic rhetoric. The case concerned conviction in Hungary under a prohibition of propagating totalitarian ideologies for publicly displaying the communist symbol of the red star. The ECtHR held that the Hungarian authorities breached the right to freedom of expression of the applicant, explaining: 'The Court is, of course, aware that the systematic terror applied to consolidate communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression.'²⁷

Such a ruling by the ECtHR may seem insensitive to the feelings that a large part, or even the majority of the Hungarian population may have towards the Soviet and communist regimes and their crimes. The Court was aware of that. It has had warned in the judgement about excessive limitations to the rights and freedoms of individuals, including when the restrictions introduced to conform to majority's preference. However, the court's reasoning in this particular aspect appears clearer when we clarify the case's context. The ECtHR grants broad protection to freedom of expression on issues of general interest and in the context of public assemblies, when they do not incite to violence or are otherwise removed from ECHR protection under the abuse of rights (Article 17 ECHR). In the *Vajnai* case, the issue was the restriction of the freedom of expression of a politician, who originated from left-wing formations and wore a red star symbolising the labour movement, during a political rally; the applicant's behaviours did not bring real threat or was not incitement to violence. The ECtHR has emphasised in its case law on the public use of symbols that each restriction of the freedom to use them must be considered strictly in context. The ruling in *Vajnai* case may be read as an attempt to defend the freedom of expression of those who refer to (non-totalitarian) left traditions in post-communist countries.

It is to be hoped that the longer and more embedded the CEE countries are in European structures, the more the European institutions, including courts, will understand the specifics of the memory of the Soviet and Communist regimes. Furthermore, during Russia's war in Ukraine the elites and societies of the West are also being educated about the tragic twentieth history of CEE and its often-complicated mnemonic heritage. For now, the CEE's part of 20th century history has not yet been fully or universally acknowledged as part of shared European history.²⁸ The common European historical memory has been built around remembrance of the Holocaust victims, with a starting point of Auschwitz liberation on 27 January 1945 as a place of mass murder of the European Jews – which later turned into a symbol of Nazi atrocities and a European "never again" founding myth.²⁹ Since 1995, the European Parliament has adopted resolutions drawing attention to the obligation to remember Holocaust through commemorations and education and called for establishment of a common day of Holocaust remembrance.³⁰ The adoption of the Stockholm Declaration in January 2000 is considered the key event for the universalisation of the Holocaust as a reference point of a European culture of memory and subsequent establishment of Auschwitz liberation day as an International Holocaust Remembrance Day.³¹

²⁷ Judgement of the ECtHR, of 8 October 2008, *Vajnai v Hungary*, 33629/06, para. 57, HUDOC.

²⁸ Aleksandra Gliszczyńska-Grabias, "Communism Equals or Versus Nazism? Europe's Unwholesome Legacy in Strasbourg". *East European Politics and Societies* 30(1), 2017, pp. 74–96. Available online: <https://doi.org/10.1177/0888325415570966>.

²⁹ Claus Leggewie, "Seven circles of European memory". Available online: <https://www.eurozine.com/seven-circles-of-european-memory/#anchor-footnote-14> [27.04.2023].

³⁰ Magdalena Pasikowska-Schnass and Philippe Perchoc, "European Parliamentary Research Service. The European Union and Holocaust remembrance. Briefing". In: *Members' Research Service*. Available online: <https://policycommons.net/artifacts/1337394/the-european-union-and-holocaust-remembrance/1945237/> [27.04.2023]. CID: 20.500.12592/n3d08g.

³¹ Heidemarie Uhl, "Learning from History? Why European Societies Remember the Holocaust Today", *Témoigner. Entre histoire et mémoire*, 126, 2018, pp. 54–59. Available online: <https://doi.org/10.4000/temoigner.7157>.

The 2004 European Constitutional Treaty Preamble euphemistically refers to the events of the WWII and the Holocaust as a “bitter experience” which united Europe and whose “lessons learned” may become a positive force for the future development.³² The EU framework also includes legislative measures to protect the Holocaust memory: *inter alia*, the 2008 Council Framework decision on racism and xenophobia had obliged the EU Member States to criminalise Holocaust denial. The 2017 EU Parliament Resolutions called on the Member States to adopt and apply the working definition of anti-Semitism employed by the International Holocaust Remembrance Alliance; and the 2018 Resolution on the rise of neo-fascist violence in Europe (2018) calls on countering Holocaust denial and trivialisation, including via mainstreaming it in education.³³ However, as the Holocaust-centred remembrance as a “shared European value” has been formed during the 1980s and 1990s, the countries of the post-socialist region aiming to accelerate their EU membership in 2000s initially imitated its adoption, their aim to equate the “Holocaust memory” and “Gulag memory”³⁴ is bringing more and more disturbances and contradictions into the European politics of history.³⁵

The limited understanding of CEE experience of Communist totalitarianism and authoritarianism as part of shared European remembrance memory culture, in turn, is being used and abused by the ruling circles and their allies, including in Poland and Hungary, which then cause domestic and international unrest over the visions and understanding of the past to mobilise their political supporters and, ultimately, win elections. Maintaining the grip on power allows these governments to further move away Poland and Hungary from European mainstream memory laws and standards of free historical debate.

* * *

This Report consists of two main parts devoted to Poland’s and Hungary’s remembering of and dealing with the past, including with the use of memory laws and other deployments of legal and extra-legal means in historical policy, including soft law. It also discusses relevant domestic courts’ jurisprudence. The report situates these practices against European human rights law standards, inferred from the ECtHR case law. The aim of this exercise is capturing the dynamics of the Polish and Hungarian state’s relationship to the past after 1989 in a concise form and examine the current legal framework.

The Polish and Hungarian sections are structured around common themes. In what follows, we shall discuss mnemonic constitutionalism, the institutionalisation of mnemonic governance, memorialisation of the Second World War and the Holocaust, reckoning with communism, education, and memory. The report includes discussions of political, social, and cultural factors that contextualise the legal framework. The final part concludes with broader reflections on the state of Polish and Hungarian *memocracies*, understood as constitutional and political regimes based on references to the past and a specific form of governance of historical memory. The report is supplemented by Conclusions and Recommendations addressed to a wide range of players and participants of public deliberations over history and the past, including lawmakers on domestic and European level, academia, and the civil society.

³² Andrea Pető, “Bitter experiences” reconsidered: paradigm change in Holocaust memorialization. Available online: <https://www.boell.de/en/2019/06/28/bitter-experiences-reconsidered-paradigm-change-holocaust-memorialisation> [27.04.2023].

³³ See Magdalena Pasikowska-Schnass and Philippe Perchoc, “European Parliamentary Research Service. The European Union and Holocaust remembrance. Briefing”. In: *Members’ Research Service*. Available online: <https://policycommons.net/artifacts/1337394/the-european-union-and-holocaust-remembrance/1945237/> [27.04.2023]. CID: 20.500.12592/n3d08g.

³⁴ Leggewie, 2010, see above note 29.

³⁵ Hanna Bazhenova, “Changes in Central and Eastern European Politics of History in the Context of Russian Aggression”. In: Hanna Bazhenova (ed.), *Constructing Memory: Central and Eastern Europe in the New Geopolitical Reality*, Instytut Europy Środkowej Lublin 2022, pp. 14.

2. MEMORY LAWS IN POLAND

2.1. Introduction

Poland has a robust and diverse set of memory laws that aim to commemorate historical events, individuals, and places, while also addressing the crimes committed against the Polish nation by totalitarian regimes. In this report, we will situate Poland's memory laws against various cultural and social factors to provide a snapshot of the grassroots memory culture that has emerged in the past three decades. We will examine the role of political factors in shaping Poland's "memocracy" — the interplay between memory and democracy — and the impact of mnemonic constitutionalism on Poland's memory laws.

We understand *memocracy* as composite of 'memorare' (Latin for 'to remember') and κράτος (Ancient Greek for 'rule'). It thus stands for 'ruling on the basis of memory'.³⁶ As such, the term is neutral, but when instrumentalised for specific purposes – it can symptomise a regress: away from democracy towards autocracy. Malksoo understands militant memocracy as „the mobilisation of state power behind its sanctioned past narrative with an inclination to criminalise accounts of the past challenging a state's preferred self-identity.”³⁷

Moreover, we will delve deeper into the memory laws themselves, analysing their contents, scope, and implications. Throughout our analysis, we will provide frequent socio-political contextualisation, considering how the memory laws have been shaped by Poland's unique historical, cultural, and political circumstances, and how they in turn shape Polish society and politics.

2.2. Social, cultural, and political contexts

After years of imposed top-down historical memory, the democratic transition of 1989, with the freeing of historical debate, enabled grassroots, diverse culture of remembrance to flourish in Poland. This debate takes place in a variety of forums: in academic studies, literature, in the media, in the arts, especially in the new historical cinema, but also in the performance and visual arts. It is inspired by various domestic and external cultural and social movements and civil society initiatives and actions.

During the period of communism in 1945–1989, important issues related to modern and contemporary history of the country had not been discussed or inadequately addressed. The “white gaps”, which refers to the missing pieces of information or events that were deliberately omitted from the official historical narrative, have started to be addressed, up to varying degrees, also from minority viewpoints.

Filling of such gaps included notably researching and discussing attitudes of the Polish state and Poles to Jews before, during,³⁸ after WWII³⁹, and to their material and immaterial heritage.⁴⁰ Jan Gross's book about 1941 pogrom in Jedwabne village, *The Neighbours*, published in Poland in 2000, has provoked one

³⁶ “[New research project] “The challenge of populist memory politics for Europe: Towards effective responses to militant legislation on the past (Memocracy)”. Available online: <https://www.asser.nl/about-the-asser-institute/news/new-research-project-the-challenge-of-populist-memory-politics-for-europe-towards-effective-responses-to-militant-legislation-on-the-past-memocracy/> [27.04.2023].

³⁷ Maria Mälksoo, Militant memocracy in International Relations: Mnemonical status anxiety and memory laws in Eastern Europe”. *Review of International Studies*, 47(4), 2021, pp. 489–507. Available online: <https://doi.org/10.1017/S0260210521000140>.

³⁸ Geneviève Zubrzycki, “Polish nationalism and the Jews”. In: Liah Greenfeld and Zeying Wu (eds.), *Research Handbook on Nationalism*, Edward Elgar Publishing, Cheltenham, UK–Northampton, MA 2020, pp. 395–405.

³⁹ Anat Plocker, *The expulsion of Jews from communist Poland: Memory wars and homeland anxieties*, Indiana University Press, Bloomington 2022.

⁴⁰ Anna Chipczyńska, “Preserving Jewish Cemeteries as an Actual Challenge in Contemporary Poland”. In: *Being Jewish in 21st Century Central Europe*, De Gruyter Oldenbourg, Berlin–Boston 2020, pp. 291. Available online: <https://doi.org/10.1515/9783110582369-016>.

of the most important public debates of the past thirty years and led to varied reactions, also from political parties and lawmakers, including introducing a new memory law, Article 132 of the Criminal Code prohibiting public slander of the Polish Nation „of participating in, organizing, or being responsible for communist or Nazi crimes” under the punished with imprisonment of up to 3 years, that was later invalidated by the Constitutional Tribunal.⁴¹ The memory of the pogrom is used to comment upon the chasm between conservative and liberal segments in Polish society.⁴² A related theme was also the integration of Jewish history into Polish history, that has been vigorously discussed, among others, on the occasion of the POLIN Museum of the History of Polish Jews opening in 2014 in Warsaw. The creation of this museum has further rekindled a museum fever,⁴³ and has also made the creation of a museum of Polish history (still under construction) a priority. Despite years of, systematically disturbed, also from the government’s side,⁴⁴ dialogue, the victimhood and memory competition between Poles and Jews does not show signs of abating.⁴⁵

The historical debate could finally be enriched with local, regional, and minority narratives about the past. The grassroots culture of remembrance has required the inclusion of the perspectives of national and ethnic minorities. Another crucial discussion concerned acknowledging the experiences and perspectives of other ethnic and religious minorities throughout the various forms of Polish statehood, as well as during periods when the state did not exist. It encompassed debates on relations with Lithuanians, Ukrainians,⁴⁶ Belarusians, post-war forced population transfers, including the Vistula Action that deliberately uprooted Lemkos,⁴⁷ and other anti-minorities policies of the communist state, including those against Silesians,⁴⁸ Kashubs,⁴⁹ or Masurians.⁵⁰ These debates are still, it seems, only in their early stages. As is the incorporation of Roma history into a common Polish history and culture.⁵¹ It also appears that the public debate on the realities with the neighbours on the eastern border may be partly steered or fuelled by externally orchestrated disinformation. The heightened interest in the Volhynian massacres of 1943-45, i.e., the ethnic cleansing of the Ukrainians against the Poles, is linked to the Polish far right and often attributed to Russian disinformation.⁵²

⁴¹ See Alina Cherviatsova, “Memory as a battlefield: European memorial laws and freedom of speech”. In: *The International Journal of Human Rights* 25(4), 2021, pp. 675–694.

⁴² Tomasz Eysak, “The barn is burning”: Polish popular music and memory of the Holocaust in the twenty-first century”. In: *Holocaust Studies*, 2022. Available online: <https://doi.org/10.1080/17504902.2022.2116546>.

⁴³ Paweł Ukielski, “New historical museums in Poland”. In: Joanna Wojdon (ed.), *Public History in Poland*, Routledge, New York 2021, pp. 50–66.

⁴⁴ Piotr Źuk, “From the anti-semitic campaign in 1968 to the nationalism of the populist right 50 years later: anti-semitic narrative in Poland as a tool of politics”. *Ethnopolitics* 22(1), 2023, pp. 69–90. Available online: <https://doi.org/10.1080/17449057.2021.1988220>.

⁴⁵ Lech M. Nijkowski, “Polish-Jewish Rivalry for Memory”. In: Katarzyna Górak-Sosnowska and Urszula Markowska-Manista (eds), *Non-Inclusive Education in Central and Eastern Europe: Comparative Studies of Teaching Ethnicity, Religion and Gender*, Bloomsbury Academic, London 2022, pp. 175. Available online: <https://doi.org/10.5040/9781350325296.ch-010>.

⁴⁶ Belavusau, Gliszczyńska-Grabias and Mälksoo, 2021, see above note 11.

⁴⁷ Jan Pisuliński, “Lemkos, Poles, and Operation Vistula: The Suffering of the Lemkos and its Reception among the Poles”. *The Polish Review*, 64(2), 2019, pp. 46–59. Available online: <https://doi.org/10.5406/polishreview.64.2.0046>.

⁴⁸ Eugenia Sojka, “Decolonizing Upper Silesia: Reclaiming and Validating a Hybrid Culture in Scholarly and Literary Discourses”. In: *Cultural Change in East-Central European and Eurasian Spaces: Post-1989 Revisions and Re-imaginings* 2021, pp. 169–193. Available online: https://doi.org/10.1007/978-3-030-63197-0_11.

⁴⁹ Oleksandr Vasiukov, “Toward the Status of Ethnic Minority: The Study on Kashubian and Silesian Activism in Contemporary Poland”. In: *Working Papers: Centre for German and European Studies*, 2021.

⁵⁰ Sabine Grabowski, “Lost Villages in Masuria: A Polish-German Project to Preserve Cemeteries”. *Acta Universitatis Carolinae Studia Territorialia* 2020, 19(2), pp. 83–97. Available online: <https://doi.org/10.14712/23363231.2020.5>.

⁵¹ Wojciech Szymański, “The Importance of Place: Romani Art, Central Europe, and the Case of Czarna Góra”. In: Mary Sherman (ed.), *International Opportunities in the Arts*, Vernon Press, Wilmington–Delaware 2019, pp. 405–428.

⁵² Agnieszka Kasińska-Metryka, Karolina Pałka-Suchojad, “New and Old Stereotypes of Ukrainians in Polish Society”. In: Agnieszka Kasińska-Metryka and Karolina Pałka-Suchojad (eds.), *The Russia-Ukraine War of 2022: Faces of Modern Conflict*, Routledge, 2023. Available online: <https://doi.org/10.4324/9781003341994-6>.

Moreover, there have been efforts at German-Polish reconciliation on state and societal level, delayed, compared to reconciliations with Western European neighbours, by almost a half of a century.⁵³ Furthermore, we can speak of a great success in freeing the debate about the ‘Polonisation’ of the post-German territories, propagandistically called ‘recovered lands’ by the communist authorities.⁵⁴ Today, the inhabitants of these areas, which make up almost a third of the country, are proud of their rich history, knowing of their passing from hand to hand over the centuries. There is a growing literature on particular experience of living among material culture left by the former German inhabitants⁵⁵ and the subject is openly addressed in popular culture. However, the expulsion of Germans from these lands and the attitude of the Polish state and society towards the German minority after WWII remains a difficult topic in Poland. Moreover, German domestic debate about it, especially a mini-series *Unsere Mütter, unsere Väter* from 2013,⁵⁶ has provoked strong negative reactions and paved way for memory laws and other legal actions in Poland. Furthermore, anti-German sentiment is instrumentalised by politicians for electoral purposes. An example of this is the efforts to obtain reparations from Germany for the damages of WWII, officially presented by the PiS party government in 2022.⁵⁷

The opening of the debate about Soviet and homegrown Communist authorities’ crimes has been another important feature of Poland’s mnemonic landscape. After 1989, it was finally possible to discuss previously forbidden topics such as the Stalin-Hitler Pact, the Soviet aggression in 1939, and commemorate victims of Soviet crimes against Polish military and civilian population in WWII, including the 1940 Katyń massacre of 21 000 prisoners⁵⁸, the Red Army’s reaction⁵⁹ to the Warsaw uprising⁵⁹ and its treatment of civilian population. A historical debate on the violence and crimes of the communist authorities in Poland, including judicial crimes, has also been opened. Holding its perpetrators accountable, on the other hand, has proven more difficult. In the 1990s, historiography marked by an anti-communist tone have emerged. Changes were made to history textbooks, streets honouring Communist heroes were renamed, public buildings were renamed, and monuments were dismantled - although remnants of them survived into the 2020s.

A heated debate on appropriate transitional justice means of reckoning with communist system, notably with the local communist authorities repression against post-war anti-communist partisans and later pro-democracy social movements have marked the past three decades.⁶⁰ Since the 2000s, great public interest in the history of the communist era has persisted, fuelled by political discussions about archives and files containing information about public figures.⁶¹ Moreover, a politically charged historical debate about the leaders of the democratic opposition, especially Solidarity movement leader and first president of the Third Republic Lech Wałęsa took central place. The right-wing parties, with roots in democratic opposi-

⁵³ Bartosz Dziewanowski-Stefańczyk, “Overcoming Conflicting Memories: History in the Polish-German Relations after 1989”. In: Jan Rydel and Stefan Troebst (eds.), *Instrumentalizing the Past: The Impact of History on Contemporary International Conflicts*, De Gruyter, Oldenbourg 2022, s. 55–70. Available online: <https://doi.org/10.1515/9783110769791-005>.

⁵⁴ Wojciech Bedyński, “Changing Cultural Landscapes: The Case of Post-German Territories in Poland”. *European Review* 30(S1), 2022, S86S93. Available online: <https://doi.org/10.1017/S1062798722000412>.

⁵⁵ Karolina Kuszyk, *Poniemieckie*, Wydawnictwo Czarne, Wołowiec 2019.

⁵⁶ Lukas Meissel, “The Innocent Perpetrators: The Portrayal of “German Victimhood” in *Unsere Mütter, Unsere Väter* (Generation War)”. *The Journal of Holocaust Research* 36(2-3), 2013, pp. 146–163. Available online: <https://doi.org/10.1080/25785648.2022.2071196>.

⁵⁷ “Polish foreign minister signs diplomatic note to Germany on WW2 reparations”. Available online: <https://www.reuters.com/world/europe/polish-foreign-minister-signs-diplomatic-note-germany-ww2-reparations-2022-10-03/> [28.04.2023].

⁵⁸ Aleks Szczerbiak, “Dealing with the Communist Past or the Politics of the Present? Lustration in Post-communist Poland”, *Europe-Asia Studies* 54(4), 2002, pp. 553–572. Available online: <http://www.jstor.org/stable/826424> [28.04.2023].

⁵⁹ Chelsea Michta, *The Warsaw Uprising Museum and the Polish politics of history*, PhD thesis, University of Cambridge, 2021.

⁶⁰ Zoltan Dujisin, “A history of post-communist remembrance: from memory politics to the emergence of a field of anticommunism”. *Theory and Society* 50(1), 2021, pp. 65–96. Available online: <https://doi.org/10.1007/s11186-020-09401-5>.

⁶¹ Paweł Machcewicz, “When History Matters Too Much: Historians and the Politics of History in Poland” *Contemporary European History* 32(1), 2023, pp. 15–20. Available online: <https://doi.org/10.1017/S0960777322000510>.

tion, maintain that Wałęsa acted as an informant for the communist authorities. They also try to belittle his achievements.⁶² Not only have Poles found it difficult to come to terms with their difficult past; they are also unable to come to an agreement and unity on celebrating the glorious pages of history. Historian Timothy Garton Ash observed in 2019, on the 30th anniversary of the end of communism, the Poles were unable to celebrate their victories, make the victory of Solidarity a beautiful founding myth and boast about it around the world, due to internal quarrels.⁶³

In the last decade, the Polish historical debate has also been enriched by discussions on women's historical experience and gendering memories,⁶⁴ including WWII experience,⁶⁵ and sexual minorities history,⁶⁶ including extermination of homosexuals in Nazi concentration camps in WWII⁶⁷ and political blackmail by Polish communist state.⁶⁸ There has been also a renewed interest in peasant history and people's history, which focuses on experiences of majorities instead of elites.⁶⁹ The modernisation of Polish society, greatly changed in the twentieth century as a consequence of two totalitarianisms, has also been influentially discussed.⁷⁰ However, the most important new debate concerned the economic and social impacts of the transition from Communism to a market-based economy, its lived experience, and legacies.⁷¹ An often painful dissection of the experience of Catholicism is also underway, which also raises strong objections from parts of society and is used and abused by politicians.⁷² At the level of civil society, especially in the youngest generation, there is also an ongoing debate over the veneration of historical figures, especially Pope John Paul II.

In democratic Poland since 1989, civil society gave expression to the competing visions of conservatives and progressives regarding Polish history – ‘heroic and martyrologic’ versus ‘critical’. This division was influentially described by Jan Józef Lipski in his 1981 essay ‘Two homelands, two patriotisms’. Lipski distinguished between ‘a critical patriotism’, instead of a non-critical one which insists on Poles’ perennial historical virtue and results in the historical policy of innocence.⁷³ This division remains in effect today.

The main object of interest in this report, however, is not the totality of this rich, multifaceted debate about the past and present, but how Polish democracy sets the framework for it. The basis of the contemporary Polish memory culture and official state historical policy, which is reflected in its mnemonic constitution and memory

⁶² Mark Kramer, “Public Memory and Communist Legacies in Poland and Russia”. In: *Transitional Justice and the Former Soviet Union*, 2018, pp. 66–87. Available online: <https://doi.org/10.1017/9781108182171.004>.

⁶³ Ash T.G., „Zmarnowana rewolucja 1989. Polacy, czy naprawdę żyć umiecie dopiero w klęsce?” [Ash T.G., “The wasted revolution of 1989: Poles, do you really only know how to live in defeat?”]. Available online: <https://oko.press/timothy-garton-ash-zmarnowana-rewolucja-1989-polacy-czy-naprawde-zyc-umiecie-dopiero-w-klęsce> [28.04.2023].

⁶⁴ Inga Kuźma, Edyta Pietrzak, “Gendering Memory: Intersectional Aspects of the Polish Politics of Memory”. *Przegląd Socjologii Jakościowej* 16(1), 2020, pp. 102–118.

⁶⁵ Joanna Ostrowska, „Lepiej nie mówić” Milczenie ofiar gwałtów wojennych z okresu drugiej wojny światowej w relacjach świadkiń” [“Better Left Untold”. The Silence of World War II Rape Victims in Female Witnesses’ Accounts]. *Narracje o Zagładzie* 1(7), 2021, pp. 36–60. Available online: <https://doi.org/10.31261/NoZ.2021.07.03>.

⁶⁶ Grzegorz Niziołek, “Gay Performance in Pre-Emancipation Times” *Central Europe* 19(1), 2021, pp. 53–64. Available online: <https://doi.org/10.1080/14790963.2021.1921998>.

