



Memory Laws, Rule of Law, and Democratic Backsliding: The Case of Poland

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Abstract

This article argues that the memory laws adopted during the democratic backsliding in Poland from 2015 to 2023 are a perversion of classic European memory laws that aimed at safeguarding democracy from internal dismantlement and protecting the rights and freedoms of individuals from social ills, such as in the case of Holocaust denial. The new wave of Polish memory laws was an element of an anti-liberal turn in Poland and contributed to a further move away from the rule of law, human rights, and European legal standards. The mechanisms adopted in those laws are removed from their stated official purposes and are examples of penal populism and populist revanchism instead of transitional justice. This article argues that adopting such memory laws was possible due to democratic backsliding and that they reinforce the erosion of democratic standards by restricting the rights of individuals. Moreover, the politically subordinate Constitutional Tribunal's reaction to the motions about the constitutionality of these memory laws further evidences a systemic lack of independent, centralized judicial review. This phenomenon has far-reaching, negative consequences for democratic standards.

Keywords: memory laws, democratic backsliding, human rights

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What is the role of the legal governance of history through memory laws in a backsliding democracy?¹ This article examines Poland's memory laws enacted during the democratic backsliding of 2015–2023 under the Law and Justice (Prawo i Sprawiedliwość: PiS) party government. Democratic backsliding is understood 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.”²

Memory laws have been adopted also in other backsliding democracies in Europe, particularly in Hungary, which is currently considered a hybrid, autocratizing regime. The Fidesz government has constitutionalized historical narratives³ and adopted memory laws further entrenching a narrative of Hungary as a victim, not a perpetrator of crimes against minorities, including the Holocaust.⁴ However, this article focuses on the example of Poland, in which the process of rule-of-law backsliding in terms of judicial independence and regarding restrictions on the rights of individuals has surpassed even the Hungarian case.⁵ The article examines the features of adopted memory laws and the approach of the politically subordinated Constitutional Tribunal to them, which is indicative of a broader subordination of law and institutions to political ends of the governing majority.

The article posits that legislating these new memory laws does not simply coincide with democratic backsliding but reinforces it. It argues that the PiS governing majority's approach to memory laws was an expression of anti-liberalism and mirrored its broader hostile attitude to the rule of law, human rights, and European legal standards. Anti-liberalism is understood here as an opposition to the values, institutions, and standards of constitutional democracy based on the rule of law, including to the kinds of strong checks and balances that limit the executive and the legislature's power and protect the rights and freedoms of individuals, including those of minorities and critics of the government.

This article proceeds as follows: first, it explains what memory laws stand for; second, it discusses the broader political, legal, and institutional context in Poland under the PiS government from 2015 to 2023, in particular the changes in official historical policy; and third, it scrutinizes two case studies of memory laws adopted during that time:

1 The author is grateful to the Volkswagen Foundation for supporting this study with a research grant for the MEMOCRACY consortium project (2021–2024), grant agreement no. 120221. I am grateful to the reviewer and editors for their comments, which significantly contributed to the refinement of this article.

2 Laurent Pech and Kim Lane Scheppele, “Illiberalism within: Rule of Law Backsliding in the EU,” *Cambridge Yearbook of European Legal Studies* 19 (December 2017): 3–47, <https://doi.org/10.1017/cel.2017.9>.

3 Gliszczynska-Grabias et al., “Memory Laws in Poland and Hungary: Report by the Research Consortium ‘The Challenges of Populist Memory Politics and Militant Memory Laws (MEMOCRACY)’ (Warsaw: Polish Academy of Sciences, 2023), 43.

4 Andrea Pető, “The Illiberal Memory Politics in Hungary,” *Journal of Genocide Research* 24, no. 2 (June 2022): 241–249, <https://doi.org/10.1080/14623528.2021.1968150>; Marina Bán and Bence Szentgáli-Tóth, “Introduction to the Thematic Section ‘Current Hungarian Memory Policies in a Broader Context,’” *Hungarian Journal of Legal Studies* 63, no. 4 (December 2023): 313–314, <https://doi.org/10.1556/2052.2023.00001>.

5 Laurent Pech, Patryk Wachowicz, and Dariusz Mazur, “Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action,” *Hague Journal on the Rule of Law* 13, no. 1 (April 2021): 1–43, <https://doi.org/10.1007/s40803-021-00151-9>.

- the amendment to the Act on the Institute of National Remembrance of January 2018, which introduced criminal and civil penalties for attributing, contrary to the facts, responsibility for crimes of German Nazis in the Second World War to the Polish state or nation; and
- the so-called de-Communization bill of 2016, amending the Act on reducing the retirement pensions of individuals employed in certain branches of the Communist state from 1944 to 1990 in Poland.

It examines the content of these two memory laws and the role of two key elements of rule-of-law backsliding that made their enactment and implementation possible (1) the lowering of the standards for the legislative process, and (2) the political capture of the Constitutional Tribunal. In addition to these measures, PiS also introduced legislation requiring local authorities to dismantle Communist-era monuments and rename streets and public buildings.⁶ However, this article understands memory laws as norms of law supporting a historical narrative and directly restricting the rights and freedoms of individuals.

Memory Laws

States are engaged, to varying degrees, in governing collective historical memory, and they do so through diverse means, including memory laws. The concept of memory laws was coined in the mid-2000s during a debate about legislating historical interpretations in France, and it has multiple definitions.⁷ There are no fixed definitions of memory laws in international human rights law or Polish constitutional law. However, the concept is referenced in international human rights bodies, notably by the United Nations Human Rights Committee⁸ and the Council of Europe.⁹ It may denote non-punitive, declaratory norms proclaiming official historical interpretations, putting expressive weight on a specific historical narrative, without criminalizing other accounts.¹⁰ However, such a broad understanding may be problematic, as too many existing laws could be covered under this umbrella. To remedy this, this article suggests understanding memory laws as norms of law directly limiting specific rights and freedoms of individuals in the name of historical policy.

6 While this particular bill did not overtly curtail individual rights and freedoms, its implementation has potentially cast a chilling effect on public discourse about the past. This is evident in the removal of street signs whose namesakes held significance for national minorities and those associated with leftist, non-totalitarian social movements and parties. The consequences of these actions extend beyond mere legislative changes, impacting the representation of historical figures and fostering a nuanced conversation about the nation's past. See Anna Wójcik and Uladzislau Belavusau, "Street Renaming after the Change of Political Regime: Legal and Policy Recommendations from Human Rights Perspectives," TMC Asser Institute for International & European Law, Policy Brief no. 1 (May 2018).

7 Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, "Introduction," in *Law and Memory: Towards Legal Governance of History*, ed. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge, UK: Cambridge University Press, 2017): 1–26; Elizabeth Barkan and Avner Lang, "Mapping Memory Laws," in *Memory Laws and Historical Justice: The Politics of Criminalizing the Past*, eds. (Cham, Switzerland: Springer International Publishing, 2022): 1–21.

