

Introduction to the Special Section ‘Memory Laws and the Rule of Law’

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Introduction to the Special Section – relationship between memory laws and the rule of law – exploiting law in the service of historical policy and undermining democracy – rule of law backsliding – democratic backsliding – risk of abuse of memory laws

THE RULE OF MEMORY AND THE RULE OF LAW

The full-scale war of Vladimir Putin’s Russia against Ukraine launched in February 2022 was ‘the return of history’, a moment brutally demonstrating the lethal threat of imperialistic revisionist historical imagination, the falsification of history, and its abuse for political ends.¹ However, the deliberate creation or official support of factually incorrect narratives about the past has been a

¹On 12 July 2021, President Vladimir Putin published a 5,000-word article titled ‘On the Historical Unity of Russians and Ukrainians’, which included many opinions aligning with Russia’s long-standing policy towards Ukraine after the annexation of Crimea and during the ensuing undeclared armed conflict. See V. Putin, ‘On the Historical Unity of Russians and Ukrainians’, 12 July 2021, <http://en.kremlin.ru/events/president/news/66181>, visited 29 January 2024.

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long-standing and enduring means of governance and national and international politics.²

States use various mechanisms to advance their preferred historical narratives: by creating and removing memorials and other forms of commemoration; establishing archives and museums; introducing standards and curricula for teaching in schools; supporting research and the arts; naming public spaces; deciding on official symbols; designating public holidays; and proclaiming commemorative years.³ States can facilitate or impose constraints on the development of a grassroots culture of remembrance by providing an enabling environment or restricting space for civil society. Autocracies usually prohibit such bottom-up initiatives.

Active historical policy at the international, national, regional, and local levels is also implemented through various legal instruments. These measures, prescribing a state-approved interpretation of history and limiting the rights and freedoms of individuals, have been conceptualised as memory laws.⁴ Memory laws⁵ include non-punitive measures, such as constitutions with preambles and parliamentary resolutions putting emphasis on historical narratives and evaluations of the past. Most constitutions reflect an interpretation of historical moments or events perceived as ‘founding’ or ‘formative’ for a state.⁶ The historical circumstances of constitution drafting and enacting ingrains the state with lasting values and assessments of the past. Constitutions set the parameters

²On genealogy of governance of historical memory through law see M. Bán and U. Belavusau, ‘Memory Laws’, *Bloomsbury History: Theory and Method* (Bloomsbury 2022).

³L. Raphael, ‘State Authority and Historical Research: Institutional Settings and Trends Since 1945’, in B. Bevernage and N. Wouters (eds.), *The Palgrave Handbook of State-Sponsored History after 1945* (Palgrave Macmillan 2018) p. 209.

⁴See essentially U. Belavusau and A. Gliszczynska-Grabias (eds.), *Law and Memory* (Cambridge University Press 2017); N. Kuposov, *Memory Laws, Memory Wars* (Cambridge University Press 2018); E. Heinze, ‘Theorizing Law and Historical Memory’, 13(1) *Journal of Comparative Law* (2017) p. 43; cf also the Council of Europe Thematic Factsheet, ‘Memory Laws and Freedom of Expression’, updated in July 2018, defining memory laws as enshrining ‘state-approved interpretations of crucial historical events and promot[ing] certain narratives about the past, by banning, for example, the propagation of totalitarian ideologies or criminalising expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law’.

⁵On mnemonic constitutionalism see essentially U. Belavusau, ‘Rule of Law and Constitutionalisation of Memory Politics in Hungary and Russia’, in M. Belov, *Rule of Law in Crisis* (Routledge 2022) p. 87; U. Belavusau, ‘Mnemonic Constitutionalism and Rule of Law in Hungary and Russia’, 1 *Interdisciplinary Journal of Populism* (2020) p. 16; U. Belavusau and A. Gliszczynska-Grabias, ‘Mnemonic Constitutionalism in Central and Eastern Europe’, 5(3) *European Papers* (2020) p. 1231.

⁶E.g., the identity-forming French revolution for France, the ‘never again’ of the Holocaust for Germany, and the condemnation of Nazi and Soviet regimes for Poland.

for constitutional orders that last decades after and are pivotal tools of 'mnemonic constitutionalism', a system of norms and practices legitimising a regime by certain historical narratives and evaluations of the past.⁷ However, they are not the sole means employed in this regard.

