

The Rise of Memory Laws in Poland

An Adequate Tool to Counter Historical Disinformation?

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Abstract

This article focuses on the growing body of Polish memory laws, including the 2016 ‘Street De-Communization’ Law and the 2018 Law on historical expression that introduced changes to the Act of the Polish Institute of National Remembrance. The analysis zooms in on, in particular, the often-overlooked component of the 2018 Law that requires the investigation of historical crimes of ‘Ukrainian nationalists’, as well as the wider context of ‘memory wars’ through memory laws in Central and Eastern Europe. The examination concludes that there is a discrepancy between the rationale to adopt this legislation in Poland, namely to counteract historical disinformation, and the legal solutions contained in the 2018 Law.

Keywords

memory laws – disinformation – freedom of expression – Poland – Holocaust

1 Introduction: The Rise of Memory Laws and the Facets of Disinformation

‘[If] Governments impose singular historical narratives and prohibit alternative interpretations in “memory laws”, then they draw a line in

* The author would like to thank Katharine Booth, Aleksandra Gliszczyńska-Grabias, André W.M. Gerrits, Christophe Paulussen and especially Anna Wójcik Anna Wójcik for valuable comments regarding this article.

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.”

LAMBERTO ZANNIER, OSCE High Commissioner on National Minorities, 2017-present¹

The year 2018 was marked by worldwide media attention to a Polish law that was presented by its legislators as a tool to counteract historical disinformation.² While it has been only one among a rich plethora of controversial memory laws adopted in Poland and the wider region of Central and Eastern Europe (CEE) in recent years, this law, which prohibited the attribution of an atrocious role to the Poles during World War II, has focused the international spotlight on the very topic of memory laws.³ Memory laws constitute an emerging study area in comparative constitutional and criminal law that focuses on various modes in legal governance of history.⁴ Criminal laws against Holocaust denial

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- 1 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.
 - 2 Law from 26 January 2018 Amending the Law of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. See U. Belavusau, ‘Polen verkondigt met herinneringswet de teloorgang van zijn liberale democratie’, de Volkskrant, available at: <https://www.volkskrant.nl/columns-opinie/polen-verkondigt-met-herinneringswet-de-teloorgang-van-zijn-liberale-democratie-b937a921/>; J. McAuley, ‘Poland’s New “Holocaust Law” Comes Up Against Massacre of Jews in 1941’, *The Washington Post*, 22 February 2018, available at: https://www.washingtonpost.com/world/europe/polands-new-holocaust-law-comes-up-against-massacre-of-jews-in-1941/2018/02/22/e99f22d4-10e4-11e8-a68c-e9374188170e_story.html; ‘Le Sénat polonaise adopte une loi controversée sur la Shoah’, *Le Monde*, 1 February 2018, *Le Monde*, available at: https://www.lemonde.fr/europe/article/2018/02/01/le-senat-polonais-adopte-une-loi-controversee-sur-la-shoah_5250085_3214.html.
 - 3 For an extensive comment, see U. Belavusau and A. Wójcik, ‘La criminalisation de l’expression historique en Pologne : la loi mémorielle de 2018’, *Archives de politique criminelle*, 40, 2018. 175–188.
 - 4 U. Belavusau and A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017; N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press,

were first adopted in Germany in the 1980s, although the terminology of ‘memory laws’ (*les lois mémorielles*) constitutes a French legacy in comparative law.⁵ The German model spilled over into Europe and was gradually extended from Holocaust denial laws *per se* to a wider prohibition of genocide denialism. In 2008, following Germany’s presidency in the European Council in 2007, such provisions were made secondary law of the European Union (EU).⁶ Despite their multiple forms – punitive and declarative, constitutional and administrative, legislative and judicial – the adoption of memory laws rose tremendously in Europe in the 2010s under the pretext of counteracting historical disinformation.⁷ Furthermore, their mushrooming in CEE, in particular in Poland, has been intertwined with a noticeable democratic decline in the region.⁸ ‘Illiberal democracies’ appear to be particularly eager to revert to populist identity-formation under the guise of memory politics, mainstreaming nationalist historiography while marginalizing and, at times, suppressing alternative visions of the past by, among others, ethnic minorities. Misinformation about the past has been well described as a specific effect in psychology, referring to the impairment in memory for the past that arises after exposure to misleading

2017; E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: T.M.C. Asser Press, 2018; G. Resto and V. Zeno-Zenkovich (eds), *Riparare Racricare Ricordere: Un dialogo tra storici e giuristi*, Editoriale Scientifica, 2012; A. Garapon, *Peut-on réparer l’histoire? Colonisation, esclavage, Shoah*, Odile Jacob (2008).