8 Human Rights Committee, "General Comment No. 34 on Article 19: Freedoms of Opinion and Expression," presented at the 102nd session of the Human Rights Committee, Geneva, July 11–29, 2011, para. 49.

9 Council of Europe, "Memory Laws and Freedom of Expression: Thematic Factsheet," July 2018 <https://rm.coe.int/factsheet-on-memory-laws-july2018-docx/16808c1690>.

10 Eric Heinze, "Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse," in *Law and Memory: Towards Legal Governance of History*, ed. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge, UK: Cambridge University Press, 2017), 415.

The article understands classic memory laws as banning expression of historical narratives under criminal law sanction.¹¹ Such classic memory laws are well-embedded in many European democracies. They include notably militant democracy provisions, such as bans on propagating fascism and totalitarian ideologies, introduced since the end of the Second World War. Most notably, these also include laws enacted since the 1980s against denying the Holocaust, other genocides, and other crimes and atrocities.¹² Although introducing these limitations on freedom of expression continues to stir intense legal, political, and cultural debates,¹³ and applications of these laws are being challenged before the European Court of Human Rights,¹⁴ these two categories of memory laws have by now become ingrained in the legal orders of most European democracies.¹⁵ Furthermore, in an attempt to foster common European remembrance based on memorializing the attempt to exterminate the Jews in the Second World War, in the European Union's 2008 Council of Ministers Framework Decision invited its member states to introduce Holocaust denial bans.¹⁶ Many states in Europe also adopt context-specific, *sui generis*, memory laws that tackle issues considered important to national history and in the local context.¹⁷ Moreover, provisions commonly found in European legal systems, for example, prohibitions on insulting the state, can be applied to serve criminal memory-law-like functions and may be interpreted in a way that creates grounds for convicting individuals for conduct that does not align with how the state authorities view permissible historical narrative and its part in present-day politics.

Classic memory laws (Holocaust denial bans, prohibitions on propagating fascism and totalitarianism) are often defended as valuable tools to protect the rights and reputations of others, memory of the victims of past atrocities, and one way to protect historical facts from distortion, falsification, or erasure, as well as to protect democracy from internal dismantlement. These are noble goals for the law to serve.

However, in the past two decades, a new wave of memory laws has proliferated in Europe, especially in its central and eastern parts, including laws that do not aim at protecting democracy and human rights but weaken them.¹⁸ An extreme case of this phenomenon is Vladimir Putin's Russia, where a slide from aspirations to democracy, through authoritarianism, to the current regime waging an imperialist war of aggression against Ukraine has been heralded by changes in historical

11 Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge, UK: Cambridge University Press, 2017), 25.

12 Nikolay Koposov, "Historians, Memory Laws, and the Politics of the Past," *European Papers: A Journal on Law and Integration* 5, no. 1 (2020): 107–117, <https://search.datacite.org/works/10.15166/2499-8249/390>; Alina Cherviatsova, "Memory as a Battlefield: European Memorial Laws and Freedom of Speech," *International Journal of Human Rights* 25, no. 4 (2021): 675–694; <https://doi.org/10.1080/13642987.2020.1791826>.

13 Lea David, *The Past Can't Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (Cambridge, UK: Cambridge University Press, 2020).

14 Anna Wójcik, "European Court of Human Rights, Freedom of Expression and Debating the Past and History," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 17 (December 2019): 33–46.

15 European Parliamentary Research Service, "Holocaust Denial in Criminal Law: Legal Frameworks in Selected EU Member States," (Brussels: European Parliamentary Research Service, January 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698043/EPRS_BRI\(2021\)698043_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698043/EPRS_BRI(2021)698043_EN.pdf).

16 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law of 2008, *EU OJ L* 328, 55–58.

17 Klaus Bachmann et al., "The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws," *East European Politics and Societies* 35, no. 4 (November 2023): 996–1012, <https://doi.org/10.1177/0888325420941093>.

18 Koposov, *Memory Laws, Memory Wars*, 9.

policy. First, new criminal memory laws were enacted.¹⁹ Afterwards, militaristic and imperialist historical narratives were constitutionalized.²⁰ This was followed by a crackdown on remaining civil society organizations promoting free historical debate, such as International Memorial. All these developments culminated with President Putin's call to attack Ukraine in an essay presenting ideological distortion of the historical narrative about Eastern and Central Europe.²¹

In the past decade, a new type of memory law has also proliferated in the European Union's two notoriously backsliding democracies, Hungary and Poland. The renewed interest of right-wing, nationalist, populist governments in historical interpretations has not been coincidental. It is an integral part of a comprehensive project of anti-liberal remodeling of the state and society. As a result, Hungary and Poland have reversed essential gains made in the first two decades of transitioning from Communism to democracy.

Democratic Backsliding and Historical Policy in Poland

Poland is a parliamentary democracy with a bicameral parliament. Since 2005, the political scene has been dominated by two right-wing parties, whose leaders played minor roles in the pro-democratic opposition during Communism. These parties are the centrist Civic Platform (Platforma Obywatelska: PO), led by Donald Tusk, which governed from 2007 to 2015, and the right-wing nationalist-populist Law and Justice party (PiS), which held power from 2005 to 2007 and 2015 to 2023. After eight years of PiS rule, in October 2023, the coalition of pro-democratic parties (Civic Platform, Poland 2050, Polish People's Party, and the Left) won the majority of seats in the parliamentary elections.

The PiS term from 2015 to 2023 was marked by a departure from democratic standards, including structural weakening of checks and balances, of judicial independence, and of press freedoms. The PiS government subordinated state institutions (the Constitutional Tribunal, prosecutors' offices, media regulators, the competition authority) to political ends.²² Human rights have been restricted, in particular freedom of speech, assembly, and women's reproductive rights.²³ The PiS government conducted polarizing campaigns against opposition parties, perceived elites (judges, doctors), sexual minorities (LGBT), and social activists promoting progressive values.²⁴ PiS conducted a comprehensive transformation of the state and a replacement of elites in politics, state-owned media, and companies controlled by the state. The PiS government was also in conflict with the European Union over the rule of law and, more broadly, the state of democracy in Poland. The process of democratic erosion was slowed down by the activity of pro-democracy civil society

19 Nikolay Koposov, "Holocaust Remembrance, the Cult of the War, and Memory Laws in Putin's Russia," in *Memory Laws and Historical Justice: The Politics of Criminalizing the Past*, ed. Elazar Barkan and Ariella Lang, (Cham, Switzerland: Springer International Publishing, 2022), 131–165.

20 Johannes Socher, "Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments," *Verfassungsblog*, July 2, 2020, <https://verfassungsblog.de/farewell-to-the-european-constitutional-tradition/>.

21 Peter Dickinson, "Putin's New Ukraine Essay Reveals Imperial Ambitions," Atlantic Council, July 15, 2021, <https://www.atlanticcouncil.org/blogs/ukrainealert/putins-new-ukraine-essay-reflects-imperial-ambitions/>.