In many states, legal systems incorporate provisions of law that explicitly articulate their mnemonic purpose. These 'explicit memory laws' or 'memory laws *per se*' include a narrative about the past and often add a sanction, notably, a criminal one, for violating the official historical account. In 'militant democracies', notable instances of explicit memory laws include criminal law prohibitions on denying and belittling the Holocaust and other crimes. Additionally, these legal systems enforce criminal bans on propagating fascism and totalitarianism.⁸

'Quasi-memory laws' have a weaker mnemonic content, and their function in historical policy becomes apparent in the contextual application of the norm.⁹ For example, a criminal prohibition of defamation or insult, as demonstrated by Grażyna Baranowska's article in this Special Section, or a civil law regime protecting personality rights, as illustrated by Adam Bodnar and Aleksandra Gliszczyńska-Grabias in their contribution, can be used as tools of historical memory governance. This occurs when these provisions are employed to penalise statements that involve historical narratives or assessments of the past.

Memory laws have been introduced in many jurisdictions with legitimate and noble objectives, aiming to acknowledge past atrocities, honour their victims, prevent their memory from fading, and reckon with the undemocratic past. These laws seek to impart valuable lessons for present and future generations, ultimately striving to deter atrocities, crimes, and xenophobia, and strengthen democracy.¹⁰ However, over the past two decades, authorities in certain states have embraced a

⁷See *supra* n. 5.

⁸See essentially on this concept S. Tyulkina, *Militant Democracy – Undemocratic Political Parties and Beyond* (Routledge 2015); P. De Morree, *Rights and Wrongs under the ECHR – The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Cambridge University Press 2017); A. Malkapoulou and A. Kirshner (eds.), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press 2019); A. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press 2014); M. Steuer, 'Militant Democracy on the Rise: Consequences of Legal Restrictions on Extreme Speech in the Czech Republic, Slovakia and Hungary', 44 *Review of Central and East European Law* (2019) p. 162.

⁹This notion has been introduced, *inter alia*, by U. Belavusau, 'Mnemonic Constitutionalism and Rule of Law in Hungary and Russia', 1 *Interdisciplinary Journal of Populism* (2020) p. 16 at p. 20; see also U. Belavusau et al., 'Memory Laws and Memory Wars in Poland, Russia and Ukraine', 69 *Jahrbuch des öffentlichen Rechts* (2021) p. 95 at p. 99.

¹⁰For example, the EU encouraged member states to criminalise Holocaust denial in a resolution on combating certain forms and expressions of racism and xenophobia, see Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

new wave of memory laws. Instead of fostering democracy, these laws often aim to whitewash national history or demonise the historical role of other states. Rather than promoting democratic values, these laws contribute to regression, significantly curtailing freedom of expression and other fundamental rights and freedoms of individuals.

Russia's transformation in this respect has been the most extreme. The political leadership has chosen to transition Russia from an autocratic regime to a totalitarian state that wages a full-scale war against Ukraine to maintain its historical sphere of influence, and realise imperialistic ambitions. The mobilisation for the ongoing war effort in Russia is built upon the mythology of the Great Patriotic War, which made the Soviet Union a global superpower.¹¹ Russia has also rehabilitated the totalitarian Soviet dictator Joseph Stalin,¹² and prohibited speaking of the murderous aspects of the Soviet regime.¹³ Moscow's official narratives and actions have prompted responses from neighbouring democracies that do not share such a positive evaluation of the Red Army and the Soviet empire, considering Putin's Russia the principal external security threat (the Baltics,¹⁴ Poland, Ukraine¹⁵). Russia's distortions of the history of the Second World War, such as blaming Poland for the outbreak of the war, have also resulted in official political responses from the European Union (EU)¹⁶ and the Council of Europe.¹⁷ The Council of Europe expelled Russia in 2022.

¹¹N. Kuposov, 'Holocaust Remembrance, the Cult of the War, and Memory Laws in Putin's Russia', in E. Barkan and A. Lang (eds.), *Memory Laws and Historical Justice: The Politics of Criminalizing the Past* (Springer International Publishing 2022) p. 131; M. Domańska, 'The Myth of a Great Patriotic War as a Tool of Kremlin's Great Power Policy', Centre for Eastern Studies, 31 December 2019, <https://www.osw.waw.pl/en/publikacje/osw-commentary/2019-12-31/myth-great-patriotic-war-a-tool-kremlins-great-power-policy>, visited 29 January 2024.

