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# Memory Laws and Memory Wars in Poland, Russia and Ukraine

by

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## I. Introduction

Recent literature in memory studies has abundantly testified to the proliferation of memory laws in Central and Eastern Europe (CEE) in the 2010s.<sup>1</sup> These memory laws address various legal measures that govern history, including punitive measures against the denial of historical atrocities, and bans prohibiting the use of totalitarian symbols of the past. The broad conception of memory laws also includes legal acts commemorating historical events and figures: laws establishing state holidays, celebrations and dates of mourning, street (re) naming, monument installations in honour of national figures, access to historical archives, as well as regulations regarding museums and school curricula on historical subjects.<sup>2</sup>

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<sup>1</sup> For the review of recently-growing literature on memory laws, see *Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias*, The Remarkable Rise of ‘Law and Historical Memory’ in Europe: Theorizing Trends and Prospects in Recent Literature, *Journal of Law and Society* (2020), 325-338.

<sup>2</sup> For the overview and classifications of memory laws in a broad comparative perspective, see *Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias*, Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice in: *Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory*,

Poland and Hungary, which are currently the major subjects of European criticism due to their violations of the rule of law standards,<sup>3</sup> have been particularly prolific in the number and scope of such memory laws.<sup>4</sup> Beyond the EU, Russia has been identified as the primary instigator for mnemonic propaganda and the white-washing of Stalinism – an *enfant terrible* – who is also accused of inciting major ‘memory wars’ in the region.<sup>5</sup> The wars over historic narratives have led to the adoption of retaliatory legislation in Ukraine (amidst Russian military aggression) and some ex-USSR countries.<sup>6</sup>

While memory laws, initially within the domain of criminal law,<sup>7</sup> emerged in the Western-European context almost three decades ago,<sup>8</sup> the recent wave of memory laws in CEE transcend criminal legislation and have acquired constitutional significance.<sup>9</sup> The initial stream of memory laws in the 1990s in France, Germany and elsewhere in Western Europe was mostly concerned with criminalization of Holocaust denial, building on the ethico-political outlook that a liberal democracy should have militant teeth capable of defending itself even if that requires biting through freedom of speech, assembly and other fundamental rights.<sup>10</sup> It was, thus, a dignity-based paradigm that guided Western European legislators in that epoch, leading to the adoption of so-called *self-inculpatory* memory laws, as termed by Eric Heinze.<sup>11</sup> Central

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Cambridge University Press (2017), 1-26. It should be stressed that this article analyzes the “newest” memory laws in Poland, Russia and Ukraine, that is covering the period of 2010-2020.

<sup>3</sup> See doctoral dissertations on memory laws in the context of the rule of law in Hungary (by Marina Bán) and Poland (Anna Wójcik) – on file with authors. See also *Marta Bucholc*, Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015, *Hague Journal of Rule of Law* (2018), 85–110. More broadly, on the interaction of the rule of law and human rights, see *Angelika Nußberger*, From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment, in: Heike Krieger, Georg Nolte, Andreas Zimmermann (eds.), *The International Rule of Law. Rise or Decline?*, Oxford University Press (2019), 150-171.

<sup>4</sup> *Aleksandra Gliszczyńska and Anna Śledzińska-Simon*, ‘Victimhood of the Nation as a Legally Protected Value in Transitional States – Poland as a Case Study’, *Wrocław Review of Law, Administration & Economics*, 6, 2, 2018. 46–51; *Uladzislau Belavusau*, The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation? *Security and Human Rights*, 2019. 36-54; *M. 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, 2017. 246-262.

<sup>5</sup> On the phenomenon of memory wars via memory laws, see: *Nikolay Koposov*, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press (2017); *Maria Mälksoo*, *Memory Must Be Defended’: Beyond the Politics of Mnemonical Security*, *Security Dialogue* (2015); *Anna Wójcik*, *Memory Laws and Security*, *Verfassungsblog*, 5 January 2018, available at: <https://verfassungsblog.de/memory-laws-and-security/> (accessed on 6 November 2020); *Ilya Nuzov*, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, *Human Rights Law Review* (2019).

<sup>6</sup> See *Alina Cherviatsova*, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, *European Paper* (2020), 119 *et seq*; *Nika Bruskina*, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, *European Paper* (2020), 137 *et seq*.

<sup>7</sup> *Emanuela Fronza*, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, Springer (2018).

<sup>8</sup> *Uladzislau Belavusau*, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in: *András Koltay* (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Wolters Kluwer (2015).

<sup>9</sup> *Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias*, *Mnemonic Constitutionalism in Central and Eastern Europe*, *European Papers*, 5, 3, 2020. 1231-1246.

<sup>10</sup> See *András Sajó* (ed.), *Militant Democracy*, Eleven International Publishing (2004); *Uladzislau Belavusau*, *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)*, *Israel Law Review* (2014), 27-61.

<sup>11</sup> See *Eric Heinze*, *Theorizing Law and Historical Memory*, *Journal of Comparative Law* (2018), 1. Regarding self-inculpatory and self-exculpatory memory laws, see a fascinating intellectual exchange between Antoon de

to this paradigm is the dignity of Holocaust victims. The recent wave of memory laws in CEE, on the contrary, appears to fortify a victimhood of nation 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.<sup>12</sup> Central to this state-sanctioned victimhood, expressed through the ever-flourishing memory laws and policies in CEE, is the contested outlook on Second World War (WWII) history and the dominance of the imposed Soviet communism in the subsequent years. In our contribution, we shall focus on three of these CEE states as country studies, covering memory laws in Poland, Russia, and Ukraine, as well as analyzing their memory legislation in the context of memory wars, i.e. the mutual political contestations of historical narratives amongst the three countries in recent years.

When examining the debate regarding the ‘rightful’ remembrance of WWII and the Soviet communist legacy between Russia and its former East European dependents, significant contestation is evident. Exemplified by the recent Russian historical truth protection clause in its constitutional amendments and the Russian criminal investigation after Czech authorities dismantled a Soviet statue in 2020,<sup>13</sup> one is struck by the states’ competing attempts to secure a preferable narrative of history in public memory through legal means. To give more instances, there are the 2014 Russian memory law which criminalised public dissemination of ‘knowingly false information’ about the activities of the USSR during the Second World War, and stipulated concrete penalties in case of violation; Ukraine’s post-Maidan decommunization laws; and Poland’s 2018 memory law<sup>14</sup> which sought to penalise public statements that “accuse the Polish nation/state, of being responsible or complicit in the Nazi crimes committed by the Third German Reich”. These are all attempts to eschew unsuitable memories while maintaining a particular narrative on the nation’s identity. The aforementioned laws will be central to our analysis in the three country studies, as they have generated much international controversy and remain ethically debatable.

But *why* have Russia, Poland, and Ukraine sought to legalise their official mnemonic narratives via memory laws in the first place? Various swaths of scholarship, ranging from Central and East European area studies, international human rights law and International Relations theory have offered their explanations in order to untangle the ‘memory knots’ of the region with

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Baets and Eric Heinze: *Eric Heinze*, Should Governments Butt Out of History?, Free Speech Debate, 12 March 2019, available at: <https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/> (accessed on 6 November 2020); *Antoon de Baets*, Criminal Regimes are Never Soft on History, Free Speech Debate, 23 December 2019, available at: <https://freespeechdebate.com/2019/12/criminal-regimes-are-never-soft-on-history/> (accessed on 6 November 2020).

<sup>12</sup> See also *George Soroka* and *Félix Krawatzek*, Nationalism, Democracy and Memory Laws, *Journal of Democracy* (2019), 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.

<sup>13</sup> In this regard, see the programmatic op-ed address of Vladimir Putin himself, in *Vladimir Putin*, The Real Lessons of the 75<sup>th</sup> Anniversary of World War II, *National Interest*, 18 June 2020, available at: <https://nationalinterest.org/feature/vladimir-putin-real-lessons-75th-anniversary-world-war-ii-162982> (accessed on 6 November 2020). Regarding the Russian constitutional amendments, including the one on historical memory, see the part on Russia in the present article. Regarding the incidence of the Czech-Russian memory “war” regarding the monument, see *Russia Opens Criminal Case After Czech Officials Remove Soviet Statue*, *Guardian*, 10 April 2020, available at: <https://www.theguardian.com/world/2020/apr/10/russia-opens-criminal-case-after-czech-officials-remove-soviet-statue> (accessed on 6 November 2020).