⁶⁷ Joanna Ostrowska, „Panienki” „szwungi” „fajfusy” „łaleczki”. O przemoc seksualnej wobec mężczyzn w obozach koncentracyjnych [“Sissies”, “Buggers”, “Fruits”: Sexual Violence Against Men in Concentration Camps]. *Teksty drugie* (3), 2020, pp. 76–94. Available online: <https://doi.org/10.18318/td.2020.3.5>.

⁶⁸ Karolina Morawska, “No authorities are interested in us, no one interferes in our affairs?": Policing homosexual men in the People's Republic of Poland". In: Tomasz Basiuk (ed), *Queers in State Socialism*, Routledge, New York 2020, pp. 88–101.

⁶⁹ Zachary Mazur, “Was There Ever a Polish Peasant? Historical Imagination and the People's History of Poland”. *Acta Poloniae Historica* 126, 2022, pp. 155–180. Available online: <https://doi.org/10.12775/APH.2022.126.09>.

⁷⁰ Andrzej Leder, *Prześlona rewolucja. Ćwiczenia z logiki historycznej*, Wydawnictwo Krytyki Politycznej, Warszawa 2014.

⁷¹ Magdalena Nowicka-Franczak, “Self-Criticism in Post-Communist Times: The Polish Debate on the Democratic Transition in the Eastern European Context.”. In: *Communist and Post-Communist Studies*, 54(4), 2021, pp. 28–53. Available online: <https://doi.org/10.1525/j.postcomstud.2021.54.4.28>.

⁷² Wojciech Sadlon, “Polarisation but Not Pillarisation Catholicism and Cultural Change in Post-Transformation Poland”. *Religions* 12(7), 2021, pp. 457. Available online: <https://doi.org/10.3390/rel12070457>.

⁷³ Kończal, 2022, see above note 16.

laws, is the condemnation of the crimes committed by non-democratic regimes, notably twentieth-century fascism, Nazism and Communism, as well as the aspiration to build an independent, democratic state that protects human rights, in contrast with the traumatic historical experience of past generations. However, within this general, underlying orientation, there have been different currents over the years, expressed by different clashing political visions and political parties. For the purpose of this Report, we have distinguished periods of pursuit of official historical policy in Poland, which were influenced by stages of democratic transition, internal and external political, societal and cultural factors, and, since 2015, the ongoing democratic backsliding.⁷⁴

The period from 1989 to 1993 was the time of certain *naïveté*, an optimism about the self-regulation of pluralistic historical debate and belief in almost organic reckoning with the past, or rejection of the need thereof. However, the lack of reckoning with the communist system, the lack of closure, has marred Polish politics for decades.⁷⁵ This period was followed by a first positional war over reckoning with the past between the post-communist and post-Solidarity camp. It has centred on the approach to transitional justice measures, in particular to lustration.⁷⁶ With the benefit of hindsight one may criticise this epoch for missing chances to seriously deal with its not distant, non-democratic past, in particular for delaying lustration policies and not applying transitional justice mechanisms, such as truth commissions.

The first decade of the Third Republic culminated with constitutionalisation in 1997 and institutionalisation in 1998 of state historical policy (with establishment of the Institute of National Remembrance, the IPN), which had been also firmly based on classic militant democracy memory laws, such as the Holocaust and other genocide denial bans and prohibition of propagating fascism and totalitarian regimes, that covered Nazism and Communism. The process leading up to the adoption of the new constitution in 1997 was marked by intense turmoil and controversy, competing interests, and a high degree of political polarisation.⁷⁷

It would seem that for the first quarter of a century, the Polish, politically polarised, and navel-gazing memory debate was influenced by internal, not the supranational, European factors. The Polish debate was reacting to elements of the historical debate in other countries, notably Germany, Israel, Russia, and Ukraine, and was largely focused on bilateral relations. However, the presence of a supranational factors has significantly, albeit indirectly, influenced Polish historical disputers. It was an epochal change and realisation of generation of Poles' aspirations that Poland entered the political, legal, military structures of the Western world: the Council of Europe (1991), NATO (1997), European Union (2004). Nonetheless, this process does not take place without resistance from conservative and nationalist circles, who feared a curtailment of traditional understanding of sovereignty and, above all, cultural change, which is, however, influenced by long-term processes such as secularisation,⁷⁸ capitalism, or technological changes. However, the fears associated with this have process aimed at a world of 'culturally alien Western values' or even a 'clash of civilisations'.

⁷⁴ L. Pech and K.L. Scheppele defined the rule of law backsliding as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.” See Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”. In: *Cambridge Yearbook of European Legal Studies*, 19, 2017, pp. 3–47. Available online: <https://doi.org/10.1017/cel.2017.9>.

⁷⁵ Michał Bilewicz, “Moving beyond the past: The role of historical closure in conflict resolution”. *Social Psychological Bulletin* 14(4), 2019, pp. 1–10. Available online: <https://doi.org/10.32872/spb.v14i4.2437>.

⁷⁶ Szczerbiak, 2022, see above note 58.

⁷⁷ Tomasz Rawski, “Nation-State Reframed: The Memory Struggle over the Genealogy of the Third Polish Republic (1997–1998)”. *Problems of Post-Communism*, 2022, pp. 1–13. Available online: <https://doi.org/10.1080/10758216.2022.2148541>; Wiktor Osiatynski, “A brief history of the constitution”. *East European Constitutional Review* 6(2&3), 1997, pp. 66. Available online: [https://heinonline.org/HOL/LandingPage?handle=hein.journals/eurcr6&div=27&id=&page=\[25.04.2023\]](https://heinonline.org/HOL/LandingPage?handle=hein.journals/eurcr6&div=27&id=&page=[25.04.2023]).

⁷⁸ Elżbieta Bilska-Wodecka, “Secularisation and Sacralisation. New polarisation of the Polish religious landscape in the context of globalisation and European integration”. *Auc Geographica* 44(1), 2019, pp. 318. Available online: https://karolinum.cz/data/clanek/9156/geographica_1-2_09.3-18.pdf [24.05.2023].

In the last twenty years, the Polish political scene has been dominated by two blocs, originating from communist-era democratic opposition: the centre-right economic-liberal and the nationalist-Catholic-populist-right. Governing liberals showed more limited interest in historical policy, although they have supported the creation of the Museum of the Second World War in Gdańsk, that aimed at presenting WWII history in comparative global perspective. After the Smoleńsk crash in 2010, in which President Lech Kaczyński, his wife Maria Kaczyńska, and dozens of top officials were killed, Platforma Obywatelska (PO, Civic Platform) party in power made some concessions to the historical policy of PiS party, then in the opposition, exemplified by introducing the national holiday commemorating post-WWII anti-communist partisan, so-called cursed soldiers. On the other hand, the right-wing parties have been particularly invested in responding to certain societal anxieties about memory and history.

From 2005 to 2007 the first right-wing populist Prawo i Sprawiedliwość (PiS, Law and Justice party) coalition government aimed to implement a systemic legal policy of historical pride, which would entail incorporating a strong sense of national pride of history into the country's legal framework, under criminal law penalties for those who would dissent from it (we discuss it in more detail below). The first ideas of enacting legislation for the protection of the Polish state and nation against the competing responsibilities for Nazi crimes followed the publication of Jan Gross' *The Neighbours* in 2000. The book brought to light the delicate and sensitive issue of the role of the Polish people during the Holocaust, and the need for proper recognition and accountability. Moreover, PiS party leader Jarosław Kaczyński also included 'abolishing postcommunism' in his program, meaning removing previous elites from important positions in the current system.

Furthermore, the dispute between main political parties has over the years become increasingly structured around the degree to which Poland should adhere to the European standards and the possibility of a certain distinctiveness, or exceptionalism. All parties of the political spectrum agree that Poland should move towards Western European prosperity and living standards. However, the degree of adherence to all democratic standards and especially to social and cultural standards of the West, which have been adopted up to varying degrees by the states and societies in CEE, is a point of contention and is successfully used by right-wing parties in power to structure electoral contest.⁷⁹ Since 2010 tragic Smoleńsk crash, the political conflict has been increasingly culturally defined.⁸⁰

After PiS party's candidate won presidential elections and the party won general elections in 2015, creating the governing United Rights coalition, Poland have entered the current period of constitutional crisis. It has an important transitional justice dimension.⁸¹ This institutional setup allowed the governing camp to pass controversial bills, knowing that the President will sign them. The Polish democratic backsliding is also the period of memory laws abuse for short and medium-term political goals. Populist legislation on memory is in stark contrast with Europeanised memory laws of the 1990s.⁸² The new memory laws were designed for and proved to be quite popular in the government's target group. They reinforce the historical policy which revolves around Poles' heroic sacrifice and prohibits impugning the nation and state's good name by discussing crimes attributed to Poles.⁸³ In addition, the PiS party government has justified its

⁷⁹ Agata Włodkowska and Joanna Gajda, *The context of gender in the presidential election campaigns in Poland (2015–2020)*. In: Paulina Barczyszyn-Madziarz and Przemysław Żukiewicz (eds.), *Gender and LGBTQ Issues in Election Processes*, Routledge, New York 2022, pp. 167–186. Available online: https://karolinum.cz/data/clanek/9156/geographica_1-2_09.3-18.pdf [28.04.2023].

⁸⁰ Paulina Sałek and Agnieszka Sztajdel, "Poland – "Modern" versus "Normal": The Increasing Importance of the Cultural Divide". In: Paulina Barczyszyn-Madziarz and Przemysław Żukiewicz (eds.), *European Party Politics in Times of Crisis*, Routledge, 2019, pp. 189–213. Available online: <https://doi.org/10.1017/9781108652780.009>.

⁸¹ Michał Krotoszyński, "From Legal Impossibilism to the Rule of Law Crisis: Transitional Justice and Polish Counter-Constitutionalism", *Forthcoming in Imagine Paper* (25), 2022. Available online: <https://doi.org/10.2139/ssrn.4220914>.

⁸² Nikolay Kopusov, "Populism and memory: Legislation of the past in Poland, Ukraine, and Russia". *East European Politics and Societies* 36(1), 2022, pp. 272–297. Available online: <https://doi.org/10.1177/0888325420950806>.

⁸³ Kornelia Kończal, "Mnemonic Populism: The Polish Holocaust Law and its Afterlife". *European Review* 29(4), 2021, pp. 457–469. Available online: <https://doi.org/10.1017/S1062798720000502>.

various policies by the need to complete its reckoning with the communist system and the current elites it understands to be descended from it - either directly or by association.⁸⁴ It has tried to justify in this way, both at home and abroad, changes in the judiciary that were nevertheless aimed at staffing courts and subordinating judicial branch to the executive. The seizure of control over state institutions, that are headed by political appointees - the public media, much of the state museums and art galleries, the Institute of National Remembrance, as well as the establishment of many new institutions throughout the country and abroad - allow this new historical policy to be carried out with consistency and momentum.

2.2. Mnemonic constitutionalism

The 1990s in Poland was characterised by efforts to adapt the legal system inherited from the undemocratic era of ‘socialist constitutionalism’ to be suitable for a democratic state.⁸⁵ The enactment of the democratic Constitution of 2 April 1997, an example of liberal, pro-European constitutionalism, marks this period.⁸⁶ The 1997 Constitution attempted to combine the various traditions of modern Polish political thought: the conservative tradition, with its references to the Christian heritage; the liberal tradition, with its emphasis on the separation and cooperation of powers and a separate chapter on the protection of rights and freedoms, as well as the leftist tradition emphasizing the social market economy and the protection of minority rights. These traditions also shape references to the past in the Constitution.

The Preamble to the 1997 Constitution, which is an attempt to present a political compromise with various political players, including the Catholic Church,⁸⁷ positions the Third Republic of Poland in the light of Poland’s thousand-year history (966 is treated as the beginning of the Polish state) and makes extensive reference to the identity-shaping past. The Polish ‘mnemonic constitutionalism’,⁸⁸ understood as the placement of the authority and legitimacy of the state within the boundaries of a particular historical paradigm,⁸⁹ is based on an acknowledgement of the continuity of the achievements of the First (1569–1795) and Second (1918–1939) Republics and distancing itself from their shortcomings, as well as on the appreciation of the centuries-old independence aspirations at a time when the Polish state did not exist (1795–1918).

The Constitution treats the Polish nation as all citizens of the Republic of Poland, united by shared values derived from religion or other sources, rooted in the Christian⁹⁰ and humanist heritage. The Preamble emphasises the bond with the Polish diaspora worldwide, acknowledging centuries of political and economic immigration from Poland’s territories. It should be pointed out here that the Polish legislator’s inten-

⁸⁴ Anna Wójcik, “Reckoning with the communist past in Poland thirty years after the regime change in the light of the European Convention on Human Rights”. *Polish Yearbook of International Law* 39, 2020, pp. 135–157. Available online: <https://doi.org/10.24425/pyil.2020.134479>.

⁸⁵ Michal Kopeček and Ned Richardson-Little, “Introduction: (Re-)constituting the state and law during the “long transformation of 1989” in East Central Europe”. *Journal of Modern European History* 18(3), 2020, pp. 275–280. Available online: <https://doi.org/10.1177/1611894420924944>.

⁸⁶ Piotr Winczorek, “Axiological Foundations of the Constitution of Poland”, in *Saint Louis-Warsaw Transatlantic Law Journal*, 1997, pp. 59–67.

⁸⁷ Elżbieta Hałas, “Constructing the identity of a nation-state. symbolic conflict over the preamble to the constitution of the third republic of Poland”, in *Polish Sociological Review*, 149(1), 2005, pp. 49–67.

⁸⁸ Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias, “Mnemonic Constitutionalism in Central and Eastern Europe”. *European Papers*, 5(3), 2020, pp. 1231–1246. Available online: <https://ssrn.com/abstract=3782056>.

⁸⁹ Uladzislau Belavusau, “Mnemonic Constitutionalism and the Rule of Law in Hungary and Russia”. *Interdisciplinary Journal of Populism* 1(1), 2020, pp. 16–29. Available online: <https://ssrn.com/abstract=3768037> [8.05.2023].

⁹⁰ Piotr Polak, “The normative value of the reference to God and Christianity in the preamble to the Constitution of the Republic of Poland of 2 April 1997”. *Przegląd Prawa Konstytucyjnego*, 6(46), 2018, pp. 425–439. Available online: <https://doi.org/10.15804/ppk.2018.06.32>.

tion to reconnect with the diaspora is reflected in the citizenship law, which allows for dual citizenship,⁹¹ in the repatriation law, which addresses the process of people with Polish origins repatriating to Poland from the Asian parts of the former Soviet Union,⁹² and in provisions supporting members of kin-minorities.⁹³

The language of human rights is strongly present in the Preamble. Remembering past human rights violations provides a foundation for a democratic community based on the interaction of powers (Polish: *współdziałanie*)⁹⁴ (importantly: not the separation of powers), the protection of human rights, social dialogue, and the principle of subsidiarity. It reminds ‘all those who will apply this constitution’ to ‘preserve the inherent dignity of man, his right to freedom and his duty of solidarity with others, thereby emphasising the need to protect political and socio-economic human rights.’ Opinions in the Polish doctrine of constitutional law about the legal status of the Preamble are diversified. The dominant view is that the Preamble is indeed of a normative nature and plays a vital role in mapping out the lines of interpretation of the norms of the Basic Law.⁹⁵

The Constitution includes provisions on militant democracy to protect democracy from internal attacks and the abuse of rights, including a memory law. Loewenstein coined the term militant democracy,⁹⁶ which is often used interchangeably with defensive democracy, fighting democracy, or democracy that is capable of defending itself. It refers to a regime that is willing to adopt pre-emptive measures to prevent whoever intends to subvert democracy using democratic means from destroying the democratic regime.⁹⁷ Contemporary manifestations of mechanisms of militant democracy are diverse and include the prohibition of the propagation of undemocratic regimes, the prohibition of hate crime and hate speech, and the prohibition of discrimination.

Poland’s mnemonic constitutionalism directly outlaws political parties that apply methods and practices of non-democratic regimes: fascism and totalitarian regimes, both Nazism and communism.⁹⁸ Article 13 of the Constitution prohibits the formation and operation of parties and organisations ‘referring in their programs to the totalitarian methods and practices of Nazism, fascism and communism, as well as those, the program or activities of which presuppose or permit racial and national hatred, the use of violence to gain power or influence state policy, or which envisage secrecy of their structures or membership.’⁹⁹

This restriction on political parties has rarely been applied in practice. The marginal Union of Polish Communists ‘Proletariat’ was disbanded by a court order in 2000.¹⁰⁰ In 2020, the Prosecutor General filed a motion with the Constitutional Tribunal to ban the niche Communist Party of Poland, which publishes

⁹¹ Angelika Popyk, “Dual-citizenship as an instrument for the diaspora policy: The comparative analysis of Lithuania, Hungary and Poland”. *Centre of Migration Research Working Papers* 127(185), 2021. Available online: https://www.migracje.uw.edu.pl/wp-content/uploads/2021/12/CMR-WP_127185.pdf [18.05.2023].

⁹² Daria Łucka, “Widely Open Closed Doors. Contemporary Repatriation Policy in Poland”. *Studia Migracyjne–Przegląd Polonijny* 1(179), 2021, pp. 9–31. Available online: <https://doi.org/10.4467/25444972SMPP.21.001.13313>.

⁹³ Dorota Pudzianowska, “Karta Polaka New Wine in Old Bottles”. *Ethnopolitics* 20(1), 2021, pp. 12–24. Available online: <https://doi.org/10.1080/17449057.2020.1808319>.

⁹⁴ Wojciech Brzozowski, “Współdziałanie władz publicznych”. *Państwo i Prawo* 2, 2010, pp. 3–16.

⁹⁵ Ryszard Piotrowski, “The importance of preamble in constitutional court jurisprudence”. *Acta Juridica Hungarica* 52(1), 2011, pp. 29–39. Available online: <https://doi.org/10.1556/AJur.52.2011.1.3>.

⁹⁶ Karl Loewenstein, “Militant Democracy and Fundamental Rights, I–II”. *American Political Science Review* 31(3), 1937, pp. 417–432. Available online: <https://doi.org/10.2307/1948164>.

⁹⁷ Jan-Werner Müller, *Militant Democracy*. In: Keith Ewing (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1253–1269.

⁹⁸ Maciej Skrzypek, “The Banning of Extremist Political Parties as a Measures of Neo-Militant Democracy: The Experience of Post-Communist States”. *HAPSc Policy Briefs Series* 1(2), 2020, pp. 67–73. Available online: <https://doi.org/10.12681/hapscpbs.26450>.

⁹⁹ Piotr Janiak, “Publicznoprawne instrumenty “demokracji walczącej” w polskim systemie prawa”. *Studia nad Autorytaryzmem i Totalitaryzmem* 43(4), 2021, pp. 463–476. Available online: <https://doi.org/10.19195/2300-7249.43.4.36>.

¹⁰⁰ See Joanna Rak and Roman Bäcker, “Drift towards quasi-militant democracy in defiance of resistance”. In: Joanna Rak and Roman Bäcker (eds.), *Neo-militant Democracies in Post-communist Member States of the European Union*, Oxon-New York 2022, p. 9. Available online: <https://doi.org/10.4324/9781003245162-7>.

a periodical titled ‘Brzask’; the case is pending.¹⁰¹ However, the popularity of communist parties and movements in Poland after 1989 is negligible. Militant democracy provisions rather serve to combat the more widespread phenomenon of neo-Nazi and neo-fascist social movements or initiatives, that have far greater impact on political discourse than niche communist movements.¹⁰²

The text of the 1997 Constitution did not undergo much change, as a large qualified majority in the Sejm is required to amend it (at least 2/3 of the votes in the presence of at least half of the statutory number of deputies). The Constitution was amended only once, in execution of a ruling by Poland’s then-independent Constitutional Tribunal from 2005 to bring Poland into line with the European Union’s European Arrest Warrant system.¹⁰³ This change demonstrated the then prevailing pro-European orientation of the Polish legislature and constitutionalism. After changes in its composition and the assumption of political control of the Constitutional Tribunal in 2015-2016,¹⁰⁴ the Court departed from its pro-European line of jurisprudence, issuing antagonistic rulings that undermined the judgements of the European Court of Human Rights¹⁰⁵ and the Court of Justice of the European Union.¹⁰⁶ Since 2015, there has been an era of anti-constitutionalism with a strongly anti-European line.

2.3. Commemorative resolutions and memory wars

The Sejm and the Senate in democratic Poland also passed non-binding, declarative resolutions, which are in line with the mnemonic constitutionalism expressed in the Constitution. Their objective is to commemorate selected personalities, institutions, and events to create a positive culture of remembrance. Varied themes characterise the resolutions and take up an essentially unlimited list of past events. They enable the commemoration of local events and personalities of importance equally to regional communities and the Republic of Poland.¹⁰⁷ The resolutions have also honoured the memory of historical events of other nations and groups. For instance, in 2005, the Sejm paid tribute to ‘the victims of the genocide committed against the Armenian population in Turkey during the First World War, on the 90th anniversary of these events’.¹⁰⁸

Certain resolutions of the Polish Parliament have triggered memory wars at international level.¹⁰⁹ For

¹⁰¹ Trybunał Konstytucyjny, Cele i działalność partii politycznej, Komunistyczna Partia Polski [Constitutional Tribunal, Goals and activity of a political party, Communist Party of Poland], Pp 1/20. Available online: <https://trybunal.gov.pl/sprawy-w-trybunale/art/cele-i-dzialalnosc-partii-politycznej-komunistyczna-partia-polski> [8.05.2023].

¹⁰² Michael Minkenberg, Anca Florian and Malisa Zobel, “Depleting democracy? The radical right’s impact on minority politics in Eastern Europe”. *International Political Science Review* 42(5), 2021, pp. 649–671. Available online: <https://doi.org/10.1177/0192512120972883>.

¹⁰³ Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r. [Constitutional Tribunal judgement of 27 April 2005], P 1/05. Available online: https://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf [8.05.2023].

¹⁰⁴ Wojciech Sadurski, *Poland’s constitutional breakdown*, Oxford University Press, Oxford 2019. Available online: <https://doi.org/10.1093/oso/9780198840503.001.0001>.

¹⁰⁵ Adam Ploszka, “It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional”. *Hague Journal on the Rule of Law* 15, 2022, pp. 51–74. Available online: <https://doi.org/10.1007/s40803-022-00174-w>.

¹⁰⁶ Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, “Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland”. *European Constitutional Law Review* 19(1), 2023, pp. 163–181. Available online: <https://doi.org/10.1017/S1574019622000396>.

¹⁰⁷ Lech Michał Nijakowski, “Sejmowe uchwały upamiętniające jako medium pamięci zbiorowej. Studium przypadku: Muzeum Śląska Opolskiego” [Parliamentary commemorative resolutions as a medium of collective memory. A case study: The Opole Silesia Museum]. *Sociological Studies* 1(240), 2021, pp. 43–60. Available online: <https://doi.org/10.24425/sts.2021.136278>.

¹⁰⁸ Resolution of the Sejm of the Republic of Poland of 19 April 2005 on the 90th anniversary of the genocide committed against the Armenian population in Turkey during the First World War, Memo no. 3918. Available online: https://www.armenian-genocide.org/Affirmation.354/current_category.7/affirmation_detail.html [8.05.2023].