- 5 French memory laws took as an inspirational basis the prohibition of the Holocaust denialism, mimicking it on Armenian genocide and discussion about French colonial past. See Pierre Nora, ‘Lois mémorielles: pour en finir ce sport législatif purement français’, *Le Monde*, December 2011; Sèvana Garibian, ‘Pour une lecture juridique des quatre lois «mémorielles»’, *Esprit*, 2006. 158–73.
- 6 EU Council Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law 2008/913/JHA (28 November 2008). See Luigi Cajani, ‘Legislating History: The European Union and Denial of International Crimes’, in Belavusau and Gliszczynska-Grabias, op. cit., 129–148. See also the online symposium about memory laws on the Verfassungsblog, available at: <https://verfassungsblog.de/category/debates/memory-laws-debates/> (January 2018).
- 7 U. Belavusau, *Final Thoughts on Mnemonic Constitutionalism*, Verfassungsblog, available at: <https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/> (15 January 2018).
- 8 Marta Bucholc, ‘Commemorative Law-Making: Memory Frames of the Democratic Backsliding in Poland after 2015’, *Hague Journal on the Rule of Law*, 11, 1, 2018. 85–110; Wojciech Sadurski, *Poland’s Constitutional Breakdown*, Oxford: Oxford University Press, 2019; Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press, 2016.

information. This area of psychology addresses a number of issues regarding this phenomenon, including the conditions under which people are especially susceptible to the negative impact of misinformation and conversely when they are resistant.⁹ The discussion about (in)permissible criminalisation of historical discourses often draws on the limits of freedom of speech.¹⁰ In this respect, Poland does not constitute an exception but rather a powerful example of how legal instrumentalization of historical memory can be detrimental to fundamental rights.¹¹ This contribution, therefore, will focus on several Polish memory laws with an emphasis on the aforementioned law of 2018, often – albeit misleadingly – referred to as the ‘Holocaust Law’ (further 2018 Law).¹² The contribution will first consider the wider context with regard to the justifications leading up to the adoption of memory laws in Poland, as well as the role of the Polish Institute of National Remembrance. It will then discuss the controversial adoption of the 2018 Law, including the often-overlooked ‘Ukrainian component’ of the legislation and the wider CEE context of memory wars triggered by Russia. The conclusions of this article will highlight the discrepancy between the official rationale behind the 2018 Law, namely to counteract historical disinformation, presented as an effective means to disqualify the language of ‘Polish death camps’, and legal solutions adopted in the 2018 Law.

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- 9 Elizabeth F. Loftus, ‘Planting Misinformation in the Human Mind. A 30-year Investigation of the Malleability of Memory’, *Learning & Memory*, 2019. 361–366.
- 10 U. Belavusau, ‘Memory Laws and Freedom of Speech: Governance of History in European Law’, in A. Koltay (ed), *Comparative Perspectives on Fundamentals of Freedom of Speech*. Amsterdam: Wolters Kluwer, 2015. 537–558; Ilya Nuzov, ‘Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe’, *Human Rights Law Review*, 19, 2019. 231–253.
- 11 Aleksandra Glizczyńska-Grabias, *Calling Murders by Their Names as Criminal Offence – a Risk of Statutory Negationism in Poland*, *Verfassungsblog*, 1 February 2018, <https://verfassungsblog.de/calling-murders-by-their-names-as-criminal-offence-a-risk-of-statutory-negationism-in-poland/>.
- 12 For example, O. Aderet, *Poland’s Holocaust Law: First Lawsuit Filed Using Contentious Legislation*, *Haaretz*, available at <https://www.haaretz.com/world-news/europe/poland-s-holocaust-law-first-lawsuit-filed-using-contentious-law-1.5867841> (4 March 2018); V. Charnysh and E. Finkel, ‘Rewriting History in Eastern Europe: Poland’s New Holocaust Law and the Politics of the Past’, *Foreign Affairs*, available at <https://www.foreignaffairs.com/articles/hungary/2018-02-14/rewriting-history-eastern-europe> (14 February 2018).

2 Polish Memory Laws and Policies under the Guise of Counteracting Disinformation

2.1 *Socio-Political Context and the Polish Institute of Memory*

After the fall of communism, Poland adopted a new Constitution¹³ only in 1997 and a Criminal Code¹⁴ in 1998. Both the Constitution and the Criminal Code outlawed the propagation of fascism and other totalitarian ideologies – a standard found in many Council of Europe Member States.¹⁵ In line with other post-communist transitional democracies in CEE, Poland expanded the core of this ban to cover the propagation of ideas and methods of totalitarian Stalinist and communist regimes.¹⁶ This ban included the display of relevant symbols.¹⁷ In 2016, the Polish parliament adopted the Law on prohibiting propagation of communism and other totalitarian regimes through names of buildings, objects, and public service devices, dubbed the ‘street de-communization law’ (2016 Law).¹⁸ The 2016 Law was adopted by the votes of the governing ‘Law and Justice’ party (*Prawo i Sprawiedliwość*, further *PiS*).¹⁹ In 2017, the Law was amended to incorporate the removal of monuments.²⁰

13 The Constitution of the Republic of Poland adopted by the National Assembly of Poland on April 2, 1997, *Journal of Laws of the Republic of Poland*, No. 78 of 2 April 1997, item No. 483.

14 Law of 6 June 1997 on The Penal Code of the Republic of Poland, *Journal of Laws of the Republic of Poland*, No. 81 of 2 August 1997, item No. 553.

15 See U. Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, London: Routledge, 2013.

16 The right to ban the names and symbols of undemocratic regimes from public spaces is recognised by international and European human rights bodies, including the UN Human Right Committee, the Council of Europe’s Venice Commission and the European Court of Human Rights. Such legislation, however, must pass an obligatory test of lawfulness, proportionality, and necessity in a democratic society. States are given a wide margin of appreciation to choose adequate policies, depending on country-specific circumstances and the historical experiences of their citizens.

17 A. Fijalkowski, ‘The Criminalisation of Symbols of the Past: Expression, Law and Memory’, *International Journal of Law in Context*, 10, 2014. 298–9; U Belavusau, ‘Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant?’, *Israel Law Review* 47, 2016. 27.

