

Mnemonic Constitutionalism and Rule of Law in Hungary and Russia

*Dr Uladzislau Belavusau

Abstract

The article examines the rise of memory laws and the wider practice of using simplistic historical narratives within constitutional law in countries with serious democratic decline. The mushrooming of memory laws in Central and Eastern Europe (CEE) throughout the 2010s, which went hand-in-hand with democratic backsliding in the region, is now well documented. In particular, Hungary has recently been at the epicentre of the EU's critique for violation of the rule of law standards. Beyond the EU, Russia has been identified as the main provocateur for mnemonic propaganda and whitewashing of Stalinism, also accused of stirring up major "memory wars" in the region. While clearly memory laws (*lois mémorielles*) – as a specific phenomenon initially in criminal law – emerged in the Western European context almost three decades ago, the recent wave of memory laws in CEE transcend criminal legislation and have acquired a constitutional significance, which this article analyses under the heading of *mnemonic constitutionalism*. After setting out an analytical framework of mnemonic constitutionalism and an account of its intrinsic relationship with the rule of law, the article focuses on the two specific CEE examples of Hungary and Russia. In the last decade, both countries have promulgated – via referenda – new constitutional projects with embedded populist historical narratives therein. In Hungary, Fidesz pushed the adoption of a new Basic Law in 2010. In Russia, Putin safeguarded constitutional amendments in 2020. The article concludes that both of these projects perceive mnemonic constitutionalism not only as an ideological basis for an entire governance of historical memory but also as an ontological foundation to justify "illiberal democracies".

Keywords: memory laws, mnemonic constitutionalism, democracy, rule of law, populism, Hungary, Russia

1. Introduction: Mnemonic constitutionalism and a wider challenge for the rule of law

Recent literature in memory studies has abundantly testified to the mushrooming of memory laws in Central and Eastern Europe (CEE) throughout the 2010s, which went hand-in-hand with democratic decline in the region.¹ Hungary (together with Poland) currently stands at the epicenter of internal European Union (EU) critique of the violation of rule of law standards.² Beyond the EU, Russia has been identified as the main provocateur for mnemonic propaganda and white-washing of Stalinism – an *enfant terrible* – also accused of stirring up major “memory wars” in the region.³ Such wars over historic narratives led to the adoption of

* Senior Researcher, T.M.C. Asser Institute, The Hague—University of Amsterdam, u.belavusau@asser.nl. The author would like to thank Katharine Booth for her assistance on this piece, as well as Nathalie Alkiviadou and Stephanie Laulhe-Shaelou for inviting him to contribute to the summer school at the UCLan Cyprus with this paper.

¹ For the review of recently-growing literature on memory laws, see U. Belavusau and A. Gliszczyńska-Grabias, *The Remarkable Rise of ‘Law and Historical Memory’ in Europe: Theorizing Trends and Prospects in Recent Literature*, in *Journal of Law and Society*, 2020, p. 325-338.

² See pending doctoral dissertations on memory laws in the context of the rule of law in Hungary (by Marina Bán) and Poland (Anna Wójcik) – on file with author. See also M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, *Hague Journal of Rule of Law*, 2018, 85–110.

³ On the phenomenon of memory wars via memory laws, see: N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; M. Mälksoo, *Memory*

counteractive legislation in the Baltic states and Ukraine.⁴ While memory laws – as a specific phenomenon initially in criminal law⁵ – emerged in the Western-European context almost three decades ago,⁶ the recent wave of memory laws in CEE transcend criminal legislation and have acquired a constitutional significance, which I discuss in this paper under the heading of *mnemonic constitutionalism*.

One can be critical or positive of the *naïveté* embedded into memory laws of the 1990s in France, Germany and elsewhere in Western Europe.⁷ Their justification, especially with regard to the criminalisation of Holocaust denial, was strongly embedded into the paradigm of *militant democracy*, that is, an ethical political outlook that a liberal democracy should have militant teeth capable of defending itself even if that requires biting through the core of freedom of speech, assembly and other fundamental rights.⁸ It was, thus, a dignity-based paradigm that guided their legislators in that epoch, leading to the adoption of the so-called *self-inculpatory* memory laws, in the words of Eric Heinze.⁹ Central to that paradigm was the dignity of Holocaust victims. The recent wave of mnemonic constitutionalism in CEE, to the contrary, fortifies a victimhood of national states and majority nations. Such – in contrast, *self-exculpatory* – memory laws serve as both a shield and sword in the context of memory wars unfolding in the region.¹⁰

Must Be Defended: *Beyond the Politics of Mnemonic Security* in *Security Dialogue*, 2015; A. Wójcik, *Memory Laws and Security*, in *Verfassungsblog*, 5 January 2018, <https://verfassungsblog.de/memory-laws-and-security/>; I. Nuzov, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review*, 2019.