¹⁰⁹ Bartłomiej Secler, “Konfliktowe rocznice – wymiar międzynarodowy polskiej polityki pamięci na przykładzie wybranych uchwał rocznicowych Sejmu Rzeczypospolitej Polskiej”. *Przegląd Humanistyczny* 2(457), 2017, pp. 115–124. Available online: https://www.academia.edu/34692145/Konfliktowe_rocznice_wymiar_mi%C4%99dzynarodowy_polskiej_polityki_pami%C4%99ci_na_przyk%C5%82adzie_wybranych_uchwa%C5%82_rocznicowych_Sejmu_Rzeczypospolitej_Polskiej [8.05.2023].

instance, a 2009 resolution on the 70th anniversary of the Soviet aggression against Poland¹¹⁰ has become a part of a long-standing memory war between Poland and Russia about the evaluation and remembrance of the Soviet Red Army's conquest of Central and Eastern Europe. Under Vladimir Putin's regime,¹¹¹ the Russian Federation is building its imperialist and nationalist identity on the glorious history of the liberation of Europe from German Nazism during the 'Great Patriotic War', as Russia refers to WWII, with renewed force.¹¹² At the same time, the current Russian regime has again suppressed the memorialisation of Soviet terror, mass human rights atrocities and repression. It has also resurrected the cult of Josef Stalin as part of its efforts to militarise Russian society.¹¹³ The official Russian historical policy is at odds with the memory of Soviet imperialism and territorial aggression, exemplified by the Soviet Moscow and Nazi Berlin 1939 non-aggression pact that also included a secret protocol providing for the partitioning of Poland (Ribbentrop-Molotov pact), which was denied by the Soviet until 1989; the Red Army's brutal occupation of territories in CEE, which is especially remembered in Poland in the context of 1940 Katyń massacre of 21,000 Polish officers, intelligentsia and clergy, which was also denied by the Soviet Union and only admitted by Russia in the 1990s,¹¹⁴ mass deportations of Poles to Siberia and other parts of the Soviet Union, wartime rapes of civilians and pillaging of civilian property,¹¹⁵ followed by four decades of political subordination marked by gross human rights violations and a lack of sovereignty of the Polish state.¹¹⁶ The memory war between Putin's Russia and Poland extended to the European Union in 2019 when President Putin condemned the European Parliament's resolution on the Importance of European Remembrance for the Future of Europe,¹¹⁷ which blamed the 1939 Ribbentrop-Molotov pact for the outbreak of WWII. Putin considered it unacceptable to blame Hitler and Stalin equally for WWII. Putin also referred to Poland's Pre-War minister of foreign affairs as a 'bastard' and 'anti-Semitic pig', accusing him of plans of collaborating with Hitler.¹¹⁸ These historically false remarks resulted in a harsh, written response from Polish Prime Minister Mateusz Morawiecki. Next, Russia's president declined to participate in the 70th anniversary of the liberation of the German Nazi concentration and death camp, Auschwitz-Birkenau, which was celebrated in Poland in January 2020 and, instead, attended celebrations in Jerusalem organised on the initiative of a Russian businessman, in which Poland's President Duda declined to participate. At that time, Russian officials attempted to blame Poland for the outbreak

¹¹⁰ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 23 września 2009 r. upamiętniająca agresję Związku Radzieckiego na Polskę 17 września 1939 r. [Resolution of the Sejm of the Republic of Poland of 23 September 2009 commemorating the aggression of the Soviet Union against Poland on 17 September 1939], M.P. 2009 nr 63, poz. 831. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20090630831> [8.05.2023].

¹¹¹ Olga Malinova, "Political Uses of the Great Patriotic War in Post-Soviet Russia from Yeltsin to Putin". In: Julie Fedor, Simon Lewis and Tatiana Zhurhenko (eds.), *War and Memory in Russia, Ukraine and Belarus*, Palgrave Macmillan, London 2017, pp. 43–70. Available online: https://doi.org/10.1007/978-3-319-66523-8_2.

¹¹² Uchwała Sejmu RP z dnia 9 stycznia 2020 r. w sprawie wyrażenia sprzeciwu wobec manipulowania faktami i zakłamywania historii przez polityków Federacji Rosyjskiej w celu dyskredytowania Polski i pogorszenia relacji rosyjsko-polskich [Resolution of the Sejm of the Republic of Poland of 9 January 2020 on objecting to the manipulation of facts and falsification of history by politicians of the Russian Federation to discredit Poland and worsen Russian Polish relations], Official Journal M.P. of 2020, item 34. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20200000034> [8.05.2023].

¹¹³ Stephen M. Norris, *Bringing Stalin Back in Memory Politics and the Creation of a Useable Past in Putin's Russia*. In: Todd H. Nelson (eds), *The Soviet and Post-Soviet Review*, pp. 1–3. Available online: <https://doi.org/10.30965/18763324-bja10066>.

¹¹⁴ George Soroka, "Recalling Katyń: Poland, Russia, and the Interstate Politics of History". *East European Politics and Societies*, 36(1), 2022, pp. 328–355. Available online: <https://doi.org/10.1177/0888325420983433>.

¹¹⁵ Katarzyna Stańczak-Wiślicz, "The Politics of Silences: Women's War Experiences and the Discourses of Reconstruction in Poland (1945–1948)". In: *Reconstructing Minds and Landscapes: Silent Post-War Memory in the Margins of History*, Marja Tuominen, T.G. Ashplant, Tiina Harjumaa (eds), Routledge, New York 2020, pp. 61–73.

¹¹⁶ Grażyna Skąpska, "Facing Past Human Rights Abuse: A Way from a Liquid to a Solid Society". In: Jiří Přibáň (ed), *Liquid Society and its Law*, Routledge, New York 2007, pp. 115–128.

¹¹⁷ European Parliament resolution of 19 September 2019 on the importance of European remembrance for the future of Europe, 2019/2819(RSP), RC-B9-0097/2019. Available online: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0021_EN.html [8.05.2023].

¹¹⁸ Mike Eckel, "Memory Wars: Polish, Russian Fight Over World War II Shifts to Auschwitz". In: *Radio Free Europe*. Available online: <https://www.rferl.org/a/memory-wars-polish-and-russian-fight-over-world-war-ii-shifts-to-auschwitz/30386948.html> [8.05.2023].

of WWII.¹¹⁹ On 9 January 2020, the Polish parliament passed a resolution against the ‘manipulation of facts and the distortion of history by Russian politicians intended to discredit Poland and worsen Polish-Russian relations.’¹²⁰ Amendments to the Russian Constitution were enacted on 3 July 2020.¹²¹ Article 67 provides that the state protects ‘the historic truth’, constitutionalising what was previously a legal standard: in 2016, the Supreme Court upheld the conviction of a Russian citizen under Article 354.1 of the Criminal Code, for saying that Nazi Germany and Soviet Russia cooperated and attacked Poland in 1939.¹²²

The day before Russia invaded Ukraine, on 23 February 2022, the Sejm adopted a resolution by acclamation condemning ‘in the strongest terms any action by the Russian Federation aimed at attacking the sovereignty of Ukraine.’¹²³ The resolution emphasises that ‘the successive steps taken by Vladimir Putin demonstrate that his policy has the objective of undoing more than 30 years of peace in Europe after the fall of communism. Russia is deliberately trying to bring about the resurrection of the demons of the past and the rejection of any rules other than those of force, brutality and willingness to kill innocent people.’¹²⁴

Polish-Ukrainian relations bear a heavy historical burden related to centuries of economic exploitation of Ukrainians and other minorities by the Polish nobility and attempts to suppress their identity, which partly provoked the heinous acts of mass ethnic cleansing of Poles by the Ukrainian Insurgent Army (UPA) and Stepan Bandera’s faction of the Organisation of Ukrainian Nationalists (OUN) in Volhynia and Eastern Galicia in 1943–45 (then in Nazi German-occupied Poland). Poles also murdered Ukrainian neighbours in acts of retaliation. Poland lost the eastern borderland (Kresy) to the Soviet Union through the Yalta conference agreement between the great world powers. In 1947, in ‘Operation Vistula’, thousands of Ukrainians and other minorities, such as Lemkos, were forcibly relocated to Poland’s ‘recovered territories’, formerly German lands granted to Poland by the great powers. Atrocities against civilians accompanied the movements of the population.

At the time of adoption, the Polish Sejm’s resolution of 2016 commemorating the murders in Volhynia committed by Ukrainians against Poles, labelling it genocide,¹²⁵ caused tension in Poland’s relationship with Ukraine.¹²⁶ OUN members and leaders were treated as heroes by several Ukrainian governments. In January 2018, an amendment to the Act on the Institute of National Remembrance (Act on the IPN)¹²⁷ criminalised the denial of ‘crimes of members of Ukrainian formations collaborating with the Third Reich’ and ‘Ukrainian nationalists’.¹²⁸ The provision in its ‘Ukrainian nationalists’ part was repealed by the Constitutional Tribunal as insufficiently precise for criminal legislation in 2019. The Constitutional Tribunal

¹¹⁹ Anne Applebaum, “Putin’s Big Lie”. In: *The Atlantic*. Available online: <https://www.anneapplebaum.com/2020/01/05/putins-big-lie/> [8.05.2023].

¹²⁰ Resolution of the Sejm of the Republic of Poland of 9 January 2020, see above note 112.

¹²¹ See Johannes Socher, “Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments”. In: *Verfassungsblog*. Available online: <https://verfassungsblog.de/farewell-to-the-european-constitutional-tradition/> [2.07.2020].

¹²² Gleb Bogush and Ilya Nuzov, “Russia’s Supreme Court Rewrites History of the Second World War”. Available online: <https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war/> [8.05.2023].

¹²³ Resolution of the Sejm of the Republic of Poland of 23 February 2022 on the aggression of Russia against Ukraine. Available online: https://www.sejm.gov.pl/media9.nsf/files/ASEA-CBXDCN/%24File/uchwała_en.pdf [8.05.2023].

¹²⁴ *Ibid.*

¹²⁵ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 12 lipca 2013 r. w sprawie uczczenia 70. rocznicy Zbrodni Wołyńskiej i oddania hołdu Jej ofiarom [Resolution of the Sejm of the Republic of Poland of 12 July 2013 on the commemoration of the 70th anniversary of the Volhynian Crime and payment of homage to its victims], M.P. 2013 poz. 606. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20130000606> [8.05.2023].

¹²⁶ Belavusau, Gliszczyńska-Grabias and Mälksoo, 2021, see above note 11.

¹²⁷ Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [The Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for Investigating Crimes Against the Polish Nation, the Act on Military Graves and Cemeteries, the Act on Museums and the Act on Corporate Liability for Proscribed Punishable Conduct], Dz.U. 2018 poz. 369. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000369> [8.05.2023].

¹²⁸ See Uladzislau Belavusau and Anna Wójcik, “La criminalisation de l’expression historique en Pologne: la loi mémorielle de 2018”, *Archives de politique criminelle* 40(1), 2018, pp. 175–188. Available online: 10.3917/apc.040.0175.

ruled that the provision is incompatible with the principle of the specificity of legal provisions inferred from Article 2 and Article 42.1 of the Polish Constitution.¹²⁹ However, since the 2018 amendment to the Act on the IPN entered into force, the denial of ‘crimes of members of Ukrainian formations collaborating with the Third Reich’ has become a criminal offence punishable by up to 3 years’ imprisonment. Nonetheless, since the Russian invasion on Ukraine, Polish-Ukrainian historical grievances have been put aside, and the Polish state and society have steadfastly supported Ukraine in its defence against Russia. Ukraine’s President Volodymyr Zelensky congratulated Poland on the 104th anniversary of its independence in November 2022, recalling the differences of the past, but focusing on the sisterhood of the two peoples and countries and the mutual joys of sovereignty and democratisation over the past thirty years.¹³⁰ The acts of historical reconciliation have also taken place at the grassroots level. For instance, in the spring of 2022, residents of Volhynia in Ukraine cleaned the Polish cemeteries to demonstrate their gratitude to the Poles for their help in defending the country. This plainly contrasts with Putin-controlled Lukashenka’s regime in Belarus, which destroyed a cemetery of Polish Home Army soldiers in the Belarusian village of Mikulishki. The Polish Ministry of Foreign Affairs condemned the event because it ‘resembles the darkest episodes in the history of communism’ and aims to denigrate bilateral Polish-Belorussian state relations further.¹³¹

2.4. Institutionalisation of mnemonic governance

The first wave of mnemonic governance institutionalisation is marked by the establishment of the Institute of National Remembrance (Polish: *Instytut Pamięci Narodowej*, IPN) in December 1998. The IPN which became a model for similar organisations in the CEE region.¹³² The law establishing the IPN contains references to the need to cultivate the memory of ‘the enormity of the number of victims, the losses and damage suffered by the Polish people during World War II and after it ended’ and ‘the patriotic tradition of the struggle of the Polish people against the occupiers, Nazism and Communism’.

The Act on the Institute of National Remembrance (hereinafter ‘INRA’) stipulates the substantive and temporal scope of events that the Institute is to handle in all very extensive aspects of its activities, from documentation to prosecution.¹³³ The Preamble clarifies the IPN’s objective as follows:

- ‘Bearing in mind: – the remembrance of the enormity of the number of victims, the losses and damages suffered by the Polish people during the Second World War and after it ended, – the patriotic tradition of the struggle of the Polish people against the occupiers,

¹²⁹ Wyrok Trybunału Konstytucyjnego z 17 stycznia 2019 r., K 1/18, Nowelizacja ustawy o Instytucji Pamięci Narodowej [Judgement of the Constitutional Tribunal of 17 January 2019, Amendment of the Act on the Institute of National Remembrance]. Available online: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10463-nowelizacja-ustawy-o-instytucji-pamieci-narodowej> [8.05.2023].

¹³⁰ “Volodymyr Zelensky sends Poland best wishes on Independence Day”. Available online: <https://tvn24.pl/tvn24-news-in-english/ukraines-zelenskiy-sends-poland-best-wishes-on-independence-day-6216703> [8.05.2023].

¹³¹ Ministerstwo Spraw Zagranicznych, Oświadczenie MSZ ws. zniszczenia kwatery żołnierzy AK w Mikulishkach na Białorusi [Foreign Ministry statement on destruction of AK soldiers’ quarters in Mikulishki, Belarus]. Available online: <https://www.gov.pl/web/dyplomacja/oswiadczenie-msz-ws-zniszczenia-kwatery-zolnierzy-ak-w-mikulishkach-na-bialorusi> [8.05.2023].

¹³² Idesbald Goddeeris, “History Riding on the Waves of Government Coalitions: The First Fifteen Years of the Institute of National Remembrance in Poland (2001–2016)”. In: Berber Bevernage and Nico Wouters (eds.), *The Palgrave Handbook of State-Sponsored History after 1945*, Palgrave Macmillan, London 2018, pp. 255–269. Available online: https://doi.org/10.1057/978-1-349-95306-6_13; Dariusz Stola, “Poland’s Institute of National Remembrance: A Ministry of Memory?”. In: Alexei Miller and Maria Lipman (eds.), *Convulsions of Historical Politics*, Central European University Jewish Studies Program and Central European University Press, Budapest New York 2012, pp. 45–58. Available online: <http://doi.org/10.1515/9786155225468-003>.

¹³³ The Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Journal of Laws of 1998 No. 155, item 1016. Available online: <https://www.legal-tools.org/doc/fc69d7/pdf/> [8.05.2023].

Nazism and communism, – the actions of the citizens for the sake of the independence of the Polish State and in defence of freedom and human dignity, – the obligation to prosecute the crimes against peace, humanity and war crimes, – as well as the obligation of our state to compensate all the aggrieved by a state which violated human rights, as an expression of our belief that no unlawful action by the state against the citizens can be guarded as classified or left to oblivion.¹³⁴

The Institute has an extensive range of tasks and powers. In addition to its documentary activities and the maintenance of archives, it is required to investigate, among other things, crimes committed in Poland and against its citizens, other political repressions, and the activities of the bodies of state security in the years specified by the provisions of the Act (currently: 1917–1990). The IPN also searches for the resting places of Poles killed in the struggle for the independence and unification of the Polish State. It also conducts educational and commemorative activities. The IPN had a budget of PLN 423 million in 2019, which was half the budget of the Ministry of Justice.¹³⁵

2.5. Memorialisation of the Second World War and the Holocaust

States typically adopt denial bans for any of three forms of historical crimes, namely 1) Holocaust denial bans, 2) prohibitions against denying selected genocides, crimes against humanity, and war crimes, and 3) prohibitions to deny all genocides, crimes against humanity and war crimes.¹³⁶ Poland opted for the second model by prohibiting denial of selected past crimes. Poland has no general prohibition on the denial of all past crimes established in international criminal law and by international criminal courts. However, it is prohibited to deny specific categories of crimes, as defined in international and domestic law, committed between 8 November 1917 and 31 July 1990 against Polish nationals, citizens of the Republic of Poland, or on Polish territory. Poland's historical crimes denial model prohibits the denial of Nazi and communist crimes on an equal footing.¹³⁷

The original Act on the IPN of 18 December 1998 contains Article 55, which introduces a criminal prohibition to deny certain historical crimes. Article 55 reads, ‘Whoever publicly and contrary to the facts denies crimes specified in Article 1(1) shall be subject to a fine or imprisonment of up to 3 years. The sentence shall be made public.’¹³⁸ Therefore, the Polish historical crimes denial prohibition is linked to the thematic and temporal mandate of the IPN in Article 1(1). Currently, the criminal prohibition on the denial of historical crimes applies to ‘Nazi crimes, communist crimes, crimes of members of Ukrainian formations collaborating with the Third Reich, and other crimes against peace, humanity, or war crimes, perpetrated against persons of Polish nationality

¹³⁴ *Ibid.*

¹³⁵ Adam Leszczynski, “Nasz drogi IPN. Za co dostanie w 2019 roku aż 423 mln zł z naszych podatków?”. Available online: <https://oko.press/nasz-drogi-ipn/> [8.05.2023].

¹³⁶ See Emanuela Fronza, “The Crime of Historical Denialism and International Law”. In: *Memory and Punishment, International Criminal Justice Series*, 19, 2018, T.M.C. Asser Press, The Hague 2018, pp. 51–69 Available online: https://doi.org/10.1007/978-94-6265-234-7_2; Paolo Lobba, “From the introduction to implementation. First steps of the EU Framework Decision 2008/913/JHA against racism and xenophobia”. In: Paul Behrens, Olaf Jensen, Nicholas Terry (eds.), *Holocaust and Genocide Denial: A Contextual Perspective*, Taylor & Francis, 2017, pp. 189–210. Available online: <https://doi.org/10.4324/9781315562377-14>.

¹³⁷ A form of prohibition to deny “communist” or “totalitarian” crimes was also adopted in Hungary, the Czech Republic, Slovakia, and Lithuania. See The Criminal Code of the Czech Republic Section 405; the Act of 18 December 1998 Establishing the Institute of National Remembrance, Articles 1 and 55; Hungarian Criminal Code as amended in June 2010, Article 269(c); Slovak Criminal Code, Article 422(d); Lithuanian Criminal Code as amended on 15 June 2010, Article 170–2. After Lobba (2014), “From the introduction to implementation...”, p. 63.

^{For} denial prohibition in Lithuania, see Justinas Žilinskas, “Introduction of ‘Crime of Denial’ in the Lithuanian Criminal Law and First Instances of its Application,” in *Jurisprudencija* 19(1), 2012, pp. 315–329.

¹³⁸ The Act of 18 December 1998 on the Institute of National Remembrance, see above note 133.

or Polish citizens of other nationalities between 8 November 1917 and 31 July 1990.’ The prohibition should be, however, also read in the light of the Preamble to the Act on the IPN, which considers the Act to be:

- ‘an expression of our conviction that no unlawful actions of the state against citizens cannot be protected by secrecy or forgotten’ and aims at
- preserving the memory of the enormity of the victims, losses and damages suffered by the Polish Nation and Poland during and after World War II,
 - The patriotic traditions of the Polish Nation’s struggle against the occupying forces, Nazism, and communism,
 - The deeds of citizens performed for the independent existence of the Polish State and in defence of freedom and human dignity,
 - The duty to prosecute crimes against peace, humanity, and war crimes war crimes,
 - as well as the duty of our state to compensate all victims of state violations of human rights.¹³⁹

Tellingly, in the Preamble to the Act on the IPN, martyrdom and victimhood is emphasised, no guilt and the need to reckon with negative deeds of the state and Poles.

After 1989, Poland started to account for past and present prejudice, discrimination, and violence against national and ethnic minorities, especially anti-Semitism. However, unlike in Germany¹⁴⁰ and France,¹⁴¹ the forerunners of the Holocaust denialism prohibition, anti-Semitism in the form of denying or casting doubt on the Holocaust did not figure prominently in public life in Poland at the time of adoption of the Act on the IPN in 1998. Article 55 of the Act demonstrates the efforts of the time to Europeanise domestic criminal law and is an example of transferring or borrowing legal concepts to a different historical-social-political context. The legislator’s decision to introduce such a provision at that time can also be seen as a desire to modernise the Polish criminal law system as comprehensively as possible.

Since 1998, when Article 55 of the Act on the IPN was introduced, there has only been one conviction under this provision. Dariusz Ratajczak, a historian at the University of Opole, was sentenced in 2002 under Article 55 of the Act on the IPN for publishing a book on French Holocaust deniers. The courts found that he failed to distinguish between quoted opinions of deniers and his views in the book and conditionally dismissed the case.¹⁴² As there is little domestic case law on Article 55, there was no application to the ECtHR regarding the conviction under this provision. Nonetheless, the Convention standards inferred by the ECtHR in its case law on, among others, memory laws entail that deprivation of freedom for expression that does not incite violence is disproportionate under the ECHR.¹⁴³ In a hypothetical case regarding historical crime denial, which is prohibited under Polish law, involving the incitement of violence, domestic courts could sentence a perpetrator to imprisonment under Article 55 of the Act on the IPN.

Convictions based on most criminal memory laws are relatively infrequent in Poland. The most commonly applied memory law is Article 256 of the Penal Code, which prohibits the promotion of fascism and totalitarian ideologies, and its use is strongly embedded in the militant democracy paradigm. The Supreme Court defined propagation as ‘any behaviour that involves the public presentation of fascist or other totalitarian regimes with the intention to gain support for it.’¹⁴⁴ Police statistics show that there were

¹³⁹ *Ibid.*

¹⁴⁰ Rhein-Fischer and Mensing, 2022, see above note 13.

¹⁴¹ Ioanna Tourkochoriti, “Should Hate Speech Be Protected: Group Defamation, Party Bans, Holocaust Denial, and the Divide between (France), Europe and the United States”, in *Columbia Human Rights Law Review*, 2014, pp. 552–622.

¹⁴² On Ratajczak’s case, see Uladzislau Belavusau, “Historical revisionism in CEE”. In: Uladzislau Belavusau, *Freedom of speech: importing European and US constitutional models in transitional democracies*, Routledge, 2014, 1st ed., pp. 190–197.

¹⁴³ ECtHR, *Murat Vural v Turkey*, Judgement, 21 October 2014, 9540/07.

¹⁴⁴ Uchwała Sądu Najwyższego z dnia 28 Marca 2002 r., I KZP 5/2002 [Resolution of the Supreme Court of 28 March 2002,

374 confirmed cases of a breach of Article 256 in 2016.¹⁴⁵ Article 256 of the Penal Code has been typically used to prosecute extreme right and neo-Nazis. In a recent well-known case, on 1 June 2022, a first instance court sentenced six people under this provision after they were filmed in 2017 in the forest celebrating Hitler's birthday with a cake decorated with a swastika, chanting, and making Nazi salutes. Criminal law does not define 'fascism' or 'totalitarianism', which grants public authorities a certain amount of leeway on interpreting it on a case-by-case basis.¹⁴⁶ In the past, such leeway sometimes resulted in shocking arguments of some courts, as in the case regarding the public display of a swastika; the Supreme Court ruled that the swastika is a Hindu symbol of good fortune.¹⁴⁷ Polish courts should be mindful of the Convention standards that a link must be established between displaying a symbol and propagating totalitarian ideas.¹⁴⁸ Moreover, the display of the symbol must intentionally justify or propagate totalitarian oppression.¹⁴⁹

In recent decades, the public debate in Poland on the Holocaust has focused on *who was responsible* for the Holocaust, carried out mainly on Polish territory occupied by Nazi Germany. Poland was not allied with the Nazis, its resistance was remarkable, and its population suffered great losses.¹⁵⁰ The remembrance of the responsibility of the German Nazis for their brutal occupation in 1939–45, crimes committed against Polish civilians and the Holocaust are foundations of Polish memory culture. Communist, nationalist propaganda from 1945–89 focused on (Western) German guilt and Polish martyrdom, emphasising that the Auschwitz camp was set up for ethnically Polish political prisoners and only later became an extermination camp for Europe's Jews and the symbol of their genocide. In the first decades after WWII, as elsewhere on both sides of the Iron Curtain, including in Poland, remembrance of the victims did not focus on Jewish suffering but rather universalised the victims of the 'Hitlerite regime'.¹⁵¹ The post-war hostility with respect to the few surviving Jews in Poland was high and, among other acts of cruelty, provoked the 1946 Kielce pogrom, in which at least 40 Holocaust survivors were killed. The communist authorities further stirred up widespread anti-Semitism and scapegoated the marginal Jewish minority in Poland, leading to a state-led anti-Jewish campaign and forced the emigration of many of the remaining Polish Jews in 1968.¹⁵²

It was not until the free historical debate after 1989 that it became possible to publicly and officially discuss not only Polish heroism, merit and suffering but also historical guilt. The confrontation of the Polish public with historical findings that were new to them was due, firstly, to the liberation of the public debate, freedom of speech and freedom of the media in Poland after 1989. Secondly, the new findings of historians were made possible by the opening of archives, the possibility of freely conducting historical research and the consultation of sources kept abroad.