18 Law of 1 April 2016 on Prohibiting Propagation of Communism or Other Totalitarian Regime Through Names of Buildings, Objects, and Public Service Devices, amended on 22 June 2017 and 14 December 2017, *Journal of Laws of the Republic of Poland* 2016 item 744.

19 Results of the parliamentary vote No. 15 on the 136th sitting of Sejm on 1 April 2016.

20 Law of 14 December 2017 amending the Law on prohibiting propagation of communism or other totalitarian regimes through the names of organisational units, auxiliary units of local communes, and monuments and law; Law on prohibiting propagation of

Under the 2016 Law, local authorities were obliged to rename locations that propagate communism as defined in the Law and according to a list prepared by the Institute of National Remembrance (*Instytut Pamięci Narodowej*, further *IPN*), a public history research institution with prosecutorial powers to investigate crimes against Polish citizens. The IPN was created in 1998 to specifically investigate the crimes of the Nazi and Soviet regimes. Since its creation it has become a true 'Ministry of History' with quasi-legislative powers and a yearly budget that is five times higher than that of the Polish Academy of Sciences.²¹ In accordance with the 2016 Law, the IPN drafted a list of 130 locations to be renamed within twelve months of the entry into force on 1 September 2016. If local authorities failed to comply with the requirement before this date, provincial governors (*województwie*) who represent the central government in Polish provinces (*województwa*) were obliged to issue an administrative decision, a so-called replacement ordinance (*zarządzenie zastępcze*), and rename streets within three months after the expiry of the initial period prescribed by the Law. To limit the arbitrariness of the ordinance, provincial governors were required to consult with the IPN in relation to the renaming of locations. The 2016 Law permitted local councils to overrule provincial governors' administrative decisions in a regular vote within three months of the proposed name change. Decisions could also be appealed to the administrative courts. However, these rights of appeal were seriously restricted by a 2017 amendment to the 2016 Law, which was introduced after several protests against the Law's implementation. Following this amendment, from 7 January 2018 local councils were required to seek the permission of the IPN and the provincial governor to overrule the latter's decision. While there have been cases in which the IPN's decision was favourable to the claims of local communities,²² the 2017 amendment demonstrates an increased centralisation of power in Poland and a peculiar understanding of civil liberties under the ruling *PiS* party.²³

communism or other totalitarian regimes through the names of buildings, objects, and public service devices, *Journal of Laws of the Republic of Poland* 2017 item 2495.

- 21 B. Kocejko, 'Przeliczamy budżet państwa na IPN-y', *Oko.press*, 12 January 2018, available at: <https://oko.press/przeliczamy-budzet-panstwa-ipny-ilu-prawicowych-historykow-trzeba-by-ochronic-polska-przyrode/>.
- 22 See e.g., Institute of National Remembrance (IPN), Oświadczenie w sprawie zmian nazw ulic wskazywanych jako podlegające zmianie na terenie gminy miejskiej (Kołobrzeg, 14 November 2017), available at: <https://ipn.gov.pl/pl/dla-mediow/komunikaty/42794,Oswiadczenie-w-sprawie-zmian-nazw-ulic-wskazywanych-jako-podlegajace-zmianie-na-.html> (I am grateful to Anna Wójcik for bringing my attention to this case).
- 23 See D. Sześciło, *Recydywa centralizmu? Zmiany w polityce państwa wobec samorządu po 2015 roku*, Fundacja im. Stefana Batorego (January 2018), available at: http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/D_Szescilo%20Recydywa%20centralizmu.pdf.

Apart from the 2016 Law, the most prominent Polish memory law regarding World War II is a January 2018 amendment to the 1998 law that established the IPN (subsequently amended again in June 2018). The Amendment criminalised statements contrary to established historical facts about the involvement of the Polish State in the atrocities of World War II. It introduced a new power for the IPN to investigate ‘crimes of Ukrainian nationalists’ committed between 1920 and 1950, and extended the temporal mandate of the IPN to the documentation and investigation of crimes and gross human rights violations against Polish nationals and citizens committed between 8 November 1917 and 31 July 1989. The 2018 Amendment had a practical impact on the IPN’s responsibilities as well as a symbolic impact in that they are paradigmatic expressions of the historical policy of the current ‘Law and Justice’ government as well as its approach to democratic norms and political process, including the exercise of rights and civil liberties.

3 Analysis of the 2018 Law and the Issue of ‘Disinformation’ Regarding World War II

At the beginning of 2018, Poland found itself at the epicentre of a history-related scandal stemming from the enactment of the 2018 Law, which was signed by President Andrzej Duda. This enactment was immediately harshly criticised in Europe,²⁴ Israel,²⁵ Ukraine,²⁶ and the USA.²⁷ Poland’s Prime Minister Mateusz Morawiecki’s chancellery even produced a recorded statement intended to clarify the ‘Polish’ position on the Law and to stress that its primary purpose was not a whitewashing of perpetrators but rather the countering of the disinformation about the behaviour of the Poles during World War II. A paragon of media propaganda, Morawiecki speaks with dramatic intonation

24 *Pologne: la loi sur la Shoah «malvenue» selon Le Drian*, Le Figaro, 7 February 2018, available at: <http://www.lefigaro.fr/flash-actu/2018/02/07/97001-20180207FILWWW00072-pologne-la-loi-sur-la-shoah-malvenue-selon-le-drian.php>.