⁴ See A. Cherviatsova, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, in *European Paper*, 2020, p. 119 *et seq*; N. Bruskina, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Paper*, 2020, p. 137 *et seq*.

⁵ E. Fronza, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: Springer, 2018.

⁶ U. Belavusau, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in A. Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest: Wolters Kluwer, 2015.

⁷ By memory laws here I address various forms of legal measures governing history, including punitive measures against the denial of historical atrocities and bans prohibiting the use of totalitarian symbols of the past. Such a broad notion of memory laws also covers legal acts recognising and commemorating historical events and figures, including laws establishing state holidays, celebrations and dates of mourning, street (re-)naming and monument installations in honour of historical figures, status and access to historical archives, as well as regulations regarding museums and school curricula on historical subjects. See U. Belavusau and A. Gliszczynska-Grabias, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. Belavusau and A. Gliszczynska-Grabias (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017, p. 1–26.

⁸ See A. Sajó (ed), *Militant Democracy*, Eleven International Publishing, 2004; U. Belavusau, *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)*, in *Israel Law Review*, 2014, p. 27–61.

⁹ See E. Heinze, *Theorizing Law and Historical Memory*, in *Journal of Comparative Law*, 2018, p. 1. Regarding self-inculpatory and self-exculpatory memory laws, see a fascinating intellectual exchange between Antoon de Baets and Eric Heinze: E. Heinze, *Should Governments Butt Out of History?*, in *Free Speech Debate*, 12 March 2019, <https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/>; A. De Baets, *Criminal Regimes are Never Soft on History*, in *Free Speech Debate*, 23 December 2019, <https://freespeechdebate.com/2019/12/criminal-regimes-are-never-soft-on-history/>.

¹⁰ See also G. Soroka and F. Krawatzek, *Nationalism, Democracy and Memory Laws*, in *Journal of Democracy* 2019, p. 157-160, who refer to self-inculpatory and self-exculpatory memory laws as, respectively, prescriptive and proscriptive, similarly focusing on the intentions and motivations of the states introducing such regulations.

This contribution will focus on the case of two CEE countries, Hungary and Russia, that have been on the radar of European institutions as well as numerous academic and civil society organisations, testifying to a rule of law crisis within the EU (for Hungary) and the Council of Europe (for Russia and Hungary).¹¹ The rule of law backsliding in Hungary and Russia has occurred hand-in-hand with the rise of nationalist memory politics and so-called ‘memory wars’ in CEE.¹² The populist politics of memory has articulated itself in ‘mnemonic constitutionalism’, that is, the elevation of the legal governance of historical memory to the constitutional level.¹³ Both Hungary and Russia have within 10 years – introduced new constitutional projects with a strong focus on historical memory. While only the Hungarian case can be *stricto sensu* attributed to the introduction of the new Basic Law, the Russian pathway opted for constitutional amendment. In both countries, these constitutional processes were accomplished by means of referenda and have been intertwined with an explicitly populist “commemorative law-making”.¹⁴ I therefore define ‘mnemonic constitutionalism’ as a form of legal governance that encompasses, yet transcends, pure measures against genocide denialism and statutory memory laws. The heading of constitutionalism replicates the idea that government can and should be limited in its powers, and that its authority or legitimacy depends on its observation of these limitations.¹⁵ Mnemonic constitutionalism in this regard places the authority and legitimacy of a state into the boundaries of a certain historical paradigm, whereas current and future attitudes and behaviours of state actors derive from and are limited by moral lessons of the past. Within mnemonic constitutionalism, the historical past becomes the foundation of collective identity prescribed by either the national constitution itself, or by legal provisions which traditionally shape the substructure of national constitutional law, such as citizenship laws or statutes shaping collective identities by virtue of imposing specific understandings of the historical past.

Without consciously or explicitly identifying this area of law-making, and without necessarily changing the constitutional text itself, the new populist regimes in CEE clearly perceive this invisible mnemonic constitution as a certain ontological foundation for their ‘illiberal democracies’ and as a basis for an entire governance of historical memory, as justification for their current political choices. It is obvious that various forms of mnemonic constitutionalism existed before the current epoch characterised by the decline in the rule of law. It certainly has not been uncommon for constitutional preambles, for example, to briefly narrate historical

¹¹ Gábor Halmai, *The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government*, in U. Belavusau and A. Gliszczyńska-Grabias, *Constitutionalism Under Stress*, Oxford: Oxford University Press, 2020; Lauri Mälksoo & Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge University Press, 2018.

