



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – SECOND PART

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EPILOGUE: MNEMONIC CONSTITUTIONALISM IN CENTRAL AND EASTERN EUROPE

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ABSTRACT: This *Article* summarizes the conclusions for the Special Section on memory laws that was published by *European Papers* in two parts over 2020, and explores the nexus between the emerging phenomenon of mnemonic constitutionalism and democratic backsliding. It looks at their interactions through the lens of the legal governance of history and the historical policy implemented by the Central and East European (CEE) States, with Poland and Hungary as the prime subjects of consideration and analysis. The mushrooming of memory laws in CEE throughout the 2010s, which went hand-in-hand with democratic backsliding in the region, is well documented in the Special Section. Memory laws (*lois mémorielles*) initially emerged as a specific phenomenon within criminal law in Western Europe almost three decades ago. However, the recent wave of memory laws in CEE transcends criminal legislation and has acquired constitutional significance, which this *Article* analyses under the heading of mnemonic constitutionalism. After setting out an analytical framework of mnemonic constitutionalism, the *Article* focuses on the two specific CEE examples of Hungary and Poland. In the last decade, both countries have promulgated either constitutional (in case of Hungary) or quasi-constitutional (in case of Poland) provisions that indicate a strong turn towards mnemonic constitutionalism. The *Article* concludes that Fidesz (in Hungary) and PiS (in Poland) regimes perceive mnemonic constitutionalism not only as an ideological basis for the governance of historical memory but also as an ontological foundation to justify “illiberal democracies”.

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I. INTRODUCTION: THE SPECIAL SECTION AND THE MELA PROJECT

This Special Section has abundantly testified to the mushrooming of memory governance in Central and Eastern Europe (CEE) throughout the 2010s, which ran parallel to democratic decline in the region.¹ Hungary and Poland currently stand at the crosshairs of EU institutions for the violation of the rule of law standards.² Beyond the EU, Russia has been identified as the main agent provoking mnemonic propaganda and the white-washing of Stalinism – an *enfant terrible* – also accused of stirring up major “memory wars” in the region.³ Such wars over historic narratives have led to the adoption of counteractive legislation in the Baltic States and Ukraine.⁴ While memory laws emerged in the Western European context almost three decades ago⁵ as a specific phenomenon in criminal law,⁶ the recent wave of memory laws in CEE transcend criminal legislation and have acquired a constitutional significance, which we frame as *mnemonic constitutionalism*. Yet before we proceed to outline our perspective on mnemonic constitutionalism, a few words have to be said about the wider research project behind this Special Section – an endeavour that led us to identify the tectonic constitutional metamorphoses at stake.

¹ For the review of recently-growing literature on memory laws, see U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *The Remarkable Rise of “Law and Historical Memory” in Europe: Theorizing Trends and Prospects in Recent Literature*, in *Journal of Law and Society*, 2020, p. 325 *et seq.*

² See *Articles* by Wyrzykowski (on Poland) in this second part of the Special Section, and by Könczöl and Kevevári (on Hungary) in the first part of the Special Section: M. WYRZYKOWSKI, *Waking up Demons. Bad Legislation for an Even Worse Case*, in *European Papers*, 2020, Vol. 5, No 3, www.europeanpapers.eu, p. 1171 *et seq.*; M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 161 *et seq.*

³ On the phenomenon of memory wars via memory laws, see: M. MÄLKSOO, *Memory Must Be Defended: Beyond the Politics of Mnemonical Security*, in *Security Dialogue*, 2015, p. 221 *et seq.*; N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; A. WÓJCIK, *Memory Laws and Security*, in *Verfassungsblog*, 5 January 2018, www.verfassungsblog.de; I. NUZOV, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review*, 2019 p. 231 *et seq.*

⁴ See *Articles* by Cherviatsova and Bruskina in the first part of this Special Section: A. CHERVIATSOVA, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 119 *et seq.*; N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 137 *et seq.*

⁵ U. BELAVUSAU, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in A. KOLTAY (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest: Wolters Kluwer, 2015, p. 537 *et seq.*

⁶ E. FRONZA, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: Springer, 2018.

In 2016, we launched a research consortium entitled “Memory Laws in European and Comparative Perspective” (MELA) supported by a European Commission research grant, HERA (Humanities in the European Research Area).⁷ The MELA Project was run by four research teams based in Italy (University of Bologna), the Netherlands (T.M.C. Asser Institute – University of Amsterdam), Poland (Polish Academy of Sciences), and the UK (Queen Mary University of London, the latter being represented by the Project Leader of our research consortium, Eric Heinze). During 2016-2019, the editors of this Special Section, Grażyna Baranowska and León Castellanos-Jankiewicz, were postdoctoral researchers in, respectively, the Polish and Dutch teams, which were led by the authors of this *Article* as Principal Investigators. Apart from several books and various articles, book chapters, policy documents and essays,⁸ the project has resulted in two doctoral theses,⁹ the compilation of the first-ever database of memory laws,¹⁰ and a Framework Declaration on Law and Historical Memory.¹¹ The Declaration summarizes the best practices developed by the MELA Project over the course of three years and recommends modes for the legal governance of history that tend to be less detrimental to fundamental rights.¹² In 2018, the Project also delivered its first special journal issue for MELA, focusing on memory laws and policies mostly in Western Europe and Latin America.¹³ In contrast, this second Special Section focuses on memory laws in the post-communist space.