22 Adam Bodnar, "Polish Road toward an Illiberal State: Methods and Resistance," *Indiana Law Journal* 96 (2020), 1059; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019).

23 Marta Bucholc, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon," *Hague Journal on the Rule of Law* 14, no. 1 (2022): 73–99, <https://doi.org/10.1007/s40803-022-00167-9>.

24 Wojciech Sadurski, "Populism and Human Rights in Poland," in *Human Rights in a Time of Populism: Challenges and Responses*, ed. Gerald L. Neuman (Cambridge, UK: Cambridge University Press, 2020), 60–80.

groups and protesters²⁵ and the European Union, although the EU's response to democratic backsliding in Poland was frequently criticized as slow and inadequate.²⁶

The PiS government showed a particular commitment to shaping educational, cultural, and historical policies. Since the early 2000s, Polish conservative elites, impressed by Germany's historical policy's soft power, have advocated that Poland also pursue a comprehensive politics of history (*polityka historyczna*).²⁷ The PiS party tilted state historical policy to its ideology. The memory field and the objectives of state were fused together.

The two memory laws selected for examination in this article were part of a broader historical policy turn that included changes in the management and content of museums²⁸ and art institutions,²⁹ establishing new museums³⁰ and institutes, changing school curricula and commissioning new textbooks, and changing the official scoring of researchers' publications in scientific journals, based on which the state evaluates universities and research centers, to privilege theological journals and Catholic universities (in Poland there are public and private Catholic universities; an example of a public one is Cardinal Stefan Wyszyński University in Warsaw [UKSW], and an example of a private one is John Paul II Catholic University of Lublin; the latter, however, also receives public funding). Moreover, the state was also for directing public funding towards research and civil society organizations promoting Catholicism and traditional values.

Important elements and mechanisms of the PiS governing majority's historical policy were made possible under the specific conditions of democratic backsliding. For example, the PiS government falsely claimed that the changes it enacted in the judiciary in Poland since 2015, were aimed at completing the process of de-Communization.³¹ In reality, these changes were aimed at increasing political control over courts. According to the assessments of Polish courts (the three independent chambers of the Polish Supreme Court, and the Supreme Administrative Court) and transnational tribunals (the Court of Justice of the European Union, and the European Court of Human Rights) the changes in the judiciary enforced by PiS resulted in structural violation of judicial independence in Poland, which represent violations of both domestic constitutional and European standards.

Moreover, the leading politicians of the ruling majority took part in a defamatory campaign against researchers when they disagreed with the dissemination of their

25 Adam Bodnar, "The Role of Polish Civil Society in Supporting EU Activities as Regards Protection of Judicial Independence and Other Elements of the Rule of Law," in *Rule of Law and the Judiciary*, ed. Katja Meier, Astrid Lorenz, Mattias Wendel (Nomos Verlagsgesellschaft mbH & Co. KG 2023), 167–180; Barbara Grabowska-Moroz and Olga Śniadach, "The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland," *Utrecht Law Review* 17, no. 2, Special Issue: Rule of Law from below (October 2021), 59; <https://doi.org/10.36633/ulr.673>.

26 See, for instance, Daniel R. Kelemen, "The European Union's Authoritarian Equilibrium," *Journal of European Public Policy* 27, no. 3 (2020): 481–499; Kim Lane Scheppele, "The Treaties without a Guardian: The European Commission and the Rule of Law," *Columbia Journal of European Law* 29, no. 2 (2023), 93.

27 Balázs Trencsényi, "Beyond Liminality? The Kulturkampf of the Early 2000s in East Central Europe," *Boundary 2*, vol. 41, no. 1 (2014): 135–152, <https://doi.org/10.1215/01903659-2409703>.

28 Paweł Machciewicz, *The War that Never Ends: The Museum of the Second World War in Gdańsk*, Vol. 1. (Berlin: Walter de Gruyter GmbH & Co KG, 2019).

29 Martha Otwinowski, "Perfecting the Art of Oppression," *Index on Censorship* 51, no. 3 (September 2022): 17–20, <https://doi.org/10.1177/03064220221126389>.

30 Jaskułowśki, Krzysztof, Piotr Majewski, and Adrianna Surmiak, *Celebrating Nationalism: School History Education in Poland* (Abingdon: Routledge, 2021).

31 See Anna Wójcik, "Keeping the Past and Present Apart," *Verfassungsblog*, April 26, 2022, <https://verfassungsblog.de/keeping-the-past-and-the-present-apart/>.

scientific research findings,³² and used the powerful state-controlled media³³ for this purpose. One such campaign was waged against renowned Holocaust historians Barbara Engelking and Jan Grabowski, who were also targeted by a strategic lawsuit against public participation (SLAPP) filed by a private individual who claimed her personal rights were breached by the content of their book. The claimant received help and advice from a civil society organization aiming at defending the good name of Poland and Poles and supported with public funds.³⁴ The organization's chief was later appointed as the president of the media regulator.³⁵ The prosecution, subordinated to the governing majority,³⁶ launched preparatory proceedings against a journalist of Polish-Jewish origin who criticized the PiS historical policy in an op-ed piece.³⁷ Furthermore, a poet and activist was brought before the courts after uploading a recording of a protest song performance to the internet. In the song, he rephrased the Polish national anthem as a means of taking part in a debate about migration policy. The lower courts ordered him to pay a fine, but the Supreme Court eventually ruled in his favor.³⁸ The PiS party adopted polarizing historical narratives and policies aimed at mobilizing voters to secure positive electoral outcomes.

The PiS historical policy celebrates Poles' heroism and martyrdom, in particular the rescuing of Jews by the righteous Poles during the Second World War³⁹ and the postwar anti-Communist partisans.⁴⁰ The party claimed that it aimed to preserve and make Poles proud of perceived traditional values, a culture based on Catholicism, and a glorious history.⁴¹ Promoting such attitudes towards the past is a way for the party to signal its distance from liberal and leftist cultural and political elites. The party has long deplored grassroots trends in the Polish memory culture that occurred with freeing up of historical debate after 1989. They have criticized historians, journalists, activists, artists, and politicians calling on the country to fully acknowledge and reckon with dark chapters of its national history, notably attitudes

32 Paweł Machcewicz, "When History Matters Too Much: Historians and the Politics of History in Poland," *Contemporary European History* 32, no. 1 (February 2023): 15–20, <https://doi.org/10.1017/S0960777322000510>.

33 Damian Guzek, and Agnieszka Grzesiok-Horosz, "Political Will and Media Law: A Poland Case Analysis," *East European Politics and Societies* 36, no. 4 (November 2022): 1245–1262, <https://doi.org/10.1177/08883254211049514>.