25 *Israel and Poland clash over proposed Holocaust law*, Reuters, 28 January 2018, available at: <https://www.reuters.com/article/us-israel-poland/israel-and-poland-clash-over-proposed-holocaust-law-idUSKBN1FH0S3>.

26 *Ukrainian parliament condemns Polish law banning Bandera ideology*, Ukrainform.net, 6 February 2018, available at: <https://www.ukrinform.net/rubric-polytics/2397345-ukrainian-parliament-condemns-polish-law-banning-bandera-ideology.html>.

27 *Statement by Secretary Tillerson on Recent Legislation in Poland*. U.S. Department of State. Office of the Spokesperson, 6 February 2018, available at: https://pl.usembassy.gov/legislation_poland/.

accompanied by sombre music. The video recording also contains images of Nazi concentration camps juxtaposed with those of heroic Polish soldiers. ‘Poland,’ he argues, ‘was under a dual German and Soviet occupation. Practically every Polish family mourned the loss of loved ones who perished at the hands of these occupying powers.’ From the image of Polish misfortunes, Morawiecki then immediately explains that Polish law shall held accountable those who spread disinformation about the involvement of the Polish nation in Nazi atrocities and who try to deny the suffering of Poles under Nazi terror. ‘Similar laws,’ he continues:

operate in other countries across Europe and the world. Holocaust denial is not only a denial of German crimes, but also other ways of falsifying history. One of the worst types of this lie occurs when someone diminishes the responsibility of real perpetrators and attributes that responsibility to their victims.²⁸

In 2016, the draft Law prepared by the Ministry of Justice was presented in the Polish *Sejm*, lower house of the Polish parliament. The Ministry of Justice consulted the draft law with various actors, including the Ministry of Culture, Foreign Affairs Ministry, and the Embassy of Israel in Warsaw. The Office of the Commissioner for Human Rights and non-governmental organisations criticised the bill. Nonetheless, on 26 January 2018, to the great surprise of observers of the legislative process, the *Sejm* adopted the 2018 Law – somewhat ironically – on the eve of Holocaust Remembrance Day (27 January). This resulted in the domestic and international outcry mentioned above. The Law caused a deterioration of Polish-Israeli relations on a scale unprecedented since Poland’s transition to democracy in 1989. Despite such diplomatic scandals, on 6 February 2018 the President of the Republic of Poland signed the 2018 Law into force.

International media frequently referred to the 2018 Law as the ‘Holocaust law’, which may incorrectly insinuate that the Law introduced criminal prohibitions on the denial of the Holocaust to the Polish legal system, or new, related legislation with a parallel aim. However, the 2018 Law belongs to an entirely different category of criminal memory laws. It is an insult law which aims to protect the reputation of abstract entities such as State and nation. The Law introduced a new system of criminal and civil means, which were adopted

28 *The Statement by the Prime Minister of Poland Mateusz Morawiecki*, Chancellery of the Prime Minister of Poland, 3 February 2018 available at: <https://www.youtube.com/watch?v=GXcm7k3FpJc>.

to counter allegedly defamatory statements about the Polish State and the nation's involvement in World War II atrocities when such statements were considered to be contrary to established historical facts and as such disparage the reputation of Poles and their country.

The 2018 Law initially amended the 1998 law that established the IPN, adding, *inter alia*, Article 55a, Clause 1, which states:

Whoever accuses, publicly and against the facts, the Polish nation, or the Polish state, of being responsible or complicit in the Nazi crimes committed by the Third German Reich or other crimes against peace and humanity, or war crimes, or otherwise grossly diminishes the actual perpetrators thereof, shall be subject to a fine or a penalty of imprisonment of up to three years.²⁹

Clause 2 of the 2018 Law also stipulates that persons who 'act unintentionally' may be liable to punishment. Clause 3 introduced artistic and scientific exceptions: 'the perpetrator of the offence referred to in clauses 1 and 2 is not committing a crime if he or she commits such an act as part of artistic or scientific activities.'³⁰

The 2018 Law is the Polish government's second attempt to introduce a specific criminal offence of defaming the State and nation. The first attempt was temporarily successful in 2006 when Article 132a was incorporated into the Criminal Code of the Republic of Poland. The Article provided: '[...] whoever publicly slanders the Polish Nation for participating, organizing or being responsible for communist or Nazi crimes, is subject to a restriction of liberty up to 3 years'. The Polish Human Rights Commissioner raised concerns about the compatibility of Article 132a with the Constitution and referred the provision to the Polish Constitutional Tribunal.³¹ In a ruling handed down in 2008, the Constitutional Tribunal found the provision to be incompatible with the Polish Constitution on procedural grounds.³² The legal reasoning developed

29 Law from 26 January 2018 amending the Law of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.

30 *Ibidem*.