<sup>14</sup> That is, an amendment to the Act on the Institute of National Remembrance. For details and citations of the aforementioned laws, see the parts on Poland, Russia and Ukraine in this article.

pertinent disciplinary tools.<sup>15</sup> We take the aforementioned memory laws to be instances of *mnemonical security-seeking*: coordinated state-level attempts at fixing distinct understandings of the past in order to bolster the states' stable sense of self, therefore underpinning and enabling their political agency in the contemporary world.<sup>16</sup> As a variation of ontological security-seeking, a quest for mnemonical security is premised on the states' need for a stable sense of self, which is something political collectives arguably share with individuals.<sup>17</sup>

The memory laws within our purview seek to prioritize historical memory above political contestation. By institutionalizing a version of the past as a legally defended and hence politically untouchable single truth, this narrative is lifted above 'normal politics'.<sup>18</sup> By characterising memory as an issue of state security (or more specifically, the security of state identity as a particular kind of a state), historical memory is simultaneously sacralized and depoliticized. It is pushed out of open public debate and subjugated to restrictive legal frameworks of permissible discourse and acceptable remembrance practices. Methods of mnemonic governance seeking to secure a politically preferable version of the past by militant memory laws thereby erode the foundational elements of liberal democracy, weaken constitutional orders and institutions as well as add fuel to nationalist tendencies.<sup>19</sup>

Methodologically, our analysis of recent Russian, Polish, and Ukrainian memory laws draws on the classification of the respective governance of memory which we suggest to distinguish into four major clusters:

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<sup>15</sup> See Uilleam Blacker, Alexander Etkind, and Julie Fedor (eds), *Memory and Theory in Eastern Europe* (London: Palgrave Macmillan, 2013); Julie Fedor, Markku Kangaspuro, Jussi Lassila, and Tatiana Zhurzhenko (eds), *War and Memory in Russia, Ukraine and Belarus* (London: Palgrave Macmillan, 2017); Dina Khapaeva, 'Triumphant memory of the perpetrators: Putin's politics of re-Stalinization', *Communist and Post-Communist Studies*, 49:1 (2016), pp. 61-73; Nikolay Koposov, *Memory Laws, Memory Wars. The Politics of Memory in Europe and Russia* (Cambridge: Cambridge University Press, 2018); Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017); Maria Mälksoo, 'Criminalizing Communism: Transnational Mnemopolitics in Europe', *International Political Sociology*, 8:1 (2014), pp. 82-99; "'Memory Must Be Defended": Beyond the Politics of Mnemonical Security', *Security Dialogue*, 46:3 (2015), pp. 221-37; 'Kononov v. Latvia as an Ontological Security Struggle over Remembering the Second World War', in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017), pp. 91-108; 'A Baltic Struggle for a "European Memory": The Militant Mnemopolitics of *The Soviet Story*, *Journal of Genocide Research*, 20:4 (2018), pp. 530-44; 'The Transitional Justice and Foreign Policy Nexus: The Inefficient Causation of State Ontological Security-Seeking', *International Studies Review*, 21:3 (2019), pp. 373-97; Jelena Subotic, *Yellow Star, Red Star: Holocaust Remembrance after Communism* (Ithaca and London: Cornell University Press, 2019).

<sup>16</sup> Maria Mälksoo, "'Memory Must be Defended": Beyond the Politics of Mnemonical Security,' *Security Dialogue* 6(3) (2015): 221-237.

<sup>17</sup> For constitutive accounts of ontological security in IR, see Jennifer Mitzen, 'Ontological Security in World Politics: State Identity and the Security Dilemma', *European Journal of International Relations*, 12:3 (2006), pp. 341-70; Catarina Kinnvall, *Globalization and Religious Nationalism in India: The Search for Ontological Security* (London and New York: Routledge, 2007), and Brent J. Steele, *Ontological Security in International Relations: Self-identity and the IR State* (New York and London: Routledge, 2008).

<sup>18</sup> For the distinction between emergency and normal politics in securitization theory, see Barry Buzan, Jaap de Wilde, Ole Wæver, *Security: A New Framework for Analysis* (Lynne Rienner: 1998).

<sup>19</sup> See the unpublished doctoral dissertation on memory laws and rule of law by Marina Bán (defended in October 2020) – on file with authors.

- a. punitive measures of memory governance (e.g., Russian memory law of 2014<sup>20</sup> and Polish memory law of 2018<sup>21</sup>);
- b. non-punitive measures of memory governance (e.g., majority of Ukrainian decommunization laws of 2015<sup>22</sup>);
- c. quasi-memory laws (e.g., citizenship laws that permit naturalisation based on historical belonging or those regulating aspects of education and language, like the *Pole's Card* in Poland<sup>23</sup>, or Ukrainian Law on Education of 5 September 2017 which concern the use of the state language and minority and other languages in education); and
- d. judgments of national courts relating to the (legitimate) remembrance of the past (e.g. decisions regarding memory laws by constitutional tribunals in Poland<sup>24</sup> and Ukraine<sup>25</sup>, or by the Supreme Court in Russia<sup>26</sup>).

The above typology is characteristic of all three countries (and thus three nations, three histories, three narratives, and three national experiences of suffering over past events) that we have selected for our discussion. However, our choice of states was dictated by another factor connecting Russia, Poland and Ukraine: memory laws were implemented in these countries against the background of decades, if not centuries, of memory wars. The disputes over memory and historical truth were based in real and occasionally armed conflicts in this tense and complex neighbourhood. The climax of these disputes, which led to hatred and subsequent violence and crime, came during WWII, in particular in the Soviet-Polish and Ukrainian-Polish relationships.<sup>27</sup>

Regarding the former, the Soviet aggression against Poland in 1939, the Katyń massacre of nearly 22,000 Polish military officers and intelligentsia in 1940, and the decades of the communist regime in Poland installed by the USSR have resulted in the Polish perception of Russia as a sworn foreign enemy. This perception of history is still reflected in social moods to this very day. It was thus easy for those in power to manipulate such emotions in Poland to further stoke conflicts over memory. Regarding the Ukrainian-Polish relationship, the massacres of Poles in Volhynia by the Ukrainian Insurgent Army (1943-1944), and the crimes committed by Poles against Ukrainians were unacknowledged and concealed for decades from public discourse and proper historical research. Consequently, the unhealed wounds have led to the current war for remembrance between Poland and Ukraine, and could not be mitigated by historical reconciliation attempts after the fall of communism. However, the historical

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<sup>20</sup> Federal'nyi zakon 'O vnesenii izmeneniy v otdel'nyie zakonodatel'nyie akty Rossiyskoy Federatsii' [Federal Law 'On the Introduction to Certain Legislative Acts of the Russian Federation'], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: [www.rg.ru/2014/05/07/reabilitacia-dok.html](http://www.rg.ru/2014/05/07/reabilitacia-dok.html) (in Russian).

<sup>21</sup> Ustawa o zmianie ustawy o Instytucji 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 Law Amending the Act on the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation, the Act on Military Graves and Graveyards, the Museums Act as well as the Act on the Criminal Liability of Collective Entities for Punishable Offences], Dz.U. 2018 poz. 369.

<sup>22</sup> E.g., Law no. 2539 "On Remembering the Victory over Nazism in the Second World War".

<sup>23</sup> Ustawa o Karcie Polaka [Act on the Pole's Card], Dz. U. 2007 nr 180 poz. 1280.

<sup>24</sup> E.g. Judgment of the Constitutional Tribunal of Poland of 17 January 2019, K 1/18, otk ZU A/2019, poz. 6 on the Amendment to the Institute of National Remembrance Act of January 2018.

<sup>25</sup> Decision of the Constitutional Court of Ukraine on 16 July 2019 on the constitutionality of the Law "On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of their Symbols".

<sup>26</sup> Decision of the Supreme Court of the Russian Federation on 1 September 2016, in Vladimir Luzgin's affair.

<sup>27</sup> For the history of these turbulent relations, see Norman Davies, *God's Playground A History of Poland*, Volume 1 and Volume 2 (New York, Columbia University Press: 2005).

legacy of the Russian- Ukrainian relationship is also crucial to understand the tensions in CEE. In recent years, the disputes over memory (but also over territory and real power as evident by the 2014 annexation of Crimea) have reconfigured into open armed conflict. The wrongs and crimes committed by the Soviets against the Ukrainian nation have never been truly accounted for, and to a large extent, remain unacknowledged.<sup>28</sup>

Historical freedom, i.e. the freedom to study and talk about the past after the fall of communism brought no relief. Similarly, reconciliation attempts and ventures to engage in conversation about the differing perceptions of the past did little to address the post-war grievances and disputes.<sup>29</sup> Over time, the memory wars were captured by nationalist forces, who built a collective identity based on a single acceptable historical narrative of national trauma and a sense of superiority. These fixed narratives were the impetus for the adoption of memory laws discussed in this article. A narrative that leaves no room for a critical view of one's own history and national identity, as highlighted by one of the leading Polish columnists:

“Do we really need to count who killed more civilians? Will it be morally more noble, for example, to consider what role Poles played in relation to Ukrainians in the course of history? Poles do not allow themselves to know that we were the invader of Ukraine, the same as Russia for us. We are in no way better than the Ukrainian nation. Nor are we worse. As with the Russian nation, because nations are not good or bad.”<sup>30</sup>

## II. Memory Laws in Poland

### 1. Socio-legal context for memory laws and wars in Poland

The feeling of injustice, the sense of being ignored and underestimated, often becomes the driving force for significant decisions and actions: not only in the personal, individualised domain, but also within public, engaging both the state and nation. This is evident in the case of Poland. Such emotions, embedded in the ‘genetic code’ of Poles and fuelled by current political forces, are key to deciphering the escalation of memory wars through memory laws in Poland in recent years.<sup>31</sup> The combination of social emotions and populist historical policy, when encapsulated in a binding law, inevitably leads to controversies. In Poland, these problems were multiplied as the adopted legal measures unambiguously violated constitutional norms and various standards of international law. They also contributed to the deepening of the extreme political polarization of the Polish society.<sup>32</sup> Using a somewhat simplified

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<sup>28</sup> For a detailed exploration of the history of Russian-Ukrainian relations see Serhii Plokhyy, *Ukraine and Russia: Representations of the Past* (Toronto, University of Toronto Press: 2014).