Concepts such as '*szmalcownik*', a collaborator who handed over Jews who were in hiding to the German Nazi occupiers, had long been ingrained in the Polish language about WWII.¹⁵³ However, it was only since 1990 that historians, sociologists, writers, and journalists, notably the Centre for Holocaust Research

I KZP 5/02], (<http://www.sn.pl/sites/orzecznictwo/orzeczenia1/i%20kzp%205-02.pdf>).

¹⁴⁵ Policja. Publiczne propagowanie faszyzmu, nawoływanie do nienawiści. Art. 356 KK [Police. Public propagation of fascism, incitement to hatred. Article 356 of the Penal Code], <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-13/63613,Publiczne-propagowanie-faszyzmu-nawoływanie-do-nienawisci-art-256.html>.

¹⁴⁶ Dovilė Sagatienė, Anna Wójcik and Paula Rhein-Fischer, "Governing the Memory of the Present: Banning Russian War Symbols in Lithuania, Germany, and Poland", In: *Verfassungsblog*, <https://verfassungsblog.de/governing-the-memory-of-the-present/>.

¹⁴⁷ Postanowienie Sądu Najwyższego dnia 1 września 2011 r. [Resolution of the Supreme Court of 1 September 2011], V KK 43/11. Available online: <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/V%20KK%2043-11.pdf> [8.05.2023].

¹⁴⁸ *Vajnai v Hungary*, see above note 27, para 52.

¹⁴⁹ *Ibid.*, para 25.

¹⁵⁰ Kopusov, 2022, see above note 82.

¹⁵¹ Jonathan Huebner, *Auschwitz, Poland, and the politics of commemoration, 1945–1979*, Ohio University Press, 2003.

¹⁵² Anat Blocker, *The Expulsion of Jews from Communist Poland: Memory Wars and Homeland Anxieties*, Indiana University Press, 2022.

¹⁵³ Sławomir Buryła, "Literatura polska o donosach i donosicielach". *Zagłada Żydów. Studia i Materiały* 2, 2006, pp. 76–98.

researchers, and Jan Gross in his popular book *Neighbours*, have demonstrated to the broader Polish public that Poles were not only victims or bystanders but also perpetrators during the Holocaust, murdering, denouncing and robbing their Jewish neighbours or otherwise profiting from their misery.¹⁵⁴

Polish denialism contradicts the facts and historical narratives that speak of these black pages in the history of Polish society.¹⁵⁵ It involves the denial of the extent to which Poles participated in the Holocaust of the Jews during the Second World War and anti-Semitic violence before and after WWII. It amounts to denying, undermining or relativising not only historical narratives but also the findings of the Institute of National Remembrance about the crimes committed against Jews during the Second World War, notably the 1941 Jedwabne pogrom,¹⁵⁶ and 1946 court ruling sentencing perpetrators of the 1946 Kielce pogrom, also known as the ‘Kielce events’ (Polish: *wypadki kieleckie*).¹⁵⁷ Furthermore, it includes the denial or omission of post-war violence against ethnically Polish Holocaust rescuers.¹⁵⁸

However, a related problematic phenomenon is the emphasis, and often the exaggeration of the scale of the aid the Poles gave to the Jews. This leads to a distortion of the memory of WWII and the historical Polish – Jewish relations in the collective memory. It also involves the distortion of the memory of the heroic aid given by some Poles to Jews, suggesting that it was more common than historical sources say. Yet the awareness of the heroism and rarity of this help makes the figures of the Righteous among the Nations, as well as other helpers about whom we do not know, all the more worthy of admiration and emulation today. The scale of post-War violence against ethnically Polish Holocaust rescuers remains taboo in Poland. At the same time, the state of Israel expects the Polish authorities to recognise that some Poles were perpetrators and co-perpetrators in the Holocaust. Israel closely monitors the Polish government’s efforts to exonerate individual Poles from their participation in atrocities against Jews, which leads to diplomatic and legal disputes.¹⁵⁹

Instrumentalizing Polish fears of confronting the dark chapters of history has led to mnemonic and penal populism through criminal memory laws. These self-exculpatory laws have the objective of cementing Poland as the centre of cycles of victimhood and Poles as helpers, not perpetrators. Historical facts that were new to many Poles, and the need to confront complex, unknown, or overlooked historical events or phenomena, generated a great deal of emotion and strongly influenced the political and legal debate in the late 1990s and 2000s.¹⁶⁰

The discourse surrounding the remembrance of World War II through legal means in Poland has been shaped by a combination of internal and external factors, with cultural factors playing a significant role. The first wave of debates culminated in 2006, under the first Law and Justice (PiS) party right-wing coalition government, when a new memory law was introduced into the Polish legal system: Article 132a

¹⁵⁴ Geneviève Zubrzycki, “Jan Gross’s *Neighbours* and Poland’s Narrative Shock”, in *Jewish Quarterly Review* 112.2, 2022, pp. 234–238.

¹⁵⁵ See Larry Ray and Sławomir Kaprański, “Introduction to the special issue – disputed Holocaust memory in Poland”, *Holocaust Studies* 25(3), 2019, pp. 209–219. Available online: <https://doi.org/10.1080/17504902.2019.1567657>.

¹⁵⁶ Oddziałowa Komisja Ścigania Zbrodni Przeciwko Narodowi Polskiemu w Białymstoku, Postanowienie o umorzeniu śledztwa [Branch Commission for the Prosecution of Crimes Against the Polish Nation in Białystok, Decision to discontinue the investigation], 30 June 2003, S 1/00/Zn.

¹⁵⁷ Paweł Wiczorek, “Oblicza zbrodni. Pogrom kielecki w świetle polskojęzycznej prasy żydowskiej” [Faces of crime. The Kielce pogrom in the Polish-language Jewish press], In: August Grabski (ed.), *Pogromy Żydów na ziemiach polskich w XIX i XX wieku* 4, Instytut Historii PAN, Warszawa 2019, pp. 433–452. Available online: https://rcin.org.pl/Content/134003/PDF/WA303_166728_II14367-4_Wiczorek.pdf [8.05.2023].

¹⁵⁸ Alicja Podbielska, “That’s for harbouring Jews! Post-Liberation Violence against Holocaust Rescuers in Poland, 1944–1948”. *S: I.M.O.N. Shoah: Intervention. Methods. Documentation* 6(2), 2019, pp. 110–120. Available online: https://doi.org/10.23777/SN0219/ART_APOD01.

¹⁵⁹ Uładzislau Belavusau, “The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation?”. *Security and Human Rights* 29(1–4), 2019, pp. 36–54. Available online: <https://doi.org/10.1163/18750230-02901011>.

¹⁶⁰ Piotr Forecki, *Od Shoah do strachu. Spory o polsko-żydowską przeszłość i pamięć w debatach publicznych*, Wydawnictwo Poznańskie, 2010.

of the Penal Code. It read: ‘whoever publicly slanders the Polish Nation of participating in, organizing or being responsible for communist or Nazi crimes shall be subject to the penalty of imprisonment for up to three years’.¹⁶¹ In 2008, the then-independent Constitutional Tribunal ruled that this provision was unconstitutional on procedural grounds because of irregularities in the legislative procedure.¹⁶² However, the Constitutional Tribunal did not address the merits of the case: whether freedom of expression protected by the Constitution and international human rights law can be restricted in such a far-reaching manner.¹⁶³

At the time that the contested memory law was being introduced, Poland’s criminal law already had a robust framework for protecting the good name of the Polish state in Article 133 of the Penal Code and Article 49, para. 1 of the Code of Misdemeanours, as well as the laws protecting national symbols.¹⁶⁴ These provisions are applied relatively infrequently, and convictions for restriction or deprivation of freedom have been rare. The ECtHR found an inadmissible application in *Hösl–Daum and Others v. Poland*, a case regarding a conviction under Article 133 of the Penal Code, as the applicants had not exhausted the domestic remedies.¹⁶⁵ The case applied to two German nationals putting up posters in Poland close to the German border. The posters accused Poles and Czechs of crimes against civilian Germans in WWII and its aftermath. In the first instance, the Regional Court sentenced the first applicant to ten months’ imprisonment and the two remaining applicants to eight months’ imprisonment. It conditionally suspended the prison sentences for a three-year probationary period. The Wrocław Court of Appeal dismissed the applicants’ appeal and upheld the first-instance judgement. The ECtHR held that the accusations of war crimes committed by Poles against Germans were false and the demands to return property to the Germans were unfounded. However, the main reason for applying Article 133 of the Penal Code in the case was that the actions of the applicants posed a risk to public order by stirring antagonism between Germans and Poles.¹⁶⁶ Such reasoning of the court in Poland presented in 2006 is in compliance with the ECtHR’s case law regarding the proportionate restriction of freedom of expression in the context of heightened community tensions.¹⁶⁷

There is also an example of memory laws intended to protect Poland’s historical heritage that has not sparked such intense political and legal controversies as Article 132a of the Penal Code. A memory law protecting the WWII resistance symbol of ‘*Polska Walcząca*’ [English: Fighting Poland] was adopted in 2014.¹⁶⁸ The symbol, in the form of an anchor forming the letter P, was the official emblem of the 1944 Warsaw Uprising. It has become a symbol of the fight for independence against non-democratic regimes, first Nazism, and later communism. The objective of the Act on the Protection of ‘Fighting Poland’ (APFP) was to restrict the use of this famous symbol. Article 3, para. 1 APFP prohibits publicly insulting the ‘Fighting

¹⁶¹ Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944–1990 oraz treści tych dokumentów [Act of 18 October 2006 on disclosing information about state security documents from 1944–1990 and the content of those documents], Dz.U. 2006 nr 218, poz. 1592. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20062181592> [8.05.2023].

¹⁶² Wyrok Trybunału Konstytucyjnego z dnia 19 września 2008 r. [Judgement of the Constitutional Tribunal of 19 September 2008], K 5/07, Dz.U. 2008 nr 173, poz. 1080.

¹⁶³ Aleksandra Gliszczyńska-Grabias and Anna Śledzińska-Simon, “Victimhood of the Nation as a Legally Protected Value in Transitional States—Poland as a Case Study”, in *Wrocław Review of Law, Administration & Economics*, 6(2), 2016, pp. 45–61.

¹⁶⁴ The good name of the Republic of Poland is further protected through laws prohibiting official symbols of the state from insult: the national emblem – the white eagle, state seals, and the red and white colours of the national flag and the national anthem in the Article 28, para. 4 of the Constitution and in the Article 1 of Ustawa z dnia 31 stycznia 1980 r. o godle, barwach i hymnie Rzeczypospolitej Polskiej oraz o pieczęciach państwowych [The Act of 31 January 1980 on the Coat of Arms, National Colours and National Anthem of the Republic of Poland, and on State Seals], Dz.U. 1980 nr 7 poz. 18.

¹⁶⁵ ECtHR, *Hösl–Daum and Others v Poland*, Decision, 7 October 2014, 10613/07.

¹⁶⁶ *Ibid*, para 15.

¹⁶⁷ ECtHR, *Balsytė-Lideikienė v Lithuania*, Decision, 4 February 2009, 72596/01; ECtHR, *Donaldson v United Kingdom*, Decision, 25 January 2011, 56975/09; ECtHR, *Maguire v United Kingdom*, Decision, 3 March 2015, 58060/13.

¹⁶⁸ Ustawa z dnia 10 czerwca 2014 r. o ochronie Znaku Polski Walczącej [the Act of 10 June 2014 on the protection of the “Fighting Poland” sign], Dz.U. 2014 poz. 1062, Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20140001062> [8.05.2023].

Poland' symbol, which is punishable by a fine under the rules of the Code of Misdemeanors. The offence involves using the symbol in a manner that does not reflect its historical meaning. The memory law was adopted to reduce the widespread, including commercial use of the symbol, which, as the association of Warsaw insurgents emphasised, leads to its trivialisation and the insult of the memory of the victims of the 1944 Warsaw Uprising.¹⁶⁹ The symbols feature on all sorts of 'patriotic' merchandise. The APFP aims to promote the responsible use of the venerated historical symbol. However, the case law to date demonstrates that there has only been one conviction for the commercial use of the protected sign by a distributor of baseball bats - a tool associated with hooligan culture that in Poland is often linked to right-wing extremism. The symbol was also used to restrict the freedom of expression of protesters at public gatherings, which is at odds with the original idea of protecting the sign, while promoting its responsible use in society.¹⁷⁰

Over the past decade, the elimination of potentially misleading expressions, such as 'Polish extermination/death/concentration camps' about concentration and extermination camps established and operated by Nazi Germany on occupied Polish territory during WWII from the public debate, especially in the international media, has become one of the primary objectives of Poland's historical policy. Efforts to eliminate such statements from the public debate have included soft measures, such as diplomacy and educational activities. Furthermore, Polish courts have ruled in favour of former prisoners of concentration and extermination camps, claiming that their personal rights had been breached by statements about 'Polish extermination/concentration/death camps' in foreign media.¹⁷¹

The current, third era of Poland's memory law, which dates back to the time when the PiS party came to power in 2015, is characterised by the increased interest of the state in pursuing its historical policy using commemorations, memory laws, and commemorative law-making.¹⁷² Thematically, as before, the official historical policy since 2015 is based on the condemnation of non-democratic regimes, especially Nazism and communism and finalizing the reckoning with the communist past.

Most recently, mnemonic, and penal populism has been exemplified in the January 2018 criminal memory law prohibiting the false attribution of responsibility for Nazi crimes during WWII to the Polish state or nation.¹⁷³ The legislator introduced the memory law as an amendment to the Act on the IPN.¹⁷⁴ Article 55a of the Act on the IPN reads:

1. 'Whoever, publicly and contrary to the facts, attributes to the Polish Nation or the Polish State responsibility or co-responsibility for Nazi crimes committed by the Third German Reich, as specified in Article 6 of the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, executed in London on 8 August 1945 (Journal of Laws of 1947, item 367), or for any other offences constituting crimes against peace, humanity or war

¹⁶⁹ Opinion of the Senate's Legislative Bureau of 16 June 2014 on the Act on the protection of the "Fighting Poland", sign. Form no. 654.

¹⁷⁰ Anna Wójcik, "Prezentacja przetworzonego Znak Polski Walczącej w ramach zgromadzeń publicznych", *Państwo i Prawo* 12, 2018, pp. 24–38.

¹⁷¹ Krakow Court of Appeal judgement of 25 April 2016, I C 151/14; *Osewski versus Die Welt/Axel Springer*, Regional Court in Warsaw judgement of 5 March 2015, II C 10/11. Court of Appeal in Warsaw judgement of 31 March 2016, I ACa 971/15; *Zapaśnik versus Focus Online - Tomorrow/Focus Media GMBH*, Regional Court in Olsztyn, the judgement of 25 February 2015, I C 726/13; Court of Appeal in Olsztyn, the judgement of 30 September 2015, ACa 403/15).

¹⁷² Marta Bucholc, "Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015". *Hague Journal on the Rule of Law* 11, 2018, pp. 85–110. Available online: <https://doi.org/10.1007/s40803-018-0080-7>.

¹⁷³ Kończal, 2021, see above note 83.

¹⁷⁴ Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucji Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [The Act of 27 June 2018 on the Amendment of the Act on the Institute of National Remembrance – Commission for the Investigation of Crimes Against the Polish Nation and Corporate Liability for Proscribed Punishable Conduct], Dz.U. 2018. poz. 1277. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001277> [8.05.2023].

crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of such crimes, shall be liable to a fine or to deprivation of liberty for up to 3 years. The judgement shall be communicated to the public.

2. If the perpetrator of the act specified in section 1 acts unintentionally, they shall be liable to a fine or a restriction of liberty.
3. An offence is not committed if the perpetrator of a prohibited act set out in sections 1 and 2 above acted within the framework of artistic or scientific activity.¹⁷⁵

Article 55a (2) specifies that anyone who acts unintentionally would also be punished, which implies that an offence could be committed either intentionally or unintentionally. Article 55a (3) presents exceptions for artistic and scientific activities. The memory law sparked the greatest diplomatic crisis in Poland's relations with Israel in decades.¹⁷⁶ It was unclear whether the legislator's intention was to criminalise statements about the participation and joint responsibility of individual Poles in WWII crimes, including the Holocaust.¹⁷⁷ International law experts universally disputed the effectiveness of the memory law in fighting expressions of 'Polish death/concentration camps' in foreign media.¹⁷⁸ Certainly, introducing prohibition to discussing Poles' involvement and responsibility for the Holocaust is part of global discussion, and restricting this debate is far removed from the Convention standards obliging states to assure that historical debate can take place freely.

Six months after the enactment of the amendment, the Polish parliament repealed Article 55a by amending the Act on the IPN.¹⁷⁹

However, the January 2018 amendment to the Act on the IPN introduced a new regime of civil liability (Article 53o) which grants non-governmental organisations pursuing their statutory objectives the right to file civil law claims to protect the good name of the Republic of Poland and the Polish nation against statements that falsely attribute Nazi WWII crimes to the Republic of Poland and the Polish nation. In Poland's current political and legal context, such a provision risks being abused by government-supported organisations (GONGOs) which can file abusive, exaggerated lawsuits (SLAPPs) intended to silence critics of the ruling camp's historical policy.¹⁸⁰ Criminal and civil SLAPPs have been increasingly used in recent years against journalists and media criticizing the Polish government. SLAPPs have been applied to activists using legally protected national historical symbols to speak about the migration crisis,¹⁸¹ opinion writers using historical comparisons,¹⁸² and renowned historians

¹⁷⁵ *Ibid.*

¹⁷⁶ Przemysław Furgacz, "Israeli-Polish Political Dispute over the Amendment of the Act of the Institute of National Remembrance". In: Jan Rydel and Stefan Troebst (eds.), *Instrumentalizing the Past: The Impact of History on Contemporary International Conflicts*, De Gruyter Oldenbourg, Berlin Boston 2022, p. 259. Available online: <https://doi.org/10.1515/9783110769791-018>.

¹⁷⁷ Aleksandra Gliszczyńska and Wojciech Kozłowski, "Calling Murders by Their Names as Criminal Offence – a Risk of Statutory Negationism in Poland". In: *Verfassungsblog: On Matters Constitutional*. Available online: <https://doi.org/10.17176/20180201-165352>.

¹⁷⁸ Patrycja Grzebyk, "Amendments of January 2018 to the Act on the Institute of National Remembrance-Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law". *Polish Yearbook of International Law* 37, 2017, pp. 287–300. Available online: <https://doi.org/10.7420/pyil2017o>.

¹⁷⁹ Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucji Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [The Act of 27 June 2018 on the Amendment of the Act on the Institute of National Remembrance – Commission for the Investigation of Crimes Against the Polish Nation and Corporate Liability for Proscribed Punishable Conduct], Dz.U. 2018. poz. 1277. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001277> [8.05.2023].

¹⁸⁰ Judit Bayer, Petra Bárd, Lina Vosyliute and Ngo Chun Luk, "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study". In: *EU-CITIZEN: Academic Network on EU Citizenship Rights*. Available online: <https://doi.org/10.2139/ssrn.4092013>.

¹⁸¹ Aleksandra Gliszczyńska-Grabias, "Intersection of Conflicting Values: Symbols of Memory and Acts of Artistic Expression". *East European Politics and Societies* 37(2), 2022. Available online: <https://doi.org/10.1177/08883254221110571>.

¹⁸² Aleksandra Gliszczyńska-Grabias, "Intimidation through Litigation Freedom of Speech in Poland Today". Available online: <https://doi.org/10.17176/20210329-195147-0>.

of the Holocaust for passages contained in their academic publications.¹⁸³ The January 2018 Amendment also expanded the temporal and material scope of the IPN's mandate and included the controversial expression of 'crimes of Ukrainian nationalists', which has been already discussed in this Report.

In conclusion, new memory laws, by which the state has chosen to pursue its historical policy, go much further in restricting the rights and freedoms of individuals than before and, most importantly, they do not respect the established Convention standards regarding freedom of expression and its proportionate limitations¹⁸⁴ or the standards related to the non-democratic past.¹⁸⁵ The adequacy and proportionality of the mechanisms introduced into the objectives which the Polish legislator sets are questionable.¹⁸⁶

It cannot go unnoticed that this period of Poland's *memocracy* is taking place during an ongoing, deepening rule of law crisis, resulting in the absence of an independent, centralised constitutional review. The political capture of the Constitutional Tribunal,¹⁸⁷ the improperly staffed panels which the ECtHR considers to be in breach of Article 6 ECHR,¹⁸⁸ is (ab)used to pursue the ruling camp's policies. This practice also applies to the memory laws. Another important element of the rule of law backsliding in Poland is the subordination of the prosecutor's office to the ruling politicians, which leads to discriminatory legalism¹⁸⁹ through criminal law for conducting proceedings against anyone criticizing the government's actions and policies, including historical policy.¹⁹⁰ Notably, the current period of legal governance of historical memory is taking place in parallel with distancing from, breaching and rejecting European law standards of the Convention¹⁹¹ and EU fundamental rights law.¹⁹² Compared to previous decades, memory laws are used on a larger scale for international politics, both bilaterally and multilaterally, resulting in new memory wars.¹⁹³

¹⁸³ Aleksandra Gliszczynska-Grabias, "A Ruling Against Survivors-About the Trial of Two Polish Holocaust Scholars". In: *Cultures of History Forum*. Available online: <https://doi.org/10.25626/0126>. Anna Wójcik, "Historians on Trial". In: *Verfassungsblog*. Available online: <https://verfassungsblog.de/historians-on-trial/>.

¹⁸⁴ See Aleksandra Gliszczynska-Grabias, Grażyna Baranowska and Anna Wójcik, "Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards". *Polish Yearbook of International Law* 38, 2018, pp. 59–72. Available online: <https://doi.org/10.24425/pyil.2019.129606>.

¹⁸⁵ Wójcik, 2020, see above note 84.

¹⁸⁶ Belavusau, 2019, see above note 159.

¹⁸⁷ On the Constitutional Tribunal, see Monika Florczak-Wątor, "The capture of the Polish Constitutional Tribunal and its impact on the rights and freedoms of individuals". In: Jürgen Mackert, Hannah Wolf and Bryan S. Turner (eds), *The Condition of Democracy*, Routledge, New York 2021, pp. 127–142; Aleksandra Kustra-Rogatka, "An illiberal turn or a counter-constitutional revolution? 101 About the Polish Constitutional Tribunal before and after 2015". In: Martin Belov (ed.) *Courts and Judicial Activism under Crisis Conditions*, Routledge, New York 2021, pp. 100–124. Available online: <http://doi.org/10.4324/9781003200666-9>; Wojciech Sadurski, "Polish constitutional tribunal under PiS: from an activist court to a paralysed tribunal, to a governmental enabler". *Hague Journal on the Rule of Law* 11(1), 2019, pp. 63–84. Available online: <https://doi.org/10.1007/s40803-018-0078-1>.

¹⁸⁸ Judgement of the ECtHR, of 7 May 2021, *Xero Flor in Poland sp. z o.o. v Poland*, 4907/18; See Marcin Szwed, "The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland*". *European Constitutional Law Review*, 18(1), pp. 132–154. Available online: <https://doi.org/10.1017/S1574019622000050>.

¹⁸⁹ Adam Bodnar, „Für meine Feinde das Gesetz” Das Rechtsverständnis der PiS-Regierung in Polen [For my enemies, the law]. *Zeitschrift Osteuropa* 71(3), 2021, pp. 99–114.

¹⁹⁰ An example is the proceedings conducted by state authorities against the journalist Katarzyna Markusz in connection with her statements and articles presenting a critical assessment of current state policy, especially regarding history and Polish–Jewish relations. "Prokuratorzy IPN wezwali na przesłuchanie redaktorkę Jewish.pl. Nie podoba im się wpis na Twitterze". Available online: <https://oko.press/redaktorka-jewish-pl-wezwana-na-przesluchanie> [8.05.2023].