¹²S.M. Norris, 'Bringing Stalin Back in Memory Politics and the Creation of a Useable Past in Putin's Russia', in T.H. Nelson (ed.), *The Soviet and Post-Soviet Review* p. 1–3, available at https://brill.com/view/journals/spsr/50/3/article-p350_6.xml, visited 29 January 2024.

¹³A. Nekoliak and E. Klochkova, 'Weaponising Russia's Memory Law', *Verfassungsblog* (11 July 2023), <https://verfassungsblog.de/weaponizing-russias-memory-law/>, visited 29 January 2024.

¹⁴M. Mälksoo, 'Kononov v Latvia as an Ontological Security Struggle over Remembering the Second World War', in Belavusau and Gliszczyńska-Grabias, *supra* n. 4, p. 91; M. Mälksoo, 'Memory Must be Defended: Beyond the Politics of Mnemonical Security', 46(3) *Security Dialogue* (2015) p. 221; M. Mälksoo, 'Militant Memocracy in International Relations: Mnemonical Status Anxiety and Memory Laws in Eastern Europe', 47(4) *Review of International Studies* (2021) p. 489.

¹⁵Belavusau et al., *supra* n. 9; N. Kuposov, 'Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia', 36 *East European Politics and Societies* (2022) p. 272.

¹⁶European Parliament resolution of 19 September 2019 on the importance of European remembrance for the future of Europe, 2019/2819(RSP), RC-B9-0097/2019.

¹⁷PACE, Ensuring a just peace in Ukraine and lasting security in Europe. Resolution 2516 (2023).

Nonetheless, a preoccupation with memory laws and other legal forms of historical memory governance is not exclusive to totalitarian or autocratic regimes. The surge in historical memory governance in EU member states Hungary and Poland during their democratic backsliding under populist right-wing governments demonstrates that memory laws can be used to underscore the defence of traditionally understood national sovereignty and the rejection of transnational norms and rules, including standards of the rule of law. In the EU's two most discussed member states experiencing backsliding in the rule of law – Hungary and Poland –, changes in constitutionalism have been evident.¹⁸ Hungary introduced a new fundamental law,¹⁹ while Poland witnessed a politicisation of constitutional interpretation without formally changing the constitution.²⁰ These changes have been accompanied by profound alterations in mnemonic constitutionalism.

Even consolidated, relatively stable democracies in Western Europe have not abandoned interest in memory laws,²¹ including punitive measures.²² Democracies in other parts of the world, such as South Korea, are also engaged in conducting historical policy through legal means.²³ Interestingly, these laws are purportedly aimed at protecting democracy and the rule of law. In Central and Eastern Europe, particularly in the Baltics, memory laws have been enacted to create distance from neighbouring non-democratic states (Russia, Belarus). These laws serve as militant democracy means of deterrence, strengthening ontological

¹⁸T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2021); T. Drinóczi and A. Bień-Kacała (eds.), *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022).

¹⁹See, for example, M. Könczöl and I. Kevevári, 'History and Interpretation in the Fundamental Law of Hungary', 5(1) *European Papers* (2020) p. 161.

²⁰See, for example, Drinóczi and Bień-Kacała, *supra* n. 18; M. Wyrzykowski and M. Ziółkowski 'Illiberal Constitutionalism and the Judiciary', in A. Sajó et al (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021) p. 517; G. Halmai, 'The Making of "Illiberal Constitutionalism" with or without a New Constitution: The Case of Hungary and Poland', in D. Landau and H. Lerner (eds.), *Comparative Constitution Making* (Edward Elgar 2019) p. 302.

²¹See, for example, I. Tourkochoriti, 'Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece', in Belavusau and Gliszczynska-Grabias, *supra* n. 4, p. 151; A. Aragonese, 'Legal Silences and Memory of Francoism in Spain', in Belavusau and Gliszczynska-Grabias, *supra* n. 4, p. 175; P. Rhein-Fischer and S. Mensing, 'Memory Laws in Germany', *Occasional Paper No. 14* (Torkel Opsahl Academic EPublisher 2022).

²²K. Bachmann et al., 'The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws', 35(4) *East European Politics and Societies* (2021) p. 996.