<sup>29</sup> Such efforts were made, inter alia, by the Polish-Russian Group for Difficult Matters, established in 2002, composed of outstanding historians, diplomats and sociologists. Its activity, along with the growing tensions between Poland and Russia, has been extinguished in recent years. In 2019, the Group ceased its works.

<sup>30</sup> *Nie jesteśmy lepsi od Ukraińców*, an interview with Sławomir Sierakowski, “Rzeczpospolita”, 10 July 2013, available at: <https://www.rp.pl/artukul/1028237-Nie-jestesmy-lepsi-od-Ukraincow.html> (in Polish).

<sup>31</sup> For more detailed analysis of these laws, see Aleksandra Gliszczyńska-Grabias, *Deployments of Memory with the Tools of Law – the Case of Poland*, *Review of Central and East European Law* 44 (2019) 464-492; Tomasz Tadeusz Konciewicz, *On the Politics of Resentment, Mis-memory and Constitutional Fidelity. The Demise of the Polish Overlapping Consensus?*, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History* (cup, Cambridge, 2017); Anna Wójcik, *Street Renaming after the Change of Political Regime: Legal and Policy Recommendations from Human Rights Perspectives*, 1/2018 T.M.C. Asser Institute for International & European Law Research Paper Series (2018), Uladzislau Belavusau, *The Rise of Memory Laws in Poland An Adequate Tool to Counter Historical Disinformation? In: Security and Human Rights*, Volume 29: Issue 1-4, 2018.

<sup>32</sup> Hubert Tworzecki, *Poland: A Case of Top-Down Polarization*, *The ANNALS of the American Academy of Political and Social Science*. 2019;681(1):97-119.

metaphor, it can be said that the Poles are divided into two tribes: the one that "does not apologize for Jedwabne Pogrom"<sup>33</sup> and the other that accepts historical truth about Polish crimes committed in the past.

There is certainly a tragedy in the history of Poland, particularly within the 20th-century. It is a tragedy of heroic struggle, resistance and a brutally imposed regime. Thus, for decades, it was impossible for the wounds to be healed and a community based on historical truth to be formed. In this history, apart from the obvious tensions between Poland and Germany, Polish relations with Russia and Ukraine played a leading role. But it was first in 1989, along with regaining freedom after decades of communist rule, when Poles could speak openly about their history, and could demand recognition of the harm and suffering they experienced. However, as proved by the symptomatic example of the above-mentioned reactions to the revealed facts about pogrom of Jews in Jedwabne in July 1941, Poles were not prepared to deal with the past. Even today, the messianic themes of the 'chosen nation' remain present. Thus, Poland entered an extremely difficult transition from dictatorship to democracy while carrying the baggage of historical experiences and unhealed wounds: the feeling that the world was only interested in the Holocaust, and not in the devastation of the Polish state and nation by Nazi Germany; resentment of the lack of sufficient condemnation of Stalinist and communist crimes by the 'western world', crimes of which the Poles were victims long after the end of World War II; and the lack of true Polish-Ukrainian reconciliation, due to the sentiments of hurt from both sides.<sup>34</sup>

The fuelling of the 'victimhood competition' and the legal sanctioning of the specific one-sided narrative of the memory of the past was an element of the "end of the pedagogy of shame" policy announced in 2015 by the newly incumbent Law and Justice party.<sup>35</sup> At the time, the close relations with Ukraine, achieved despite the difficult historical past, began to sour. Moreover, Polish relations with Russia also continued to deteriorate. In the context of these three countries and their worsening relationships, the 'war for remembrance' entered one of its most severe phases: the Polish Amendment to the Institute of National Remembrance Act of January 2018 (hereinafter: "INRA"), discussed the 'crimes of Ukrainian nationalists' and unequivocally intensified Polish historical policy based on falsehoods by Russia. Subsequently, President Putin in retaliation, made accusations against Poland and Poles in the context of Holocaust responsibility.<sup>36</sup>

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<sup>33</sup> "I do not apologise for Jedwabne" was an inscription sprayed by the vandals on the fence of a symbolic grave of the victims of Jedwabne Pogrom of 1941, in which Poles burned their Jewish neighbors alive in a barn — over 300 women, men, and children — and stole their belongings. See Jan Tomasz Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton University Press, Princeton, 2001); Anna Bikont, *The Crime and the Silence: Confronting the Massacre of Jews in Wartime Jedwabne* (Farrar, Straus and Giroux, New York, 2016, translated by Alissa Valles from *My z Jedwabnego (We from Jedwabne)*, Prószyński i S-ka, Warszawa, 2004).

<sup>34</sup> On the origins of the „double standards” in general perception of the suffering caused by the Soviets see: Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin*, Basic Books 2010.

<sup>35</sup> For more on "the end of the pedagogy of shame", repeatedly referred to in relation to the Polish history by members of the Law and Justice party and its Government see Jakub Majmurek, 'Pedagogika wstydu, której nigdy nie było' ('Pedagogy of shame that has never been'), oko.press (6 August 2016), available at <<https://oko.press/pedagogika-wstydu-ktorej-nigdy-bylo/>>.

<sup>36</sup> Some of the statements by President Putin and other members of the Russian political elites should be regarded as historical revisionism. For more examples see Sergey Radchenko, *Vladimir Putin Wants to Rewrite the History of World War II*, Foreign Policy, 21 January 2020, <https://foreignpolicy.com/2020/01/21/vladimir-putin-wants-to-rewrite-the-history-of-world-war-ii/>.

Today, the unquestionable relationship between populist rule and strengthening nationalist narratives that allow only one side, one party to be heard and acknowledged is visible in many countries around the world.<sup>37</sup> Worldwide, the question of historical truth is supplanted by the question of *whose* historical truth is accepted as the ‘official’ one. Considering the geo-political constellation in which Poland operates, combined with the current administration’s intensively implemented historical policy, the answer to this question of truth is unambiguous: it is primarily the *Polish* (officially accepted by the government and state institutions) historical truth. Perhaps, if operating in isolation, this statement would not raise objections or controversy. However, this policy, in a very tangible and literal way, shapes and influences the legal situation of individuals and groups. Moreover, the actions of the authorities in the area of memory, even assuming that they were motivated by the will to ensure the ‘mnemonic security’, brought irreparable losses in the international sphere by weakening the Polish position in the general dispute over memory and responsibility for the past crimes.

## 2. Overview of Polish memory laws

The most significant Polish memory laws that exist within the memory wars conducted by the current government include: the INRA, along with its subsequent Amendment of June 2018<sup>38</sup>; the Law of 16 December 2016 that amends 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<sup>39</sup>; and the Law of 1 April 2016 on the prohibition of the propagation of communism or other totalitarian regimes through names of buildings, objects, and public service devices.<sup>40</sup>

Each of these memory laws concerns a different area of memory and also creates different legal effects. Their common denominator, however, is the intention to ‘administer historical justice’ by censorship: and limiting or even violating other rights and freedoms. Thus, INRA, in its original version, provided that: “Anyone who publicly and falsely attributes responsibility or co-responsibility to the Polish Nation or the Polish State for the crimes committed by the German Third Reich (...) or for any other crimes that are crimes against peace, crimes against humanity, or war crimes, or who otherwise glaringly trivializes the responsibility of their actual perpetrators, shall be subject to a fine or the penalty of imprisonment of up to 3 years.” The

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<sup>37</sup> Many examples of this trend are described in Uladzisla Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Constitutionalism under Stress: Essays in Honour of Wojciech Sadurski*, Oxford University Press 2020.

<sup>38</sup> Ustawa 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 Law Amending the Act on the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation, the Act on Military Graves and Graveyards, the Museums Act as well as the Act on the Criminal Liability of Collective Entities for Punishable Offences], Dz.U. 2018, poz. 1277.

<sup>39</sup> 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 [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.

<sup>40</sup> 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.

Amendment also introduced a new category of crimes, namely, crimes of Ukrainian nationalists and Ukrainian organizations collaborating with the Third Reich, defining them as acts committed by Ukrainian nationalists in 1925–1950, involving the use of violence, terror, or other forms of violation of human rights against individuals or groups of people, in particular against the Polish population.

The Amendment of June 2018, and the judgment of the Constitutional Tribunal of January 2019<sup>41</sup> offered opportunities to “blunt the edge” of these provisions. However, their very introduction into the legal system had far-reaching, multi-dimensional effects on the perception of the memory of the past in Poland, giving a green light to those who reject the very concept of Polish responsibility or the perpetration of past crimes. On the other hand, the law depriving former officials associated with the communist regime of some of their social benefits, irrespective of the degree or time of their involvement in the regime, constituted a far-reaching interference in the fundamental rights and freedoms of an individual. This way, 30 years after the fall of communism, the ‘account of injustices’ was intended to symbolize the determination of the authorities, without however, respecting the basic legal principles and the rule of law.