¹⁹¹ Adam Płoszka, "It Never Rains but it Pours...", pp. 1–24.

¹⁹² Justin Lindeboom, "Legal Embarrassment after PSPP and K 3/21: The Bogus Distinction between Primacy and Supremacy and the Need for an Ethics of EU Law Supremacy", *University of Groningen Faculty of Law Research Paper* 7, 2022,. Available online: <https://ssrn.com/abstract=3988975> [8.05.2023].

¹⁹³ Belavusau, Gliszczynska-Grabias and Mälksoo, 2021, see above note 11.

2.6. Reckoning with the communist past

Just as in the case of other CEE states, Poland's historical policy is founded on the condemnation of the Nazi and Communist regimes on an equal footing. The Polish state condemned the Ribbentrop-Molotov pact between Nazi Germany and Soviet Russia and the subsequent Soviet Union invasion of Poland in 1939. It also condemned Soviet war crimes, especially the 1940 Katyn Massacre, which was a series of mass executions of almost 22,000 Polish military officers and intelligentsia prisoners of war, which the Soviet authorities had been denying for decades and which the Russian Federation only acknowledged in 1990 as 'one of the gravest crimes of Stalinism'. Furthermore, Poland condemns the decision of the Red Army commanders not to help the civilian insurgents in the 1944 Warsaw Uprising against Nazi Germany, leading to an estimated 150,000 to 200,000 deaths, the Red Army crimes against the civilian population of Poland, the systematic murdering of the political opposition, including Polish socialists and communists, and the establishment of a government subordinated to Moscow from 1944 to 1990. Furthermore, reckoning with Poland's communist past involves reckoning with the communist government in 1944–1990 and its gross human rights violations, as well as the evaluation of the behaviour of individual people during the communist era as part of the lustration process.

The reckoning with the communist past started in Poland in the early 1990s. However, compared to Germany, the Czech Republic and Hungary, the settlement of accounts with the communist past stretched over many decades and was not conducted comprehensively. Holding individuals accountable for 'communist crimes' proved challenging for the new democratic state. Conflicts over the scope and mechanisms of lustration marred Polish politics.¹⁹⁴ More than thirty years after the regime change, problems with decommunisation still arouse a political debate and result in further memory laws. De-communisation has also been instrumentalised in attempts to legitimise the government's rule of law-dismantling policies, such as PiS's changes to the justice system.¹⁹⁵

Resolutions of the Sejm and Senate directly condemned the Polish state's undemocratic actions and human rights violations during the communist era and rehabilitated its victims. For instance, a resolution was passed in 1994 on the criminal nature of the work of the state security apparatus in 1944–1956.¹⁹⁶ In 1995, the Sejm honoured the victims and condemned those responsible for the introduction of martial law in 1981 and called for them to be held accountable.¹⁹⁷ In 1998, the Sejm condemned communist totalitarianism and reaffirmed its commitment to punish all those guilty of communist crimes committed in Poland in 1944–1989.¹⁹⁸

The victims of the communist regime were rehabilitated. In 1991, judgements against people repressed for activities conducted in support of the independent existence of the Polish state were declared invalid.¹⁹⁹

¹⁹⁴ Szczerbiak, 2022, see above note 58.

¹⁹⁵ Anna Wójcik, "Keeping the Past and Present Apart. In: *Verfassungsblog*. Available online: <https://verfassungsblog.de/keeping-the-past-and-the-present-apart/> [8.05.2023].

¹⁹⁶ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 16 listopada 1994 r. w sprawie zbrodniczych działań aparatu bezpieczeństwa państwowego w latach 1944–1956, [Resolution of the Sejm of the Republic of Poland of 16 November 1994 on the Criminal Acts of the State Security Apparatus in 1944–1956] M.P. 1994 nr 62, poz. 544. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP19940620544> [8.05.2023].

¹⁹⁷ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 15 grudnia 1995 r. w sprawie uczczenia ofiar stanu wojennego [Resolution of the Sejm of the Polish Republic of 15 December 1995 on Honouring the Victims of the Period of Martial Law], M.P. 1995 nr 67, poz. 753. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP19950670753> [8.05.2023].

¹⁹⁸ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 18 czerwca 1998 r. w sprawie potępienia totalitaryzmu komunistycznego [Resolution of the Sejm of the Republic of Poland of 18 June 1998 Condemning Communist Totalitarianism], M.P. 1998 nr 20, poz. 287. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP19980200287> [8.05.2023].

¹⁹⁹ Ustawa z dnia 23 lutego 1991 r. o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego [the Act of 23 February 1991 on declaring rulings issued against persons repressed for activities in support of the independent existence of the Polish State invalid], Dz.U. 1991 nr 34, poz. 149. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19910340149> [8.05.2023].

Benefits were introduced for war veterans and victims of repressions of the War and the post-War period and their families.²⁰⁰

The criminal basis for the prosecution of communist crimes was established in 1991.²⁰¹ However, it proved difficult for the Polish democratic state to hold those who committed gross human rights violations after the Stalinist period accountable. A communist crime was defined as ‘acts committed by functionaries of the communist state during the period from 17 September 1939 to 31 December 1989 involving or in connection with the use of repression or other forms of human rights violations against individuals or groups of the population, constituting offences according to Polish criminal law in force at the time when they were committed’. The adoption of the new Penal Code of 6 June 1997 represented a break with the era of socialist criminal law, which had been an instrument of repression against the Polish public.²⁰² The Penal Code contains memory laws that are typical of militant democracy, including Article 256 of the Penal Code discussed above prohibiting the propagation of fascist or totalitarian state systems, which also applies to the propagation of communism.

A ‘thick line’ policy was applied in Poland in the early years of the transition. During an exposé in the Sejm, the first non-communist prime minister of democratic Poland, Tadeusz Mazowiecki, famously said:

‘The government I will form will not be responsible for the mortgage it is inheriting. However, it will affect the circumstances in which we come to act. We are drawing a thick line under the past, and we will only be responsible for what we have done to bring Poland out of its collapse.’²⁰³

According to Mazowiecki, this was about a firm, unequivocal repudiation of the previous system. However, his critics pointed to excessive leniency with respect to the leaders of the People’s Republic of Poland and its repressive functionaries of the state apparatus, which enabled some of these people to build themselves significant careers in democratic Poland. The first lustration bill was adopted in 1992 and invalidated by the Constitutional Tribunal.²⁰⁴ Bitter political disputes led to the new lustration act being adopted in 1997.²⁰⁵ The Polish lustration model is a ‘confessional’ one.²⁰⁶ It requires the person being investigated to declare whether he cooperated with the security services, but this admission alone has no legal consequences. This act required everyone born before 1 August 1972 to submit a lustration declaration upon agreeing to stand as a candidate for or take up public office. Giving false testimony is a crime upon its confirmation by a court.

²⁰⁰ Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego [the Act of 24 January 1991 on veterans and certain pwho are victims of repressions of the War and post-War period], Dz.U. 1991 nr 17, poz. 75. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19910170075> [8.05.2023].

^{Ustawa} z dnia 7 maja 2009 r. o zadośćuczynieniu rodzinom ofiar zbiorowych wystąpień wolnościowych w latach 1956-1989, Dz.U. 2009 nr 91 poz. 741 [Act of 7 May 2009 on Compensation to Families of the Victims of Mass Freedom Gatherings in 1956–1989]. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20090910741> [8.05.2023].

²⁰¹ Ustawa z dnia 4 kwietnia 1991 r. o zmianie ustawy o Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce Instytucie Pamięci Narodowej, [the Act of 4 April 1991 on the Amendment of the Act on the Main Committee on Investigating Hitlerite Crimes in Poland – the Institute of National Remembrance] Dz.U. 1994 nr 53 poz. 214. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19910450195> [8.05.2023].

²⁰² Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, [the Penal Code of 6 June 1997], Dz.U. 1997 Nr 88, poz. 553. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19970880553>.

²⁰³ Graczyk R. „Gruba linia, gruba kreska i prawdziwa polityka”. In: *InteriaHistoria*. Available online: https://historia.interia.pl/polska-wspolczesna/news-gruba-linia-gruba-kreska-i-prawdziwa-polityka,nId,1488656#utm_source=paste&utm_medium=paste&utm_campaign=chrome [8.05.2023].

²⁰⁴ Orzeczenie Trybunału Konstytucyjnego z dnia 19 czerwca 1992 r. [Constitutional Tribunal judgement of 19 June 1992], U 6/92, OTK 1992 Nr 1, poz. 13.

²⁰⁵ Ustawa z dnia 11 kwietnia 1997 r. o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne [The Act of 11 April 1997 on the disclosure of work or service in or cooperation of persons holding public functions with the state security services between 1944 and 1990], Dz.U. 1997 nr 70, poz. 443. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970700443> [8.05.2023].

²⁰⁶ Cf. Michał Krotoszyński, *Lustracja w Polsce w świetle modeli sprawiedliwości okresu tranzycji*, Helsińska Fundacja Praw Człowieka, Warszawa 2014. Available online: <https://depot.ceon.pl/bitstream/handle/123456789/15396/Krotoszy%20ski?sequence=1> [8.05.2023]

The ruling party, PiS, passed another lustration act in 2006, which was amended in 2007.²⁰⁷ The Constitutional Tribunal ruled in 2007 that some provisions of the lustration act of 18 October 2006 were incompatible with the Constitution and international human rights law. The Constitutional Tribunal ruled that the lustration process, in principle, is compatible with the Constitution, especially with the concept of a democratic state ruled by law, as stated in Article 2. To quote the Tribunal's ruling:

‘The objective of the legal regulation is to remove from persons exercising authority if they are not certain of exercising it in accordance with democratic principles because they have not shown a commitment to or belief in them in the past and currently have no interest or incentive to assimilate them. Such measures can be compatible with a functioning democratic rule of law if several criteria are met. That is, guilt – individual and not collective – must be proved in every case, which clearly indicates the need for the individual, and not collective, application of the lustration laws. It also means that the right to a defence, the presumption of innocence until proved guilty and the right of appeal to a court must be guaranteed.’²⁰⁸

New mechanisms of reckoning with the past were introduced as the time passed. The first act lowering retirement pensions to people employed in some branches of the communist state was passed in 2009 by the centre-right liberal coalition government. It reduced pension benefits for people who had worked in certain formations and institutions of the communist state in 1944–90, including in the services that remained in the privileged social security system.²⁰⁹ The pension reduction mechanisms were intended to reduce benefits for everyone who had worked in institutions responsible for human rights violations and political repression. The Constitutional Tribunal ruled in 2010 that this act was partially unconstitutional.²¹⁰ It controversially considered unconstitutional to make cuts to the pensions of military officers, even though they had served on the Military Council for National Salvation (WRON), a junta of the People's Republic of Poland during martial law. However, the Constitutional Tribunal emphasised that the mechanism of reducing pensions in principle falls within the mechanism of a democratic state reckoning with the past. In 2013, the ECtHR held that an application challenging the 2009 act reducing pensions was inadmissible, among other things, because of the Constitutional Tribunal's ruling confirming the constitutionality of the mechanism.²¹¹

The official cult of the so-called cursed soldiers [Polish *żołnierze wyklęci*], anti-communist partisans who fought against the communists at the end of and after the Second World War, was being introduced in

²⁰⁷ Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa... [The Act of 18 October 2006], see above note 161.

²⁰⁸ Wyrok Trybunału Konstytucyjnego z dnia 11 maja 2007 r. [Judgement of the Constitutional Tribunal of 11 May 2007], K 2/07, Dz.U. 2007 nr 85, poz. 571. Available online: <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/wyrok-trybunału-konstytucyjnego-sygn-akt-k-2-07-17347133> [8.05.2023].

²⁰⁹ Ustawa z dnia 23 stycznia 2009 r. o zmianie ustawy o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin oraz ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [the Act of 23 January 2009 on the Amendment of the Act on pensions of professional soldiers and their families and the Act on pensions for officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Central Anti-Corruption Bureau, the Border Guard Service, the Government Protection Bureau, the State Fire Service and the Prison Service and their families], Dz.U. 2009 nr 24, poz. 145. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20090240145> [8.05.2023].

²¹⁰ Wyrok Trybunału Konstytucyjnego z dnia 24 lutego 2010 r. [Ruling of the Constitutional Tribunal of 24 February 2010], K 6/09, Dz.U. 2010 nr 36, poz. 204. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20100360204> [8.05.2023].

²¹¹ Decision, of the ECtHR of 6 June 2013, *Cichopek and 1,627 other applications v Poland*, Application nos. 15189/10, 16970/10, 17185/10, 18215/10, 18848/10, 19152/10, 19915/10, 20080/10, 20705/10, 20725/10, 21259/10, 21270/10, 21279/10, 21456/10, 22603/10, 22748/10 and 23217/10. HUDOC.

Poland over the past two decades.²¹² A resolution of the Sejm commemorated ‘the heroes of the fallen, murdered, and persecuted members of the “Freedom and Independence” organisation’ in 2001. The memory law introducing the National Day of Remembrance of the Cursed Soldiers, a national holiday, was signed by Bronisław Komorowski, a former president from the liberal centre-right.²¹³ It was a gesture made to the right-wing opposition circles of the time, as President Lech Kaczyński, who tragically died in the Smolensk air crash in 2010, had championed this memory law. The cult of the ‘cursed soldiers’ is controversial because of the documented crimes of some of their commanders against the civilian population, including in particular Jews and other ethnic minorities.²¹⁴

The PiS government has introduced two new decommunisation laws. In 2016, an act was passed on the mass renaming of streets and public buildings²¹⁵ with the objective being to finalise the removal of communist names from public spaces. However, the implementation of this act provoked social tensions, as it sometimes imposed changes that local communities considered senseless. For example, it required the removal of names of street patrons who were important to national and ethnic minorities, especially Silesian and Belorussian personalities, and left-wing philosophers, artists, and politicians. Additionally, in many cases, the streets were renamed to honour the tragically deceased president of Poland, Lech Kaczyński and the first lady, Maria Kaczyńska. This sparked concerns over the institutionalisation of the PiS-led propagated cult of the 2010 Smolensk air crash.²¹⁶ After Russia’s invasion of Ukraine, Poland, like the Baltic States, increased its efforts to remove the remaining Red Army monuments from public space.

The second decommunisation law was the amendment to the act reducing the pensions of everyone who worked for institutions and formations of the communist state in 1944–1990²¹⁷, which constituted another example of mnemonic populism adopted under the PiS government. The openly declared objective of the Act of 16 December 2016 was to take away the remaining privileges in terms of pensions and other benefits of people who had worked in the security services, the secret political police, the Ministry of Public Security, and other formations structurally responsible for gross human rights violations in Poland in 1994–1990. However, the list of formations and institutions in the Act of 16 December 2016 is much broader. It does not guarantee an individualised assessment and operates on the principle of collective guilt. Its mechanism does not require the verification of the individual’s real responsibility for upholding the

²¹² Kornelia Kończal and Joanna Wawrzyniak, “Provincialising memory studies: Polish approaches in the past and present”. *Memory Studies* 11(4), 2018, pp. 391–404. Available online: <https://doi.org/10.1177/1750698016688238> [8.05.2023].

²¹³ Ustawa z dnia 3 lutego 2011 r. o ustanowieniu Narodowego Dnia Pamięci “Żołnierzy Wyklętych” [the Act of 3 February 2011 on the establishment of the National Day of Remembrance of the “Cursed Soldiers”], Dz.U. 2011 nr 32, poz. 160. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20110320160> [8.05.2023].

²¹⁴ Kornelia Kończal, “The invention of the „Cursed Soldiers” and its opponents: Post-war partisan struggle in contemporary Poland”. *East European Politics and Societies* 34(1), 2020, pp. 67–95. Available online: <https://doi.org/10.1177/0888325419865332> [8.05.2023].

²¹⁵ Ustawa z dnia 1 kwietnia 2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki [the Act of 1 April 2016 on the prohibition of the propagation of communism or another totalitarian system by the names of organisational units, auxiliary units of the municipality, public utility buildings, structures and equipment and monuments], Dz.U. 2016 poz. 744. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20160000744> [8.05.2023].

²¹⁶ Uladzislau Belavusau, Anna Wojcik, “Street Renaming After the Change of Regime. Legal and Policy Recommendations from Human Rights Perspectives”. In: *T.M.C. ASSER Institute Policy Brief Series* 1, 2018. Available online: <https://ssrn.com/abstract=3169184> [8.05.2023].

²¹⁷ Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [the Act of 16 December 2016 on the amendment of the Act on the pensions of officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Central Anti-Corruption Bureau, the Border Guard Service, the Government Protection Bureau, the State Fire Service and the Prison Service and their families], Dz.U. 2016, poz. 2270. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160002270> [8.05.2023].

communist regime or bearing responsibility for human rights violations. Under the Act of 16 December 2016, the people affected still receive a pension. However, in some individual cases, the people affected by this reduction suffered a drastic reduction in their pensions and benefits.

In some cases, this reduction applied to elderly, vulnerable people who could not earn additional income. Furthermore, many people have seen their pensions reduced for a second time, as the 2009 Act reducing pensions had already included them. All this gives rise to serious concerns over the compatibility of the mechanisms with the Convention standards.²¹⁸

Tens of thousands of appeals against the decisions of the Social Insurance Institution to reduce pensions and benefits have been filed with courts in Poland. The Regional Court in Warsaw submitted a question to the Constitutional Tribunal in 2018 regarding the unconstitutionality of the provisions of the Act of 2016. The Constitutional Tribunal has not yet ruled on this politically sensitive issue.²¹⁹ In the 2022 judgement in *Bielinski v Poland*, the ECtHR ruled that Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention were breached by the excessive length of appeal proceedings before the domestic courts.²²⁰

PiS's historical policy in its decommunisation dimension also included the removal of the statute of limitations for communist crimes,²²¹ which would otherwise have been time-barred on 1 August 2020.²²² The new legal status of the 'anti-communist opposition activist' was introduced²²³ in 2015, together with a monthly allowance of around €100 for anti-communist opposition activists or their families.²²⁴ PiS also increased the list of public office candidates or holders who are obliged to submit lustration declarations.

2.7. Commemoration, education and memory

Poland currently has fourteen public holidays (Polish: *święto państwowe*), which were adopted by an act of parliament. However, such a pronouncement does not necessarily carry the same weight in every case: some national holidays are days that are free from work, while most are not. Of the fourteen public holidays, twelve commemorate historic events. Almost half of them is related to the Second World War, showing the importance that the Polish legislator has attached to events related to this war. Of those, two deserve particular attention in this analysis. First, a public holiday was introduced in commemoration of the so-called 'cursed soldiers', which is celebrated on 1 March. Contrary to expectations, this public holiday was not adopted after 2015 – by the PiS government – but in 2011.²²⁵ Secondly, a national day commemorating

²¹⁸ Wójcik, 2020, see above note 84.

²¹⁹ Sprawa Trybunału Konstytucyjnego [Constitutional Tribunal's case], P 4/18. Available online: <https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=P%204/18> [8.05.2023].

²²⁰ Judgement of the ECtHR, of 21 July 2022, *Bielinski v Poland*, 48762/19, HUDOC.

²²¹ Ustawa z dnia 15 lipca 2020 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [the Act of 15 July 2020 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation], Dz.U. 2020, poz. 1273. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200001273> [8.05.2023].

²²² See Valeri Vachev, "Statute of limitations on the punishment of communist crimes as a tool of transformative justice", *University of Warsaw*, PhD thesis, 2020.

²²³ Ustawa z dnia 20 marca 2015 r. o działaczach opozycji antykomunistycznej oraz osobach represjonowanych z powodów politycznych [the Act of 20 March 2015 on anti-communist opposition activists and persons repressed for political reasons], Dz.U. 2015, poz. 693. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150000693> [8.05.2023].

²²⁴ Ustawa z dnia 8 czerwca 2017 r. o zmianie ustawy o działaczach opozycji antykomunistycznej oraz osobach represjonowanych z powodów politycznych oraz niektórych innych ustaw [the Act of 8 June 2017 amending the Act on activists of the anti-communist opposition and other politically persecuted persons and certain other Acts], Dz.U. 2017, poz. 1386. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001386> [8.05.2023].

²²⁵ The Act of 3 February 2011, see above note 213.

Poles saving Jews under German Nazi occupation was also introduced. It was introduced in 2018,²²⁶ as part of the politically driven memory politics initiated by the PiS government to highlight the efforts of Poles saving Jews while denying instances of Poles participating in such crimes.

There is a specific law on the protection of the territories of former concentration camps, which specifies how they are protected.²²⁷ The law currently names eight camps²²⁸ which are protected. A much larger group of places is protected by the Act on war graves and cemeteries dating back to 1933.²²⁹ This Act has been repeatedly amended and applies to the graves of people who died while fighting for the independence of Poland, all soldiers regardless their nationality, all victims of German and Soviet camps, people who lost their lives because of the fight against the totalitarian system or because of totalitarian repression or ethnic cleansing between 1917 and 1990. Consequently, it protects the graves and cemeteries of an extensive group of people.

Students must take compulsory history classes throughout their primary and secondary education. The history curriculum at school in Poland strongly emphasises Polish history, which starts from the Christianisation of Poland in 966 and brings the students up to the 21st century. After learning about the history of Poland in their primary school, pupils repeat this – in greater detail – at secondary school. Learning about the Holocaust is not central to the curriculum.²³⁰

Major post-2015 political initiatives were taken to change education in Poland. This also applied to changes in the school's organisation structure, as in 2017, the three-stage education was reverted to the traditional two-stage education. Furthermore, the school curriculum was reformed to be more Poland-centric and conservative.²³¹ The changes to the curriculum gained momentum, particularly after the appointment of Przemysław Czarnek to the office of education minister in October 2020. After his appointment, he stated publicly that his objective would be to free Polish education of what he called 'political correctness' and 'leftist-liberal ideology', which he has since been implementing by changing education programmes and introducing new classes.²³² To show just one of the changes, starting in September 2022, the school subject 'Knowledge about Society' (Polish: *Wiedza o Społeczeństwie*), was changed to 'History and the Present' (Polish: *Historia i Terażniejszość*). While the objective of the original subject was to provide civic education covering social, political, legal, and international issues, the new subject adds history from 1945 to 2015 and its influence on today's world. This is done from the point of view of the current memory politics, for example, by highlighting the positive role of the Catholic Church and politicians connected with the ruling party. The curriculum

²²⁶ Ustawa z dnia 6 marca 2018 r. o ustanowieniu Narodowego Dnia Pamięci Polaków ratujących Żydów pod okupacją niemiecką, [the Act of 6 March 2018 establishing the National Day of Remembrance of Poles who saved Jews under German occupation], Dz.U. 2018, poz. 589. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000589> [8.05.2023].

²²⁷ Ustawa z dnia 7 maja 1999 r. o ochronie terenów byłych hitlerowskich obozów zagłady [the Act of 7 May 1999 on the protection of the areas of former Nazi extermination camps], Dz.U. 1999 nr 41, poz. 412. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19990410412> [8.05.2023].

²²⁸ 1) Pomnik Męczeństwa w Oświęcimiu [the Monument of Martyrdom in Oświęcim]; 2) Pomnik Męczeństwa na Majdanku [the Monument of Martyrdom at Majdanek]; 3) Muzeum "Stutthof" w Sztutowie [the "Stutthof" Museum in Sztutowo]; 4) Muzeum Gross-Rosen w Rogoźnicy [the Gross-Rosen Museum in Rogoźnica]; 5) Mauzoleum Walki i Męczeństwa w Treblince [the Mausoleum of Battle and Martyrdom in Treblinka]; 6) Muzeum Martyrologiczne – Obóz w Chełmnie nad Nerem [the Museum of Martyrdom – Camp in Chełmno on the Ner]; 7) Muzeum Byłego Obozu Zagłady w Sobiborze [the Museum of the Former Extermination Camp in Sobibór]; 8) były Obóz Zagłady w Bełżcu [the former Extermination Camp in Bełżec].

²²⁹ Ustawa z dnia 28 marca 1933 r. o grobach i cmentarzach wojennych [the Act of 28 March 1933 on war graves and cemeteries], Dz.U. 1933 nr 39, poz. 311. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19330390311> [8.05.2023].