34 Aleksandra Gliszczyńska-Grabias and Grażyna Baranowska, "Using and Abusing Memory Laws in Search of 'Historical Truth,'" in *The Right to Memory: History, Media, Law, and Ethics*, ed. Noam Tirosh and Anna Reading, (New York: Berghahn Books, 2023), 112–131.

35 Świrski Przewodniczącym KRRiT, "PiS Postanowiło Iść na Wojnę z Mediami," *Wirtualne Media*, October 11, 2022. <https://www.wirtualnemedi.pl/arttykul/maciej-swirski-przewodniczaczy-krrit-sklad>.

36 On the subordination of prosecution to political ends, see Laurent Pech, Anna Wójcik, and Patryk Wachowiec, "Political Capture and Ensuing Systemic Instrumentalisation of Poland's Investigation and Prosecution Services," in *The Case for Activating the Rule of Law Conditionality Regulation in Respect of Poland*, ed. Laurent Pech, Anna Wójcik, and Patryk Wachowiec (Brussels: The Greens/Efa in the European Parliament, 2023): 88–113.

37 Ofer Aderet, "Polish Journalist Quizzed by Police for Writing That Poles Were Involved in the Holocaust," *Haaretz*, February 7, 2021, <https://www.haaretz.com/world-news/europe/2021-02-07/ty-article/premium/polish-journalist-quizzed-by-police-for-writing-ipoles-were-involved-in-the-holocaust/0000017f-dc67-df9c-a17f-fe7f2dc90000>.

38 Aleksandra Gliszczyńska-Grabias, "Intersection of Conflicting Values: Symbols of Memory and Acts of Artistic Expression," *East European Politics and Societies* 37, no. 2 (May 2023): 395–412, <https://doi.org/10.1177/0888325422110571>.

39 Ur Ulma Family Museum in Markowa of Poles Saving Jews in World War II, <https://muzeumulmow.pl/en/>.

40 Kornelia Kończal, "The Invention of the 'Cursed Soldiers' and Its Opponents: Post-war Partisan Struggle in Contemporary Poland," *East European Politics and Societies and Cultures* 34 no. 01 (August 2021): 67–95, <https://doi.org/10.1177/0888325419865332>.

41 Jaskulowski, Krzysztof, and Piotr Majewski, "Populist in Form, Nationalist in Content? Law and Justice, Nationalism, and Memory Politics," *European Politics and Society* 24 no. 4 (March 2022): 461–476, <https://doi.org/10.1080/23745118.2022.2058752>.

and actions towards minorities living in the Polish lands—especially Jews,⁴² but also Ukrainians, Belarusians, Lemkos, Silesians, or Roma.

The PiS politicians have also publicly undermined research findings discussing Poles' participation in the Holocaust.⁴³ The term “pedagogy of shame” has been used to belittle advocacy for a more honest approach to the past than perpetuating a one-dimensional narrative about Poland and Poles' eternal victimhood and heroism. The PiS elites regard such a self-critical approach as weakening the state and nation, or even as betraying the national interest. Instead, the PiS argued that in a relatively young democracy such as Poland's, when compared to the established democracies in Western Europe, pride in the nation's past should be fostered and never diluted. The PiS government engaged in the struggle for the good name of Poland in relation to the Second World War. Party politicians fought against the use of expressions such as “Polish concentration/extermination/death camps” (to denote camps created and operated by Nazis on occupied Polish territories during the Second World War) as part of this struggle.⁴⁴

Moreover, the PiS government supported the idea of Germany paying reparations or other forms of compensation for its past crimes to Namibia, Greece, and Poland,⁴⁵ and presented Germany with official demands to pay €1.03 trillion in reparations to Poland.⁴⁶ The Polish Communist government, under pressure from the Soviets, legally renounced claims for reparations from Germany in 1953; however, the validity of this renunciation is questioned today by some scholars and politicians.⁴⁷ In the context of recent election campaigns in Poland, PiS has attempted to smear the opposition parties as “pro-German” and “anti-Polish”;⁴⁸ opposition parties have decided to support reparatory demands, but they have also expanded them to include reparations from Russia as the successor to the Soviet Union.⁴⁹

Simultaneously, the PiS government invested considerable effort and resources to educate Poles and the world about the Second World War's Polish resistance agents who informed the West about the Holocaust, such as long-forgotten resistance

42 Kornelia Kończal, “Politics of Innocence: Holocaust Memory in Poland,” *Journal of Genocide Research* 24, no. 2 (June 2022): 250–263, <https://doi.org/10.1080/14623528.2021.1968147>.

43 Geneviève Zubrzycki, “Jan Gross's Neighbors and Poland's Narrative Shock,” *Jewish Quarterly Review* 112, no. 2 (Spring 2022): 234–238, <https://doi.org/10.1353/jqr.2022.0012>.

44 Jörg Hackmann, “Defending the ‘Good Name’ of the Polish Nation: Politics of History as a Battlefield in Poland, 2015–18,” in *The Holocaust/Genocide Template in Eastern Europe*, edited by Ljiljana Radonić (Abingdon: Routledge, 2020), 105–124.

45 Simon A. Klein, “The Instrumentalisation of the Right to Reparation and Dealing with the Past between Germany and Poland,” *Rocznik Polsko-Niemiecki*, no. 30 (December 2022): 117–131, <https://doi.org/10.35757/RPN.2022.30.06>.

46 Euronews, “Poland Formally Demands €1.3 Trillion from Germany in WWII Reparations,” Euronews (news site), October 3, 2022, <https://www.euronews.com/2022/10/03/poland-formally-demands-13-trillion-from-germany-in-wwii-reparations>.

47 Jerzy Kranz, “War Reparations and Individual Claims in the Context of Polish-German Relations,” *Polish Yearbook of International Law* 41 (2021): 121–142, <https://doi.org/10.24425/PYL.2022.142343>.

48 Euractiv, “PiS' Anti-German Rhetoric in Polish Election Bothers Berlin,” October 6, 2023, <https://www.euractiv.com/section/politics/news/pis-anti-german-rhetoric-in-polish-election-bothers-berlin/>.

49 Daniel Tilles, “Polish Opposition Wants War Reparations from Russia as Well as Germany,” Notes from Poland (news site), September 14, 2022, <https://notesfrompoland.com/2022/09/14/polish-opposition-wants-war-reparations-from-russia-as-well-as-germany/>.

leader Witold Pilecki.⁵⁰ PiS created the Witold Pilecki Institute,⁵¹ which aims to commemorate and honor people of merit to the Polish nation for the period from 1917 to 1990. The government has also established an official narrative around the Ulma family of Polish villagers, who rescued Jews during the Second World War. The family, consisting of parents and six children, was executed by the Nazis along with the Jewish neighbors they had hidden, after being revealed to the German by a Polish informant.⁵² In 2023, the Vatican beatified the Ulmas.