The last of the above-mentioned rights, concerning the procedure of changing the names of streets and buildings, which may have the least severe consequences on the rights and freedoms of individuals, has at the same time, a very meaningful and real dimension of ‘memory erasing’, which will probably become visible only after a certain time. With this law, the battle over remembrance takes place most strongly at the local level, where small communities do not want to remove the symbols of the past from their own space and memory. It may be seen – and often has been seen – as an act of symbolic violence whereby public space becomes symbolically colonized by the political incumbents, with disregard for local feelings, habits, and preferences.<sup>42</sup>

In the case of Poland, introducing the aforementioned memory laws into the legal order was a gesture primarily directed at the national audience and domestic voters. The authorities intended to prove that this “regaining national pride”, i.e. building an identity based on a partially imaginary “community of harm” is possible only through a specific political option. Therefore, it was less about strengthening mnemonic security, as was the case with the memory laws adopted in Ukraine, but more about a tangible political result. This policy of diplomatic confrontation was also supposed to show divergence from the reconciliation policies chosen by previous administration, who were repeatedly accused of, inter alia, succumbing to Russian pressure or failing to properly honour Polish victims of historical conflicts with Ukraine. In this context, one should also consider the programmatic change that took place at the Polish Institute of National Remembrance.<sup>43</sup>

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<sup>41</sup> Judgment of the Constitutional Tribunal of Poland, 17 January 2019, K 1/18, otk ZU A/2019., poz. 6. The Tribunal decided that the wording “Ukrainian nationalists” was in conflict with one of the principles deriving from Art. 2 of the Constitution, namely, the principle of specificity of legal provisions, and Art. 42 (1), concerning the principles of restricting rights and freedoms. At the same time, by the time the judgment has been delivered, the most controversial provisions of the January Amendment, concerning the imprisonment penalty, have already been removed from the Polish legal system by the June 2018 Amendment.

<sup>42</sup> For the description of such examples and in-depth analysis of the phenomenon see Bartłomiej Różycki, *Renaming Urban Toponymy as a Mean of Redefining Local Identity: the Case of Street Decommunization in Poland*, *Open Political Science* 2017, Volume 1, Issue 1.

<sup>43</sup> The answer by Professor Szarek, the head of the Institute of National Remembrance, for an appeal to condemn the devastation of Ukrainian graves in Poland, is a telling example here. Replying to those who appealed for such condemnation, Professor Szarek stated: “With best regards, I hope that you will persistently strive for a dignified burial and commemorate the Poles, Ukrainians, Jews and other citizens of the Second Republic of Poland

While reflecting on Polish memory laws, it is crucial to keep one aspect in mind: the fact that proper constitutional control over the adopted legal provisions is no longer possible. The Polish Constitutional Tribunal has been captured by the governing party, and some of its members have been appointed unlawfully. Moreover, the rule of law is about to collapse, and the judicial structure is slowly being populated by judges who accept nominations from the illegally staffed and functioning National Council of the Judiciary. The devastation of the judiciary (including the Supreme Court), taking place on the initiative of the government, has a direct impact on the legal situation of individuals or groups affected by the memory laws.

However, as the common courts still function, some of the negative effects of memory laws have been contained. The most symptomatic example is the recent decision of the Labour Law and Social Security Chamber of the Supreme Court, which decided against the ‘collective responsibility’ law prescribed in 2016 regarding the social benefits of former collaborators of the communist regime.<sup>44</sup> Courts all over Poland, referring to this dictum of the Supreme Court, are beginning to question the application of these provisions to specific individuals. Also, the case law concerning the subject area covered by the INRA (although based on the provisions of the Civil Code as the provisions of INRA remain essentially unused, which only proves the thesis about the political motivation for their adoption) is ambiguous. Some already visible, disturbing trends can be summarized as follows: "the new approach in the jurisprudence of the Polish courts facilitates the process of reshaping the views regarding Polish history (as some claim - in defense of historical truth against its distortion). But what really is at stake here is the risk of whitewashing the uncomfortable truths. However, even greater risk, arises from the tendency of the government to have the legal battles over history be decided by individuals or organisations close to the ruling circle."<sup>45</sup>

The Polish ‘war over memory’, carried out through controversial memory laws, takes place primarily within the multilayered context of the current disputes, the paradigm shift in political direction, the growing international wave of populism and nationalism, and the systemic destruction of the rule of law.<sup>46</sup> The creation of a historical narrative based on the ‘correct’ version of Polish heroism, as well as attempts to punish those who do not ‘sufficiently’ acknowledge the experienced wrongs suffered by the Poles, and the violation of individual rights and freedoms in the name of "historical justice" should be taken as a severe warning by all those who place hope on the legitimacy of the legal governance of history.

### III. Memory Laws in Russia

#### 1. Socio-legal context for memory laws and wars in Russia

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murdered by Ukrainian nationalists in today's Ukraine and buried there in numerous nameless death pits, as you do in relation to UPA members" (<https://wyborcza.pl/7,75968,26024702,jak-prezes-ipn-odpowiedzial-na-protest-prasz-bezczeszczeniu.html>).

<sup>44</sup> Resolution of a panel of 7 judges of the Supreme Court of 16 September 2020 in case III UZP 1/20.

<sup>45</sup> Aleksandra Gliszczyńska-Grabias, Michał Jabłoński, *Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?* Verfassungsblog, 12 October 2019, <https://verfassungsblog.de/is-one-offended-pole-enough-to-take-critics-of-official-historical-narratives-to-court/>.

<sup>46</sup> For a detailed account on the dismantling of the system of liberal democracy and the rule of law in Poland, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, Oxford, 2019). See also the Report of the Iustitia Association of the Polish Judges: Jakub Kościerzyński (ed.), *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019*, Warszawa 2019, available at: [https://www.iustitia.pl/images/pliki/raport2020/Raport\\_EN.pdf](https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf).

Following the fall of communism and the dissolution of the USSR, the (re-)appraisal of the Soviet past has shaped a true Gordian knot in Russian memory politics. A plethora of Russian citizens still believe a specific ideological image, one nurtured by populist politicians and old regime historians: the Soviet empire as a source of ontological security<sup>47</sup> that cemented prosperity inside Russia as well as peace outside its external boundaries regarding its relations with both ex-Soviet republics and the – *de facto* – occupied countries of the Warsaw Pact.<sup>48</sup> Central to this ideology, is the pompous heroic narrative regarding World War II, embraced in Russian settings as the “Great Patriotic War” (*Великая Отечественная Война*) that supposedly exclusively liberated the nations of Central and Eastern Europe.<sup>49</sup> Furthermore, the (post-)Soviet historiography has delimited the war period as 1941-1945 rather than 1939-1945, in order to divert attention away from the Pact of Molotov-Ribbentrop (23 August 1939) that enabled the joint Soviet-Nazi occupation of Poland in 1939.<sup>50</sup> While some efforts to promulgate punitive memory laws occurred during Boris Yeltsin’s presidency, the explicit legalization of the governance of historical memory reached its full swing during the 2010s during Vladimir Putin’s presidency. These legalisation efforts intensified following the Russian military intervention in Ukraine and the annexation of Crimea.<sup>51</sup> As summarized by Nikolay Koposov, Putin’s politics of memory was crucial to his ‘project of neo-imperial reconstruction’, which intended to ‘promote the cult of the Russian state’, “whose primary incarnation rests in the celebration of the heroic memory of WWII”.<sup>52</sup>

## 2. Overview of memory laws in Russia

In spring 2014, the Russian Duma (the lower chamber of the parliament) adopted a memory law that remains pivotal for the legal governance of historical memory in Putin’s Russia.<sup>53</sup> This

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<sup>47</sup> For a broader outlook on the concept of ontological security in the context of memory laws, see *Maria Mälksoo*, ‘Memory Must be Defended’: Beyond the Politics of Mnemonic Security, *Security Dialogue*, 46, 3, 2015. 221-237; *Maria Mälksoo*, *Kononov v. Latvia* as an Ontological Security Struggle over Remembering the Second World War, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 91-108.

<sup>48</sup> *T. Sherlock*, *Historical Narratives in the Soviet Union and Post-Soviet Russia: Destroying the Settled Past, Creating an Uncertain Future*, New York: Palgrave-MacMillan, 2007. *Dina Khapaeva*, *Historical Memory in Post-Soviet Gothic Society*, *Social Research*, 76, 1, 2009. 359-94.

<sup>49</sup> *Nina Tumarkin*, *The Great Patriotic War as Myth and Memory*, *European Review*, 11, 4, 2003. 595-61.

<sup>50</sup> The Molotov–Ribbentrop Pact was a non-aggression pact between Nazi Germany and the Soviet Union that enabled those two powers to partition Poland between them in 1939, the year that is widely considered marking the beginning of World War II. See *Nikolay Koposov*, *Defending Stalinism by Means of Criminal Law: Russia, 1995-2014*, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 293-309.

<sup>51</sup> See *Nikolay Koposov*, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, 2017. In his monograph, Koposov summarizes first attempts to pass a memory law in Russia that were made long before Putin’s coming to power, in the context of Boris Yeltsin’s democratic reforms and his struggle against the communist and nationalist opposition (*Ibid.*, p. 297). Yeltsin’s government, Koposov concludes, had insufficient political and financial resources to conduct a sustained and efficient “history politics” (*Ibid.*, p. 214).

<sup>52</sup> *Nikolay Koposov*, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, 2017. 297. Koposov notes that under the Soviet regime, there were no specific laws banning any statements about the past that contradicted the official version of history, although “falsification of history” could be punished on the basis of the Penal’s Code’s articles (art. 70-71) forbidding anti-Soviet propaganda” (*Ibid.*, p. 221).