¹² N. Kaposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press 2017; I. Nuzov, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review* 2019, p. 231–253. See also M. Bán, *Memory Wars of Commercial Worth: The Legal Status of the Red Star in Hungary*, in *Verfassungsblog*, 11 January 2018, <https://verfassungsblog.de/memory-wars-of-commercial-worth-the-legal-status-of-the-red-star-in-hungary/>.

¹³ U. Belavusau, *Final Thoughts on Mnemonic Constitutionalism*, in *Verfassungsblog*, 15 January 2018, <https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/>.

¹⁴ About commemorative law-making albeit in the (similar) Polish context, see M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, in *Hague Journal of Rule of Law*, 2018, p. 85–110.

¹⁵ See W. Waluchow, *Constitutionalism*, in E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, 2018.

milestones of the history of a state, especially in the context of post-colonial or transitional democracies distancing themselves from their dependent or totalitarian past via new constitutional texts.¹⁶ Likewise, certain liberal democratic regimes without a formal constitution can be characterised by a strong — albeit invisible — mnemonic constitution, as for example in Israel with its idea of a historic state and religious community attributed to a certain territory and fortified by a powerful ‘Law of Return’, that is, a specific citizenship paradigm privileging Jews as welcome citizens of a ‘reborn’ state.¹⁷ Furthermore, the way citizenship — a central subject of constitutional texts — is distributed in many states is dependent on historical lineage.¹⁸ From the way we teach history in schools to the way we impose national holidays, street names and monuments,¹⁹ this mnemonic constitutionalism surrounds us from our childhood and shapes our identities through various legal measures, only a tiny fraction of which are actually criminal prohibitions. The majority of such regulations amount to the soft governance of memory. Yet the recent threat of mnemonic constitutionalism, which can be addressed as *mnemocracy*, manifests itself in the outright populist abuse of the historical narrative to justify a new regime that is hostile to the rule of law standards of equality, judicial independence and pluralism of opinions.²⁰ In this regard, Hungary and Russia stand as vivid examples, even though the manifestations of this mnemonic constitutionalism and the subsequent populism around this legal governance of historical memory somewhat differ.

The numerous accounts in recent literature on memory politics illustrate a growing density in the network of memory laws, policies, state commissions and Institutes of National Remembrance, leading to the effective rise of mnemocracy in CEE. The relevant legislation, adjudication and policies of mnemocracy can be initially classified into five clusters:

¹⁶ See H. Nyssönen and J. Metsälä, *Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions*, in *European Politics and Society*, 2019, p. 323. According to the authors, constitutional preambles often “highlight[s] historical events, canonise[s] an interpretation of the past as the basis of the whole legal and political system”.

¹⁷ D. Ernst, *The Meaning and Liberal Justification of Israel’s Law of Return*, in *Israel Law Review*, 2009, p. 564–602.

¹⁸ In this regard, it is remarkable that Spanish and Portuguese naturalisation laws granted citizenship to the defendants of the Sephardic Jews expelled in the Medieval period. See H. U. Jessurun d’Oliveira, *Iberian Nationality Legislation and Sephardic Jews: ‘With Due Regard to European Law?’*, in *European Constitutional Law Review*, 2015, p. 13–29. See also Y. Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton University Press, 2019; M. Gancher, *Hungarians Outside Hungary – The Twisted Story of Dual Citizenship in Central and Eastern Europe*, in *Verfassungsblog*, 8 October 2014, <https://verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/>.

¹⁹ The 2020 wave of ‘Black Lives Matter’ in the USA and Europe, for example, has manifested in a controversial monument iconoclasm demanding the re-visitation of certain historical understandings in public space. See L. Zannier, OSCE High Commissioner on National Minorities, *Open Letter on Symbols in Public Spaces*, in *OSCE*, 16 June 2020, <https://www.osce.org/hcnm/455041>.