Promoting noble, exceptional attitudes in extreme conditions is, of course, important. However, in the official narrative promoted by PiS, the rescued Jews are rarely mentioned by name and problematically reduced to vehicles for Christian Poles' virtue and martyrdom. Moreover, the fact that a fellow Pole ratted out the Ulmas is also usually omitted. Even more controversially, the PiS government's consistent and often spectacular efforts to commemorate Poles rescuing Jews have been accompanied by a particular distaste for emphasizing the oftentimes indifferent or hostile attitudes of Poles towards Jews and other minorities, which were much more prevalent during and after the Second World War. The PiS authorities have sought to highlight the exceptional attitude and courage of a relatively small number of Poles in order to overshadow more painful and difficult (as well as politically inconvenient) historical facts. In 2016, during a television interview, Education Minister Anna Zalewska refused to answer a question posed by journalist about who was responsible for the murders of Jews in the Jedwabne pogrom in 1941 and the Kielce pogrom in 1946. According to the Institute of National Remembrance and the prosecution, both pogroms were committed by Poles against their Jewish neighbors. However, extreme right-wing nationalist organizations deny these findings and demand the exhumations of Jedwabne pogrom victims and new investigations into the events, arguing that the massacres were committed or ordered by Nazis or Communists.

Publicly, PiS politicians have tried not to admit that Poles committed violence against Jews. This leads to a distortion of the past and contributes to worsening an already limited awareness of historical facts in Polish society and cultivating the national myth of the exceptional suffering and merit of Poles compared to other groups.⁵³

The PiS government also made significant modifications to historical policy regarding the Communist period in Poland from 1944 to 1989. It notably promoted controversial post-Second World War anti-Communist partisans, the so-called "cursed soldiers,"⁵⁴ even though some units were accused of crimes against civilians. The PiS also used a street de-Communization law passed in 2016 to remove from

50 Witold Pilecki was the Second World War intelligence officer and resistance leader who infiltrated the Auschwitz concentration camp in 1940 and collected intelligence for the Home Army, which was shared with the Western Allies. He was arrested by Communist authorities in 1947 on charges of working for "foreign imperialism," put on show trial, and executed in 1948.

51 "Instytut Pileckiego rozpoczyna działanie," Ministerstwo Kultury i Dziedzictwa Narodowego, August 29, 2018, <https://www.gov.pl/web/kultura/instytut-pileckiego-rozpoczyna-dzialanie>.

52 Zofia Wóycicka, "Global Patterns, Local Interpretations: New Polish Museums Dedicated to the Rescue of Jews during the Holocaust." *Holocaust Studies* 25, no. 3, Special Issue: Disputed Holocaust Memory in Poland (January 2019): 248–272, <https://doi.org/10.1080/17504902.2019.1567660>.

53 According to a 2021 survey, 82% of Poles believed that "Poles helped Jews during the war as much as they could." The survey's participants did not deny Poles' involvement in the Holocaust, but half of the respondents justified it by external circumstances during the war. See "Polacy nie zaprzeczają współudziałowi przodków w zagładzie Żydów, ale wielu go usprawiedliwia," Badanie CBOS, Więzy.pl, January 27, 2021, <https://wiesz.pl/2021/01/27/polacy-nie-zaprzeczaja-wspoludzialowi-przodkow-w-zagladzie-zydow-wielu-go-usprawiedliwia-badanie-cbos/>.

54 Kończal, *The Invention of the 'Cursed Soldiers' and Its Opponents*.

public spaces street names commemorating historical figures linked to Communist movements and parties (such as Dąbrowszczacy,⁵⁵ a group of Polish Communists fighting in the Spanish Civil War of 1936 to 1939 against the far-right General Francisco Franco's forces), along with names of streets important for ethnic and national minorities (such as Silesians,⁵⁶ or Belarussians⁵⁷). This was successfully challenged before administrative courts. The PiS government removed the statute of limitations for Communist crimes (the investigation of which would otherwise have been barred beginning on August 1, 2020), introduced a new benefit for Communist-era pro-democracy activists or victims of the Communist regime, and in a memory law examined in this article, it further reduced the pensions and benefits to individuals otherwise entitled to them due to their having worked in some branches of the Communist state. Moreover, the PiS governing majority instrumentally used the call for de-Communization in an attempt to whitewash its own policies that were detrimental to judicial independence.

The memory laws selected for analysis in this article should be considered against the backdrop of these broader phenomena and trends in the historical policy of the PiS government in Poland.

The Two Memory Laws of Poland's Rule-of-Law Backsliding

2018 Amendment to the Act on the Institute of National Remembrance

On the eve of Holocaust Remembrance Day, on January 26, 2018, the PiS parliamentary majority passed an amendment to the Institute of National Remembrance Act (INRA)—Commission for Investigation of Crimes Against the Polish Nation. The amendment introduced, among other things, a criminal and civil liability regime for a new offense of “accusing 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 as well as otherwise grossly diminishing the actual perpetrators of those atrocities.”⁵⁸ Under Article 55a of INRA, these crimes are punishable by fine or up to three years in prison. The amendment incorporated exceptions for artistic and scientific activities. However, the dynamic nature of contemporary artistic and scientific practices raised concerns about the specific activities that would be exempt from punishment under the new provision.

Critics of the controversial memory law argued that it would considerably stifle free historical debate in Poland, especially, it was feared, the debate on Poles' involvement

55 Jarosław Osowski, “Koniec dekomunizacji w Warszawie. Wracają ul. Dąbrowszczaków i gen. Kaliskiego,” *Gazeta Wyborcza*, April 10, 2019, <https://warszawa.wyborcza.pl/warszawa/7,54420,24635517,koniec-dekomunizacji-w-warszawie-wracaja-ulice-dabrowszczakow.html>.

56 Jan Dziadul, “Dekomunizacji Katowic ciąg dalszy,” *Polityka* (blog), May 17, 2023, <https://dziadul.blog.polityka.pl/2023/05/17/dekomunizacji-katowic-ciag-dalszy/>.

57 Uladzislau Belavusau, “Rule of Law in Poland: Memory Politics and Belarusian Minority,” *Verfassungsblog*, November 21, 2017, <https://verfassungsblog.de/rule-of-law-in-poland-memory-politics-and-belarusian-minority/>.