Following the introductory explanation of the research background preceding this Special Section, the second part of this *Article* will detail our understanding of mnemonic constitutionalism and the wider analytical framework of *mnemocracy*. The third part will

⁷ For materials and the wider output of the project, see the MELA webpage: www.melaproject.org.

⁸ See in particular, U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017; special issue of the *Res Publica Nowa*, Pamięć i bezpieczeństwo, 2017 (in Polish); E. FRONZA, *Memory and Punishment*, cit.; E. FRONZA, P. CAROLI (eds), *Special Issue on Memory Laws*, in *Diritto Penale Contemporaneo*, 2018, p. 114 *et seq.* See also the 2017 joint Asser Institute – Verfassungsblog symposium, “Memory Laws” with thirteen contributions: *Memory Laws*, in *Verfassungsblog*, www.verfassungsblog.de. See also a policy brief regarding street-renaming: A. WÓJCIK, U. BELAVUSAU, *Street Renaming after a Change of Political Regime: Legal and Policy Recommendations from Human Rights Perspective*, T.M.C. Asser Institute for International and European Law, Policy Brief, 2018, papers.ssrn.com.

⁹ See doctoral dissertations by Marina Bán (M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, defended in October 2020) and Anna Wójcik (A. WÓJCIK, *Polish Laws Affecting Historical Memory from the Human Rights Perspective*, expecting her defense in spring 2021). The manuscripts of both unpublished dissertations are with the Authors.

¹⁰ For the first database of memory laws covering all EU Member States and some non-EU countries, along with major EU legislation in the area and the jurisprudence of the European Court of Human Rights and United Nations Human Rights Committee, see the legal database on the MELA website, www.melaproject.org.

¹¹ For the Declaration of the MELA Project with the accompanying explanatory comments, see the MELA website: www.melaproject.org.

¹² *Ibid.*

¹³ See the special journal issue guest edited by N. KEBRANIAN, P. PARIGI, *Memory Laws in European and Comparative Perspective*, in *Journal of Comparative Law*, 2018, p. 13 *et seq.*

focus on mnemonic constitutionalism in Hungary, while the fourth will unpack the idea of mnemonic constitutionalism in Poland, which has unfolded without a change in the actual constitutional text. In our conclusions, we will summarise the repercussions that mnemonic constitutionalism has for the rise of populism and the decline of the rule of law in the region. In doing so, we will also touch on Lithuanian, Russian (recently expanding its mnemonic constitutionalism in the summer 2020 via a referendum) and Ukrainian examples.

II. MNEMONIC CONSTITUTIONALISM AND A WIDER CHALLENGE OF MNEMOCRACY

One can be critical or positive about the the *naïveté* embedded in memory laws adopted in France, Germany and elsewhere in Western Europe during the 1990s.¹⁴ Their justification, especially with regard to the criminalisation of Holocaust denial, was strongly embedded into the paradigm of militant democracy, i.e. an ethical political outlook that a liberal democracy should have teeth capable of defending itself even if that requires biting through the core of freedom of speech, assembly and other fundamental rights.¹⁵ It was, therefore, undoubtedly a rather noble paradigm that guided their legislators at the time, leading to the adoption of so-called *self-inculpatory* memory laws, in the words of Eric Heinze.¹⁶ Central to that paradigm was the dignity of Holocaust victims. The recent wave of mnemonic constitutionalism in CEE, to the contrary, underlines the victimhood of national States and majority nations. Such – in contrast, *self-exculpatory* – memory laws serve as both a shield and a sword in the context of memory wars unfolding in the region.¹⁷

¹⁴ For the purpose of this *Article*, we define memory laws as various forms of legal measures governing history, including punitive measures against the denial of historical atrocities and bans prohibiting the use of totalitarian symbols of the past. Our broad notion of memory laws also covers legal acts recognising and commemorating historical events and figures, including laws establishing state holidays, celebrations and dates of mourning, street (re-)naming and monument installations in honour of historical figures, status and access to historical archives, as well as regulations regarding museums and school curricula on historical subjects. See U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 1 *et seq.*

¹⁵ See A. SAJÓ (ed.), *Militant Democracy*, Utrecht: Eleven International, 2004; U. BELAVUSAU, *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)*, in *Israel Law Review*, 2014, p. 27 *et seq.*

¹⁶ See E. HEINZE, *Theorizing Law and Historical Memory*, in *Journal of Comparative Law*, 2018, p. 1 *et seq.* Regarding self-inculpatory and self-exculpatory memory laws, see a fascinating intellectual exchange between Antoon de Baets and Eric Heinze: E. HEINZE, *Should Governments Butt Out of History?*, in *Free Speech Debate*, 12 March 2019, freespeechdebate.com; A. DE BAETS, *Criminal Regimes are Never Soft on History*, in *Free Speech Debate*, 23 December 2019, freespeechdebate.com.

¹⁷ See also G. SOROKA, F. KRAWATZEK, *Nationalism, Democracy and Memory Laws*, in *Journal of Democracy*, 2019, pp. 157-160, who refer to self-inculpatory and self-exculpatory memory laws as, respectively, prescriptive and proscriptive, similarly focusing on the intentions and motivations of the States introducing such regulations.