31 Human Rights Commissioner Office notice from 15 January 2007 r., no. RPO-545868-II-06/ST.

32 Judgement of the Constitutional Tribunal of 8 September 2008, Case no. K 5/07.

by the Polish Constitutional Tribunal was far from convincing and, regrettably, did not include a critique on substantive grounds.³³

Building up to the adoption of the 2018 Law, politicians and government officials in Poland increasingly argued in favour of legislative action against the persistent use, mostly in foreign media, of historically incorrect expressions – perceived to be vicious disinformation – such as ‘Polish death camps’ and ‘Polish concentration camps’ in reference to the concentration and extermination camps established on the territory of occupied Poland by Nazi Germany during the World War II. However, in the 2000s, the framing of the issue changed. The Polish legislator began to define the challenge of such disinformation as fighting against ‘untrue accusations about Poles’. In 2016, legislation had already been proposed to counter references, such as ‘Polish death camps’, which, according to the authorities, constituted an intentional misinterpretation and falsification of history, disparaging the honour of the Polish State and nation and, consequently, infringing on individual’s rights, including the right to pride of belonging to one’s nation.

Before the adoption of the 2018 Law, civil law measures about the expression ‘Polish death camps’ had been used in three cases,³⁴ namely *Osewski v Die Welt/Axel Springer*,³⁵ *Zapaśnik v Focus Online – Tomorrow/Focus Media GMBH*,³⁶ and *Tendera v ZDF*.³⁷ In the latter case, the Court ordered damages in favour of the applicant. Despite this success, which confirmed that extant civil law provisions could be used to effectively protect individual’s rights infringed by the use of phrases such as ‘Polish death camps’, some political actors in Poland nonetheless insisted that it was a matter of national urgency to incorporate more specific guarantees concerning the reputation of the Polish State and nation.

However, such criminal guarantees already existed in the Polish legal system. Poland has a specific criminal provision protecting the good name of the Republic against public insult. Article 133 of the Criminal Code of 1997 states:

33 A. Gliszczyńska and A. 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.

34 See T.T. Konciewicz, T.T., ‘On the Politics of Resentment, Mis-memory and Constitutional Fidelity’, in Belavusau and Gliszczyńska-Grabias, op. cit., 263–290.

35 Judgment of the Regional Court in Warsaw of 5 March 2015, Case I C 10/11; Judgment of the Court of Appeal in Warsaw of 31 March 2016, Case I ACa 971/15. I am grateful to Anna Wójcik for bringing my attention to these cases.

36 Judgment of the Regional Court in Olsztyn of 25 February 2015, Case I C 726/13; Judgment of the Court of Appeal in Olsztyn of 30 September 2015, Case ACa 403/15.

37 Regional Court in Cracow, case dismissed on 25 April 2016, case I C 151/14.

‘Whoever insults the Nation or the Republic of Poland in public shall be subject to the penalty of the deprivation of liberty for up to 3 years.’³⁸ The Polish constitutional doctrine confirms that ‘the Polish Nation’ means all citizens of the Republic of Poland.³⁹ The wording in the Criminal Code does not specify what constitutes the crime of defamation of the State and nation, thereby opting for a general formulation.

4 The 2018 Law in Comparative Perspective

Poland is not a unique case in Europe when it comes to protecting the State and the nation’s reputation. Article 90a of the German Criminal Code prohibits ‘insulting or maliciously expressing contempt toward Germany or one of its states’. Likewise, Article 291 of the Italian Criminal Code forbids denigration of ‘the Italian nation’, Article 423 of the Slovak Criminal Code provides criminal liability for defamation of the ‘nation, its language or any race or ethnic group’ and a parallel provision is found in Article 355 of the Czech Criminal Code.⁴⁰ According to the 2017 OSCE report on insult and defamation laws, ‘[a]t least 14 OSCE participating States have criminal laws prohibiting insult of the state: Austria, Belarus, Croatia, Germany, Italy, the former Yugoslav Republic of Macedonia, Montenegro, Poland, Portugal, San Marino, Serbia, Slovenia, Spain and Turkey.’⁴¹

In 2007, the Parliamentary Assembly of the Council of Europe criticised state-insult laws, arguing that ‘the reputation of a nation, the military, historic figures or a religion cannot and must not be protected by defamation or insult laws.’⁴² In 2010, the United Nations Special Rapporteur on Freedom of Expression stressed that ‘international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.’⁴³

38 Criminal Code of the Republic of Poland (1997).

39 A. Zoll (ed.). *Komentarz. Kodeks karny. Część szczególna* [Commentary to Criminal Code], 2006. 135.

40 2017 OSCE, op. cit.

41 OSCE. *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, March 2017. <https://www.osce.org/fom/303181?download=true> (accessed 2 March 2018).

42 Resolution 1577 (2007).

43 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, Fourteenth Session, 20 April 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>. While this article does not directly analyse memory laws in terms of their compatibility with

5 Chilling Effects of the 2018 Law

Despite the exception made in the 2018 Law for artistic and scientific expression, the Law's wording raises serious concerns that it will criminalise references to the complicity of Poles in the Holocaust. It goes without saying that all of the concentration camps on Polish territories – including the most widely known, Auschwitz – were built by Germans, not Poles. Likewise, Poland proudly holds the highest number of the so-called 'righteous among the nations', i.e. non-Jewish people honoured in Israel for hiding Jews from Nazi repressions. Yet one cannot simply pretend that any nation is immune to atrocities and hatred. Sadly, Poland's unsavoury history remains partially concealed in Poland, including anti-Semitism, Poles burning their neighbours alive in Jedwabne in 1941, and the Kielce massacre of Jews by Poles immediately after the war in 1946.⁴⁴ The 2018 Law is revisionist legislation designed to stir up nationalism and safeguard support for the *PiS* by feeding primitive populism with the neurotic memory of World War II.