58 Ustawa z dnia 26 stycznia 2018 r. 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 [Act of 26 January 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation, the Military Graves and Cemeteries Act, the Museums Act and the Corporate Liability for Proscribed Punishable Conduct Act], *Dziennik Ustaw* 2018, item 369.

in the Holocaust.⁵⁹ The amendment divided public opinion in Poland and provoked strong diplomatic reactions from Israel⁶⁰ and the United States.⁶¹ The explanatory statement to the amendment explained the purpose of the new regulation:

Such terms as “Polish death camps,” “Polish extermination camps,” or “Polish concentration camps” have been appearing in public debate, including abroad. It happens that such terms are repeatedly used by the same persons, press titles, television or radio stations. There are also publications and programs that deliberately falsify history, especially contemporary [history]. There is no doubt that such statements, contrary to the historical truth, have significant consequences directly damaging the good name of the Republic of Poland and the Polish Nation, and act destructively on the image of the Republic of Poland, especially abroad. They cause the impression that the Polish Nation and the Polish State are responsible for the crimes committed by the Third German Reich. ... In this state of affairs, it is necessary to create effective legal instruments allowing Polish authorities for persistent and consistent historical policy in the field of counteracting falsification of Polish history and protection of the reputation of the Republic of Poland and the Polish Nation.⁶²

Public officials have defended the amendment as a means to combat the “Polish death/concentration/extermination camps” expressions.⁶³ Such expressions are not commonly used in the Polish language to denote the Nazi German camps in occupied Poland. Politicians signaled that they would like to use the law to fight the use of such expressions outside of Poland and in international media. However, criminal law experts highlighted that the provisions would not be enforceable abroad.⁶⁴

The introduction of a new criminal law provision prohibiting the violation of the good name of the Polish state was not justified, as there were already general regulations in this regard in the Polish legal system. Article 133 of the Criminal Code of 1997 prohibits publicly insulting the Polish state or nation.⁶⁵ In 2006, the PiS-led governing coalition passed a law criminalizing (with penalties of up to three years in prison) slandering the Polish nation of participating in, organizing, or being responsible for Communist or Nazi crimes. However, the then-independent Constitutional Tribunal

59 Jan Grabowski, “The Holocaust and Poland’s ‘History Policy,’” *Israel Journal of Foreign Affairs* 10, no. 3 (September 2016): 481–486, <https://doi.org/10.1080/23739770.2016.1262991>.

60 Jon Henley, “Poland Provokes Israeli Anger with Holocaust Speech Law,” *Guardian*, February 1, 2018, <https://www.theguardian.com/world/2018/feb/01/poland-holocaust-speech-law-senate-israel-us>.

61 Paweł Sobczak, “Poland Backs Down on Holocaust Law, Moves to End Jail Term,” *Reuters*, June 27, 2018, <https://www.reuters.com/article/us-israel-poland-idUSKBN1JN0SD/>.

62 Piotr Mikuli and Mikołaj Malecki, “The New Polish ‘Memory Law’: A Short Critical Analysis,” *Diritto Pubblico Comparato et Europeo* 1 (April 2018), 282.

63 Jacek Nizinkiewicz, “Jaki: Izrael to dla nas wzór,” *Rzeczpospolita*, January 30, 2018, <https://www.rp.pl/Polityka/301299895-Patryk-Jaki-Izrael-to-dla-nas-wzor.html/>.

64 Karolina Wierczyńska, “Act of 18 December 1998 on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace,” *Polish Yearbook of International Law*, no. 37 (2017): 275–286; Patrycja Grzebyk, “Amendments of January 2018 to the Act on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law,” *Polish Yearbook of International Law*, no. 37 (2017), 293.

65 Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny, June 6, 1997, Dz.U. 1997 nr 88 poz. 553 [Journal of Laws 1997 No. 88 item 553].

found the provisions unconstitutional on procedural grounds.⁶⁶ Since 1998, Poland has also had criminal penalties for the denial of historical crimes, as introduced in the original Act on the Institute of National Remembrance. The provision has been applied only in one case concerning Holocaust denial by a historian, Dariusz Ratajczak, who published a book on French Holocaust denialists. The final verdict in Ratajczak's case was announced in 2002. Due to a peculiar construction of Poland's historical crimes denial ban, which is linked to the mandate of the Institute of National Remembrance, the January 2018 amendment to INRA expanded the scope of the ban.

Art. 1. In the Act of December 18, 1998 on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. of 2016, item 1575, and of 2018, item 5) shall be amended as follows:

1) in Art:

(a) in point 1, letter a shall be replaced by the following:

“(a) committed against persons of Polish nationality or Polish residents of other nationalities in the period from November 8, 1917 to July 31, 1990:

- Nazi crimes,
- Communist crimes,
- crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich,
- other crimes constituting crimes against peace, humanity or war crimes.”

Under the January 2018 amendment to INRA, the ban applies to crimes committed from 1917 (starting with the October Revolution in Russia) to 1990 (the end of Communism in Poland) against Polish citizens anywhere, and to crimes committed on Polish lands against individuals who did not hold Polish citizenship.

Additionally, Article 53s of INRA introduced a new civil liability system for the infringement of the good name of Poland and the Polish nation.⁶⁷ It enabled the Institute of National Remembrance and civil society organizations to file a civil suit against whomever insults the Polish state or nation by falsely attributing responsibility for Nazi crimes to them. As with the criminal law aspect of INRA, the civil one is mainly applicable in Poland and threatens freedom of expression on historical topics. In 2018, an organization with links to the government, the Polish League Against Defamation (Reduta Dobrego Imienia) brought a civil suit before the District Court in Warsaw against an Argentinian newspaper that incorrectly illustrated an article about the pogrom of Jews in the village of Jedwabne in Poland

66 Constitutional Tribunal judgement of 19 September 2008, K 5/7.

67 Jarosław Wyrembak, “Opinia prawna w sprawie projektu ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach, ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary oraz ustawy o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy budowli, obiektów i urządzeń użyteczności publicznej,” Print No. 806, November 7, 2016, <https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=806>.

in 1941⁶⁸ with a photo of murdered Polish resistance soldiers.⁶⁹ However, the court found the claim inadmissible due to falling outside its jurisdiction, and explained that the newspaper's publisher could be sued in Argentina.⁷⁰

Furthermore, the January 2018 amendment to INRA required the Institute of National Remembrance to document and investigate “the crimes of Ukrainian nationalists” and “crimes of Ukrainian formations collaborating with the Third Reich” committed between 1920 and 1950 against citizens of the Republic of Poland.⁷¹ The term “crimes of Ukrainian nationalists” was not defined in Polish or international law, which gave Polish law enforcement authorities and courts broad leeway on how to interpret the provision.⁷²

The new memory law's criminal aspect was in force from March 1 to July 17, 2018. The Parliament amended INRA in June 2018 to repeal Article 55a of INRA; no proceedings were conducted on this ground.⁷³ However, before that, Polish President Andrzej Duda filed a motion with the Constitutional Tribunal to consider the constitutionality of Article 55a of INRA and its provisions on “the crimes of Ukrainian nationalists.” The Constitutional Tribunal discontinued proceedings on the part that was repealed in Parliament (Article 55a of INRA). In January 2019, the Constitutional Tribunal found the remaining contested parts of INRA to be unconstitutional, arguing that the formulation “the crimes of Ukrainian nationalists” lacked legal certainty.⁷⁴

The discussed January 2018 amendment is linked to the rule-of-law crisis and democratic backsliding in at least four ways. Firstly, the legislative process did not meet democratic standards, since the opposition was prevented from having any meaningful participation in it. To the opposition's surprise, the draft was adopted suddenly, without a proper parliamentary debate, even though it concerned serious restrictions on civil rights and introduced criminal penalties of up to three years in prison. The ruling coalition had a majority in the Sejm (lower house) and the Senate (upper house). The bill was supported by the PiS party and signed into law by the president.