²⁰ See U. Belavusau, *Final Thoughts on Mnemonic Constitutionalism*, in *Verfassungsblog*, 15 January 2018, <https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/>. For the term ‘mnemocracy’ (or ‘memocracy’), I would like to thank Maria Mälksoo, with whom we had numerous intellectual exchanges about this subject in the recent years and who first coined this term for our analytical framework to study the migration and distortion of constitutional concepts in Europe. This analytical framework, positioning mnemocracy within the realm of what I suggest to conceptualise as mnemonic constitutionalism in comparative legal studies, may be particularly suitable for exploring the debate on militant democracy to new conceptual and empirical grounds.

- a. constitutional provisions prescribing certain understandings of the past and distributing guilt for past atrocities;
- b. punitive measures of memory governance (e.g., imposing criminal responsibility for the denial of Nazi or communist crimes, or prescribing the ‘correct’ attribution of atrocities to a singular perpetrator);
- c. non-punitive measures of memory governance (e.g., memory laws and policies prescribing re-naming of streets or the place of historical monuments);
- d. quasi-memory laws (e.g., citizenship laws that permit naturalisation based on historical belonging); and
- e. judgments of national tribunals relating to the (legitimate) remembrance of the past.

While *stricto sensu* only the first group of this mnemocratic governance is based on constitutional provisions, all five elements, especially citizenship policies,²¹ can be seen as a part and parcel of mnemonic constitutionalism. All five groups have been applied to secure a politically preferable version of the past and prescription of an ontological foundation of respective CEE societies. Such foundation mirrors an idealised constitutional understanding of a transitional nation seeking to postulate its self-exculpation from the atrocities committed by the dystopian regimes of the 20th century. Yet, such militant memory laws and policies are equally capable of eroding the foundational elements of liberal democracy, weakening constitutional orders and adding fuel to populist tendencies. In this regard, the developments in both Hungary and Russia testify to the remarkable rise of mnemonic constitutionalism.²²

Following this brief introduction outlining the scope of mnemonic constitutionalism, the second part of this paper will focus on the place of historical memory in the Fundamental Law of Hungary (2010). The third part will unpack the politics of memory behind and inside the most recent text of the Russian constitution (2020). In the final part, I will summarise repercussions of mnemonic constitutionalism for the rise of populism and decline of rule of law in the region, touching more broadly also on Polish and Ukrainian examples.

3. Mnemonic constitutionalism in Hungary

²¹ In Hungarian context, see, for example, 2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról. This law grants a fast-track access to citizenship to those with Hungarian ancestry, especially aimed at Hungarian minorities living in the Trianon territories. For a wider analysis of how citizenship laws often perform the function of quasi-memory laws, in particular in Hungary, France, Spain, Portugal and Ukraine, see the doctoral dissertation by Marina Bán, *Historical Memory and the Rule of Law in France and Hungary* (on file with author). See also C. Joppke, *The Instrumental Turn of Citizenship*, in *Journal of Ethnic and Migration Studies*, 2019, p. 858-878. Likewise, in the Russian context, see Christian Neschheim, Duma Votes 302-0 to Pass Russia’s Historic Dual Citizenship Law in Record Time, *Investment Migration Insider*, 20 April 2020, available at: <https://www.imidaily.com/editors-picks/duma-votes-302-0-to-pass-russias-historic-dual-citizenship-law-in-record-time/>. More widely, see also Eric Lohr, *Russian Citizenship*, Harvard University Press, 2012.

²² This account should be also understood as a part of a broader landscape in the recent rule of law studies, clearly showing that CEE political regimes (especially in Hungary and Poland) tend to mimic their socio-legal trajectories regarding the ongoing erosion of their liberal democracies. In this regard, see U. Belavusau and A. Gliszczyńska-Grabias, *Constitutionalism Under Stress: Essays in Honour of Wojciech Sadurski*, Oxford: Oxford University Press, 2020.

Pre-1949 Hungarian constitutionalism looked somewhat similar to the British organisation of the state – both emerging from collected foundational documents without a constitutional charter. However, the concept of ‘historical constitution’ in Hungary was also connected to the medieval doctrine of the ‘Holy Crown’. This doctrinal mythology stressed both the symbolic and actual role of the Holy Crown in guarding the independence of Hungary.²³ After World War II, in 1949, Hungary adopted its constitutional text, which was promulgated by the communist regime and, unlike in most other CEE transitional democracies, existed (albeit with substantial amendments that have transformed it into a democratically spirited constitution) until the 21st century. After the victory of Fidesz in the 2010 elections, for the first time the government received a super parliamentary majority, sufficient to immediately initiate the drafting of a new constitution.