In our *Article*, we focus on the paradigmatic case of two CEE countries, Hungary and Poland, that have been on the radar of European institutions as well as numerous academic and civil society organisations, testifying to a rule of law crisis.¹⁸ The rule of law backsliding in Hungary and Poland has followed the rise of nationalist memory politics and so-called “memory wars” in CEE.¹⁹ The populist politics of memory have articulated themselves in what we address as “mnemonic constitutionalism”, that is, the elevation of the legal governance of historical memory to the constitutional level.²⁰ While only the Hungarian case can be *stricto sensu* attributed to the introduction of the new Basic Law, the deterioration of democracy in both Hungary and Poland have been intertwined with an explicitly populist “commemorative law-making”.²¹ We therefore define “mnemonic constitutionalism” as a form of legal governance that encompasses, yet transcends, pure measures against genocide denialism and statutory memory laws. The heading of constitutionalism replicates the idea that government can and should be limited in its powers, and that its authority or legitimacy depends on its observing these limitations.²² Mnemonic constitutionalism in this regard places the authority and legitimacy of a State into the boundaries of a certain historical paradigm, whereas current and future attitudes and behaviours of state actors derive from and are limited by moral lessons of the past. Within mnemonic constitutionalism, the historical past becomes the foundation of collective identity prescribed by either the basic law itself, or by legal provisions which traditionally shape the substructure of national constitutional law such as, for example, citizenship laws or statutes shaping collective identities by virtue of imposing specific understandings of historical past.

Without consciously or explicitly identifying this area of law-making and without necessarily changing the constitutional text itself, the new populist regimes in CEE clearly perceive this invisible mnemonic constitution as a certain ontological foundation for their “illiberal democracies” and as a basis for an entire governance of historical memory, to justify their current political choices. It is obvious that various forms of

¹⁸ See W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019; G. HALMAI, *The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Constitutionalism Under Stress: Essays in Honour of Wojciech Sadurski*, Oxford: Oxford University Press, 2020.

¹⁹ N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; I. NUZOV, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review*, 2019, p. 231 *et seq.* See also M. BĂN, *Memory Wars of Commercial Worth: The Legal Status of the Red Star in Hungary*, in *Verfassungsblog*, 11 January 2018, www.verfassungsblog.de.

²⁰ U. BELAVUSAU, *Final Thoughts on Mnemonic Constitutionalism*, in *Verfassungsblog*, 15 January 2018, www.verfassungsblog.de.

²¹ M. BUCHOLC, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, in *Hague Journal of Rule of Law*, 2018, p. 85 *et seq.*

²² See W. WALUCHOW, *Constitutionalism*, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, 2018, plato.stanford.edu.

mnemonic constitutionalism existed before the current epoch characterised by the decline in the rule of law. It certainly has not been uncommon for constitutional preambles, for example, to briefly narrate historical milestones of the evolution of a state, especially in the context of post-colonial or transitional democracies distancing themselves from their dependent or totalitarian past via new constitutional texts.²³ Likewise, certain liberal democratic regimes without a formal constitution can be characterised by a strong – albeit invisible – mnemonic constitution, as for example in Israel with its idea of a historic State and religious community attributed to a certain territory and fortified by a powerful “law of return”, that is, a specific citizenship paradigm privileging Jews as citizens of a “reborn” state.²⁴ Furthermore, the way citizenship – a central subject of constitutional texts – is distributed in many States can be highly dependent on historical lineage.²⁵ From the way we teach history in schools to the way we impose national holidays, street names and monuments,²⁶ this mnemonic constitutionalism surrounds us from childhood and shapes our identities through various legal measures, a fraction of which are criminal prohibitions. The majority of such regulations amount to the soft governance of memory. Yet the recent threat of mnemonic constitutionalism, which we also address as *mnemocracy*, manifests itself in the outright populist abuse of historical narratives to justify a new regime that is hostile to the rule of law standards of equality, judicial independence, and the pluralism of opinions.²⁷ In this regard, Hungary and Poland stand as vivid examples, even though the manifestations of this mnemonic constitutionalism, and the subsequent populism around this legal governance of historical memory, somewhat differ.

²³ See H. NYSSÖNEN, J. METSÄLÄ, *Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions*, in *European Politics and Society*, 2019, p. 323. According to the Authors, constitutional preambles often “highlight[s] historical events, canonise[s] an interpretation of the past as the basis of the whole legal and political system”.

²⁴ D. ERNST, *The Meaning and Liberal Justification of Israel's Law of Return*, in *Israel Law Review*, 2009, p. 564 *et seq.*

²⁵ In this regard, it is remarkable that Spanish and Portuguese naturalisation laws grant citizenship to the descendants of the Sephardic Jews expelled in the Medieval period. See H.U. JESSURUN D'OLIVEIRA, *Iberian Nationality Legislation and Sephardic Jews: “With Due Regard to European Law?”*, in *European Constitutional Law Review*, 2015, p. 13 *et seq.* See also Y. HARPAZ, *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton: Princeton University Press, 2019; M. GANCHER, *Hungarians Outside Hungary – The Twisted Story of Dual Citizenship in Central and Eastern Europe*, in *Verfassungsblog*, 8 October 2014, www.verfassungsblog.de.

²⁶ The 2020-wave of “Black Lives Matter” in the USA and Europe, for example, has manifested in a controversial monument iconoclasm demanding to revisit certain historical understandings in public space. See L. ZANNIER (OSCE High Commissioner on National Minorities), *Open Letter on Symbols in Public Spaces*, 16 June 2020, www.osce.org.

²⁷ See U. BELAVUSAU, *Final Thoughts on Mnemonic Constitutionalism*, *cit.* For the term “mnemocracy” (or “memocracy”), we would like to thank Maria Mälksoo, with whom we had numerous intellectual exchanges about this subject in the recent years and who first coined this term for our analytical framework to study the migration and distortion of constitutional concepts in Europe. This analytical framework may be particularly suitable for exploring the debate on militant democracy to new conceptual and empirical grounds.