²³H. Shin, 'South Korea Court Orders Japan to Compensate "Comfort Women"', *Reverses Earlier Ruling*, (*Reuters*, 23 November 2023), <https://www.reuters.com/world/asia-pacific/south-korea-court-orders-japan-compensate-comfort-women-reverses-earlier-ruling-2023-11-23/>, visited 29 January 2024.

security.²⁴ Ukraine has enacted a so-called de-communisation legislation²⁵ and, in response to Russia's full-scale invasion, further recalibrated its historical policy to emphasise its shared history with the West and its attachment to democracy and European values.²⁶

LAW IN THE SERVICE OF HISTORICAL POLICY AND UNDERMINING THE RULE OF LAW

To what extent are the diverse mechanisms by which the state regulates collective historical memory, notably memory laws, not only a product of constitutional systems but also mechanisms compromising these systems? This Special Section demonstrates that 'explicit' and 'quasi' memory laws not only occur parallel to the rule of law backsliding but also serve as important features and boosters of it.

For scholars of the rule of law, this Special Section will unveil less-discussed mechanisms employed to destroy the rule of law, namely memory laws. For scholars of memory studies and laws, this Special Section adds value by showcasing the role of institutional structures in influencing the implementation of historical policies and the influence of historical policies on the state of the rule of law. Additionally, it illustrates how the conduct of such policies is assessed from the perspective of human rights law standards and the rule of law.

Narratives propagated through memory laws and their application in specific cases serve governments in polarising voters, strengthening identification with the ruling majority and incentivising voting. Emotion-laden historical narratives are particularly compelling in this regard. Governing politicians often draw historical parallels and express approval or, more frequently, disapproval of certain grassroots historical narratives and official historical policies of former governments.²⁷ Furthermore, the government's approach to the freedom of historical debate

²⁴Mälksoo (2021), *supra* n. 14.

²⁵D.R. Marples, 'Decommunisation, Memory Laws, and Builders of Ukraine in the 20th Century', 39 *Acta Slavica Iaponica* (2018) p. 1; A. Cherviatsova, 'On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine', 5(1) *European Papers* (2020) p. 119.

²⁶L. Klymenko and M. Siddi, 'Exploring the Link between Historical Memory and Foreign Policy: An Introduction', in L. Klymenko and M. Siddi (eds.), *Historical Memory and Foreign Policy* (Springer International Publishing 2022) p. 1.

²⁷For example, in Poland, the PiS government that was in power from 2015 to 2023 believed that previous governments pursued an inappropriate historical policy, for example, failing to hold accountable those responsible for Communist-era wrongdoings or insufficiently highlighting acts of Polish heroism while apologising for past crimes against minorities instead. This led to the adoption of new memory laws. See A. Gliszczyńska-Grabias et al., 'Law-secured Narratives of the Past in Poland in Light of International Human Rights Law Standards', 38 *Polish Yearbook of International Law* (2018) p. 59.

reflects its broader attitudes to the rule of law and individual rights and freedoms. Non-liberal memory politics jeopardise individual rights and critical history; they tend to be centralising, anti-pluralist, exclusionary,²⁸ and antagonising.²⁹

The nexus between the governance of historical memory and the rule of law has been under-explored, with some important exceptions.³⁰ We adopt a 'thick' understanding of the rule of law, as defined by the European Commission in the Annual Rule of Law Reports as encompassing checks and balances, judicial independence and media freedom.³¹ We understand the rule of law backsliding as:

the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.³²

The Special Section examines the relationship between memory laws and the rule of law backsliding, using examples from Hungary, Poland and Turkey. The two EU member states have reversed significant gains made since the fall of Communism, shifting from consolidated democracies to flawed ones (Poland) or hybrid regimes between quasi-democracy and authoritarianism (Hungary).³³ Turkey, under the government of the AKP since the 2010s, has deteriorated into a regime described as competitive authoritarianism.³⁴ This Special Section also juxtaposes memory laws in rule of law backsliding states with Germany, an example of consolidated democracy with a robust memory laws system, to explore how structural factors impact memory laws and their assessments.³⁵

²⁸For example, an exclusionary view of the nation, traditional family and gender roles, minorities and migrants viewed as enemies, and assaults on the independence of judiciary and media.

²⁹See M. Mälksoo, 'Illiberal Memory Politics', in M. Laruelle (ed.), *The Oxford Handbook of Illiberalism*, (Oxford University Press 2023).

³⁰Special Issue entitled 'Historical Memory in Post-Communist Europe and the Rule of Law', 5(1) *European Papers* (2020) p. 95 and 5(3) *European Papers* (2020) p. 1171.

³¹European Commission, '2022 Rule of Law Report', https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en#methodology, visited 29 January 2024.

³²L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3 at p. 10.