The preamble of the new Hungarian Fundamental Law (2010) is truly unique as compared to the constitutional preambles of other EU Member States with written constitutions (currently 22 out of 27) in terms of the scope of historical depth and references. The new constitutional text starts with the National Avowal, which refers to King Saint Stephen I as founder of the Hungarian state, proclaims Christianity as historically central “in the preservation of nationhood”²⁴ and, most importantly, reinforces Hungarian victimhood as a divided nation in the 20th century after the post-World War I Treaty of Trianon. This perfidious narrative of national division justifies Hungary’s role in the protection of “Hungarians beyond the borders”.²⁵ In addition, the Avowal praises the “achievements of the historical constitution” and the Holy Crown as symbols of the independence and continuity of the Hungarian state, and condemns Hungary’s Nazi and communist foreign occupations. It claims the state lost its self-determination on 19 March 1944, the date of Hungary’s German occupation, and regained it after the fall of the communist dictatorship on 2 May 1990, the day of assembly of the first freely elected Hungarian parliament. This rejects the 1949 constitution of Hungary as unlawful and as the basis for “tyrannical rule”. As aptly explained by Miklós Könczöl, by adopting a detailed constitution with a preamble, rather than merely a charter of rights, the constitution-makers made it possible to take ideological positions on a number of controversial questions related to the past.²⁶ Gábor Halmai has further exposed how the preamble recognises only the positive pre-1944 years of Hungarian history, not the acts and failures that give cause for self-criticism:

[The] Constitution failed to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents

²³ See the doctoral dissertation by Bán, *Historical Memory and the Rule of Law in France and Hungary* (on file with author). On the doctrine of the Holy Crown, see: K. Lane Scheppelle, *The Constitutional Basis of Hungarian Conservatism*, in *East European Constitutional Review*, 2000, p. 51.

²⁴ Seventh Amendment to the Fundamental Law (September 2018). This Amendment references the struggles of the Hungarian State to keep its independence and fight for its existence throughout several invasions and revolutions, including the Turkish wars and the revolutions of 1848-49 and 1956. Since 2018, the Seventh Amendment has provided for an obligation of state authorities to protect Hungary’s ‘self-identity’ and Christian culture.

²⁵ See the doctoral dissertation by Bán, *Historical Memory and the Rule of Law in France and Hungary*, cit.

²⁶ See M. Könczöl, *Dealing with the Past in and Around the Fundamental Law of Hungary*, in U. Belavusau and A. Gliszczynska-Grabias, *Law and Memory*, cit., p. 246–262.

during World War II, but also between 1920 and 1944 by extreme right-wing ‘free troops’ and the security forces of the independent Hungarian state, not only against ‘the Hungarian nation and its citizens’ but also against other peoples. Nor does it acknowledge that the continuity of Hungary’s statehood was not interrupted: restrictions were placed on government agencies’ freedom to act, but the government was not shut down.²⁷

In April 2013, the Hungarian government also adopted Article U as a constitutional provision, stating *inter alia* that the pre-1989 Communist Party (the Hungarian Socialist Workers’ Party) and its satellite organisations that supported the communist ideology were “criminal organisations” whose leaders carry a liability that is “without a statute of limitations”. Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including: destroying post-World War II Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; “devastating the value of European civilization”; and liability for all criminal acts that were committed with political animus and which have not been prosecuted by the criminal justice system for purely political motives.²⁸ As Gábor Halmai concluded in relation to the Fundamental Law of Hungary, “the current Hungarian government’s attitude towards public discussion of history [is] similar to that of the Polish one, [as it] reflects the position of these illiberal populist regimes towards the rights of their citizens”.²⁹

4. Mnemonic constitutionalism in Russia

Following the fall of communism and the dissolution of the USSR, the (re-)appraisal of the Soviet past has shaped a true Gordian knot in Russian memory politics. A plethora of Russian citizens still believe a specific ideological image, one nurtured by populist politicians and old-regime historians: the Soviet empire as a source of ontological security³⁰ that cemented prosperity inside Russia as well as peace outside its external boundaries regarding its relations with both ex-Soviet republics and the – *de facto* – occupied countries of the Warsaw Pact.³¹ Central to this ideology, is the pompous heroic narrative regarding World War II, embraced in Russian settings as the “Great Patriotic War” (*Великая Отечественная Война*) that

²⁷ G. Hálmai, *Memory Politics in Hungary: Political Justice without Rule of Law*, in *Verfassungsblog*, 10 January 2018, <https://verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/>.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ For a broader outlook on the concept of ontological security in the context of memory laws, see *Maria Mälksoo*, ‘Memory Must be Defended’: Beyond the Politics of Mnemonic Security, *Security Dialogue*, 46, 3, 2015. 221-237; *Maria Mälksoo*, *Kononov v. Latvia as an Ontological Security Struggle over Remembering the Second World War*, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 91-108.