The numerous accounts in this Special Section have illustrated a growing density in the network of memory laws, policies, state commissions and institutes of national remembrance, leading to the effective rise of mnemocracy in CEE. The relevant legislation, adjudication and policies of mnemocracy can be classified into five clusters: 1) constitutional provisions prescribing certain understandings of the past and distributing guilt for past atrocities; 2) punitive measures of memory governance (imposing criminal responsibility for the denial of Nazi or communist crimes, or prescribing the “correct” attribution of atrocities to a singular perpetrator); 3) non-punitive measures of memory governance (e.g., memory laws and policies prescribing re-naming of streets or the place of historical monuments); 4) quasi-memory laws (e.g., citizenship laws that permit naturalisation based on historical belonging); and 5) judgments of national tribunals relating to the (legitimate) remembrance of the past.

While *stricto sensu* only the first group of this mnemocratic governance is based on constitutional provisions, all five elements, especially citizenship policies,²⁸ can be seen as being part and parcel of mnemonic constitutionalism. All five groups have been applied to secure a politically preferable version of the past and prescription of an ontological foundation of respective CEE societies. Such foundation mirrors an idealised constitutional understanding of a transitional nation seeking to postulate its self-exculpation from the atrocities committed by the dystopian regimes of the 20th century. Yet, as this Special Section has demonstrated, such militant memory laws and policies are equally capable of eroding the foundational elements of liberal democracy, weakening constitutional orders and adding fuel to populist tendencies. For the sake of our Epilogue in the Special Section, we have opted to focus on Hungary and Poland, as both these countries testify to the remarkable rise of mnemonic constitutionalism.²⁹

III. MNEMONIC CONSTITUTIONALISM IN HUNGARY

Pre-1949 Hungarian constitutionalism looked somewhat similar to the British organisation of the state – both emerged from collected foundational documents and dispensed

²⁸ In Hungarian context, see, for example, 2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról. This law grants a fast-track access to citizenship to those with Hungarian ancestry, especially aimed at Hungarian minorities living in the “Trianon territories”. For a wider analysis of how citizenship laws often perform the function of quasi-memory laws, in particular in Hungary, France, Spain, Portugal and Ukraine, see the doctoral dissertation by M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit. See also C. JOPPKE, *The Instrumental Turn of Citizenship*, in *Journal of Ethnic and Migration Studies*, 2019, p. 858 *et seq.*

²⁹ This account should be also read in conjunction with the *Articles* by Könczöl and Kevevári (on Hungary) in the first part of the Special Section (M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, cit.) and Wyrzykowski (on Poland) in this second part (M. WYRZYKOWSKI, *Waking Up Demons*, cit.). Both respective accounts testify to the rise of mnemocracy in these two CEE countries. Furthermore, the current political regimes in Hungary and Poland tend to mimic their socio-legal trajectories regarding the ongoing erosion of their liberal democracies.

with a single constitutional charter. However, the concept of “historical constitution” in Hungary was also connected with the medieval doctrine of the “Holy Crown”. This doctrinal mythology stressed both the symbolic and actual role of the Holy Crown in guarding the independence of Hungary.³⁰ After World War II, in 1949, Hungary adopted its constitutional text, which was promulgated by the communist regime and, unlike in most other CEE transitional democracies, existed (albeit with substantial amendments that have transformed it into a democratically spirited constitution) until the 21st century. After the victory of Fidesz in the 2010 elections, the government for the first time received a parliamentary supermajority, sufficient to immediately initiate the drafting of a new constitution. The preamble of the new Hungarian Fundamental Law (2010) is truly unique as compared to the constitutional preambles of other EU Member States with written constitutions (which are currently twenty-two out of twenty-seven in number) in terms of the scope of historical depth and references. The new constitutional text starts with the National Avowal, which refers to King Saint Stephen I as founder of the Hungarian state, proclaims Christianity as historically central “in the preservation of nationhood”³¹ and, most importantly, reinforces the narrative of Hungarian victimhood following the post-World War I Treaty of Trianon. This contradictory account of national division helps justify Hungary’s role in the protection of “Hungarians beyond the borders”.³² In addition, the Avowal praises the “achievements of the historical constitution” and the Holy Crown as symbols of the independence and continuity of the Hungarian State, and condemns the Nazi and communist occupations of the country. It also claims that the State lost its self-determination on 19 March 1944, the date on which Hungary’s German occupation began, and regained it after the fall of the communist dictatorship on 2 May 1990, the day of assembly of the first freely elected Hungarian parliament. This characterizes the 1949 constitution of Hungary as unlawful and as the basis for “tyrannical rule”. As aptly explained by Miklós Könczöl, by adopting a detailed constitution with a preamble, rather than merely a charter of rights, the constitution framers made it possible for themselves to take ideological positions on a number of controversial questions related to the past.³³ Gábor Halmai further exposed how the preamble rec-

³⁰ See the doctoral dissertation by M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit. On the doctrine of the Holy Crown, see K. LANE SCHEPPELE, *The Constitutional Basis of Hungarian Conservatism*, in *East European Constitutional Review*, 2000, p. 51 *et seq.*

³¹ Seventh Amendment to the Fundamental Law (September 2018). This amendment references the struggles of the Hungarian State to keep its independence and fight for its existence throughout several invasions and revolutions, including the Turkish wars and the revolutions of 1848-49 and 1956. Since 2018, the Seventh Amendment has provided for an obligation of state authorities to protect Hungary’s “self-identity” and Christian culture.