<sup>53</sup> Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., *Rossiyskaya gazeta*, 7 May 2014, available at: [www.rg.ru/2014/05/07/reabilitacia-dok.html](http://www.rg.ru/2014/05/07/reabilitacia-dok.html) (in Russian). The law is sometimes

law introduced a prison term for, *inter alia*, the ‘denial of facts’ related to the Red Army’s actions during the war or for the ‘desecration of the symbols of military glory’,<sup>54</sup> the latter of which plays a peculiar role in the memory wars with Ukraine during the recent conflicts over Crimea and Donbas.<sup>55</sup> Most significantly, the law amended the Criminal Code to impose punishment through a fine of up to three hundred thousand roubles or the deprivation of liberty for up to three years via Article 354-I entitled ‘Rehabilitation of Nazism’. This provision in the Penal Code makes it a criminal offence *to deny*:

[...] the facts established by the Judgement of the International Military Tribunal for the trial and punishment of major war criminals of European countries of the Axis, the approval of crimes established by the above-mentioned Judgement, as well as dissemination of knowingly false information on the activities of the USSR during the Second World War, committed publicly.<sup>56</sup>

The law further increases the punishment to up to five years of imprisonment if “the same deeds [have been] committed by using one’s official position or via mass media, as well as with an artificial fabrication of prosecution evidence.”<sup>57</sup> Furthermore, the law stipulates that:

Public distribution of information expressing manifest disrespect toward society regarding Russia’s days of military glory and the commemorative dates associated with the defence of the Fatherland or public insults to the symbols of Russia’s military glory are punishable by a fine up to three hundred thousand roubles [...] or by correctional labour for up to one year.<sup>58</sup>

One telling fact regarding this provision is that Article 354-1 mimics Article 190-1 of the Criminal Code of the Russian Soviet Federative Socialist Republic, through which the USSR punished the “spreading of knowingly false fabrications” about the Soviet system and was a tool widely used against dissidents.<sup>59</sup>

Several months later after the addition of Article 354-1 to the Criminal Code, Vladimir Putin also signed into law an amendment to the 1995 Law banning propaganda or any public display

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referred to as Yarovaya Act, following the name of Irina Yarovaya, a deputy from the ruling “United Russia” party that played a central role in its promotion.

<sup>54</sup> Article 3 in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: [www.rg.ru/2014/05/07/reabilitacia-dok.html](http://www.rg.ru/2014/05/07/reabilitacia-dok.html).

<sup>55</sup> See *Nikolay Kuposov*, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, 2017; *Ilya Nuzov*, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, *Human Rights Law Review*, 19, 2019. 231-253; *Lina Klymenko*, *Cutting the Umbilical Cord: The Narrative of the National Past and Future in Ukrainian De-communization Policy*, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 310-328.

<sup>56</sup> Article 354-1, Ugolovnyi Kodeks Rossiyskoy Federatsii (Criminal Code of Russian Federation), available at: [http://www.pravo.gov.ru/proxy/ips/?docbody=&link\\_id=1&nd=102041891](http://www.pravo.gov.ru/proxy/ips/?docbody=&link_id=1&nd=102041891) (in Russian).

<sup>57</sup> Article 1.2. in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: [www.rg.ru/2014/05/07/reabilitacia-dok.html](http://www.rg.ru/2014/05/07/reabilitacia-dok.html).

<sup>58</sup> Article 1.3. in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: [www.rg.ru/2014/05/07/reabilitacia-dok.html](http://www.rg.ru/2014/05/07/reabilitacia-dok.html).

<sup>59</sup> Ugolovnyi kodeks RSFSR ot 27 oktyabrya 1960 g. [Criminal Code of the RSFSR of 27 October 1960], available at [www.lawrussia.ru/bigtexts/law\\_3558/page3.htm](http://www.lawrussia.ru/bigtexts/law_3558/page3.htm). About this aspect, see also *Nikolay Kuposov*, *Defending Stalinism by Means of Criminal Law: Russia, 1995-2014*, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 307; *Alina Cherviatsova*, *Memory as a Battlefield: European Memorial Laws and Freedom of Speech*, *International Journal of Human Rights*, 2020. 1-20, at p. 12.

of symbols of organizations that have collaborated with Nazis and those that negate the facts or the verdict of the International Military Tribunal.<sup>60</sup> Furthermore, the Administrative Code was amended to broaden the prohibition of display of Nazi symbols to include symbols of other extremist organizations.<sup>61</sup> As aptly noted by Ilya Nuzov:

While the wording of the 2014 amendment appears to follow the 1960 French Penal Code formulation, the content of the regulation is significantly broader and, therefore, vaguer and more imprecise. It not only extends to organizations that were outside of the scope of the IMT's [International Military Tribunal] judgement but also those that negate *either* the facts *or* the verdict of the IMT, making their determination abstract and extremely difficult to determine, especially for an ordinary citizen. Moreover, no current Russian law or guidance offers an authoritative list of prohibited Nazi or Nazi-collaborative symbols informing this provision.<sup>62</sup>

These punitive memory laws are not dormant monsters, but have been already utilised by the Russian courts. To give an instance, the Russian Supreme Court in 2016 upheld the conviction of Vladimir Luzgin under Article 354-1 of the Criminal Code.<sup>63</sup> In June 2016, a court in Perm imposed a fine onto Mr. Vladimir Luzgin for reposting a link to an article on the Russian social platform *Vkontakte*: the article in question defended the Ukrainian paramilitaries in the 1940s, and suggested shared Soviet responsibility for World War II and the invasion of Poland.<sup>64</sup> Curiously enough, the court in Perm referred to Luzgin's high marks in history from his grade school as proof of his competence in history, and stated that Luzgin should have anticipated the 'harmful effects' of his re-post.<sup>65</sup> Likewise, the administrative provision regarding symbols was used against citizens who criticized the so-called Saint George ribbon, a Russian and Soviet military symbol that is perceived as imperialist – and therefore, offensive – in post-Soviet republics (in particular, in Ukraine).<sup>66</sup>

The legal governance of historical memory in Russia has continued this punitive legislation, which has further infiltrated the latest constitutional project. On 11 March 2020, the State Duma adopted its third and final reading of the amendments to the Constitution of the Russian Federation, which were approved by the Federation Council (upper chamber of the Russian Parliament) soon thereafter.<sup>67</sup> The majority of constitutional amendments and the referendum

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<sup>60</sup> Federal'nyj zakon ot 4 nojabrja 2014 g. N 332-FZ "O vnesenii izmenenij v stat'ju 6 Federal'nogo zakona "Ob uvekovečenii Pobedy sovetskogo naroda v Velikoj Otečestvennoj vojne 1941 - 1945 godov" i stat'ju 20.3 Kodeksa Rossijskoj Federacii ob administrativnyh pravonarušenijah" (Federal Law from 4 November 2014, number 332-FZ "On the Introduction of Changes to Federal Law "On the Memorization of the Victory of the Soviet People in the Great Patriotic War of 1941-1945" and Article 20.3 of the Code of Administrative Offences of the Russian Federation).

<sup>61</sup> Article 20.3 of the Code of the Russian Federation on administrative offences.

<sup>62</sup> *Ilya Nuzov*, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, *Human Rights Law Review*, 19, 2019. 231-253, at p. 247.

<sup>63</sup> *Mark Edele*, Fighting Russia's History Wars: Vladimir Putin and the Codification of World War II, *History and Memory*, 29, 2, 2017. 90-124.

<sup>64</sup> For a detailed annotation of this case, see *Gleb Bogush & Ilya Nuzov*, Russia's Supreme Court Rewrites History of the Second World War, *EJIL: Talk!*, 28 October 2016, available at: <https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war/>.

<sup>65</sup> Online and on All Fronts: Russia's Assault on Freedom of Expression, Report of Human Rights Watch, 18 July 2017, available at: [https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression#\\_ftn277](https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression#_ftn277).

<sup>66</sup> Ilya Nuzov describes a case of a Russian national who was convicted by the District Court of the Krasnodar region for posting online and making disparaging remarks about the image of Saint George ribbon. The national was sentenced to 10 months of community service. See *Ilya Nuzov*, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, *Human Rights Law Review*, 19, 2019. 231-253, at p. 245-246.

<sup>67</sup> See *The State Duma*, What Changes Will be in the Constitution of the Russian Federation?, 12 March 2020, available at: <http://duma.gov.ru/en/news/48039/> (accessed on 28 October 2020).

organized to orchestrate them was an obvious trick by Vladimir Putin to remain in power post-2024, when his presidential term was expected to end (with the maximum of two re-elections reached under the previous version of the Russian Constitution).<sup>68</sup> One of the amendments, however, introduced a novel Article 67.1 to the Russian Constitution, which prohibits "diminishing the importance of the heroism of the people in the defense of the Fatherland."<sup>69</sup> This amendment on 'historical truth' was therefore squeezed into a bigger package of constitutional changes, which can be considered part of a broader façade intended to convince the public of the urgency for the referendum.<sup>70</sup> While the referendum was initially scheduled for 22 April 2020, supposedly in order to discuss the amendments with Russian citizens, it was changed to 25 June 2020 due to the COVID-19 pandemic. According to the official results of the referendum, nearly 78% of voters backed the constitutional reforms, thereby allowing Putin to remain in power until 2036. The Kremlin hailed the vote a triumph and Putin thanked Russians for their "support and trust", adding that they were "improving the political system, firming up social guarantees, strengthening sovereignty and territorial integrity".<sup>71</sup>

In a presidential address in January 2020, preceding the introduction of the constitutional novels only by a couple of months, Putin stated:

This year, we will celebrate the 75th anniversary of Victory in the Great Patriotic War. For Russia, 9<sup>th</sup> of May is the greatest and sacred holiday. We are proud of the generation of victors and honour their feat, and our memory is not only a tribute to our heroic past, but it also serves our future, inspires us and strengthens our unity. It is our duty to defend the truth about the Victory; otherwise what shall we say to our children if a lie, like a disease, spreads all over the world? We must set facts against outrageous lies and attempts to distort history. Russia will create the largest and most complete set of archival documents, film and photo materials on the Second World War, accessible both for our citizens and for the whole world. This work is our duty as a winning country and our responsibility to the future generations.<sup>72</sup>

While the annual military parade in Moscow was unprecedentedly rescheduled due to the ongoing pandemic,<sup>73</sup> Putin's rhetoric is characteristic of the populist narrative promulgated by his

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<sup>68</sup> These amendments, *inter alia* enshrining "protection of historical memory", allowed Putin to run for two more six yearly presidential terms. This package of constitutional amendments has also inserted constitutional provisions regarding social measures on pensions and the welfare state, along with broader conservative demagoguery into the text of Russian constitution, including provisions precluding a same-sex marriage, ensuring patriotic education in schools, explicitly mentioning faith in the Christian God, and placing the Russian Constitution above international law.