²³⁰ Magdalena H. Gross, "Struggling to deal with the difficult past: Polish students confront the Holocaust". *Journal of Curriculum Studies* 46(4), 2014, pp. 441–463. Available online: <https://doi.org/10.1080/00220272.2014.923513>.

²³¹ Michał Gostkiewicz, "Czego dzieci nauczą się na historii? Nauczycielka nie ma złudzeń. Od mamuta do Bieruta". Available online: <https://weekend.gazeta.pl/weekend/7,177344,22305352,czego-dzieci-nauczaja-sie-na-historii-nauczycielka-nie-ma-zludzen.html> [8.05.2023].

²³² Claudia Ciobanu, "Polish Ruling Party Education reforms". Available online: <https://balkaninsight.com/2021/06/10/polish-ruling-party-education-reforms-god-country/> [8.05.2023].

and proposed textbooks have been widely criticised, and factual mistakes have been pointed out,²³³ including by the Political Science Committee of the Polish Academy of Sciences²³⁴ and the Polish Historical Society.²³⁵

The PiS government has invested in the construction of new state museums and cultural institutions commemorating Polish history,²³⁶ including the flagship Museum of the History of Poland currently being built in Warsaw.²³⁷ Additionally, the government significantly altered the permanent exhibition of the Museum of the Second World War in Gdansk in 2017, which had initially been conceived to present the global history of the war, to emphasise ‘the Polish point of view’ about WWII.²³⁸ The government has also decided to finance a new museum commemorating Polish victims of Nazi terror. The Museum of Piaśnica in Wejchorowo on the Baltic coast is being established to commemorate the victims of crimes committed by the Germans against the Polish population and representatives of other nationalities in Kashubia and Gdansk Pomerania in 1939–1945. Its opening is planned for 2022.

Poland emphasises the commemoration of heroic acts and positive attitudes of Poles with respect to Jews during the Second World War, including through criminal and commemorative memory laws, new museums, and research institutes. For instance, the Witold Pilecki Centre for the Study of Totalitarianism was established in 2016. Its objective was to collect and make available testimonies of German and communist crimes, including testimonies given before the Main Commission for the Investigation of Nazi Crimes. The centre was incorporated into the new Witold Pilecki Institute for Solidarity and Valour, known as Pilecki Institute, in 2017.²³⁹ The institution was dubbed the ‘Polish Yad Vashem’. It aims to commemorate and honour people of merit to the Polish Nation in nurturing the memory of or providing assistance to people of Polish nationality or Polish citizens of other nationalities who were victims of crimes against peace, humanity or war crimes in the years 1917–1990. The Institute conducts research, grants scholarships and research grants, has a digital archive and organises exhibitions and commemorations. The Polish President has been awarding the annual Virtus et Fraternitas Medal on behalf of the Pilecki Institute since 2019 to people who saved Poles in the Second World War and, more generally, during the period of totalitarianism. The Institute has a local branch in Berlin near the Brandenburg Gate and organises exhibitions.

The Institute’s patron, Witold Pilecki (1901–1948), was a Second World War cavalry officer, intelligence agent and resistance leader who infiltrated the Auschwitz concentration camp in 1940 and collected intelligence for the Home Army, which was shared with the Western Allies. He was arrested by communist authorities in 1947 on charges of working for ‘foreign imperialism’, put on show trial, and executed in 1948. Until recently, his biography has been unknown to the general public in Poland; he has become the symbol of the fight against two totalitarianisms and victimhood. Jan Karski is another hero of the Polish WWII re-

²³³ Adam Leszczyński, “HiT Czarnka. Teorie spiskowe, denializm klimatyczny. 6 największych kuriozów z podstawy programowej” [Czarnek’s ‘HiT’: Conspiracy theories, climate denialism: The 6 strangest curiosities from the core curriculum]. Available online: <https://oko.press/hit-czarnka-6-najwiekszych-kuriozow-z-podstawy-programowej> [8.05.2023].

²³⁴ Stanowisko KNP PAN ws. wprowadzenia do szkół przedmiotu HiT [position of the Committee of Pedagogical Sciences of the Polish Academy of Sciences on the introduction of the subject History and the Present into schools]. Available online: https://knpol.pan.pl/index.php?option=com_content&view=article&id=468&catid=55&Itemid=201&lang=pl [8.05.2023].

²³⁵ Opinia PTH dotycząca Podstawy programowej historii oraz nowego przedmiotu Historia i Teraźniejszość [Opinion of the Polish Historical Society on the core curriculum of history and the new subject, History and the Present]. Available online: <http://pth.net.pl/aktualnosci/275> [8.05.2023].

²³⁶ Maria Kobielska, “The Touchstone of Polishness? Suffering Exhibited in “New Museums” in Poland”. *The Polish Review* 64(2), 2019, pp. 121–131. Available online: <https://doi.org/10.5406/polishreview.64.2.0121>.

²³⁷ Jörg Hackmann, “Defending the “good name” of the Polish nation: politics of history as a battlefield in Poland, 2015–18”. *Journal of Genocide Research* 20(4), 2018, pp. 587–606. Available online: <https://doi.org/10.1080/14623528.2018.1528742>.

²³⁸ David Clarke, Paweł Duber, “Polish cultural diplomacy and historical memory: the case of the Museum of the Second World War in Gdańsk”. *International Journal of Politics, Culture, and Society* 33(1), 2020, pp. 49–66. Available online: <https://doi.org/10.1007/s10767-018-9294-x>.

²³⁹ Ustawa z dnia 9 listopada 2017 r. o Instytucie Solidarności i Męstwa imienia Witolda Pileckiego [the Act of 9 November 2017 on the Witold Pilecki Institute of Solidarity and Bravery], Dz.U. 2017, poz. 2303. Available online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170002303> [9.05.2023].

sistance which is regularly featured in Polish historical policy. Karski wrote reports describing the political and humanitarian situation in the German-occupied areas of Poland, including the Holocaust. The Polish authorities have also been actively engaged in promoting lesser-known resistance personalities, such as Krystyna Skarbek, a Polish aristocrat of Jewish descent, who was a British intelligence officer, now becoming a symbol of Polish-British cultural ties.

In recent years, the Polish authorities have also significantly invested in officially honouring the memory of Polish Holocaust rescuers. The Ulma Family Museum of Poles Saving Jews in the Second World War was opened in 2016 in the village of Markowa. Other museums honouring gentiles who helped Jews during the Holocaust include the Żabiński Villa at the Warsaw Zoo, which opened to visitors in 2015. The POLIN Museum of the History of Polish Jews dedicates a small but significant part of its permanent exhibition to this topic.²⁴⁰

2.8. Poland's strong mnemonic constitution and robust memory laws

Poland has a robust mnemonic constitution that attempts to honour various traditions of political thought which shape references to past events. This constitution was adopted to build a democratic society with a separation of powers, strong checks and balances and guarantees to protect human rights, including those of historical and contemporary minorities. To this end, the official state historical policy after 1989 is based on continuing the good traditions of past forms of Polish republics, hoping to learn from their self-destructive vices on the path to a strong democracy.

In Polish mnemonic constitutionalism, awareness of the past is the foundation for building a better future. Remembrance of the victims of genocides, crimes against humanity and grave human rights violations was supposed to extend beyond remembering ancestors in a universally Christian or humanistic way. However, in the Polish *memocracy*, by which we mean the legal and political regime based on collective memory and deriving contemporary identification from it, there have also always been other tendencies. In one trend, the commemoration of the past or, in principle, the just struggle for historical truth are instrumentalised, becoming an excuse to try to legitimise actions intended to weaken, distort or even destroy the essence of constitutional democracy.

The great importance of the past and history in public life in Poland has meant that Polish democracy has always been open to adopting different memory laws. It adopted 'progressive' memory laws in its early years, following the democracies with a long tradition, such as those of Germany and France. For instance, Poland banned the denial of selected crimes, including the Holocaust ten years before the enactment of the 2008 EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. At that time, Poland's authorities were attempting to Europeanise the criminal law system as part of the process of accession to the EU. The specific structure of the historical crime denial ban in the Act on the IPN ties it to the temporal and substantive mandate of the Institute of National Remembrance. The criminal prohibition of denial of historical crimes currently applies to 'Nazi crimes, communist crimes, crimes of members of Ukrainian formations collaborating with the German Third Reich, and other crimes against peace, humanity, or war crimes, perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 and 31 July 1990.'²⁴¹

In modernizing its Penal Code, Poland has also banned the propagation of fascism and totalitarian regimes in order to protect democracy from internal dismantlement through the abuse of freedom of expression.

However, the Polish legal framework of historical memory and especially the memory laws adopted in recent years are also a negative factor that distances Poland from European standards of human rights protection, thus leading to memory wars in relations with other countries and to the polarisation of Polish society.

²⁴⁰ Zofia Wóycicka, "Global patterns, local interpretations: new Polish museums dedicated to the rescue of Jews during the Holocaust". *Holocaust Studies* 25(3), 2019, pp. 248–272. Available online: <https://doi.org/10.1080/17504902.2019.1567660>.

²⁴¹ The Act of 18 December 1998 on the Institute of National Remembrance, see above note 133.

All too often, mnemonic governance in Poland is supposed to reinforce the belief in the historical heroism and martyrdom of the nation, which, in the extreme case, including through the use of punitive memory laws, leads to a contest of historical, national suffering in which there is no room for an honest display of and reckoning with the dark elements of the history of Polish society. In addition to the rise in self-exculpatory memory laws,²⁴² which has been repealed, at least in their most dangerous, criminal part, because of international pressure, Poland has seen self-congratulatory forms of historical governance of memory, notably through the establishment of commemorations, museums and new institutes tasked with promoting historical policy. The current Polish authorities would probably like these efforts to lead to an improved positive image of Poland in the Western culture of remembrance, which has been focusing on commemorating the Holocaust since the 1970s. However, the mechanisms chosen by the Polish legislator or even the narrative language about the solutions adopted have led to quite different results.

In recent years, self-exculpatory memory laws in Poland have been coinciding with the calls of the authorities for increased sovereignty, fewer intrusions of transnational structures, a vision of moral superiority of the Polish state and nation and the portrayal of minorities and other states as alien, hostile and dangerous. Calls for the protection of the historical truth or reckoning with the undemocratic past to strengthen democracy led to the adoption of norms that disproportionately restrict freedom of expression under the threat of criminal sanctions that include imprisonment for expressions not inciting violence and for adopting allegedly decommunisation measures that serve as tools of revenge rather than reconciliation and weaken, instead of strengthening, the quality of democracy.

The memory laws that mushroomed after 2015 extend beyond criminal legislation and include mechanisms restricting political rights (such as freedom of expression) and social rights. The new mechanisms recently introduced allegedly to finalise the reckoning with the undemocratic, communist past, such as the Act of 16 December 2016 amending the Act on the pensions of the former employees of the various branches of the communist state-controlled authorities, is far removed from transitional justice mechanisms, in the meaning of the ECHR, as it introduces collective responsibility instead of an individualised assessment, and punishes twice for the same deed, as if the cardinal rule of criminal systems, *ne bis in idem*, has been forgotten. Furthermore, state symbols, the good name of the state and its authorities are strongly protected in Poland, while the laws regulating this in practice have, in recent years, led to a restriction of debates on historical issues or references to the past when speaking out on important public issues.²⁴³ As a result, the memory laws that have been adopted in recent years, as well as the prosecution's interpretation of the pre-existing laws, have led to a weakening of the protection of individual rights.²⁴⁴

Finally, mnemonic propaganda and rewriting history, whether it is distant history, the history of the Second World War or recent political history, have been employed in education and the state media to strengthen the currently ruling conservative-nationalist camp. As a result, at this point, Polish *memocracy* is at a crossroads, more generally reflecting the state of Polish democracy. It has been founded on many elements of European legal culture, including militant democracy,²⁴⁵ but from which it is increasingly moving away, disregarding norms, standards and procedures.

²⁴² See Erik Heinze, "Theorizing Law and Historical Memory". In: *Queen Mary School of Law Legal Studies Research Paper* 290, 2018, p. 1. Available online: <https://doi.org/10.17176/20180108-103453>.

²⁴³ Gliszczyńska-Grabias, 2022, see above note 181.

²⁴⁴ Gliszczyńska-Grabias, Baranowska and Wójcik, 2018, see above note 184.

²⁴⁵ Agnieszka Bień-Kacała, "Neo-militant democracies under siege in post-communist Europe": In: *Neo-militant Democracies in Post-communist Member States of the European Union*, 2022, p. 176. Available online: <http://doi.org/10.4324/9781003245162-15>.

3. MEMORY LAWS IN HUNGARY

3.1. Introduction

Hungary, like other CEE countries, became heavily involved in memory politics after the transition to democracy in 1989, especially in the periods under the rule of the national-conservative party FIDESZ, in the years 1998–2002 and again since 2010 under the leadership of Viktor Orbán, whose major policy element is the rebuilding of Hungarian society along ‘illiberal’ lines.²⁴⁶

As such, the instrumental use of questions of collective memory by the Hungarian government merits a closer investigation, proposed here in seven parts: a more general analysis of FIDESZ’s memory politics (3.2.), followed by an overview of the issues of memory in the 2011 Hungarian Constitution (3.3.), aspects of Holocaust remembrance in Hungary (3.4.), an examination of the country’s lustration and decommunisation processes (3.5.), the prohibition of certain symbols in the country, as well as other instances of treating memory as a tool in the country (3.6.), including in education (3.7.), closing with a comparison of Hungarian legal and political responses to the past with European legal standards (3.8.).

First, however, it should be noted that, as stated by Marina Bán, in principle, three types of memory laws can be distinguished in Hungary: *emléktörvény* (acts tasked with remembrance and commemoration), *emlékezet törvény* (punitive memory laws), and quasi-memory laws (relating to the ‘historicisation’ of certain aspects of the Hungarian legal system).²⁴⁷ While not exclusive, this classification proves useful in viewing Hungarian memory laws, while examples of all of these, as well as of some that cannot be easily categorised, have been presented in this Report.

3.2. Present-day memory politics

As described in greater detail below, each of Hungary’s alternating right- and left-wing administrations in the country’s post-1989 governments engaged in memory politics – be it with regard to lustration, other means of decommunisation, commemoration of the heroes of the 1956 revolution or school curricula – have attempted to influence social perceptions of the past to further their respective political goals. It was FIDESZ, however, which took memory politics to another level, often building on the already existing themes of the Hungarian collective memory, such as that of the Treaty of Trianon, and using them to pursue wide-ranging political and legal policies, including on the international stage. Importantly, the instrumentalisation of memory is one of a number of elements in Orbán’s illiberal project²⁴⁸ which over the course of the past decade saw the country’s democratic freedoms have decline, with Hungary classified as only “partly free” in the most recent Freedom House report.²⁴⁹ As such, Hungary’s memory politics since 2010 require a particularly close and general examination.

Established in 1988 by Viktor Orbán and 36 fellow students as *Fatal Demokraták Szövetsége* (Federation of Young Democrats, FIDESZ), the party quickly became particularly important among the Hun-

²⁴⁶ Mirosław M. Sadowski, “Central Europe in the Search of (Lost) Identity. The Illiberal Swerve”. In: “Constitutional Identities in Central and Eastern Europe”, Alexandra Mercescu (ed.), Peter Lang, 2020, pp. 173–193. Available online: <https://doi.org/10.48269/2451-0610-ksm-2021-1-003>.

²⁴⁷ Marina Bán, “The Legal Governance of Historical Memory and the Rule of Law”, PhD thesis, 2020, University of Amsterdam, pp. 166–169. Available online: <https://pure.uva.nl/ws/files/51201837/Thesis.pdf> [9.05.2023].

²⁴⁸ Mirosław M. Sadowski, “Law and Collective Memory in the Service of Illiberalism. Through the Looking-Glass: Transformation or a Reactionary Revolution?”. In: *XVIII.1 Krakowskie Studia Międzynarodowe – Krakow International Studies*, 2021. Available online: <https://doi.org/10.48269/2451-0610-ksm-2021-1-003>.

²⁴⁹ Freedom House, Hungary. Available online: <https://freedomhouse.org/country/hungary> [8.05.2023].

garian opposition, participating in the 1989 roundtable talks. It later successfully participated in the 1990 elections with a socially and economically liberal programme in opposition to the nationally conservative and religious MDF. Following a meagre performance in the 1994 elections, however, FIDESZ changed its political stance, adopting the previously despised ‘religious-national ideology’, a significant element of which has been the question of control over social perceptions of the past.²⁵⁰ Memory politics later became a staple of their governance (in coalition with a smaller conservative party, the KDNP), following FIDESZ’s win in the 2010 elections, which gave the party a super-majority in the parliament.²⁵¹ History is often a significant point of reference in Orbán’s speeches.²⁵² During its time in power, FIDESZ developed four intertwined historical narratives relating to Hungary: that of the country (1) as the last battalion, ‘sacrificing itself for others who do not take the blows’; (2) being betrayed – by the great powers; (3) being alone among the Slavic and the Western peoples, without allies (except for Poland); (4) being the youngest prince, i.e. a small country which needs to be ‘smart, intelligent and tricky’ in order to succeed;²⁵³ and yearning for the lost glorious past (visible in the certain institutional changes, e.g., to historical names, analysed below). By creating this four-point official narrative, FIDESZ has provided Hungarian society with ‘an authority based on tradition and reverence for a sacred and shared national past.’²⁵⁴

An important element of this narrative is the linking of the historical with the contemporary, as the Orbán administration argues that what once was attempted by the Nazis and the Soviets is now the domain of the EU,²⁵⁵ resulting in the creation of a ‘strange mélange on the Vienna–Moscow–Brussels historical trajectory of external dependence.’²⁵⁶ The 2015 migrant crisis was also instrumentalised by the Hungarian government along historical lines.²⁵⁷ Furthermore, Viktor Orbán’s image itself has been carefully crafted in order to fit the new official narrative as the ‘embodiment of rural Hungary’s resilient Christian agrarian populism’ against the ‘urban, left, liberal (and Jewish) elites.’²⁵⁸

In the process of disseminating these newly-minted collective memories, in addition to the various memory laws analysed below, FIDESZ has been involved in (1) overhauling established institutions, including the public media, so that they reproduce the government’s point of view, (2) the creation of new and generously funded pro-government civic society institutions and (3) the reduction of funding to those entities which do not concur with government policy.²⁵⁹ An element of this fight is the battle with the NGOs, which, should they receive international funding, are required to register as ‘foreign-funded’ organisations²⁶⁰

²⁵⁰ Bartek Pytlas, “Radical-right narratives in Slovakia and Hungary: historical legacies, mythic overlaying and contemporary politics”. *Patterns of Prejudice* 47(2), 2013, pp. 162–183. Available online: <http://doi.org/10.1080/0031322X.2013.786199>.

²⁵¹ Maya Nadkarni, *Remains Of Socialism: Memory And The Futures Of The Past In Postsocialist Hungary*, Cornell University Press, Ithaca 2020, p. 187.

²⁵² Ittipol Jungwatanawong, *Historical Memory as a Political Tool for Legitimacy by FIDESZ Government in Hungary*, MA thesis, Lund University, 2014, pp. 36–45. Available online: <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=4610458&fileId=4610461> [8.05.2023].

²⁵³ Tibor Deseffy and Zsófia Nagy, “Dreaming homogenous – power switches of history in public discourse in Hungary”, *Journal of Ethnic and Migration Studies* 47(18), 2021, pp. 4189–4208. Available online: <https://doi.org/10.1080/1369183X.2020.1812277>.

²⁵⁴ Simon Bradford and Fin Cullen, “Populist Myths and Ethno-Nationalist Fears in Hungary”. In: Melody Devries, Judith Bessant and Rob Watts (eds), *Rise of the Far Right. Technologies of Recruitment and Mobilisation*, Rowman and Littlefield, 2021, pp. 41–62. Available online: <https://research.stmarys.ac.uk/id/eprint/5174/1/Populist%20myths%20Hungary%20ACCEPTED.docx> [[9.05.2023].

²⁵⁵ Nadkarni, 2020, pp. 188, see above note 251.

²⁵⁶ Attila Ágh, “Cultural War and Reinventing the Past in Poland and Hungary: The Politics of Historical Memory in East-Central Europe”, *Polish Political Science Yearbook* 45, 2016, pp. 32–44. Available online: <https://doi.org/10.15804/ppsy2016003>.

²⁵⁷ Bradford and Cullen, 2021, pp. 48–49, see above note 254.

²⁵⁸ *Ibid.*

²⁵⁹ Deseffy and Nagy, 2021, pp. 41–96, see above note 253.

²⁶⁰ Nadkarni, 2020, pp. 188, see above note 251.

since the introduction of the 2017 ‘Lex NGO’, which was found to be unlawful by the CJEU in 2020.²⁶¹ The party has also successfully used modern (social media) and traditional (billboards) means of communication to propagate its message,²⁶² further cementing the system of dissemination of the official narratives.

A shift has taken place in the narrative of the Orbán administration’s memory politics over time: the anti-communist discourse already lost its role as a significant point of reference before the 2018 elections, as the pre-1989 past came to be decontextualised as being retro, rather than totalitarian,²⁶³ while Hungary’s ties with Russia strengthened.²⁶⁴

3.3. Mnemonic constitutionalism

The Constitution, the highest legal act of a nation, frequently offers a unique insight into a nation’s socio-legal and socio-political mind-set. Given that, following the transition to democracy, Hungary did not adopt a new constitution, instead amending the one from 1949,²⁶⁵ once FIDESZ gained a majority of the seats in the parliament after the 2010 elections, the adoption of a new constitution became of paramount symbolic importance.²⁶⁶ Promulgated symbolically on 25 April 2011 (Easter Monday), a day of major importance for all Christians,²⁶⁷ the new Constitution ‘contains a considerable amount of historical references clearly intended to establish a coherent view of Hungarian history.’²⁶⁸ Despite being recently adopted, it has already been amended seven times, including with regard to historical issues, as noted further below.²⁶⁹ It should also be noted that the Act has a particular specific name — it is not referred to as the constitution, but rather as the Basic Law²⁷⁰ or Fundamental Law, in principle echoing Kelsen’s *grundnorm* as the basis of the whole legal system²⁷¹ (however the extent to which Kelsenian thought influenced the current Hungarian constitution remains, given its particularity analysed here, remains debatable).

The Basic Law is preceded by a preamble, which presents a dichotomous understanding of various events from the country’s history, referencing family values²⁷² and deeply linked to Christianity, in particular Roman Catholicism. Taking the form of the ‘National Avowal of Hungary’,²⁷³ as Cyuńczyk poignantly notes, it presents three categories of past events: (1) those of which the Hungarians should be proud, including the legacy of St. Stephen, namely the establishment and the strengthening of the state, the legacy of all fighters for freedom and independence of Hungary, the role of the nation in the protection of Europe, as well as its contribution to the region’s common values; (2) those which Hungarians should regard as

²⁶¹ Lydia Gall, “Hungary’s Scrapping of NGO Law Insufficient to Protect Civil Society”. *Human Rights Watch*. Available online: [hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society](https://www.hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society) [9.05.2023].

²⁶² Bradford and Cullen, 2021, pp. 41, see above note 254.

²⁶³ Nadkarni, 2020, pp. 192–193, see above note 251.

²⁶⁴ Simone Benazzo, “Not All the Past Needs To Be Used: Features of Fidesz’s Politics of Memory”. *Journal of Nationalism, Memory & Language Politics* 2017, 2(11), pp. 198–221. Available online: <https://doi.org/10.1515/jnmlp-2017-0009>.

²⁶⁵ Filip Cyuńczyk, “Prawo, historia a pamięć zbiorowa. Odwołania do przeszłości w preambułach do konstytucji Łotwy i Węgier na tle innych państw postkomunistycznych” [Law, history and collective memory. References to the past in the preambles to the Constitution of Latvia and Hungary in comparison with other post-communist countries], *Miscellanea Historico-Iuridica* 15(2), 2016, pp. 221–233. Available online: <https://doi.org/10.15290/mhi.2016.15.01.12>.

²⁶⁶ Katalin Miklóssy and Heino Nyssönen, “Defining the new polity: constitutional memory in Hungary and beyond”. In: *Journal of Contemporary European Studies* 3(26), 2018, pp. 322–333. Available online: <https://doi.org/10.1080/14782804.2018.1498775>.

²⁶⁷ *Ibid.*, p. 329.