³² See M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit.

³³ See M. KÖNCZÖL, *Dealing with the Past in and Around the Fundamental Law of Hungary*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 246 *et seq.*

ognizes only the positive pre-1944 years of Hungarian history, not the acts and failures that give cause for self-criticism:

“[The] Constitution failed to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents during World War II, but also between 1920 and 1944 by extreme right-wing “free troops” and the security forces of the independent Hungarian state, not only against “the Hungarian nation and its citizens” but also against other peoples. Nor does it acknowledge that the continuity of Hungary’s statehood was not interrupted: restrictions were placed on government agencies’ freedom to act, but the government was not shut down”.³⁴

In April 2013, the Hungarian government also adopted Art. U as a constitutional provision, stating *inter alia* that the pre-1989 Communist Party (the Hungarian Socialist Workers’ Party) and its satellite organisations that supported the communist ideology were “criminal organisations” whose leaders carry a liability that is “without a statute of limitations”. Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including: destroying post-World War II Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; “devastating the value of European civilization”; and liability for all criminal acts that were committed with political animus and which have not been prosecuted by the criminal justice system for purely political motives.³⁵ As was further concluded by Gábor Halmai with regard to the Fundamental Law of Hungary, “the current Hungarian government’s attitude towards public discussion of history [is] similar to that of the Polish one, [as it] reflects the position of these illiberal populist regimes towards the rights of their citizens”.³⁶

IV. MNEMONIC CONSTITUTIONALISM IN POLAND

When confronted with a recent rise of right-wing politics in CEE, in particular in Hungary and Poland, the core question inevitably arises: how is it possible for this type of populist, xenophobic government to continue to hold power and repeatedly win parliamentary elections? As observed by Patterson and Monroe: “For the community to construct self-image means choosing interpretations of specific events from the past in a way that will allow it to create a coherent and understandable vision of their own identity. By

³⁴ G. HALMAI, *Memory Politics in Hungary: Political Justice Without Rule of Law*, in *Verfassungsblog*, 10 January 2018, www.verfassungsblog.de.

³⁵ *Ibid.*

³⁶ *Ibid.*

shaping a specific story about the past, the community can also refer to the presently surrounding events and design its future".³⁷

In this respect, Poland and Hungary constitute a suitable case study to further explore the phenomenon of mnemonic constitutionalism and memory laws. In fact, some commentators see the very craving for a positive, proud self-image, unfettered by recent norms of belonging to the universe of liberal democracies, as the main force that propelled the Prawo i Sprawiedliwość (Law and Justice) – PiS party to power in Poland in 2015 and which keeps it there despite what would normally be seen as unacceptable behaviour.³⁸

The development of a specific historical narrative and an official historical policy that we have witnessed over the past few years in Poland has occurred together with the creation of a vision of a grand country and nation; a vision of proud sovereignty and moral superiority over others who are almost invariably portrayed as alien and hostile. Over time, efforts to promote this vision have created an environment in which a large portion of the public has found palatable the words uttered loudly and emphatically by Poland's president during one of his election rallies in response to the criticism of foreign experts regarding the changes forced through by the ruling party and which have demolished the independent judicial system in Poland.³⁹ Xenophobic tones have again resurfaced in the rhetoric of the ruling camp in Poland, suggesting that the country's sovereignty is once more under attack by "alien forces" – this time by EU institutions and advisory bodies such as the Venice Commission.⁴⁰ These messages, designed to justify the need to defend Poland and its people against their "enemies", have become one of the means of convincing Poles to accept the unlawful actions taken by those in power. There is one other distinctive aspect to note about Poland: one of the most common justifications for the assault on the judiciary is that judges need to undergo "decommunization". With no factual

³⁷ M. PATTERSON, K. RENWICH MONROE, *Narrative in Political Science*, in *Annual Review of Political Science*, 1998, pp. 315-316.

³⁸ For a detailed account of the most recent manifestations of such behaviour, see L. PECH, R. DANIEL KELEMEN, *If You Think the U.S. is Having a Constitutional Crisis, You Should See What is Happening in Poland*, in *Washington Post*, 25 January 2020, www.washingtonpost.com.

³⁹ As reported in the Rule of Law blog on President Duda's remarks: "On 17 January, he claimed that the European Union's resistance to the courts being taken over by politicians was a threat to Poland's sovereignty. He said: 'Today, they are pulling out all the stops to deprive us of our right to have an honest and good justice system, to fix it. We will not let others decide for us. We Poles have the right to decide about our own country, our own laws – that is why we fought for democracy. They will not come here and impose on us in foreign languages the political system we are supposed to have in Poland, or tell us how Polish matters are to be handled. Yes, we are in the European Union, and we are very happy that this is so, but first and foremost we are in Poland'. D. FLIS, *Duda Shocks with Hate Speech Attack on Polish Judges*, in *Rule of Law*, 24 January 2020, www.ruleoflaw.pl.