<sup>69</sup> Now Article 67 (3) of the Russian Constitution. See *BBC News*, Russia's Putin Wants Traditional Marriage and God in Constitution, 3 March 2020, available at: <https://www.bbc.com/news/world-europe-51719764> (accessed on 28 October 2020). For a full text of constitutional amendments to the Russian Constitution (in Russian), see the official page of the Russian Parliament: <http://duma.gov.ru/news/48045/>. The amendments to the Constitution add 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."

<sup>70</sup> In parallel, Putin's propaganda has railed against what his government perceives as foreign attempts to diminish the enormous sacrifice made by the USSR in World War II.

<sup>71</sup> See *BBC News*, Putin Strongly Backed in Controversial Russian Reform Vote, 2 July 2020, available on: <https://www.bbc.com/news/world-europe-53255964> (accessed on 28 October 2020).

<sup>72</sup> See *President of Russia*, Presidential Address to the Federal Assembly, 15 January 2020, available on: <http://en.kremlin.ru/events/president/news/62582> (accessed on 28 October 2020).

<sup>73</sup> Belarus, where Lukašenka's regime has been providing a similar type of Soviet propaganda regarding "Great Patriotic War", was the only country to hold the parade on 9 May 2020, despite the pandemics. See *Uladzislau Belavusau and Maksim Karliuk*, The State of Denial Amidst the Military Parade: COVID-19 in Belarus,

regime in recent years. The narrative of Russian official historiography that continues to use the terminology of the “Great Patriotic War 1941-1945” postulates a self-exculpatory rhetoric with two goals: to position the Soviet Union as the major – if not outright ‘winner’ and victim of World War II, as well as to cement the denial of Russian culpability. The latter involves erasing the history of the Molotov-Ribbentrop Pact, the Russian involvement in the occupation of Poland, and the atrocities committed by the Soviet Army and the NKVD in the inter-war and World War II period. Thus, the ‘sacred’ victory of the Great Patriotic War has formed a central ideological pillar of the current regime.<sup>74</sup> The 2020 referendum has elevated this pillar to the realm of mnemonic constitutionalism, comparable to the self-exculpatory narrative of the Hungarian Constitution that was promulgated 10 years earlier, also achieved by virtue of a referendum.<sup>75</sup> Furthermore, in advance of the Russian referendum, Putin published an article ‘teaching’ the whole world “real lessons from the 75th anniversary of the Great Patriotic War.”<sup>76</sup> This cementing of ‘historical truth’ occurred immediately after the military parade at the Red Square, preparations for which continued since March 2020, despite the coronavirus pandemic.<sup>77</sup> Ilya Nuzov eloquently summarized the process:

For the current government, such "historical truth" is akin to as follows: the Soviet Union is a victorious country that saved Europe and "the whole world" from Nazi oppression, and the participation of the USSR in aggression against Poland and the Baltic countries, in war crimes such as Katyn execution, in crimes against humanity, such as deportation of the Volga Germans and Crimean Tatars, are exaggerated or distorted by the enemies of Russia in every possible way.<sup>78</sup>

In June 2020, Putin also stressed that voting in favour of the proposed amendments to the Russian Constitution was tantamount to “preserving the memory of their ancestors and expressing respect for the defenders of the Fatherland”.<sup>79</sup> The recent wave of Russian mnemonic constitutionalism disguises amendments contrary to rule of law standards, including not only the nullification of presidential terms, but also the expansion of presidential powers and influence over the judiciary.

The novel Article 67.1 of the Russian constitution protecting ‘historical truth’ and respect of the ‘memory of the defenders of the Fatherland’ targets mainly the Soviet past and its commemoration, in particular the glorification of the Soviet army. However, Russian mnemonic constitutionalism has significant implications for memory governance across CEE, and will undoubtedly deepen existing divisions and disputes. As demonstrated by Nikolay

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Verfassungsblog: On Matters Constitutional, 20 May 2020, available at: <https://verfassungsblog.de/the-state-of-denial-amidst-a-military-parade-covid-19-in-belarus/>.

<sup>74</sup> Ilya Nuzov, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], Radio Svoboda, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

<sup>75</sup> See *Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias*, Mnemonic Constitutionalism in Central and Eastern Europe, *European Papers* 5 (2020), 1231-1246.

<sup>76</sup> *Vladimir Putin*, The Real Lessons of the 75<sup>th</sup> Anniversary of World War II, *The National Interest*, 18 June 2020, available at: <https://nationalinterest.org/feature/vladimir-putin-real-lessons-75th-anniversary-world-war-ii-162982>

<sup>77</sup> For an excellent summary of Putin’s politics of memory on the eve of the 2020 constitutional referendum, see Ilya Nuzov, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], Radio Svoboda, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ilya Nuzov*, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], Radio Svoboda, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

Koposov, countries such as Czechia, Hungary, Latvia, Lithuania and Poland criminalised communist crimes as retaliation to Putin's neo-imperial ambitions and the memory wars with Moscow.<sup>80</sup> Ironically, the 2020 amendments to the Russian Constitution by Putin mimic the 2011 constitutional amendments implemented by Hungary's Orbán, which relate to the historical continuity of a 'thousand-year' statehood and references the Christian God, reminiscent of the Hungarian constitutional avowal.<sup>81</sup>

The amended Russian Constitution, thus, clearly reflects the new wave of memory wars in the CEE region, manufacturing new external enemies during this illusionary 'defense of the Soviet past'. Yet, most importantly, the constitutional amendments signal a significant deterioration for the rule of law generally, as well as human rights standards more specifically in Russia. Instead of condemning Stalinism and protecting dignity of the millions of victims of Soviet atrocities, Russian memory laws glorify the Soviet past along with whitewashing the legacy of Communism and the Soviet Union.

## IV. Memory Laws in Ukraine

### 1. Socio-legal Context for Memory Laws and Wars in Ukraine

The context and content of Ukraine's post-Euromaidan de-communisation laws raise an important ethico-political question about the legitimacy of restricting political freedoms in order to defend a version of 'national memory' in the context of regime change, active intra-state conflict with international involvement, and ongoing nation-building. The case of Ukraine highlights how a 'hybrid' conflict<sup>82</sup>, wherein the historical memory 'front' intricately intertwines with the kinetic confrontation (with an active engagement of one's historical 'master' throughout)<sup>83</sup>, appears as an aggravating factor for the adoption of restrictive and punitive memory laws.

Ukraine's prompt legalisation of an official memory narrative by means of the 'de-communisation package', after the Russian annexation of the Crimea in 2014 and against the backdrop of the unfolding conflict in the Donbas region, indicates the importance of mnemonical security-seeking for a state going through multiple concurrent transitions.<sup>84</sup> By

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<sup>80</sup> See Nikolay Koposov, *Historians, Memory Laws, and the Politics of the Past*, *European Papers* (2020), 107 *et seq.*

<sup>81</sup> See Miklós Könczöl, *Dealing with the Past In and Around Fundamental Law of Hungary*, in *Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 246-262.

<sup>82</sup> 'Hybrid warfare' generally refers either to a particular mode of waging war, combining various conventional and unconventional, military and non-military means and tactics, or, alternatively, works as a loose synonym for political/information operations as a build-up phase to kinetic engagements. For a discussion of the definitional ambiguities of 'hybrid warfare', see Maria Mälksoo, 'Countering hybrid warfare as ontological security management: the emerging practices of the EU and NATO,' *European Security* 27(3) (2018): 374-92.

<sup>83</sup> For an extensive historical background discussion, see Julie Fedor, Markku Kangaspuro, Jussi Lassila, Tatiana Zhurzhenko, eds., *War and Memory in Russia, Ukraine and Belarus* (Basingstoke: Palgrave Macmillan, 2017). See also Shaun Walker, *The Long Hangover: Putin's New Russia and the Ghosts of the Past* (Oxford: Oxford University Press, 2018).