The Polish government continues to fan a metaphorical fire each time the foreign media or a politician – like President Barack Obama in 2012 – inadvertently refers to 'Polish concentration camps'.⁴⁵ This misnomer has been heralded by politicians as a purposeful disinformation exercise and a pretext for new legislation which, as is clear from its formulation, extends beyond the prohibition of 'Polish death camps'.

6 Subsequent Amendments of the 2018 Law in June 2018 and January 2019

On 27 June 2018, unexpectedly for many and even before a decision of the Constitutional Tribunal, the Polish parliament amended the 2018 Law by repealing Articles 55a and 55b which had been introduced in the January 2018

human rights, in particular, with freedom of expression, there is an extensive literature on this subject. See in particular, a splendid recent analysis by Ilya Nuzov, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, *Human Rights Law Review*, 19, 2019. 231–253. See also Belavusau, 'Memory Laws and Freedom of Speech: Governance of History in European Law', in A. Koltay (ed), *Comparative Perspectives on Fundamentals of Freedom of Speech*, Wolters Kluwer, 2015. 537–558.

44 Jan Tomasz Gross, *Neighbours: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton, NJ: Princeton University Press, 2001.

45 The video of Obama's speech is available at: <https://www.youtube.com/watch?v=qXhlTKQufPg>.

Amendment (June 2018 Amendment).⁴⁶ These Articles comprised a criminal offence for insulting the Polish State or nation through falsely alleging responsibility or co-responsibility for the atrocities of World War II committed by Nazi Germany. Thus, this crime existed in the Polish legal system only for four months from March up to and including June 2018. Other provisions introduced in January 2018 remain in force, however, until January 2019, including Article 1.1a, which relates to Polish-Ukrainian history, and Articles 53o, 53p and 53q, which introduce a civil liability system for the infringement of personal rights of the Republic of Poland and the Polish nation.

Upon signing the January 2018 Amendment, the President of the Republic of Poland referred Articles 55a and 1.1a to the Constitutional Tribunal to verify whether they were compatible with the Constitution of the Republic of Poland. The June 2018 Amendment meant that the Constitutional Tribunal would not be required to pronounce its verdict on Article 55a (which was repealed). However, the Constitutional Tribunal still had to deliver its judgment on the constitutionality of Article 1.1a which concerns 'crimes of Ukrainian nationalists'. On 17 January 2019, the Constitutional Tribunal handed down its verdict in case K /18 and considered the provisions, including the wording 'Ukrainian nationalists' and 'Eastern Small Poland [Małopolska Wschodnia]', to be incompatible with the principle of specificity of law derived from Article 2 and the principle *lex retro non agit* derived from Article 42.1 of the Polish Constitution. Still, it is punishable by up to three years imprisonment to deny crimes of 'members of Ukrainian formations that collaborated with the Third Reich'. This provision, introduced in a January 2018 amendment, was not challenged in the President's motion to the Constitutional Tribunal, nor repealed in legislative procedure.

The June 2018 Amendment was the result of a Polish-Israeli dialogue. The governmental project was processed through both chambers of the Polish parliament in record speed. The entire legislative process in the lower and upper chambers was finalised within five hours. Immediately afterwards, President Duda signed the June 2018 Amendment ahead of a press conference by Prime Minister Morawiecki and the Israeli Prime Minister Benjamin Netanyahu. Morawiecki and Netanyahu presented a joint declaration,⁴⁷ in which

46 The Law of 27 June 2018 amending the Law on the Institute of National Remembrance. *Journal of Laws of the Republic of Poland* 2017 item 1277.

47 Chancellery of the Prime Minister of the Republic of Poland. 'Joint Declaration of the Prime Minister of the State of Israel and the Prime Minister of the Republic of Poland', 27 June 2018, available at: <https://www.premier.gov.pl/en/news/news/joint-declaration-of-prime-ministers-of-the-state-of-israel-and-the-republic-of-poland.html>.

they agreed that ‘the term ‘Polish concentration/death camps’ is blatantly erroneous’. They condemned anti-Semitism, rejected ‘anti-Polonism and other negative national stereotypes’ and called ‘for a return to civil and respectful dialogue in the public discourse’. Both Prime Ministers were criticised in their own countries: the Polish Prime Minister for a concession to Israel and the Israeli Prime Minister for supporting distortions of historical facts. There have been no corresponding bilateral negotiations between Poland and Ukraine, similar in scale to the one between Poland and Israel.⁴⁸

7 Memory Wars through Memory Laws: Russian and Ukrainian Factors

Recent academic literature makes clear that the rise of memory laws in the CEE region during the 2010s has been, at least in part, caused by the so-called ‘memory wars’.⁴⁹ Russia has undoubtedly featured as the leading provocateur in these symbolic wars about the past in CEE. Thus, Russia has sparked conflicts through its controversial politics of memory,⁵⁰ in particular regarding Katyń (May 1940),⁵¹ as well as the beginning of World War II (Russians count 1941 as the start of the “Great Patriotic War” instead of 1939), the Molotov-Ribbentrop Pact (23 August 1939) and the imposition of the communist regime in CEE (1945–1989).⁵² As in the Baltic countries and Ukraine, the Russian factor has amplified the urge to cement ontological security⁵³ for the Polish democracy, which is in a transitional period following its troubled past with Russia and the denialist politics of the Russian elites, coupled with the annexation of the Crimean peninsula and Russian support for the separatists in Donetsk

48 Jo Harper, *Poland's Memory Wars: Essays on Illiberalism*, New York: CEU Press, 2018; Julie Fedor et al. (eds.), *War and Memory in Russia, Ukraine and Belarus*, London: Palgrave, 2017.