⁴⁰ The official statement by the Venice Commission issued in January 2020 was treated by the Polish authorities as "a private opinion" of the monitoring body. See the official document: Venice Commission, Poland – Urgent Joint Opinion on the amendments to the Law on organization on the Common Courts, the Law on the Supreme Court and other Laws, 16 June 2020, www.venice.coe.int.

grounding, it is claimed that judges who were appointed or started their careers when the communist regime was in place must be removed from their benches.⁴¹ In addition, several memory laws have been adopted in Poland in recent years, adding fuel to the vetting and decommunization narrative.⁴² As noted by Anna Wójcik, legislation of the kind introduced in Poland, notably the Law of 16 December 2016 to amend the law on social security of the former employees of the various branches of the communist state-controlled organs,⁴³ has little to do with genuine mechanisms of transitional justice and should rather be understood as purely political instruments.⁴⁴

The calculated and political motivations of the current Polish ruling elites, masked by an otherwise legitimate call for the protection of historical truth, has also been used to promulgate regulations serving to create an image of Poland and the nation as saviours and never as perpetrators of past atrocities.⁴⁵ The Polish legislation introduced in January 2018 (and partly repealed in June 2018) penalising the defamation of the Polish State and nation through claims of its responsibility or co-responsibility for crimes committed by German Nazis in occupied Poland, triggered a massive crisis in Polish–Israeli and Polish–US relations, and was criticized by numerous experts and institutions as infringing on individual rights and freedoms.⁴⁶ Additionally, the legislative process to

⁴¹ For detailed factual data concerning the claims of the government, see: Iustitia Judges Association, *The Arguments of Polish Judges Association Iustitia Related to the PM Mateusz Morawiecki Statements at the Meeting with Foreign Journalists on January 10th 2018*, in *Iustitia*, 27 January 2018, www.iustitia.pl.

⁴² U. BELAVUSAU, *The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation?*, in *Security and Human Rights*, 2019, p. 36 *et seq.*

⁴³ These controversial laws include: 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 [Law of 1 April 2016 on prohibiting the propagation of communism or other totalitarian regime through names of buildings, objects, and public service devices] Dz. U. 2016 no. 744; 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 [Law of 16 December 2016 to amend the Law on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families] Dz.U. 2016 poz. 2270.

⁴⁴ For a detailed account of these laws, see A. WÓJCIK, *Reckoning with Communist Past in Poland Thirty Years After Regime Change and European Convention on Human Rights*, in *Polish Yearbook of International Law*, 2019, p.135 *et seq.*

⁴⁵ U. BELAVUSAU, *Rule of Law in Poland: Memory Politics and Belarusian Minority*, in *Verfassungsblog*, 21 November 2017, www.verfassungsblog.de. See also A. WÓJCIK, U. BELAVUSAU, *Posponer los Cambios de Nombre de las Calles Tras la Transición de la Democracia: Lecciones Legales de Polonia*, in J. GUIXÉ, I. CORONMINES, J. ALONSO CARBALLE, R. CONESA SÁNCHEZ (eds), *Diez Años de Leyes y Políticas de Memoria (2007–2017)*, Madrid: Ediciones La Catarata, 2019, p. 27 *et seq.*

⁴⁶ For a detailed account of Polish memory law (often erroneously – as we argue elsewhere – referred to as the “Holocaust Bill” or “Holocaust Law”) see: A. GLISZCZYŃSKA-GRABIAS, *Deployments of Memory with the Tools of*

promulgate this law left much to be desired. Although this law remains dormant for all practical purposes, which only underscores the senselessness of its introduction, there are regulations in Poland which, if interpreted in a particular manner by courts, pose a realistic threat to freedom of speech and freedom of scientific research. We are referring here to regulations governing the protection of so-called “personal goods”, which are occasionally abused to convince a court that certain historical statements may hurt a person’s “sense of Polish national pride”. However:

“[W]hat really is at stake here is the risk of whitewashing the uncomfortable truths. Even greater risk, however, arises from the temptation of the governments to leave the legal battles over history to individuals or organisations close to the ruling circles. This way the governments may avoid entering into diplomatic disputes that can turn into open international conflicts. This in turn can even open space for potential politically inspired actions restricting free speech (or at least causing a ‘chilling effect’), supported and, sometimes, informally directed by the government, while formally being still just individually pursued claims”.⁴⁷

The fact that PiS is consistently relying on laws to impose its narrative in the areas of memory and history is telling. The authority of the law has been exploited to put a stamp of credibility on one particular vision of how the past should be remembered and interpreted, setting up a specific form of mnemonic constitutionalism, even without amending or changing the constitutional text *per se*, as in the Hungarian case. Poland’s rulers are also attempting to use “the law” in much the same manner as Hungary’s own to eliminate the tripartite division of power and negate the principles of liberal democracy and constitutional order. Unlike its Hungarian counterpart, the Polish strain of mnemonic constitutionalism relies heavily on an institution called the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN), which promotes and implements various memory laws.⁴⁸ One telling fact is that the Institute – effectively the offspring of PiS electoral patriotism and guardian of the ontological security of its voters – enjoys a budget several times higher than the Polish Academy of Sciences.⁴⁹ The apparent (or even false) nature of this mnemocracy – constitutionalizing historical narratives – is obvious to lawyers but not to the general public, and this is why this abuse of law and its authority must be categorically con-

Law – the Case of Poland, in *Review of Central and East European Law*, 2019, p. 464 et seq.; U. BELAVUSAU, *The Rise of Memory Laws in Poland*, cit.; U. BELAVUSAU, A. WÓJCIK, *La criminalisation de l’Expression historique en Pologne: la loi mémorielle de 2018*, in *Archives de politique criminelle*, 2018, p. 175 et seq.

⁴⁷ M. JABŁOŃSKI, A. GLISZCZYŃSKA-GRABIAS, *Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?*, in *Verfassungsblog*, 12 October 2019, www.verfassungsblog.de.