³³See M. Bernhard, 'Democratic Backsliding in Poland and Hungary', 80(3) *Slavic Review* (2021) p. 585; R.D. Kelemen, 'The European Union's Authoritarian Equilibrium', 27(3) *Journal of European Public Policy* (2020) p. 481; A. Bodnar, 'Polish Road toward an Illiberal State: Methods and Resistance', 96 *Indiana Law Journal* (2020) p. 1059; Halmai, *supra* n. 20; W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

³⁴M. Ugur-Cinar, 'Elections and Democracy in Turkey: Reconsidering Competitive Authoritarianism in the Age of Democratic Backsliding', 94(3) *The Political Quarterly* (2023) p. 445.

³⁵On memory laws in Germany, see Rhein-Fischer and Mensing, *supra* n. 21.

In the opening article, Gabór Halmai argues that deficiencies in historical policy in Hungary during the transition from Communism to democracy paved the way for the success and entrenchment of an anti-liberal government purposefully dismantling the rule of law since the 2010s. Halmai demonstrates that transitional justice mechanisms adopted after 1989 in Hungary have failed or were simply insufficient to prevent the dismantling of democracy in a society where democratic norms were not deeply rooted. He argues that these mistakes made it easier for Fidesz's government to chip away at attained democratic standards. Halmai also recognises that the government's attitude towards public historical debate reflect the ruling majority's attitude towards the rights and freedoms of individuals.

This Special Section not only explains why opponents of the rule of law came to power based on public discontent with settlements of the undemocratic past, but also analyses the tools, techniques, and manner of historical policy. After anti-rule of law governments attain power through democratic processes, they resort to tactics described as 'ruling by cheating',³⁶ which may lead to electoral autocracy. The playing field is heavily tilted in their favour, making it structurally more difficult than in established democracies for the opposition to compete in elections. The government uses propaganda in both the captured state and private media.³⁷ Identity issues are central to sustaining social polarisation with the government appealing to emotions, including those evoked by national identification based on a simplified vision of the past. Memory laws are intended to reinforce already-existing beliefs and social myths, bolstering popular historical narratives of national martyrdom, glory, and innocence.³⁸ This often leads to a polarised worldview, where those who question the simplistic black-and-white narrative of the past are deemed disloyal. The stance on public discourse concerning the national past becomes a significant societal divide, which populist, anti-rule-of-law governments exploit to criticise cultural and political elites for their perspectives on national history.³⁹

³⁶A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press 2021).

³⁷For a comprehensive analysis of the Hungarian system, see e.g. Z. Szelényi, *Tainted Democracy: Viktor Orbán and the Subversion of Hungary* (Hurst Publishers 2022). For an analysis of Poland, see Sadurski, *supra* n. 33.

³⁸K. Kończal, 'Politics of Innocence: Holocaust Memory in Poland', 24(2) *Journal of Genocide Research* (2022) p. 250; A. Pető, 'The Illiberal Memory Politics in Hungary', 24(2) *Journal of Genocide Research* (2022) p. 241.

³⁹For example, in Poland, nationalist movements use the slogan 'I do not apologise for Jedwabne', criticising the public apology made by Polish President Aleksander Kwaśniewski in 2001 on the anniversary of the pogrom of Polish Jews in Jedwabne in 1941. See G. Zubrzycki, 'Jan Gross's Neighbors and Poland's Narrative Shock', 112(2) *Jewish Quarterly Review* (2022) p. 234.

In the rule of law backsliding states, critics of official narratives or those who propose competing ones – notably historians, journalists, artists, and academics – are under pressure. Adam Bodnar and Aleksandra Gliszczyńska-Grabias's article examines how, under populist rule, strategic lawsuits against public participation become a crafty way of suppressing free speech and silencing the government's critics. The article illustrates how a subcategory of such strategic lawsuits, associated with the state's official historical policy, is employed to reinforce historical narratives favoured by the government. Specifically, the examination involves an instance of a civil law lawsuit in Poland targeting Holocaust historians who unveil and discuss the darker aspects of the nation's history. Bodnar and Gliszczyńska-Grabias's contribution showcases how civil law provisions protecting personal rights are used as quasi-memory laws and how attacks on government critics involve state proxies, such as civil society organisations friendly to and supported by the ruling majority. Additionally, the article calls for EU-level instruments to better protect academics from these strategic lawsuits and to evaluate the European Commission's proposal for a directive aimed at curtailing abusive court proceedings.⁴⁰

Criminal law provisions are also utilised as quasi-memory laws in rule of law backsliding regimes. Grażyna Baranowska's article explains how criminal defamation laws serve this purpose in Turkey and Poland. Her contribution examines how provisions protecting the good name of the state and nation, embedded within the Turkish criminal code, and newly adopted criminal provisions in Poland contribute to the rule of law backsliding. These provisions are applied against those who counter or offer a nuanced view of the state's official interpretation of the past. Baranowska identifies significant similarities between the Turkish and Polish laws and the context in which they are implemented, such as the broad terms of the clauses, the role of organisations in applying the law, and the larger memory politics pursued by the state.