49 Ilya Nuzov, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, *Human Rights Law Review*, 19, 2019. 231–253.

50 Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2018.

51 See G. Baranowska, *The Right to Truth for the Families of Victims of the Katyń Massacre*, *Verfassungsblog*, 6 January 2018, available at: <https://verfassungsblog.de/the-right-to-the-truth-for-the-families-of-victims-of-the-katyn-massacre/>.

52 Krzysztof Ruchniewicz, *The Memory of World War II in Poland*, Eurozone, 2007, available at: <https://www.eurozine.com/the-memory-of-world-war-ii-in-poland/>.

53 For a concept of ontological security in international relations, see Maria Mälksoo, Memory Must Be Defended: Beyond the Politics of Mnemonic Security, *Security Dialogue*, 46, 3, 2015. 221–237.

and Luhansk.⁵⁴ On 5 May 2014, the Russian President signed into law Article 354.1 (on the ‘rehabilitation of Nazism’) which, *inter alia*, makes it a criminal offence ‘to spread intentionally false information about the Soviet Union’s activities during World War II’, as well as ‘to distribute information with a manifest disrespect towards society regarding Russia’s days of military glory and the commemorative dates associated with the defence of the Fatherland’ or ‘public symbols of Russia’s military glory’.⁵⁵ By introducing imprisonment for the comparable ‘defamation’ of the Polish nation in the context of World War II, the Polish legislator thus mimicked the punishment under Article 354.1 of the Russian Law.

Likewise, the historical context of Polish-Ukrainian relations sparked memory wars, in particular about the history of the inter-war period.⁵⁶ Apart from Nazi crimes, the 2018 Law addresses ‘crimes of Ukrainian nationalists and Ukrainian formations collaborating with [the] Third Reich’. Most of the historical tension between Poland and Ukraine is related to the Volynia massacre. Yet this ethnic cleansing of the Polish population on Ukrainian territories occurred between 1943 and 1944, while the new Law defines the temporal scope of such crimes as having occurred much earlier, that is between 1925 and 1950. This is indicative of the explicit intention of the Polish legislature to disparage and vilify the Ukrainian national movement in Western Ukraine in the 1920s and 1930s, which was occupied by Poland until 1939 under the Riga Treaty. Furthermore, the Ukrainian government no longer denies the Volynia massacre. On the contrary, recent years have shown joint commemorative practices between the two countries despite Ukrainian national resistance during 1925–1950, the period awkwardly covered in the Polish Law, and similar Ukrainian casualties suffered at the hands of Polish perpetrators (for example, during the Pawłokoma massacre in 1945). After the *PiS* came into power, Poland adopted a 2016 resolution on the Volynia massacre that defined the massacre as an

54 Krzysztof Ruchniewicz, *The Memory of World War II in Poland*, Eurozone, 2007, available at: <https://www.eurozine.com/the-memory-of-world-war-ii-in-poland/>; Ilya Nuzov, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, *Human Rights Law Review*, 19, 2019, 231–253.

55 Nikolay Koposov, ‘Defending Stalinism by Means of Criminal Law: Russia, 1995–2014’, in Belavusau and Gliszczynska-Grabias, 293–309.

56 Ian Bateson, *Ukraine and Poland’s History Wars are a Gift for Putin*, Foreign Policy, 24 January 2017, available at: <https://foreignpolicy.com/2017/01/24/ukraine-and-polands-history-wars-are-a-gift-for-putin/>; Oleksandra Iwaniuk, *Ukrainian-Polish Relations in the Context of the Memory War: A Game of Lose-Lose*, A Blog of the Kenna Institute, 2017, available at: <https://www.wilsoncenter.org/blog-post/ukrainian-polish-relations-the-context-the-memory-war-game-lose-lose>.

act of genocide.⁵⁷ Emblematic of the Polish government's revanchist vision of 20th century history, Polish memory laws have almost always positioned Poles as victims and Ukrainians and other nations as perpetrators, whereas a more impartial interpretation of that period would consider both nations as victims *and* perpetrators. The 2018 Law introduced an obligation on the part of the IPN to document and investigate crimes of 'Ukrainian nationalists' which, however, is not a category recognised by Polish or international law and which subsequently was challenged by the Polish Constitutional Tribunal in January 2019.

8 Comparative Conclusions: The Future is Bright, the Past is Uncertain

During the 1980s and 1990s, and even partially in the early 2000s, many European countries legislated memory provisions, which largely targeted revisionist and denial narratives, in particular about the Shoah, the Armenian genocide and colonial atrocities. Memory politics through the acknowledgement of crimes against humanity, including the consolidating theme of the Holocaust, has been a source of emerging trust in international relations, especially within the European Union.⁵⁸ In contrast, the 2000s and especially from 2010 onwards there was a vivid turn in memory laws being converted into weapons of memory wars. This is especially noticeable in CEE, a region grappling with insecurity due to the perceived ambitions of Putin's Russia. The concept of the so-called 'mnemonic security' has been instrumentalised to justify legislating about the past in a number of countries in this region, which struggle to counter Russian propaganda and disinformation.⁵⁹

57 Polish MPs adopt resolution calling 1940s massacre genocide, 'Radio Poland', 22 July 2016, available at: <http://www.thenews.pl/1/10/Artykul/263005,Polish-MPs-adopt-resolution-calling-1940s-massacre-genocide>.