⁴⁸ Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu, in Polish (hereinafter IPN).

⁴⁹ See H. ORZECHOWSKI, *IPN – Ukochane Dziecko PiS. Rekordowe Finansowanie z Budżetu*, in *Gazeta Wyborcza*, 24 February 2020, wyborcza.pl.

demned as a dangerous drive to quash all reliable and honest legal analysis, and as an attempt to legitimise arbitrary legal interpretations of history.⁵⁰

V. CONCLUSIONS

“A Pole and a Hungarian are two brothers, both up to share drinks and a sword”.⁵¹ It is hard to read the aforementioned proverb today without a sad sense of irony. The romanticized Polish-Hungarian amity and a certain resemblance in mentality of the nations, to which this saying from the 18th century refers, manifests itself today in a similar dismantling of the rule of law, the trampling over fundamental democratic values, an undermining of EU law and principles, and an uncritical attitude towards the history of one’s own state and nation. In the latter context, this convergence also applies to the instrumental treatment of the past as a tool to secure and sanction only a “righteous”, state-sponsored version where “we” could only be the victims of (or rescuers for) others, and never perpetrators of atrocities and injustices.

In using and abusing history for the sake of building a “new constitutional order”, Poland and Hungary undoubtedly differ in some respects. First of all, it should be emphasised that in Poland, mnemonic constitutionalism has proceeded without a fully-fledged change or novelisation of the constitutional text *per se*. Instead, a number of “minor” legal steps and legislative initiatives have occurred there. Nonetheless, the Polish mode of constitutionalizing the historical past via controversial memory laws involving adjudication of the Constitutional Court⁵² and a powerful Institute of National Remembrance,⁵³ with its quasi-parliamentary functions, has had the same effect as in Hungary, thereby reinforcing mnemocracy. However, the reaction of other States towards the legal governance of the past, including above all the United States and Israel, was more visible in the case of Poland. This was perhaps caused by historical implications regarding the fact that Polish memory laws referred directly to the Holocaust. Yet it seems that equally the administration and propaganda of the Hungarian government simply coped better with repelling criticism. In this context, however, the most disappointing development is probably the

⁵⁰ For examples of seemingly unbelievable abuses of law, see: L. PECH, P. WACHOWIEC, *1460 Days Later: Rule of Law in Poland R.I.P. (Part I and Part II)*, in *Verfassungsblog*, 13 and 15 January 2020, www.verfassungsblog.de.

⁵¹ This is a historic, self-praising saying that exists in both the Polish and Hungarian languages: *Lengyel, magyar – két jó barát, együtt harcol, s issza borát* (Hungarian); *Polak, Węgier, dwa bratanki, i do szabli, i do szklanki* (Polish).

⁵² See judgment of the Polish Constitutional Tribunal of 17 January 2019, case *K/18*. The Tribunal considered the provisions of the Polish memory law (Law from 26 January 2018 Amending the Law of 18 December 1998 on the Institute of National Remembrance), in particular with regard to “Ukrainian nationalists” in the context of the inter-war Polish history, to be incompatible with the principle of specificity of law derived from Art. 2 and the principle *lex retro non agit* derived from Art. 42, para. 1, of the Polish Constitution.

⁵³ On the role and quasi-parliamentary powers of the Institute, see doctoral dissertation by A. WÓJCIK, *Polish Laws Affecting Historical Memory from the Human Rights Perspective*, cit.

blind eye that the EU has turned to the rise of mnemocracy in Hungary and Poland. The degree to which the EU institutions can challenge the reinforcement of mnemonic constitutionalism in its Member States remains questionable, in particular regarding the rule of law mechanism of Art. 7 TEU. The uncertainty emerges primarily in light of the esoteric defence of “national identity [...] inherent in constitutional [...] self-government” afforded to Member States in the post-Lisbon set-up of Art. 4, para. 2, TEU. Yet the current reinforcement of such mnemonic constitutionalism in CEE clearly weakens attempts at building consensus within European historical narratives and accompanies the decline of democracy in both Hungary and Poland.

Other countries in the region have also been keen to translate historic mythologies and righteous self-images into their law and historical policy, including via international judicial matters. As this Special Section has demonstrated, this was the case, in particular, in Lithuania, which sought recognition before the European Court of Human Rights of the fact that the crime of genocide had been committed by the Soviets against the Lithuanian partisans.⁵⁴ Another vivid example of building up a mnemocracy is the case of Ukraine with its package of memory laws, comprehensively discussed in this Special Section by Alina Cherviatsova.⁵⁵ As noted by the Author: “to cope with the communist past and create a new pantheon of national heroes, Ukraine is re-writing its history, selectively choosing among the several memories those that can foster its national identity and cohesion. This is a controversial process which divided Ukraine’s society and resulted in so-called memory wars – a clash of the state-sponsored historical narratives – with Russia and Poland”.