²⁶⁸ Miklós Könczöl and István Kevevári, “History and Interpretation in the Fundamental Law of Hungary”. *European Papers* 5(1), 2020, pp. 161–174. Available online: <https://doi.org/10.15166/2499-8249/388>.

²⁶⁹ *Ibid.*, pp. 162–163.

²⁷⁰ Miklóssy and Nyssönen, 2018, pp. 326, see above note 266.

²⁷¹ Könczöl and Kevevári, 2020, pp. 162–163, see above note 268.

²⁷² *Ibid.*, p. 173.

²⁷³ Miklóssy and Nyssönen, 2018, pp. 329–330, see above note 266.

a foundation of their present-day functioning, including the ‘historical constitution’ and the Crown of St. Stephen, symbolizing the state’s unity and continuity, as well as the declaration that Hungarian freedom started with the 1956 Revolution; and (3) those which Hungarians should reject, discarding them from the national legacy, including periods of foreign occupation, crimes committed on the Hungarian nation and the times of Nazi and communist dictatorships, as during these periods, namely between 19 March 1944 and 2 May 1990, it is stipulated that the country was not fully independent.²⁷⁴

Of particular importance from the point of view of law and memory are categories (2) and (3). With regard to category (2), it should be noted that the references to the country’s historical constitution and the ‘Holy Crown Doctrine’ link contemporary Hungary with over five hundred years of its legal past. These emphasise ‘that the historical state and contemporary legal principles are intertwined issues’, together with the broadly understood Hungarian nation, including not only Hungary’s current inhabitants, but also the diaspora in neighbouring countries, who are protected by the Basic Law.²⁷⁵ Importantly, it was left up to the Constitutional Tribunal to decide how to interpret the legacy of the historical constitution, and it duly recognised such elements as freedom of the press, religious freedom, judicial independence, the right to a legal remedy, judicial review of administrative acts, the disciplinary liability of judges and territorial self-government, as such, in certain cases, also stating that certain legal instruments are not a part of the historic constitution, not helping to provide a clear legal basis as to what exactly is the historical constitution.²⁷⁶ In turn, category (3) establishes a lack of statute of limitations for crimes against the Hungarian nation committed during Nazism and communism.²⁷⁷

Furthermore, the Constitution presents a list of remembrance days, including 15 March, marking the 1848 Revolution, 20 August, celebrating the establishment of the state on St. Stephen’s (the first Hungarian king’s) day; and 23 October, commemorating the 1956 Revolution.²⁷⁸ Also, 25 April was designated as Constitution Day, thus cementing its status, as Könczöl acutely notes, as ‘unequivocal lieu *de mémoire*’ of contemporary Hungary.²⁷⁹

Lastly, it should also be noted that one of the amendments introduced into the new constitution not long after its adoption in 2013 clarified the provisions regarding the Hungarian communist past, further explaining the question of the statute of limitations, allowing for the reopening of cases against the former authorities, acknowledging the Communist Party and satellite parties as being criminal organisations and establishing the basis for the reduction of the pensions and benefits of the former officials. The amendment also presented a comprehensive list of crimes from the pre-1989 era, including the destruction of democracy, the fall of the 1956 Revolution, persecution of the opposition and destruction of ‘the value of European civilisation’. Also, a new institution, the Committee of National Remembrance, was established with the amendment, which was tasked with documenting the memory of the communist period. At the same time, with the new law, the victims of the former regime were barred from applying for compensation from the state, as the enactment of such laws is now prohibited.²⁸⁰ In turn, a 2017 amendment to the constitution introduced a new duty on all state institutions, ordering them to protect “Hungary’s constitutional

²⁷⁴ Filip Cyuńczyk, 2016, pp. 229–230, see above note 265.

²⁷⁵ Miklóssy and Nyyssönen, 2018, pp. 327–328, see above note 266.

²⁷⁶ Könczöl and Kevevári, 2020, pp. 170–171, see above note 268.

²⁷⁷ Gábor Halmai, “Memory Politics in Hungary: Political Justice without Rule of Law”. In: *Verfassungsblog*, 2018. Available online: <https://doi.org/10.17176/20180110-123522>.

²⁷⁸ Katalin Izsák-Somogyi, “Memory Laws in Hungary After the Holocaust”. In: *Regional Law Review: Annual edition*, 2021, pp. 223–234. Available online: https://doi.org/10.18485/iup_rlrc.2021.2.ch13.

²⁷⁹ Miklós Könczöl, “Dealing with the Past in and around the Fundamental Law of Hungary”. In: Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory. Towards Legal Governance of History*, Cambridge University Press, Cambridge 2017, pp. 246–262. Available online: <https://doi.org/10.1017/9781316986172.013>.

²⁸⁰ Halmai, 2018, see above note 277.

self-identity and Christian culture,²⁸¹ adding another legal element to FIDESZ' official narrative and further limiting the question of the Hungarian identity to a historical, Christian one.

3.4. Memorialisation of the Second World War and the Holocaust

The basis of the remembrance of the Shoah in Hungary, as in the case of other countries of the region, is in the official narrative formed during the times of communism, which saw the first monuments erected, which were, however, dedicated to all the victims of fascism, not just Jews, also often emphasising the role of the Red Army in the liberation of the ghettos in Pest. The specific acknowledgement of the Jewish victims of WWII came only in the late 1980s; however, a certain Magyarisation of the notion of victimhood simultaneously took place, resulting in the linking of the perpetrators with only Hungarian fascists, namely members of the Arrow Cross Party.²⁸² After 1989, this narrative was combined with that of the post-communist victimhood, in particular following FIDESZ's 2010 electoral win, in what came to be known as the 'double occupation' understanding of the past,²⁸³ enshrined, as mentioned above, in the new constitution, which jointly recognises the Nazi and the communist times as periods of political dependence. As discussed below, this particular perspective on the past affects several collective memories of the past, including those related to the Holocaust and Hungarian complicity in this atrocity. *Nota bene*, another competing aspect of Hungarian victimhood is the post-Trianon trauma,²⁸⁴ also analysed below.

As such, for several years, Hungary did not have a specific ban on negationism, relying on one of the provisions of the Criminal Code regarding the 'incitement against a community'. It was only after the 2008 EU Framework Decision that a specific piece of legislation on Holocaust denial was introduced in 2010 by the outgoing socialist government, to which the Orbán administration soon added a ban on the negation of communist crimes, with the law taking the form of a prohibition of 'the denial of the genocide and crimes against humanity committed by the National Socialist and communist regimes'. While it was criticised for its reference only to Nazi and not fascist crimes, the law was upheld by the Constitutional Tribunal.²⁸⁵

In addition to the ban on negationism, Hungary also observes two remembrance days regarding the Holocaust, the international commemoration on 27 January and the Memorial Day of the Hungarian Victims of the Holocaust, marking the establishment of the Budapest Ghetto on 16 April. Schools receive instructions on how to observe them, but they are not binding, with the only systemic requirement being to include the memory of the Holocaust in the final history exam at secondary school.²⁸⁶ In turn, the Hungarian government sponsors the reconstruction of Jewish cemeteries and synagogues throughout the country.²⁸⁷

Importantly, it should be noted that the instrumentalisation of Holocaust memory by FIDESZ goes further than fostering the 'double occupation' concept mentioned above. It took on a particular shape in 2014, dubbed the Holocaust Memorial Year. The public commemorations saw several narrative-distorting initiatives, including the construction of a monument to all the victims of the German invasion, attempts

²⁸¹ "Amendments to the Fundamental Law". In: *The Orange Files. Notes on Illiberal Democracy in Hungary*. Available online: <https://theorangefiles.hu/amendments-to-the-fundamental-law/> [9.05.2023].

²⁸² Gábor Gyáni, "Hungarian Memory of the Holocaust in Hungary". In: Randolph L. Braham and András Kovács (eds), *The Holocaust in Hungary. Seventy Years Later*, Central European University Jewish Studies Program and Central European University Press, Budapest New York 2016, pp. 215–230.

²⁸³ Andrea Pető, "The Lost and Found Library: Paradigm Change in the Memory of the Holocaust in Hungary". In: *Mémoires en jeu: enjeux de société. Memories at stake* 9, 2019 pp. 77–81. Available online: https://www.ssoar.info/ssoar/bitstream/handle/document/72975/ssoar-memojeu-2019-9-peto-The_Lost_and_Found_Library.pdf?sequence=3&isAllowed=y&lnkname=ssoar-memojeu-2019-9-peto-The_Lost_and_Found_Library.pdf.

²⁸⁴ Gábor Gyáni, see above note 268, pp. 230.

²⁸⁵ Bán, 2020, pp. 199–201, see above note 253.

²⁸⁶ Izsák-Somogyi, 2021, pp. 230–231, see above note 278.

²⁸⁷ Pető, 2019, see above note 283, p. 81.

to reinterpret specific pre-1944 actions by the Hungarian government with respect to the Jewish minority, budgetary exclusion of organisations experienced in the question of Shoah remembrance in favour of novice organisations,²⁸⁸ as well as the construction of the House of Fates. This state-established Holocaust Museum has remained unopened since 2015 because of ongoing controversies regarding the narrative put forward by its exhibition.²⁸⁹

Another aspect of this particularly problematic stance of the Hungarian government with respect to the Holocaust is the process of returning to the inter-War period with the country's symbolism, which has been taking place in recent years, most notably through the whitewashing of Miklós Horthy, Hungary's ruler at that time and, for the most part, during WWII,²⁹⁰ despite his role in the deportation of Hungarian Jews and cooperation with the Nazi Germany, with his monuments appearing initially in private, but later in public areas.²⁹¹

In addition to the ban on Holocaust denialism, another punitive memory law is in place in Hungary: the prohibition of certain symbols, introduced in 2000. Section 269/B of the country's Criminal Code prohibits the public exhibition, use during rallies and distribution of the swastika, the arrow-cross, the hammer and sickle, the SS symbol, the five-pointed red star, and any symbols depicting them, except for educational, historical, scientific, or artistic purposes, under the penalty of a fine.²⁹²

The prohibition to use these symbols was examined by both national and international courts. First, in a decision in 2000, the Hungarian Constitutional Tribunal upheld the prohibition, acknowledging that the outlawed symbols could offend the victims of Nazism and communism, as well as their families and all pro-democratic individuals.²⁹³ However, the ECtHR did not agree with this point of view and, in its 2010 ruling in *Vajnai v Hungary*, held that the ban is incompatible with Article 10 ECHR [Freedom of expression], because the applicant was not actively propagating communism as a result of which there is no danger of a rebirth of the communist regime in Hungary,²⁹⁴ and the symbol of the red star cannot be singularly linked to the totalitarian system. The ECtHR expressed a similar view in the 2011 ruling in *Frantanoló v Hungary*.²⁹⁵ This led to a revision of its stance by the Hungarian Constitutional Tribunal, which found the prohibition of symbols unconstitutional in 2012.²⁹⁶ *Nota bene*, in another ruling in 2012 in *Fáber v Hungary*, in which the applicant contested his fine for the refusal to remove a publicly displayed Arpad flag (not a prohibited symbol under Hungarian law, but one that is similar to the arrow-cross flag), the ECtHR also found the country to be in breach of Article 10, with some judges linking the case to *Vajnai v Hungary*, despite one being related to communist symbols, while the other was related to fascist symbols.²⁹⁷

²⁸⁸ *Ibid*, pp. 78–81.

²⁸⁹ Cnaan Lipschitz, “Budapest’s new \$30m Holocaust Museum sits in limbo as Hungary debates its contents”. In: *The Times of Israel*. Available online: <https://www.timesofisrael.com/budapests-new-30m-holocaust-museum-sits-in-limbo-as-hungary-debates-its-contents/> [9.05.2023].

²⁹⁰ Benazzo, 2017, pp. 203–205, see above note 264.

²⁹¹ Andrea Pető, “The Illiberal Memory Politics in Hungary”. *Journal of Genocide Research* 31(2), 2021, pp. 241–249. Available online: <https://doi.org/10.1080/14623528.2021.1968150>.

²⁹² Agata Fijalkowski, “The criminalisation of symbols of the past: expression, law and memory”. *International Journal of Law in Context* 10(3), 2014, pp. 295–314. Available online: <https://doi.org/10.1017/S1744552314000135>.

²⁹³ Ilya Nuzov, “Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe”. *Human Rights Law Review* 18(2), 2019, pp. 231–253. Available online: <https://doi.org/10.1093/hrlr/ngz008> [24.05.2023].

²⁹⁴ Aleksandra Gliszczyńska-Grabias, “Orzecznictwo Europejskiego Trybunału Praw Człowieka wobec totalitarnej przeszłości Europy – wybrane przykłady”. In: *Odpowiedzialność za negowanie zbrodni międzynarodowych*, Patrycja Grzebyk (ed.), Wydawnictwo Instytut Wymiaru Sprawiedliwości, Warszawa 2020, pp. 81–88.

²⁹⁵ Nuzov, 2019, pp. 241–242, see above note 293.

²⁹⁶ Carna Piston, “Collective Memory in the context of European integration processes: some critical reflections on the EU politics of remembrance”. *De Europa* 3(2), 2020, pp. 21–38. Available online: <https://doi.org/10.13135/2611-853X/4515>.

²⁹⁷ Alastair Mowbray, “Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights”. *European Public Law* 20(3), 2014, pp. 469–498. Available online: <https://doi.org/10.54648/euro2014032>.

However, the Hungarian government not only did not change the provisions of the law but even attempted to expand them in 2017 through the so-called *Lex Heineken*, which was supposed to ban the commercial use of prohibited symbols, potentially affecting the red star logos of Converse, San Pellegrino, Milky Way and Heineken (with the last of these also being in a legal dispute with a Hungarian minority brewer in Romania regarding copyright issues at that time). Ultimately, however, the parliament did not enact the law, which disappeared from the public debate.²⁹⁸

3.5. Reckoning with the communist past

The settlement of accounts with the problematic past did not start with FIDESZ. Following other countries of the region, Hungary implemented a lustration law in 1994 as the Act on Background Checks for Individuals Holding Certain Key Offices (hereinafter in this section: the Act), opting, however, for calling the process ‘screening’ rather than ‘lustrating’,²⁹⁹ using the term *igazságtétel*, [English – doing justice].³⁰⁰

The Act subjected some public officials to the lustration process – all ‘those who had taken an oath before Parliament or the President of the Republic: the President, ministers, deputies, judges, journalists working for public mass-media, as well as leaders and managers of state universities and public companies’ – affecting anyone who collaborated with ‘the communist domestic state security services, supplied secret reports as informers, received secret information reports or belonged to the fascist Arrow Cross Party, thus extending the law’s impact to *défascisation*, in addition decommunisation.³⁰¹ Importantly, counterintelligence collaborators were not included in the Act, which led to a scandal in 2002 involving the then Prime Minister Péter Medgyessy, as it came to light that he was such an informant (and was therefore not subject to lustration).³⁰² Despite the high politicisation of the fact by FIDESZ, then in opposition, the politician remained in power, as the interest of society in general in matters of lustration, while remaining high, had significantly fallen by then.³⁰³

In designing its lustration process, Hungary opted for only moral sanctions, potentially only damaging an individual’s reputation,³⁰⁴ through the establishment of the so-called ‘inclusive system’, one based not on removal from office but on public transparency: anyone found to have collaborated with the previous regimes (either communist or fascist) was to receive a notice and be asked to resign from their posts – in the event of a refusal, the information about their collaboration would be publicised in the official gazette.

The process was to be conducted by specially appointed judicial committees, consisting of three members, each chosen by the parliament and approved by the Chief Justice, selected from among judges who were not collaborators. In order to facilitate their work, the committees had the authorisation to access documents from the Ministries of the Interior and of Defence, as well as from the Historical Archive (since 1997).³⁰⁵

As in other countries, likewise in Hungary, when choosing lustration as an instrument of transitional justice, it soon became heavily politicised, with its fate depending on the ruling party, with a clear

²⁹⁸ Piston, 2020, pp. 31–32, see above note 296.

²⁹⁹ Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland*, University of Pennsylvania Press, 2011, pp. 67–68.

³⁰⁰ *Ibid.*, pp. 77.

³⁰¹ Lavinia Stan, “Goulash Justice for Goulash Communism? Explaining Transitional Justice in Hungary”. *Studia Politica. Romanian Political Science Review* 7(2), 2007, pp. 269–291. Available online: <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-56066-8> [10.05.2023].

³⁰² Susanne Y. P. Choi and Roman David, “Lustration Systems and Trust: Evidence from Survey Experiments in the Czech Republic, Hungary, and Poland”. *American Journal of Sociology* 117(4), 2012, pp. 1172–1201. Available online: <https://doi.org/10.1086/662648> [10.05.2023].

³⁰³ Csilla Kiss, “The misuses of manipulation: The failure of transitional justice in post-communist Hungary”. *Europe-Asia Studies* 58(6), 2006, pp. 925–940. Available online: <http://www.jstor.org/stable/20451268> [10.05.2023].

³⁰⁴ *Ibid.*, p. 932.

³⁰⁵ David, 2011, pp. 77–78, see above note 299.

left-right divide, as neither side was prepared to stabilise the lustration process: following their victory in the 1994 elections, the socialist party sent the Act to the Constitutional Tribunal, whose partially critical decision allowed them to narrow the scope of lustration and choose 2000 as its cut-off date; in turn, after FIDESZ's electoral success in 1998, the scope and temporal limits of the Act were extended, from 9,000 to 17,000 officials, and up to 2004; ultimately, after the electoral victory of the socialists in 2002, the Act was once again limited, with only the most senior state and local government officials required to undergo lustration.³⁰⁶

While limiting the Act, the changes in 2002 gave the general public access to the documents: individuals could examine their files, while those of public officials became available with certain limitations; a further liberalisation of access to documentation from the times of dictatorship, one which would allow their online publication, was deemed unconstitutional in 2005.³⁰⁷ However, many files were destroyed (50%), while the reliability of those remaining (42% archived, 8% in the possession of new secret services) is often considered questionable.³⁰⁸

Ultimately, in 1994–2003 7,872 people underwent the lustration process, of whom some evidence was found against 126 of them, with findings published in 15 cases, while 24 officials chose to resign. Also, 11,000 people asked the Historical Archives for their files, with, due to a variety of reasons, only 3,800 receiving them, together with 1,000 researchers.³⁰⁹ However, not all the documents became available – some remained restricted and, in *Kenedi v Hungary*, the ECtHR found the country to be in breach of Article 10 ECHR, as the Hungarian government could not explain the legal basis for one such restriction, having reclassified the files requested by the applicant retroactively.³¹⁰

All in all, while often described as a lukewarm, ‘goulash’ process (in line with the mild regime of Kádár, a communist Hungarian leader, referred to as ‘goulash communism’),³¹¹ the lustration was well-perceived by Hungarians, who reacted positively to the effect that the dismissals of the collaborators from office had on society, despite their small number.³¹²

In addition to lustration, other decommunisation processes were introduced in Hungary after 1989. One of the first matters that needed attention was the issue of communist crimes, most notably those committed at the time of the intervention of the USSR repressing the 1956 Revolution. While the first Act passed in 1991 on these matters, which provided that ‘for certain crimes committed between 21 December 1944 and 2 May 1990, the statute of limitations shall restart on 2 May 1990 if the State failed to prosecute for political reasons’, was found unconstitutional,³¹³ the prosecution of communist atrocities was ultimately permitted by a ruling of the 1993 Constitutional Tribunal. In its judgement, the Tribunal recognised the general principles of international law, such as the lack of statute of limitations on war crimes and crimes against humanity, as inherent elements of the Hungarian legal system, meaning they could be directly applied before the courts. Furthermore, as Hungary was a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, its provisions allowed the prosecution of communist crimes within its purview.³¹⁴ While this approach led to over 40 prosecutions,

³⁰⁶ Stan, 2002, pp. 278–282, see above note 301.

³⁰⁷ Roman David, see above note 285, pp. 80–81.

³⁰⁸ *Ibid.*, p. 83.

³⁰⁹ *Ibid.*, p. 83–84.

³¹⁰ Antoine Buyse, “The truth, the past and the present: Article 10 ECHR and situations of transition”. In: Antoine C. Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights*, Cambridge University Press, Cambridge 2011, pp. 131–150. Available online: <https://doi.org/10.1017/CBO9780511758515.007>.

³¹¹ Stan, 2002, pp. 278–282, see above note 301.

³¹² Choi and David, 2012, pp. 1193–1194, see above note 302.

³¹³ Miklós Könczöl, see above note 265, pp. 248–249.

³¹⁴ Gábor Halmai, “Transitional justice, transitional constitutionalism and constitutional culture”. In: Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory*, Cheltenham. Edward Elgar, 2018, pp. 372–394. Available online: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Jacobsohn-Comparative_Constitutional_Theory_19-chapter19forts.pdf [10.05.2023].

only nine people were indicted and three sentenced, most often due to a fault in legal reasoning: an approach proposed by Hungary (i.e. the treatment of communist atrocities as crimes against humanity) was criticised by the ECtHR in *Korebely v Hungary*.³¹⁵

In addition to prosecutions, another legal institution tasked with dealing with the communist past was the Mécs parliamentary commission (from the name of its chair, Imre Mécs), which was formed in 2002 ‘to investigate the secret service connections of all ministers and undersecretaries since the 1990 elections,’ which, while promoted as a significant element of transparency and quality, was another instrument of memory politics established by the socialist government to show that all post-1989 governments had former collaborators in their midst. Followed by protests by the opposition members, its operation was ultimately declared unconstitutional.³¹⁶

Following the adoption of the new constitution, the decommunisation process was taken to another level, as the above provisions regarding the statute of limitations allowed the authorities to prosecute the former regime’s officials. Known as *Lex Biszku*, after Béla Biszku, the Minister of Interior in 1957–1961, who was the only individual charged under it, it entered into force in 2012, adopting a new definition of crimes against humanity based on the one from the Nuremberg Statute, thus allowing the Hungarian judicial system to prosecute their perpetrators, and introducing the category of communist crimes, which were not time-barred.³¹⁷ Although he was sentenced in the lower level court under the new law, the legal process did not run its course until the end as Biszku died during the appellate process.³¹⁸ Still, it needs to be noticed that, while overall ineffective due to its limited impact on the society, Hungary’s decommunisation measures provided some access to justice for the victims of the previous regime, which may be perceived as positive, albeit only on a symbolic level.

Significantly, decommunisation affected not only people but also public spaces, with the first removals of monuments (many of which were transported to a museum outside Budapest specially created for that purpose) and changes of street names taking place in the immediate aftermath of the 1989 transition. These processes accelerated during the period of FIDESZ’s rule, especially during Orbán’s second administration. While the first saw the opening of the House of Terror, a museum dedicated to communist repression, with an exhibition oversimplifying historical issues and making direct links between the Nazi and communist times,³¹⁹ decommunisation politics intensified after the 2010 electoral victory, with particular focus on Budapest, which saw some changes to street names, the erection of various new, often controversial monuments, as well as the reconfiguration of Kossuth Square in front of the Parliament building, considered the heart of Hungarian identity by the government. Imre Nagy’s monument was removed to take it to another location under the pretext of returning it to its pre-war shape (while a hero Prime Minister during the 1956 Revolution to many, a communist could not remain memorialised in a place of such importance to the current authorities). Meanwhile, the Red Army monument has remained in its prominent place in the capital, protected by increasingly close political ties with Russia, although its effect was somewhat diminished by monuments to Ronald Reagan and George H. W. Bush placed in the vicinity.³²⁰ Additionally, 25 February,

³¹⁵ Martin Faix, Ondrej Svacek, “Dealing with The Past: Prosecution and Punishment of Communist Crimes in Central and Eastern European Countries”. *Espaço Jurídico Journal of Law* 16(3), 2015, pp. 31–50. Available online: <https://ssrn.com/abstract=3106332> [10.05.2023].

³¹⁶ Kiss, 2006, pp. 936–937, see above note 302.

³¹⁷ Halmai, 2018, pp. 385–386, see above note 314.

³¹⁸ *Ibid.*

³¹⁹ János M. Rainer, “Contemporary History Discourses in Hungary after 1989”. *Institute of National Remembrance Review* 2, 2020, pp. 263–283. Available online: <https://doi.org/10.48261/INRR200208>.