58 See in particular, Luigi Cajani, 'Legislating History: The European Union and Denial of International Crimes', in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 129–148; U. Belavusau, 'Memory Laws and Freedom of Speech: Governance of History in European Law', in A. Koltay (ed), *Comparative Perspectives on Fundamentals of Freedom of Speech*, Wolters Kluwer, 2015. 537–558.

59 For extensive explanation on the nexus between memory laws and claims to protect public security, see Maria Mälksoo, 'Memory Must Be Defended: Beyond the Politics of Mnemonic Security', *Security Dialogue*, 46, 3, 2015. 221–237; Anna Wójcik, 'Memory Laws and

Poland was particularly criticised for the 2018 Law that initially introduced criminal measures to censor expressions about history. As was demonstrated in this article, the 2018 Law is in fact a law against insulting the State and nation, rather than a 'Holocaust law' as it is often misleadingly been referred to in the international press. Article 55a of the 2018 Law introduced a new and unique crime of ascribing crimes committed by the German Third Reich to the Polish State and nation. The 2018 Law certainly went against a wider European trend to decriminalize slander and libel. Criminal sanctions, and especially imprisonment, are considered to be excessive punishments in cases related to freedom of expression, so it can be considered to be positive that in June 2018 the Polish legislator repealed the criminal sanction. Nonetheless, the fears that the 2018 Law may negatively impact on freedom of expression about Polish history have solid foundations. The Law is not designed to explicitly ban only the language of 'Polish death camps'. Instead, it may 'cover an infinite number of statements'.⁶⁰ Potentially anybody who expresses views that are counter to the official version of history recognised by the Polish State could fall under its scope. Free speech standards require that controversial aspects of national history are discussed 'openly and dispassionately'.⁶¹ The 2018 Law certainly does not contribute to such an open and dispassionate discussion.

The crucial role in executing this Law has been attributed to the IPN, which was established to investigate crimes of totalitarian regimes against Poland and its citizens. Such national institutes of remembrance have been mushrooming in CEE after the fall of the Iron Curtain, including in the Czech Republic, Hungary, and Ukraine. These institutes mimic each other despite the at times mutually contradictory projects of victimised national identity that they aim to construct. By law, the IPN is also crucial for counteracting disinformation and identity-building activities, such as renaming streets and removing monuments of the totalitarian past from the public sphere.

Legally counteracting disinformation about the representation of the past is nothing new. Yet a disturbing justification advanced by the Polish government

Security', *Verfassungsblog*, 5 January 2018, available at: <https://verfassungsblog.de/memory-laws-and-security/> Maria Mälksoo, 'Democratization in Times of War: Ukraine's Militant Democracy Problem', *Verfassungsblog*, 9 January 2018, available at: <https://verfassungsblog.de/decommunization-in-times-of-war-ukraines-militant-democracy-problem/>.

- 60 T.T. Konciewicz, 'On the Politics of Resentment, Mis-memory and Constitutional Fidelity', in Belavusau and Gliszczynska-Grabias, op. cit., 263–290.
- 61 For a broader study of memory laws in light of freedom of speech, see U. Belavusau, *Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning*, *EUI Law Research Working Paper*, 12, 2013, 1–31.

is that the Law was nothing exceptional, considering also the earlier criminal provisions in Europe prohibiting the denial of the Holocaust. The argument of the Polish government that all Western European countries have been legally protecting the memory of the Holocaust in the same way is at best misleading. The closest relative of the 2018 Law is not a standard provision in continental Europe's criminal codes about punitive measures against Holocaust deniers. Rather, the closest sibling of the Law are parts of the Turkish and Russian penal codes. The way the Law frames the defence of collective Polish dignity in a historical context is foremost reminiscent of the notorious provision in the Turkish criminal code (Article 301), which criminalises denigration of the Turkish nation and is particularly used to silence people speaking out against the massacres of Armenians and other minorities by the Ottoman Empire in 1915. Likewise, the provision is similar to Putin's policy of rehabilitating Stalinism, namely Article 354.1, which was introduced into the Criminal Code in 2014 by the Russian Duma. The Article imposes a maximum of three years of imprisonment (a similar term as in the initial winter version of the 2018 Law) to people 'publicly spreading false information about USSR's activities during World War II'. By implementing the 2018 Law, Poland has confirmed the downslide of its liberal democracy. During the past three years, the Polish government has been at the epicentre of criticism from the EU and has had to face overwhelming, external criticism regarding the dismantling of its independent Constitutional Tribunal and increasing political control of the judiciary.⁶²

The following has recently been stressed by the OSCE High Commissioner for National Minorities:

[...] as is the case with other identity issues, dealing with historical interpretations is complex and sensitive and requires a careful balance to be struck. Yet, the sensitivity of the issue should not deter us from reflecting upon the role of history and memory politics in fuelling divisions and conflict.⁶³

In this respect, it is questionable whether the Polish memory laws advanced in recent years – especially the 2018 Law – have been genuinely designed as tools

62 Wojciech Sadurski, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019.

63 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.

to counteract the disinformation that they claim to prevent and challenge. In practice, we see that such laws are capable of fostering a tremendous mistrust within Poland, provoking further memory wars amongst states, and halting reconciliation processes between nations.