This process coincides with a rebuilding of the constitutional and political order in Ukraine, revealing a close nexus between the implementation of memory laws and the attempt to establish a Ukrainian form of mnemocracy. Furthermore, the Ukrainian model of mnemonic constitutionalism – with its strong package of de-communization laws and involvement of the Constitutional Court⁵⁶ – partially copied its Polish analogue

⁵⁴ See *Article* by Nika Bruskina in the first part of the Special Section, N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans*, cit. For a similar account of the Latvian case study at the European Court of Human Rights and national courts, see M. MÄLKSOO, *Konov v. Latvia as an Ontological Security Struggle over Remembering the Second World War*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 91 *et seq.*; I. MILUNA, *Adjudication in Latvian Deportation Cases: References to International Law*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 216 *et seq.* For a broader overview of memory laws in Lithuania and Latvia, see D. BUDRYTĖ, *Memory, War, and Mnemonical In/Security: A Comparison of Lithuania and Ukraine*, in E. RESENDE, D. BUDRYTĖ, D. BUHARI-GULMEZ (eds), *Crisis and Change in Post-Cold War Global Politics*, 2018, p. 155 *et seq.*; E.C. PETTAI, *Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia*, www.academia.edu.

⁵⁵ See *Article* by Alina Cherviatsova in the first part of this Special Issue, A CHERVIATSOVA, *On the Frontline of European Memory Wars*, cit.

⁵⁶ See A. NIKOLIAK, *Ukraine’s Constitutional Court, Historical Narrative-Making, and the Law*, in *MELA-Blog*, 2019, www.melaproject.org.

in establishing a vocal (Ukrainian) Institute of National Remembrance.⁵⁷ The proliferation of memory institutes in CEE is at times ironic. Such entities essentially mimic each other in their remembrance of the totalitarian past despite their varying – sometimes mutually contradictory, as the Polish-Ukrainian comparison clearly demonstrates – engineering of national identities.

It is also particularly emblematic for the rise of mnemonic constitutionalism along memory wars in CEE that Vladimir Putin has justified his latest constitutional project with a plea towards historical memory and “historical truth”. In June 2020, Putin stressed that voting for amendments to the Russian Constitution was tantamount to “preserving the memory of their ancestors and expressing respect for the defenders of the Fatherland”.⁵⁸ Somewhat similar to Hungary and Poland, the newest wave of Russian mnemonic constitutionalism disguises broader amendments contrary to rule of law standards, for example, on the “nullification” of presidential terms and the expansion of presidential powers on the right to initiate the dismissal of judges of the Constitutional Court. Furthermore, one of the proposed changes to the Russian Constitution formalises the protection of “historical truth” and respect for the “memory of the defenders of the Fatherland”. A novel Art. 67 of the Russian Constitution (2020) will prohibit “diminishing the importance of the heroism of the people in the defense of the Fatherland”.⁵⁹ Obviously, this provision targets mainly the Soviet past and its commemoration, in particular the glorification of the Soviet army. However, as clearly shown by the contributors of this Special Section, this Russian sample of mnemonic constitutionalism has broader implications for the entire area of memory governance in CEE and will undoubtedly deepen the divisions and disputes that already exist. To give but one apt example, Nikolay Kopusov has shown how countries such as Czechia, Hungary, Latvia, Lithuania and Poland criminalised communist misdeeds, both as a reaction to Putin’s neo-imperial ambitions, and as part and parcel of memory wars with Moscow.⁶⁰ Ironically, this novel – Putin’s – version of the Constitution (2020) is mimicking the preceding – Orbán’s – constitutional provisions (2011) about his-

⁵⁷ Ukraïnski Instytut Natsional’noï Pam’yati, in Ukrainian (shortly UINM).

⁵⁸ I. Nuzov, *Biez Prava na Pravdu: o Popravkakh v Konstitutsiju*, in *Radio Svoboda*, 29 June 2020, www.svoboda.org.

⁵⁹ For a full text of constitutional amendments to the Russian Constitution (in Russian), see the official page of the Russian Parliament: www.duma.gov.ru. The amendments to the Constitution added provisions as follows: “(A) The Russian Federation, united by a thousand-year history, preserves the memory of our ancestors who transmitted to us our ideals and faiths in God, as well as continuity in developing the Russian state, along with recognizing the historically established state unity. (B) The Russian Federation honours the memory of the defenders of the Fatherland, ensures the protection of historical truth. Diminishing the significance of the feat of the people in the defense of the Fatherland is not allowed”.

⁶⁰ See the *Article* of Nikolay Kopusov to the first part of this Special Section, N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 107 *et seq.*

torical continuity of a “thousand-year” statehood and references to deity reminiscent of the Hungarian constitutional avowal.⁶¹

In recent years, therefore, mnemonic constitutionalism has been used, on the one hand, as a sword of democratic backsliding and, on the other, as a shield during memory wars welded in CEE. It is also indisputable that the entanglement of memory and history in the politics of countries with authoritarian ambitions is an extremely attractive tool for controlling not only social moods, but also narratives incorporating all other elements of the state. Sadly, the examples of Poland and Hungary remain tempting role models for many other countries in the region. These trends can also be apprehended as another step towards the dismantling of European integration: overt disregard and violation of European law are reinforced by departing from the efforts to consolidate the European *demos* started decades ago.⁶² Such EU *demos* builds its community values on various historical memories, but nevertheless seeks to overcome differences, animosities and wounds from the past.

As demonstrated by the various authors in this Special Section, memory laws encompass legal, political, historical, sociological, linguistic, economic and even artistic facets meritorious of comparative study. The continuous exploration of growing mnemonic constitutionalism as it embraces and transcends memory laws leaves fascinating enigmas for further research and critical exploration.

⁶¹ For a detailed analysis of mnemonic constitutionalism in Russia, see U. BELAVUSAU, *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, forthcoming in *The Interdisciplinary Journal of Populism*, 2020.

⁶² J.H.H. WEILER, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in *European Law Review*, 1995, p. 219 *et seq.*