³²⁰ Mirosław M. Sadowski, “City as a Locus of Collective Memory. Streets, Monuments and Human Rights”. *Zeitschrift für Rechtssoziologie – The German Journal of Law and Society* 40(1–2), 2020, pp. 209–240. Available online: <https://doi.org/10.1515/zfrs-2020-0008>.

the day on which one of the Hungarian leaders was deported to the USSR in 1947,³²¹ became celebrated as the Remembrance Day of the victims of communism.³²²

3.6. Other instances of instrumentalisation of memory

In addition to WWII and communism, other events and symbols are also points of reference in Hungarian memory politics, including some from the distant past. An example is St. Stephen's physical crown, 'a focal point in conservative Hungarian political thought'³²³ prominently displayed in the country's parliament since the turn of this century.³²⁴ Its status as a 'relic embodying the continuity and independence of the Hungarian state' was confirmed by the commemorative Act of 2000, emphasising the importance of the coronation of the king, later Saint Stephen, to the country's statehood.³²⁵

Additionally, the FIDESZ government enacted the quasi-memory laws to conduct a process of 'historicismisation' of the country's legal and administrative system in recent years: the Supreme Court became *Kúria*, referencing the highest Hungarian court in the years 1723–1949; administrative units came to be once again known as *járas*, returning to their pre-1980s name; and appellate courts were renamed *ítélőtábla*, as in the 19th century.³²⁶ Also, Orbán symbolically moved the Prime Minister's Offices to the Buda Castle, a former royal residence.³²⁷

This process of draping of the county with historical narratives can also be seen in the Act on the Rights of Minorities in Hungary, which, while granting extensive privileges to the minorities, including the preservation of their language, traditions, and culture, only recognises those who settled in Hungary before or during the times of Austria-Hungary – Armenians, Bulgarians, Croatians, Germans, Greeks, Poles, Roma, Romanians, Ruthenians, Serbs, Slovaks, Slovenians and Ukrainians.³²⁸

Other more contemporary events of great importance from the legal and memory perspective are the Trianon Treaty, the 1956 Revolution, and the 1989 transition to democracy. The 1920 Trianon Treaty, a peace agreement between the Allied and Associated Powers and Hungary after the First World War (WWI), has been described as a 'psychological shock to 20th- and 21st-century Hungarian historical awareness and national identity,' thought to have interrupted the 'natural' trajectory of modern Hungary's history.³²⁹ It resulted in the shrinking of the country's borders, meaning a loss of 71% of the territory and 64% of the population, with 3 million Hungarians left outside the country.³³⁰

While this matter was initially at the side-line of the political debate following the transition from communism, it was brought to the forefront after FIDESZ's 2010 electoral victory, as the first law adopted by the new parliament applied to the rights of the Hungarian diaspora in the neighbouring countries.³³¹ The 2010 bill first granted Hungarians living outside the country's present-day borders citizenship and then voting rights, a decision which the expatriates were long pressuring for, which allowed FIDESZ profit from this political

³²¹ "Hungary to Commemorate Victims of Communism on 25 February". In: *MTI-Hungary Today*. Available online: hungarytoday.hu/Hungary-to-commemorate-victims-of-communism-on-Feb-25/ [10.05.2023].

³²² Izsák-Somogyi, 2021, pp. 230, see above note 278.

³²³ Miklóssy and Nyssönen, 2018, pp. 327, see above note 266.

³²⁴ Rainer, 2010, pp. 271, see above note 319.

³²⁵ Miklós Könczöl, see above note 265, pp. 249–250.

³²⁶ Bán, 2020, pp. 169, see above note 247.

³²⁷ Desseffy and Nagy, 2021, pp. 41–97, see above note 253.

³²⁸ Bán, 2020, pp. 186–187, see above note 247.

³²⁹ Gábor Gyáni, *A Nation Divided by History and Memory Hungary in the Twentieth Century and Beyond*, Routledge, New York, 2021, p. 59. Available online: <https://doi.org/10.4324/9781003024934> [10.05.2023].

³³⁰ Gábor Gyáni, "The Memory of Trianon as a Political Instrument in Hungary Today". In: Aleksei Miller and Maria Lipman (eds), *The convolutions of historical politics*, Central European University Press, 2012, pp. 91–115. Available online: <http://doi.org/10.1515/9786155225468-005>.

³³¹ Gyáni, 2021, pp. 60, see above note 329.

capital.³³² Furthermore, the Orbán administration adopted the National Cooperation Proclamation, creating the System of National Cooperation, a plan to integrate Hungarians living outside the country. Additionally, 4 June (the day of signature of the Trianon Treaty) was designated as the National Remembrance Day.³³³ This recognition of the Trianon legacy also became a thorny issue in Hungary's bilateral relations, as in the case of the Romanian-Hungarian quandaries over the Szekler flag (that of the Hungarian minority in Transylvania), which, following Romanian restrictions on its public display, has become one of the flags always flying at the Hungarian Parliament since 2013.³³⁴

The second event of particular importance from the point of view of collective memory for Hungary is the 1956 Revolution. Remembered today in particular because of the terror ensuing after the Soviet occupation of the country, its memory was subjected to legal and political amnesia until 1989. It was the reburial of Imre Nagy and fellow martyrs in June of that year, which became one of the main symbolic events of the Hungarian transition.³³⁵ Following the free elections in 1990, the first act of parliament commemorated the Revolution as the War on Independence. However, it overlooked Imre Nagy.³³⁶ In its aftermath, the remembrance of the events of 1956 became heavily politicised – political infighting also surrounded the adoption of the 1996 parliamentary bill recognizing Imre Nagy as a national hero.³³⁷ Ten years later, violence broke out during the 50th anniversary of the Revolution celebrations in 2006,³³⁸ which FIDESZ turned into a mass demonstration against the socialist government. Interestingly, however, despite enshrining 23 October as one of the commemoration days in the new Basic Law, the Orbán administration's relationship with the legacy of the Revolution has been lukewarm during its period in power, which has allowed the opposition to the current government to use the collective memories of 1956 for their own memory politics.³³⁹ At the same time, the authorities are positioning the Revolution 'as a battle for national sovereignty', linking it with the country's 'current struggle against the EU'.³⁴⁰ Up to this day, however, 1956 remains a major moment in the Hungarian collective memory, with the new constitution's clear anti-communist stance (as noted above) granting it official recognition.

The final event which has been subjected to the politicisation of memory is that of the 1989 transition to democracy, the whole legacy of which came to be contested, reinterpreted and used for particular political goals in the mid-2000s, becoming one of the main reasons behind the Hungarian 'illiberal revolution'.³⁴¹ Despite the obvious magnitude of the transition to present-day Hungary, in the past years, its collective memories have remained mainly overshadowed by the legacy of the 1956 Revolution, all the more so that it symbolically also took place on 23 October; it was similarly politicised, in particular by FIDESZ when it was in opposition, and ultimately its collective memory was 'relegated to the background at best, and was denigrated at worst'.³⁴²

³³² Katalin Miklóssy, Heino Nyssönen, 2018, pp. 328, see above note 266.

³³³ Gyáni, 2021, pp. 60, see above note 329.

³³⁴ Katalin Miklóssy, Heino Nyssönen, 2018, pp. 328–329, see above note 266.

³³⁵ Gábor Gyáni, 2012, pp. 95–97, see above note 330.

³³⁶ Rainer, 2010, pp. 269, see above note 319.

³³⁷ Karl P. Benziger, *Imre Nagy, Martyr of the Nation. Contested History, Legitimacy, and Popular Memory in Hungary*. Lexington Books, Lanham Boulder New York Toronto Plymouth 2008, p. 118.

³³⁸ Gyáni, 2012, pp. 97–98, see above note 330.

³³⁹ Dominik Héjj, "Pamięć o powstaniu węgierskim przegrywa z bieżącą agendą polityczną". In: *Komentarze IES*. Available online: <https://ies.lublin.pl/komentarze/pamiec-o-powstaniu-wegierskim-z-1956-r-przegrywa-z-biezaca-agenda-polityczna/> [10.05.2023].

³⁴⁰ Nadkarni, 2020, pp. 199, see above note 251.

³⁴¹ Mirosław M. Sadowski, "Central Europe in the Search of (Lost) Identity. The Illiberal Swerve". In: Alexandra Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe. The CEE Yearbook 8*, Peter Lang, Berlin 2020, pp. 173–193. Available online: https://www.academia.edu/42244973/Central_Europe_in_the_Search_of_Lost_Identity_The_Illiberal_Swerve_in_Constitutional_Identities_in_Central_and_Eastern_Europe_The_CEE_Yearbook_vol_8_ed_A_Mercescu_Peter_Lang_2020_173_193 [10.05.2023].

³⁴² Anna Seleny, "Revolutionary Road 1956 and the Fracturing of Hungarian Historical Memory". In: Michael H. Bernhard and Jan Kubik (eds), *Twenty Years After Communism: The Politics of Memory and Commemoration*, New York: Oxford University Press, 2014, pp. 38–58. Available online: <https://doi.org/10.1093/acprof:oso/9780199375134.003.0003>.

3.7. Education and memory

Education was a topic of particular importance to all post-transition Hungarian governments, with changes to the national curriculum following the shifts in power, in particular after the 2010 elections, affecting both the range of available textbooks, with the creation of several new ones supervised by the ‘single national schoolbook publisher’, as well as their content, often being inaccurate and oversimplified, with the inclusion of specific controversial figures,³⁴³ all under the auspices of the highly influential Ministry of Human Capacities.³⁴⁴

Higher education was also affected by the new government’s policies, which also had an impact, albeit less direct, on the social perceptions of the past, as at the end of the 2010s state universities were transferred to private foundations, losing their autonomy (with government-appointed provosts) and a lack of nationwide standards for selecting lecturers. Also, the international Central European University was forced to move to Vienna from Budapest,³⁴⁵ following the FIDESZ government’s long campaign of discrediting the institution and its founder, George Soros, portraying him as ‘the mastermind of a plan to destroy Europe with liberal values and increased migration,’ against which the authorities were protecting Hungarians.³⁴⁶

The changes introduced under the Orbán administration also affected research institutions: the way cultural projects are funded was modified to grant more power to government-dependant institutions, including the National Research, Development and Innovation Office and the Hungarian Academy of Arts;³⁴⁷ previously-existing institutions, such as the Hungarian Academy of Sciences³⁴⁸ and the 1956 Institute, were overhauled, while new ones were established, such as the aforementioned Committee of National Remembrance, the Veritas Institute (which ultimately absorbed the 1956 Institute),³⁴⁹ the Institute of National Heritage, the Research Institute and Archives for the History of Regime Change,³⁵⁰ the Clio Institute, the Institute for Hungarian Studies, the Rubicon Institute and the Institute of St. Stephen, all of which are considered, as Pető notes, to be conducting biased, sub-standard research, one supporting the government’s memory policies.³⁵¹ Similarly, following the so-called ‘culture war of the summer of 2018’, the government succeeded in replacing the authorities of the leading Hungarian literary museum.³⁵²

3.8. Law and Memory in Hungary between Europe and Particularity

As this report shows, Hungarian memory politics are highly particular. Their perhaps most unique feature, as Bán already noted, is the fact that, at first glance, they seem to conform to the standards of the European institutions: the prohibition of the denial of genocide, the ban on totalitarian symbols and the protection of the rights of victims and of minorities all seem to be in line with the norms of the European Union (EU) and the Council of Europe, barring the prohibition of Holocaust denial,³⁵³ as well as the prohibition of political parties and associations spreading particular ideologies.³⁵⁴ However, more complex motivations lay behind

³⁴³ Bán, 2020, pp. 183–184., see above note 253.

³⁴⁴ Benazzo, 2017, pp. 205, see above note 264.

³⁴⁵ Pető, 2021, pp. 2, see above note 291.

³⁴⁶ Shaun Walker, ‘Classes move to Vienna as Hungary makes rare decision to oust university’. Available online: [theguardian.com/world/2019/nov/16/ceu-classes-move-to-vienna-orban-hungary-ousts-university](https://www.theguardian.com/world/2019/nov/16/ceu-classes-move-to-vienna-orban-hungary-ousts-university) [10.05.2023].

³⁴⁷ Sadowski, 2020, pp. 107–128, see above note 246.

³⁴⁸ Pető, 2021, pp. 2, see above note 291.

³⁴⁹ Bán, 2020, pp. 181–184., see above note 247.

³⁵⁰ Rainer, 2010, pp. 276–277, see above note 319.

³⁵¹ Pető, 2021, pp. 1, see above note 291.

³⁵² Nadkarni, 2020, pp. 189, see above note 251.

³⁵³ Bán, 2020, pp. 170–172., see above note 247.

³⁵⁴ Max Steur, ‘The Role of Judicial Craft in Improving Democracy’s Resilience: The Case of Party Bans in Czechia, Hungary and Slovakia’. *European Constitutional Law Review* 18(3), 2022, pp. 440–465. Available online: <https://doi.org/10.1017/S1574019622000256>.

other seemingly typical legal regulations, with a most often instrumental use of past events to further particular political goals. Whether looking into the now limited protections of the former communist victims and the prohibition of totalitarian symbols or the granting of the voting rights to Hungarian expatriates in neighbouring countries, the ‘opportunistic motives’ become visible: in the case of the former, the advancement of anti-communist legislation supports the translation of historical events into the current political debate, while in the case of the latter, the rejection of non-historical minorities places FIDESZ as ‘the defender of Christian Europe.’³⁵⁵

Looking more generally at the legal changes introduced by FIDESZ, in particular following the 2013 constitutional amendment, which further clarified their – and the country’s – new official narrative of the Hungarian past, it should be stated that they were repeatedly found to be incompatible with the EU values enshrined in Article 2 of the Treaty on European Union (TEU), which ultimately led to the European Commission to launch the so-called Article 7 TEU proceedings against the country, with the Hungarian government, however, remaining fixed in their political stance.³⁵⁶ While not directly linked to the questions of memory, the proceedings before the EU institutions may be regarded as a broader critique of Orbán’s illiberal politics, of which these are a vital part.

Another characteristic it that of the totality of memocracy in Hungary, the ruling on the basis of memory, employing memory politics in conjunction with and often as a way of supporting different illiberal measures. Under the Orbán government, the questions of memory seem to have penetrated every aspect of the country’s everyday life: from the political and legal to the cultural aspects, to education, to public spaces, the official narrative is entrenched and visible, attempting to shape the social perceptions of the past everywhere.

A different matter, also connected with the question of the totality of memory politics, is the structure of the country’s constitution as a *lieu de mémoire*, full of historical references, establishing not only the fundamental law (as its name would suggest) but also a whole list of state-sanctioned collective memories. Where most other countries limit such narratives to the preamble, the Hungarian constitution is a carrier of memory *par excellence*.

Another particularity of the Hungarian relationship with the law and memory is also visible in its Basic Law, as well as other laws and regulations: namely something that can be referred to as memory syncretism – while other countries also often address historical events from various eras in the present-day, the Hungarian government seems to draw a clear line in the nation’s collective memory from St. Stephen, to the Trianon Treaty and the inter-War era, to the times of communism and the 1956 Revolution, to the Orbán administration’s present-day problems with the EU. No collective memory is safe in this process – either those of the Holocaust or the communist atrocities – they are both bundled together into the narrative of a ‘double occupation’.

In turn, it may be acknowledged that the lustration measures adopted by the FIDESZ and previous governments, while often wide-ranging, remain well within the established framework of dealing with the communist past in Central Europe. These frequently became heavily politicised in other countries, changing the scope and severity according to who is in government at the given time. What is unique to Hungary, however, is that the other decommunisation process initiated in public spaces by the Orbán government focused primarily on Budapest, where most of the changes took place, unlike in other countries of the region, which conducted a more general cleansing, affecting the whole state in a similar manner.

Lastly, while taking them to an unprecedented scale, FIDESZ was by no means the first post-1989 government to become involved with memory politics. The 1990s battles over Imre Nagy’s place in the narrative of the 1956 Revolution, the never-ending saga of lustration and the propagation of the memory

³⁵⁵ Bán, 2020, pp. 170–172, see above note 247.

³⁵⁶ Gábor Halmai, “The Fundamental Law of Hungary and the European Constitutional Values”. *Saggi-DPCE* 39(2), 2019, pp. 1503–1524. Available online: <https://www.dpceonline.it/index.php/dpceonline/article/view/742> [10.05.2023].

of the Trianon Treaty as an event of major importance to present-day Hungary are matters that all political parties in government after the transition from communism are guilty of; however, it was Orbán's government that turned the power over social perceptions of the past into a major element of his political influence over Hungarian society.

4. CONCLUSIONS OF THE REPORT

Undoubtedly, both Poland and Hungary are active players in the area of historical memory and legal governance over the past. Their history has always prompted those in power to use – and abuse – the past for political gain and for a power-consolidating effect.

However, with the rise to power of populist and nationalistic forces, the tendency to support the one-sided, national heroism-oriented vision of the past became the official state policy in both Poland and Hungary. This presents the general observation that different 'waves' of memory laws and policies reflect different constitutional regimes and times of their implementation. Some come at the time of democratisation and coming to terms with the past (as in the case of post-War Germany), while others are characteristic of democratic backsliding (Poland and Hungary). In recent years, the move away from the standards of the European Convention on Human Rights in both states, the new constitution in Hungary, and the controversial memory laws in Poland have accompanied other adverse developments that today seem to leave Poland and Hungary on the edge of the European legal sphere.

Poland and Hungary share the matter of legal governance from the past, their focus on two core thematic areas and their still open wounds in national narratives about history: the tragic heritage of the Holocaust and the communist past. Thus, the commemoration of Nazi and communist crimes is the backbone of memory culture and memory laws in both Poland and Hungary.

Even though the two states (and legislators) use different tools to regulate these two areas of memory, it seems that the standard message behind these attempts is the same: to minimise narratives about the crimes committed by Poles and Hungarians during WWII and strengthen the remembrance of the communist past with strong emphasis on national victimhood. To a vast extent, the latter approach is understandable because of the lack of common knowledge outside the CEE zone about the nature and consequences of communist crimes. Still, measures taken in this respect need to remain in compliance with national and international legal norms.

This particular Polish-Hungarian unity in reading and understanding the past was seriously broken in recent months by completely different attitudes towards Putin and Russia's brutal aggression against Ukraine, with Hungary's isolated lack of support for the sanctions and condemnation of the aggression. It is yet an open question if this position means that Orbán started to accept Putin's vision of the past, particularly the role of the 'Soviet heroes of the Great Patriotic War'.³⁵⁷

The great importance of the past and history in public life means that Poland has always been open to legal mechanisms governing historical memory. However, in recent years under the PiS government, the struggle for historical truth or commemoration of victims and past atrocities has been primarily instrumentalised, becoming an excuse to try to legitimise actions intended to weaken, distort, or even destroy the essence of constitutional democracy. Furthermore, the official state historical policy has been focusing on self-exculpatory activities, including memory laws that can distort the understanding of the past and reinforce the belief in the historical heroism and martyrdom of the nation.

New memory laws by which the state has chosen to pursue historical policy far more boldly restrict the rights and freedoms of individuals than before and, most importantly, they do not respect the established international standards of human rights law regarding freedom of expression and its proportionate

³⁵⁷ Uladzislau Belavusau, "Mnemonic Constitutionalism and Rule of Law in Hungary and Russia". *Interdisciplinary Journal of Populism* 1(1), 2020, pp. 16–29. Available online: <https://ssrn.com/abstract=3768037> [10.05.2023].

limitations and the standards regarding a non-democratic past. The adequacy and proportionality of the mechanisms introduced into the objectives set by the Polish legislator are questionable.

The defective, poorly drafted regulations have further distanced Poland from European standards of protection of human rights, provoked unnecessary memory wars, and contributed to the polarisation of Polish public opinion. The rule of law backsliding aggravates the negative impact of the new memory laws on human rights. In particular, the politically captured Constitutional Tribunal no longer provides a centralised constitutional review and delays adjudicating in ‘sensitive’ cases that are especially important for respecting human rights in Poland because of political pressure. In some cases, the Constitutional Tribunal’s persistent and unjustified inaction to pass judgement on motions regarding memory laws leads to delays in the administration of justice by the domestic courts.

Additionally, the risk of abuse of memory laws for discriminatory legalism and harassment of anyone who speaks up in the public interest, including through criminal and civil Strategic Lawsuits Against Public Participation, has dramatically increased in the current political and legal context characterised by mnemonic and penal populism. Revanchist enactment and application of memory laws add insult to injury. Polish *democracy* is at a crossroads, reflecting, more generally, the fragile state of Polish – for the time being – ever-backsliding democracy.

Meanwhile, Hungary’s law and memory relationship is one between particularity and commonness. FIDESZ’s high level of involvement in memory politics sets the country apart from most other states, which, while constantly being involved with collective memory, do not do this on the same level as present-day Hungary. The country’s government uses the past effectively as an instrument on various levels.

Such an approach to matters of memory is clearly seen in the country’s constitution – written anew by FIDESZ, it links the Hungarian past with its present and future. Despite its adoption as recently as in 2011, it has already been rewritten several times, including in order to clarify certain memory narratives propagated by the government. On the other hand, the country’s lustration and other decommunisation processes were comparable to those of other countries in the region.

As for the collective memory of the Holocaust, while Hungary punishes denialism, it not only also bans the denial of other crimes, such as communist and various totalitarian and fascist symbols, it also actively whitewashes the involvement of its population and authorities in WWII atrocities, supporting the ‘double occupation’ narrative.

This constitutes a part of a more significant phenomenon, with Hungary’s relationship with the past centred around four main themes, lying at the basis of the propagated official narrative: that of the continuity of the Hungarian state through the ages, that of the continuous relevance of the Trianon Treaty, the importance of the 1956 Revolution as the foundation of modern Hungary, and the (current) obliviousness to the circumstances of the 1989 transition. These are all used instrumentally by the government, which translates into FIDESZ’s education policies, with many changes to the national curriculum and the creation and recreation of a myriad of research institutions now tasked with conducting studies supporting the government’s official narrative.

Lastly, it should be emphasised once again that, while on the surface it seems that Hungarian memory policies are in line with the standards of the EU and the Council of Europe, their closer analysis shows that they are not only rather distinct but also in breach of the established standards, which is part of the FIDESZ government’s greater strategy of pursuing illiberal policies, with power over collective memory being their central element.

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In accordance with the Party’s slogan in Orwell’s ‘1984’, whoever controls the past controls the future, and whoever controls the present is in command of the past.³⁵⁸ This seems to be true of all governing

³⁵⁸ George Orwell, *1984*, Secker & Warburg, 1949.

authorities which aim to impose official versions of history of their states and nations by spreading heroic myths and omitting or even negating difficult truths about former atrocities and wrongdoings committed very often against minorities or other nations. However, Orwellian reality remains fictitious, and even though the current ruling elites in Poland and Hungary have been very active in promoting the unilateral, often nationalist narratives about the past, including with the use of the law, these attempts have fortunately not been fully successful yet.

Recommendations:

1. The introduction of relevant amendments to the existing legislation in the area of memory and the past under the international standards of human rights protection, including with the freedom of speech and academic freedom standards developed by the European Court of Human Rights in order to avoid the intentional political misuse of memory laws (legislators);
2. The invitation of experts on memory laws and policies to the legislative process while shaping national legislation on this (legislators);
3. The organisation of training for judges, prosecutors, law enforcement officers and other legal professions on the legal aspects of dealing with the past (government, civic society);
4. The facilitation of academic exchange and joint research projects in the area of memory studies (legal, political, sociological and historical studies), in particular in the European legal and cultural sphere, and promotion of their research results (public and private funding agencies, civic society, academia);
5. The review of school curricula to include various perspectives on complex historical events (civic society, teachers);
6. The encouragement of free media to present and to fairly and objectively interpret controversial, complex historical events (civic society, media associations);
7. The monitoring of and public commenting on court cases and proceedings, as well as actions of prosecutors regarding the area of memory and history (academia, civic society);
8. The drafting of expert opinions and analyses of the existing memory law framework and its uses and abuses (academia, legal practitioners, civic society);
9. The monitoring of cases of historical denialism and negationism (especially appearing online) (civic society, Prosecutor's Office);
10. The facilitation of a broad public discussion on dealing with past issues, with the involvement of various players, including legislators, the civic society, academia, state institutions, national, representatives of ethnic and religious minorities and the judiciary (academia, civic society);
11. In the case of Poland, strengthening the Polish-Ukrainian reconciliation process (all players).

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