The conditions of rule of law backsliding, characterised by government overreach and the capture of key democratic institutions, create an environment that is particularly conducive to the use of memory laws and quasi-memory laws against opponents. Paula Rhein-Fischer and Anna Wójcik's article emphasises the significance of institutional factors in the context of the rule of law backsliding. The article compares the constitutional review of memory laws in an established liberal democracy with a highly regarded independent constitutional court (Germany) and a state undergoing severe rule of law backsliding, where the constitutional court ceased to perform its intended function and is no longer

⁴⁰Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings 'Strategic lawsuits against public participation', COM/2022/177 final.

considered independent or impartial (Poland). The article posits that constitutional review of memory laws is particularly prone to be influenced by political considerations, meaning that, to a significant extent, it is determined by considerations of expediency without legal constraints. The article distinguishes between a 'simple' form of politicisation in a consolidated democracy and abusive judicial review in the rule of law backsliding democracy.

CONCLUSIONS

On the one hand, memory laws incorporating the concept of militant democracy are adopted by states striving to embed and consolidate democracy after experiences of totalitarianism or other non-democratic regimes, conflicts, atrocities, and human rights violations, thereby strengthening respect for the rule of law. On the other hand, the risk of abuse and politicisation is inherent in memory laws and politics, as they touch upon sensitive questions of identity, responsibility, and accountability for past crimes. They are prone to be used and abused to legitimise a character of the regime and its transformations, as well as expedient government policies.

Therefore, there are multiple examples of memory laws that directly or indirectly have contributed to a deterioration of the rule of law and democracy, both by their immediate interference with the rule of law and by strengthening a regime that attacks this core principle of European law. The normative assessment of memory laws in the context of the standards of the rule of law and human rights is frequently distinct from their evaluation based on their functionality in constructing a particular constitutional and mnemonic constitutionalism.

The contributions to this Special Section reveal that many memory laws inherently present a rule of law problem. First, determining the interpretation of history by state authorities can be seen as a rule of law problem in itself. Second, the typical vagueness of memory law wording (illustrated by Turkey's broadly-formulated provision on protecting the good name of the nation) provides state authorities, including the courts and the prosecution, with significant discretion in specific cases. This becomes particularly problematic in states experiencing democratic backsliding, where institutional safeguards for the rights and freedoms of individuals are weakened.

However, even in a consolidated democracy with a famously independent constitutional court (as in Germany), the court deviated from established constitutional law while justifying a well-intended memory law, such as a ban on approving, glorifying, or justifying the Holocaust, as constitutional.

The articles in this Special Section delve into various actors involved in the governance of historical memory in the context of rule of law backsliding: governments (Halmai, Gliszczyńska-Grabias and Bodnar), governments acting by

proxy, such as civil society organisations (Gliszczyńska-Grabias and Bodnar), prosecution offices (Baranowska), and constitutional courts (Rhein-Fischer and Wójcik). The weaponisation of civil and criminal law instruments in cases related to historical narratives may give rise to a chilling effect on public debate and delegitimise criticism of the government's historical policy.

The articles in this Special Section demonstrate that modest attempts to reconcile society and consolidate democracy by transitional justice measures may not prevent a democratising state from turning into an illiberal populist regime. Memory laws are an important part of the governance toolkit in the rule of law backsliding states and can contribute to further moving away from transnational standards on the rule of law and human rights. Governments in states experiencing rule of law backsliding adopt diverse strategies regarding memory laws, sometimes concurrently. Frequently, these strategies involve bold and straightforward historical policies and laws aimed at whitewashing a country's national history. In other instances, political leaders may opt to disguise their true intentions, for example, by utilising and distorting pre-existing legal mechanisms such as strategic civil lawsuits against their critics. It is important for the governments of liberal democracies to be aware of this inherent risk of memory laws when they decide to join the trend of governing the memory of the past.

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