<sup>84</sup> For various earlier takes on Ukraine's post-Maidan politics of the past, see Ilya Nuzov, 'The Dynamics of Collective Memory in the Ukraine Crisis: a Transitional Justice Perspective,' *International Journal of Transitional Justice* 11(1) (2017): 132-53; Oksana Myshlovska, 'Delegitimizing the Communist Past and Building a New Sense of Community: the Politics of Transitional Justice and Memory in Ukraine,' *Journal for History, Culture and Modernity* 7(1) (2019): 372-405; Barbara Törnquist-Plewa and Yuliya Yurchuk, 'Memory

mnemonic security-seeking, we refer to a coordinated state-level attempt at fixing distinct understandings of the past in social memory in particular ways in order to buttress the state's stable sense of self. The sense of *self* is assumed to underpin and enable its political agency in the first place according to ontological security theory.<sup>85</sup> Mnemonic security-seeking is a common practice among ontologically anxious and insecure political collectives.<sup>86</sup> Ukraine's historically split position vis-à-vis Soviet/Russian mnemonic narratives and remembrance practices of the Second World War (WWII) has further intensified its memo-political soul-searching and self-emancipation attempts post-Euromaidan.

The de-communisation laws, adopted in 2015, mark Ukraine's explicit political choice for the European memory order of WWII and signify an equally unequivocal cut-off from the Russian narrative of the heroes and victims thereof. The gist of these memory laws and subsequent 'de-Leninisation' policies (e.g., removal of monuments; toponymic changes to replace the Soviet-era references with vernacular preferences) is by and large emancipatory; the laws fundamentally seek to detach Ukraine from the previous hegemon's (i.e. USSR's/Russia's) memory order. Notably, the most restrictive of the decommunization laws, the law 'On the condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols' emphasises the development and strengthening of 'the independent, democratic, constitutional state'; 'binding the state to facilitate the consolidation and development of the Ukrainian nation' and 'its historical consciousness', and 'restor[ing] historical and social justice, eliminat[ing] the threat to independence, sovereignty, territorial integrity and national security of Ukraine'. The heavily state- and nation-building-centric framing of mnemonic self-emancipation has been intensified by the broader security-political context and the manner of the adoption of the de-communisation laws.<sup>87</sup> The de-communisation laws attempted to repair a perceived vulnerability in the post-Soviet emancipation of the Ukrainian nation and state,<sup>88</sup> by streamlining and redressing the historical narrative of the infamously divided country's experiences with the twentieth-century totalitarianisms and WWII.<sup>89</sup> The process was consequently framed as 'a matter of national

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Politics in Contemporary Ukraine: Reflections from the Postcolonial Perspective,' *Memory Studies* 12(6) (2019): 699-720; Lina Klymenko, 'Cutting the Umbilical Cord: the Narrative of the National Past and Future in Ukrainian De-communization policy,' in *Law and Memory: Towards Legal Governance of History*, ed. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge: Cambridge University Press, 2017), 310-28; Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2018). For an excellent comprehensive account of Ukraine's history, see Serhii Plokyh, *The Gates of Europe: A History of Ukraine* (London: Allen Lane, 2015).

<sup>85</sup> Maria Mälksoo, "'Memory Must be Defended": Beyond the Politics of Mnemonic Security,' *Security Dialogue* 46(3) (2015): 221-237.

<sup>86</sup> Maria Mälksoo, 'The Transitional Justice and Foreign Policy Nexus: The Inefficient Causation of State Ontological Security-Seeking,' *International Studies Review* 21(3): 373-97.

<sup>87</sup> The decommunisation laws were adopted a few days after having been tabled in the parliament with minimal discussion and according to accelerated procedure, without the possibility of making amendments to the draft bills. All four laws entered into force on 21 May 2015.

<sup>88</sup> Compare the trope of 'cutting the umbilical cord between Ukraine and Moscow', as expressed by Ivan Krulko, a member of parliament from the All-Ukrainian Union 'Fatherland'. See Lina Klymenko, 'Cutting the umbilical cord: the narrative of the national past and future in Ukrainian de-communization policy,' in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017), pp. 310-28.

<sup>89</sup> Alexander Motyl, 'Facing the past: in defense of Ukraine's new laws', *World Affairs*, 178:3 (2015), pp. 58-66; Karina V. Korostelina, 'Mapping national identity narratives in Ukraine', *Nationalities Papers: The Journal of Nationalism and Ethnicity*, 41:2 (2013), pp. 293-315, on pp. 312-13.

security’,<sup>90</sup> for being ‘essential to Ukraine’s integration into the civilized world’.<sup>91</sup>

Yet, as explicit mnemonical security devices, Ukraine’s de-communisation laws also pay the political and ethical price common to exclusive national narratives implemented in law. Ukraine’s fixing of the legal frames of politically preferable ‘national memory’ under the banner of mnemonical self-emancipation remains vulnerable to manifold criticism.<sup>92</sup> By bracketing off the unsavoury elements i.e. glorifying the WWII-era anti-Soviet heroes without acknowledging their implication in the Holocaust of the Ukrainian Jews, Ukraine’s post-Maidan mnemonical self-emancipation remains problematically selective, and ultimately counterproductive in relation to its original objective of defending Ukraine’s ‘national memory’ of WWII and, by implication, securing its national identity in contemporary international politics.

## 2. Overview of Ukrainian de-communisation laws

Ukraine’s de-communisation laws, prepared by the Ukrainian Institute of National Remembrance,<sup>93</sup> adopted by the Ukrainian parliament Verkhovna Rada in April 2015, and signed into effect by President Poroshenko soon thereafter, were designed to decisively settle the score with the Soviet legacy against the backdrop of Ukraine’s notoriously perfunctory politics of memory in the post-Soviet era. Compared to its Russian and Polish counterparts, the Ukrainian post-Soviet mnemo-political self-definition started off late and has fluctuated considerably throughout the post-Soviet period. The ‘toponymic stage’ of de-communisation of the early 1990s was largely delimited to the western regions of the country (such as Lviv), followed by the broadening and state-wide systematisation of the de-communisation initiatives during the era of Viktor Yuschenko.<sup>94</sup> The ‘Orange President’s mnemo-political initiatives were focused on the national and international campaign to seek recognition to *Holodomor*: the man-made famine in Soviet Ukraine in 1932-33 as an act of genocide against the Ukrainian people. The subsequent era of Viktor Yanukovich’s presidency was marked by a partial halting of the state initiatives on de-communisation, as the Ukrainian narrative was aligned again with the Russian one in concurrence with Yanukovich’s political alliance with Putin. Next came the Revolution of Dignity or the so-called ‘Euromaidan’, accompanied by a spontaneous surge of ‘*Leninopad*’ (i.e. ‘Lenin fall’) from below and the legal ‘de-communisation package’.

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<sup>90</sup> ‘Poroshenko: We must complete decommunization, it is a matter of national security’, *112 Ukraine*, 15 May 2016; available at: {<https://112.international/politics/poroshenko-we-must-complete-decommunization-it-is-a-matter-of-national-security-4877.html>}, accessed 5 August 2020.

<sup>91</sup> Motyl, ‘Facing the past’; Askold S. Lozynskyj, ‘We need a discussion on OUN and UPA without labeling and stereotypes’, *Krytyka: Thinking Ukraine*, 30 April 2015; available at: {<https://krytyka.com/en/community/blogs/we-need-discussion-oun-and-upa-without-labeling-and-stereotypes>}, accessed 5 August 2020.

<sup>92</sup> For a good discussion, see Nuzov, p. 140.

<sup>93</sup> Ukrainian Institute of National Memory, or Ukrainian Institute of National Remembrance (UINR) was originally founded in 2006, and reorganised in its current form as subordinate to the Ukrainian Cabinet of Ministers in November 2014.

<sup>94</sup> This entailed the founding of the Ukrainian Institute of National Remembrance in 2006, with an aim to raise public awareness of Ukrainian history, the preservation of the historical memory of the Ukrainian people, study of the struggle for Ukrainian independence in the twentieth century, and preservation of the memory of the victims of the famines (i.e. the 1921–22 famine, the 1932–33 *Holodomor*, and the 1946–47 famine), of political repression, and of participants in the national liberation struggle; introducing the first national legal act on decommunisation (by the presidential decree ‘On measures in connection with the 75<sup>th</sup> anniversary of the *Holodomor* 1932-1933 in Ukraine’); and the formation of the national Decommunisation Committee in 2009.

This package of four laws contains a legislation condemning the Communist and National-Socialist (Nazi) totalitarian regimes in Ukraine and criminalising the production and dissemination of their symbols and propaganda; two laws commemorating, respectively, fighters for Ukraine's independence in the twentieth century and the victory over Nazism in the Second World War, and a law guaranteeing access to archives of repressive Soviet-era organs.<sup>95</sup>

Whereas all four laws fall into a broadly regulatory category,<sup>96</sup> only one of them, the law on condemnation of the Communist and Nazi regimes, is specifically punitive, stipulating concrete limits on freedom of speech and association along with penalties in case of violating the law. 'On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols' law condemns '[c]ommunist totalitarian regime of 1917-1991 of Ukraine' as 'criminal' (Art. 2.1.) along with the Nazi totalitarian regime (Art. 2.2.); prohibits propaganda and the use of symbols of the respective regimes by the threat of punishment 'by restraint of liberty for a term up to five years or imprisonment for the same term' (Art. 6.1.), and 'if committed by a person holding a public office, or repeated, or committed by an organized group of persons, or using mass media, by imprisonment for the term of five to ten years' (Art. 6.2.); outlaws communist and Nazi(-inspired) political parties (Art. 3); promulgates that the state will investigate and raise awareness of the most serious international crimes committed by the two totalitarian regimes in Ukraine (Art. 5); and stipulates procedures and timeframes for the related toponymic changes across the country.