68 On the Jedwabne pogrom and its impact on contemporary Poland, see Paweł Machcewicz, “Neighbors, the Jedwabne Massacre of Jews and the Controversy that Changed Poland,” *Contemporary European History* (August 2023): 1–8, <https://doi.org/10.1017/S0960777323000504>; Geneviève Zubrzycki, “Jan Gross's Neighbors and Poland's Narrative Shock,” *Jewish Quarterly Review* 112, no. 2 (Spring 2022): 234–238; <https://doi.org/10.1353/jqr.2022.0012>.

69 Paola Nalvarte, “Polish NGO Sues Argentine Newspaper Using Controversial Holocaust Law,” *LatAm Journalism Review*, March 7, 2018, <https://latamjournalismreview.org/articles/polish-ngo-sues-argentine-newspaper-using-controversial-holocaust-law/>.

70 On the decision of District Court in Warsaw, see Mariusz Jąłoszewski, “Kolejne porażki Reduty Świrskiego w procesach przeciwko zagranicznym mediom i politykom,” *OKO.press* (news site), May 17, 2018. <https://oko.press/kolejne-porazki-reduty-swirskiego-w-procesach-przeciwko-zagranicznym-mediom-i-politykom>.

71 Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej–Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Act of 26 January 2018 to amend the Act on the Institute of National Remembrance–Commission for Investigation of Crimes Against Polish Nation, the Military Graves and Cemeteries Act, the Museums Act and the Corporate Liability for Proscribed Punishable Conduct Act], *Dziennik Ustaw* 2018, item 369.

72 For a detailed discussion on this aspect of the amendment, see Uladzislaw Belavusau and Anna Wójcik, “La criminalisation de l'expression historique en Pologne: la loi mémorielle de 2018,” *Archives de politique criminelle* 40, no. 1 (November 2018): 175–188.

73 Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, *Dziennik Ustaw* 2018, item 1277.

74 Constitutional Tribunal, ruling of 17 January 2019, case K 1/18.

Secondly, the enactment of a punitive memory law that limits freedom of expression under a penalty of imprisonment of up to three years can be qualified as penal populism,⁷⁵ understood as “a punishment policy developed primarily for its anticipated popularity.”⁷⁶ One of the parties in the governing coalition, *Solidarna Polska*, called for a tough-on-crime approach to law and order, including stricter sentences for criminal offenses. Public opinion in Poland was divided over the January 2018 amendment. A few days after the law was passed in Parliament, and before the President of Poland signed it into law, 36% of Poles surveyed wanted the amendment to become law despite criticism from other countries; 39% wanted the president to veto it, 14% had no opinion on the matter, and 11% had not heard of the issue.⁷⁷

Thirdly, the governing majority could amend the bill in Parliament, but instead the president of Poland (formally independent of, though originating from and friendly to, the PiS party) referred a motion to the Constitutional Tribunal, which has been packed by PiS appointees since 2015.⁷⁸ Consequently, the Constitutional Tribunal ceased to perform its constitutional role as independent reviewer of legislation and became a proxy for the governing majority.⁷⁹ In January 2018, the Constitutional Tribunal ruled according to Polish constitutional and international law standards on the specificity and predictability of law that the contested provision was unconstitutional. This ruling was convenient for the authorities.

Fourthly, the memory law in its criminal part (Article 55a of INRA) contributed to the Polish legal system’s broader move away from European Convention on Human Rights (ECHR) standards.⁸⁰ The ECHR requires state parties to provide conditions for free debate about the past and history to take place.⁸¹ The envisioned sanction of imprisonment of up to three years is incompatible with the standards of the ECHR, which deems deprivation of liberty as disproportionate for expressions that do not incite violence.⁸² Furthermore, restricting freedom of expression to protect abstract entities such as state, nation, or deceased historical figures, does not comply with the ECHR.⁸³

75 Zsolt Boda et al., “Two Decades of Penal Populism—The Case of Hungary,” *Review of Central and East European Law* 47, no. 1 (March 2022): 115–138, <https://doi.org/10.1163/15730352-bja10060>.

76 Julian V. Roberts et al., *Penal Populism and Public Opinion* (Oxford: Oxford University Press, 2003).

77 “Sondaż: ustawa o IPN dzieli Polaków,” TVN24, February 5, 2018, <https://tvn24.pl/polska/sondaz-polacy-podzieleni-w-sprawie-nowelizacji-ustawy-o-ipn-ra812239-2362122>.

78 Marcin Szwed, “The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z oo v Poland*,” *European Constitutional Law Review* 18, no. 1 (March 2022): 132–154.

79 Monika Florczak-Wątor, “The Capture of the Polish Constitutional Tribunal and Its Impact on the Rights and Freedoms of Individuals,” in *The Condition of Democracy*, ed. Jürgen Mackert, Hannah Wolf, and Bryan S. Turner (Abingdon: Routledge, 2021): 127–142.

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

Adam Płoszka, “It Never Rains but It Pours: The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional,” *Hague Journal on the Rule of Law* vol. 15 (2023): 1–24.

81 See Wójcik, *European Court of Human Rights*.

82 European Court of Human Rights, *Murat Vural v. Turkey*, Judgement of 21 October 2014, Application no. 9540/07, para. 66.

83 *Murat Vural v. Turkey*, para. 67.

The De-Communization Act of December 16, 2016

The so-called De-Communization Law was adopted on December 16, 2016, and came into force on October 1, 2017.⁸⁴ It amended a bill introduced in 2009 by the center-right governing majority of the Civic Platform and PSL (Polskie Stronnictwo Ludowe: the Polish People's Party, an agrarian-interest party).⁸⁵ The amendment further lowered retirement pensions and other benefits received by individuals due to work in some branches of the Polish Communist state from 1944 to 1990. The governing majority claimed the amendment was motivated by a quest for historical and social justice and intended to curb unjust pension privileges in a democratic state.⁸⁶

Several post-Communist states in Central and Eastern Europe have reduced pensions or other benefits as a means of reckoning with the undemocratic past and embedding democracy.⁸⁷ The European Court of Human Rights (ECtHR) declared inadmissible a complaint against the provisions of the 2009 Polish law, indicating that, in principle, such a mechanism for settling the past is not incompatible with the ECHR.⁸⁸ However, the mechanisms used in the 2016 law suggest that it has a repressive character, or even that it is a populist, revanchist measure.