The other three de-communisation laws are fundamentally declaratory or prescriptive without stipulating material implications. The law 'On the legal status and honouring the memory of fighters for Ukraine's independence in the twentieth century' lists the names of fighters for the independence of Ukraine in the twentieth century, recognises their contribution by providing them legal status and honouring their memory, deeming the public denial of the legitimacy of Ukraine's historical struggle for independence an 'insult' to the respective memory, 'disparagement of the Ukrainian people', and thus unlawful (Art. 6). The law 'On perpetuation of the victory over Nazism in the Second World War of 1939-1945' enshrines legally the co-culpability of the Nazi Germany and the USSR for the outbreak of the Second World War, and establishes the Memorial and Reconciliation Day on May 8 (Art 1.2.) in an attempt to connect the contemporary Ukrainian remembrance of the war publicly to the European commemorative calendar. The law furthermore seeks to prevent 'falsification' of the history of the Second World War of 1939-1945 in research, literature, textbooks, mass media and the political discourse of public officials and strives to facilitate 'objective and comprehensive research of

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<sup>95</sup> Law 317-VIII: 'On condemnation of the Communist and National Socialist (Nazi) regimes and prohibition of propaganda of their symbols', <http://www.memory.gov.ua/laws/law-ukraine-condemnation-communist-and-national-socialist-nazi-regimes-and-prohibition-propagan> (accessed 25 September 2020); Law 314-VIII: 'On the legal status and honoring the memory of fighters for Ukraine's independence in the twentieth century', <http://www.memory.gov.ua/laws/law-ukraine-legal-status-and-honoring-memory-fighters-ukraines-independence-twentieth-century> (accessed 25 September 2020); Law 315-VIII: 'On perpetuation of the victory over Nazism in the Second World War of 1939-1945', <http://www.memory.gov.ua/laws/law-ukraine-perpetuation-victory-over-nazism-world-war-ii-1939-1945> (accessed 25 September 2020); Law 316-VIII: 'On access to archives of repressive bodies of the totalitarian communist regime, 1917-1991', <http://www.memory.gov.ua/laws/law-ukraine-access-archives-repressive-agencies-totalitarian-communist-regime-1917-1991> (accessed 25 September 2020).

<sup>96</sup> See Eric Heinze, 'Epilogue: beyond "memory laws": towards a general theory of law and historical discourse', in Uladzislaw Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017), pp. 413-33.

history' thereof (Art 2.3., Art. 2.4.). Although 'responsibility under law' is foreseen for the desecration, destruction, or demolition of the Second World War monuments (Art 4.7.), the law does not stipulate concrete sanctions for such violations. The law 'On access to archives of repressive agencies of totalitarian communist regime of 1917-1991' ensures 'the right of everyone on access to archival information of repressive agencies of the communist totalitarian regime of 1917-1991' (Art 1.1.) and stipulates the specific conditions of such general and free access.

When taken together, the de-communisation laws seek to add 'expressive weight' to history as understood from the national Ukrainian perspective, and to consolidate Ukraine's status as a sovereign actor in international politics.<sup>97</sup> By explicitly 'prescribing and proscribing' certain views of historical regimes, figures, dates, symbols and events,<sup>98</sup> Ukraine's most recent memory laws seek to tell an authoritative version of 'true' Ukrainian history – while intentionally side-lining certain views and political actors deemed dangerous for the contemporary Ukrainian polity along the way.

## V. Conclusion

"Europe is liberating itself from the legacy of the past."<sup>99</sup> This statement was proclaimed by the Preamble to the *Charter of Paris of a New Europe* at the end of the Cold War. Applicable to both the Nazi and Soviet chapters in Europe's past, the declaration was supposed to serve as a road map for future cooperation and co-existence between states in the Organization for Security and Co-operation in Europe (OSCE). However, the 1990 promise never fully materialised: the legacy of the past still remains prevalent in the contemporary politics of Central and Eastern Europe, and guides various aspects of the domestic, bilateral and multilateral relations in and between the states in the region.

Our analysis confirms the premise that the governance of memory in contemporary politics bears further implications for the consolidation, or alternatively, backsliding of democracy.<sup>100</sup> The Central and Eastern Europe region provides much food for thought in this regard. Our analysis of Polish, Russian and Ukrainian regulations of historical memory highlights how 'memory wars' unfold as proxy wars for contemporary state identities and states' sense of security as actors of particular kind and standing in the present. All three cases demonstrate the process by which states frame historical memory as a security issue, and hence as a subject of mutual anguish that instigates counter-securitisation processes.<sup>101</sup>

Our typology of memory laws and the contextual discussion of Polish, Russian, and Ukrainian legislation on the past offers an empirical cut into three noteworthy cases in the region. The

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<sup>97</sup> Heinze, 'Epilogue', p. 415.

<sup>98</sup> Compare Antoon De Baets, 'The United Nations Human Rights Committee's view of the past', in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017), pp. 29-47.

<sup>99</sup> Charter of Paris for a New Europe, adopted at the Second CSCE Summit of Heads of State or Government, Paris, 19-21 November 1990, available at: <https://www.osce.org/files/f/documents/0/6/39516.pdf>, accessed 16 November 2020.

<sup>100</sup> Peter J. Verovšek, 'Caught Between 1945 and 1989: Collective Memory and the Rise of Illiberal Democracy in Postcommunist Europe', *Journal of European Public Policy* (2020), pp. 1-18, on p. 14.

<sup>101</sup> Cf. Lina Klymenko and Marco Siddi, 'Exploring the Link between Historical Memory and Foreign Policy: an Introduction', *International Politics* (2020), available at: <https://link.springer.com/article/10.1057/s41311-020-00269-x>, accessed 16 November 2020.

contribution demonstrates that recent memory laws in all three countries have been largely adopted as swords and shields amidst the context of mutual memory wars, (1) between Poland and Ukraine, on the one side, against Russia, on the other side, as well as (2) Poland and Ukraine between themselves, and (3) Russia and Ukraine between themselves.

Both Polish and Ukrainian memory laws draw on a strong anti-communist ethos, proclaiming victimhood as semi-occupied (absorbed in the Warsaw Pact of the Soviet satellites in the Polish case) and occupied (as a Soviet republic in the Ukrainian case) countries, that seek to condemn the communist regime, somewhat equalizing it to the Nazi ideology and Reich's occupation during World War II. In stark contrast, Russian memory laws impose the blame for the atrocities of the 21<sup>st</sup> century exclusively on Nazi ideology. Memory laws are instrumentalized to disguise the notorious role of the Soviet Union and the crimes of the communist regimes by penalizing the denial of the 'heroic' role of the Soviet Union in what Russian historiography has been persistently addressing as "Great Patriotic War" instead of World War II.

In the context of Polish-Ukrainian memory wars, both countries have adopted memory laws that articulate opposing visions on the role of the Ukrainian national movements in the 1930-1940s in Western Ukraine / Eastern Poland. While viewed in the Polish context as almost genocidal, it is characterized as liberational in Ukrainian accounts. It is equally emblematic how both countries have institutionalized legal governance of historical memory by establishing powerful "institutes of national remembrance" and especially in the Polish case, with quasi-parliamentary functions,<sup>102</sup> thus further constitutionalizing the area of memory regulation. Ironically, these institutions in Poland and Ukraine often manufacture narratives of the 20<sup>th</sup> century that are at times diametrically opposed regarding uneasy Polish-Ukrainian relations and ethnic cleansings on both sides.<sup>103</sup>

Finally, in the Russian-Ukrainian context, memory laws have played a peculiar role during and in the aftermath of the occupation of Ukraine's Donbas and annexation of Crimea by Russia. Once again, the role of Ukrainian national movements has been viewed as diametrically opposite in the official Russian and Ukrainian historiographies of the 21<sup>st</sup> century: narratives which have been strongly mirrored in the Russian memory law of 2014 and the follow-up Ukraine's decommunization laws of 2015.

It has been recently stressed by the OSCE High Commissioner for National Minorities that:

[if] governments impose singular historical narratives and prohibit alternative interpretations in "memory laws", then they draw a line in the sand of time that can continue to divide societies for generations to come. And differences in historical interpretations and commemoration practices can have a negative effect on bilateral relations between States. Moreover, States have a duty to deal with history and memory in a responsible way in order to prevent or manage conflict within the society rather than fuel it.<sup>104</sup>

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<sup>102</sup> Dariusz Stola, "Polish Institute of National Remembrance: A Ministry of Memory?", in A. Miller, M. Pipman (eds.), *The Convulsions of Historical Politics*, Central European University Press, 2012. 45-58.

<sup>103</sup> See Andreas Umland, The Ukrainian Government's Memory Institute against the West, *New Eastern Europe*, 7 March 2017, available at: <https://neweasterneurope.eu/2017/03/07/the-ukrainian-government-s-memory-institute-against-the-west/> (accessed on 18 November 2020); Oleksandra Iwaniuk, Ukrainian-Polish Relations in the Context of the Memory War: A Game of Lose-Lose, *Wilson Center*, 13 October 2017, available at: <https://www.wilsoncenter.org/blog-post/ukrainian-polish-relations-the-context-the-memory-war-game-lose-lose> (accessed on 18 November 2020).

<sup>104</sup> Lamberto Zannier, "Preventing Crises and Conflicts through Promotion of Integration of Diverse Societies", *HCNM at 25: Personal Reflections of the High Commissioners*, Office for the High Commissioner on National Minorities, The Hague, 2018. 42.

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In this regard, a critical assessment of memory laws in all three country studies points to their potential in deepening conflicts, historical feuds, and ethnic and national tensions.