Firstly, the amendment automatically reduces the pension or benefit related to work in the enumerated branches of the state from 1944 to 1990, without individualized assessment of the actions of the person and the nature of their work. This bears the hallmarks of collective responsibility instead of individual responsibility. The 2009 bill and the 2016 amendment provided exceptions for people who could prove that they had been politically harassed during Communism for their activities (for example, by a court judgement, or by recourse to Institute of National Remembrance documents). However, the vast majority of people covered by the bill did not have such a certificate. The 2016 amendment also affects benefits received by spouses or descendants of individuals who worked in the specified state institutions. The

84 Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act amending the Act on pensions of the officers 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 of 16 December 2016], *Journal of Laws* (2016) item 2270.

85 Ustawa z dnia 23 stycznia 2009 r. o zmianie ustawy o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin oraz ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act on amendments to the law on old-age pensions of professional soldiers and their families and to the law on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families]. Dz. U. 2009, no. 24, item 145.

86 Justification to the draft Act of 16 December 2016.

See Uzasadnienie do druku nr 1061 Rządowy projekt ustawy o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Explanatory Memorandum for Print No. 1061 Government Draft Law amending the Act on pensions of the officers 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], p. 5.

87 For a detailed comparative account of pension reduction policies in Central and Eastern Europe, see the justification to Constitutional Tribunal, Judgement of 20 January 2010, K 06/09.

88 *European Court of Human Rights*, Decision of 6 June 2013 in Cichopek and 1,627 Other Applications v. Poland, Appl. Nos. 15189/10, 16970/10, 17185/10, 18215/10, 18848/10, 19152/10, 19915/10, 20080/10, 20705/10, 20725/10, 21259/10, 21270/10, 21279/10, 21456/10, 22603/10, 22748/10, and 23217/10.

mechanisms used in the amendment indicate their function is not to reckon with the past in order to establish social peace and justice, but is rather motivated by ad hoc political interests to carry out a show of financial punishment on an arbitrarily selected group of Poland's citizens.

The mechanism also fits in with the narrative of the PiS party, which condemns the Communist elites and the elites of the times of transition to democracy and capitalist markets (with the exception of PiS party members and allies), and even, in the spirit of the promoted idea of "genetic patriotism,"⁸⁹ their descendants. The concept of genetic patriotism is used (notably by PiS politicians) to smear opponents as anti-Polish traitors and suggests that they are treacherous because they are descendants of those who acted against Polish interests in the past (such as Soviets or Communists). This concept is based on the assumption that only patriotic families (usually Catholic, traditionalist, belonging to anti-Nazi underground fighters, the anti-Communist partisan movement, or the pro-democratic opposition movement in the 1970s up until 1989) can raise patriots. The concept is used to set up a polarized choice between "Communists" and "patriots" in order to maintain the clear political divide around which the PiS party has built itself, despite the passage of time since the days of Communism.

Secondly, people who had already had their retirement pensions reduced under the 2009 bill, had them reduced even further. This violates the principle of legal certainty and predictability of the law. The Court of Appeals in Warsaw requested the Constitutional Tribunal to verify whether the provisions of the 2016 amendment complied with the principle of a democratic state governed by the rule of law (Article 2 of the Polish Constitution of 1997), as well as those of equality and the prohibition of discrimination (Article 32 of the Constitution).⁹⁰

Thirdly, the lower court also questioned the legality of the 2016 amendment as its adoption in parliament was investigated. The Act of December 16, 2016 was voted on during a sitting of the Sejm outside of the regular plenary chamber during the so-called parliamentary crisis sparked by plans to curb journalists' access to Parliament. The speaker of the Sejm and members of the Sejm Guard were investigated for their alleged abuse of power. The Prosecutor's Office, subordinated to the Minister of Justice/Prosecutor General and Solidarna Polska party chairman, discontinued the proceedings. On December 18, 2017, the District Court in Warsaw ordered the Prosecutor's Office to resume the investigation.⁹¹ The judge in the case, Igor Tuleya, was later suspended on disciplinary grounds and charged with alleged breach of criminal law for allowing journalists to hear him reading out the verdict. Judge Tuleya has become one of the symbols of the PiS party government's assault on judicial independence in Poland, and resistance to it.⁹²

Fourthly, by November 2023, almost six years after the lower court's filing of the motion, the Constitutional Tribunal has still not ruled on case P 4/18. In July 2022, the European Court of Human Rights ruled that persistent inaction of the Constitutional Tribunal to take up the case had contributed to the excessive length

89 On the concept of "genetic patriotism," see Adam Leszczyński, "Lichočka: 'Co drugi poseł PO jest dzieckiem działacza PZPR.' PiS wraca do genetycznego patriotyzmu." *OKO.press* (news site), April 12, 2023, <https://oko.press/lichočka-patriotyzm-jest-genetyczny>.

90 Constitutional Tribunal, case P 4/18.

91 District Court of Warsaw, Judgement of 18 December 2017, Case No. VIII Kp 1335/1.

92 See Ryszard Balicki, "O sejmowym posiedzeniu, którego nie było – uwagi na marginesie obrad w Sali Kolumnowej w dniu 16 grudnia 2016 r." *Gdańskie Studia Prawnicze* 40 (2018): 413–428.

of appeals proceedings before the domestic courts. The ECtHR ruled that there had been a breach of the appellant's right to a fair trial (under Article 6 of the ECHR) and the right to effective remedy (under Article 13).⁹³ The Constitutional Tribunal decided not to take action on a politically sensitive bill, which conformed to the PiS governing majority's preferences. The Constitutional Tribunal has shown that it does not fulfill its role of independent judicial review.

Conclusions

Politicization of history and the new, heavily politicized memory laws are an important constituent of Poland's democratic backsliding from 2015 to 2023. This article has demonstrated that the new Polish memory laws' mechanisms were removed from the laws' official purposes and served to shore up political capital for the PiS governing majority. The memory laws were tailored to the purported preferences of the majority of the target group of voters. Both bills examined in this article were populist, as they aimed to please the governing majority's voters by expressing distance from former elites, through penal populism (in the case of the January 2018 amendment to the Act on the Institute of National Remembrance) and populist revanchism (in the case of the 2016 amendment lowering the retirement pensions and benefits of most officials who served under the former Communist regime).

The examined memory laws fall far short of well-established standards of the European Convention on Human Rights and contributed to the broader turn away by Poland from the rule of law in particular, and European law more generally. Therefore, they represent a perversion of the classic European memory laws, which were designed to protect and improve democracy and human rights. The article also found that democratic backsliding has created beneficial conditions for such poorly-crafted (from the perspective of legal technique) laws to be enacted and maintained in the legal system. First, the governing majority excluded the opposition from meaningful participation in the legislative process. Second, the role of the politically-subordinated Constitutional Tribunal was abused in order to perform constitutional review to mitigate any negative political fallout of the memory laws when the government did not want to or could not take a different route. Third, the contested provisions only received scrutiny by the Constitutional Tribunal when it was convenient for the governing majority. These two discussed Polish memory laws are simultaneously the product, and the mechanism, of Poland's rule-of-law backsliding.

⁹³ European Court of Human Rights, *Bieliński v Poland*, Judgement, Application no. 48762/19, 21 July 2022.