³¹ *T. Sherlock*, *Historical Narratives in the Soviet Union and Post-Soviet Russia: Destroying the Settled Past, Creating an Uncertain Future*, New York: Palgrave-MacMillan, 2007. *Dina Khapaeva*, *Historical Memory in Post-Soviet Gothic Society*, *Social Research*, 76, 1, 2009. 359-94.

supposedly single-handedly liberated the nations of Central and Eastern Europe.³² Furthermore, the (post-)Soviet historiography has delimited the war period as 1941-1945 rather than 1939-1945, in order to divert attention away from the Pact of Molotov-Ribbentrop (23 August 1939) that enabled the joint Soviet-Nazi occupation of Poland in 1939.³³ While some efforts to promulgate punitive memory laws occurred during Boris Yeltsin's presidency, the explicit legalisation of the governance of historical memory reached its full swing during Vladimir Putin's presidency in the 2010s. These legalisation efforts intensified following the Russian military intervention in Ukraine and the annexation of Crimea.³⁴ As summarised by Nikolay Koposov, Putin's politics of memory was crucial to his 'project of neo-imperial reconstruction', which intended to 'promote the cult of the Russian state', "whose primary incarnation rests in the celebration of the heroic memory of WWII".³⁵

On 11 March 2020, the State Duma adopted its third and final reading of the amendments to the Constitution of the Russian Federation, which were approved by the Federation Council (upper chamber of the Russian Parliament) soon thereafter.³⁶ The majority of constitutional amendments and the referendum organised to orchestrate them was an obvious trick by Vladimir Putin to remain in power post-2024, when his presidential term was expected to end (with the maximum of two re-elections reached under the previous version of the Russian Constitution).³⁷ One of the amendments, however, introduced a novel Article 67.1 to the Russian Constitution, which prohibits "diminishing the importance of the heroism of the people in the defence of the Fatherland."³⁸ This amendment on 'historical truth' was therefore

³² Nina Tumarkin, *The Great Patriotic War as Myth and Memory*, *European Review*, 11, 4, 2003. 595-61.

³³ The Molotov–Ribbentrop Pact was a non-aggression pact between Nazi Germany and the Soviet Union that enabled those two powers to partition Poland between them in 1939, the year that is widely considered marking the beginning of World War II. See Nikolay Koposov, *Defending Stalinism by Means of Criminal Law: Russia, 1995-2014*, in *Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 293-309.

³⁴ See Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, 2017. In his monograph, Koposov summarises initial attempts to pass a memory law in Russia that were made long before Putin's coming to power, in the context of Boris Yeltsin's democratic reforms and his struggle against the communist and nationalist opposition (*Ibid.*, p. 297). Yeltsin's government, Koposov concludes, had insufficient political and financial resources to conduct a sustained and efficient "history politics" (*Ibid.*, p. 214).

³⁵ Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, 2017. 297. Koposov notes that under the Soviet regime, there were no specific laws banning any statements about the past that contradicted the official version of history, although "falsification of history" could be punished on the basis of the Penal's Code's articles (art. 70-71) forbidding anti-Soviet propaganda" (*Ibid.*, p. 221).

³⁶ See *The State Duma*, *What Changes Will be in the Constitution of the Russian Federation?*, 12 March 2020, available at: <http://duma.gov.ru/en/news/48039/> (accessed on 28 October 2020).

³⁷ These amendments, *inter alia* enshrining "protection of historical memory", allowed Putin to run for two more six yearly presidential terms. This package of constitutional amendments has also inserted constitutional provisions regarding social measures on pensions and the welfare state, along with broader conservative demagoguery into the text of Russian constitution, including provisions banning a same-sex marriage, ensuring patriotic education in schools, explicitly mentioning faith in the Christian God, and placing the Russian Constitution above international law.

³⁸ Now Article 67 (3) of the Russian Constitution. See *BBC News*, *Russia's Putin Wants Traditional Marriage and God in Constitution*, 3 March 2020, available at: <https://www.bbc.com/news/world-europe-51719764> (accessed on 28 October 2020). For a full text of constitutional amendments to the Russian Constitution (in Russian), see the official page of the Russian Parliament: <http://duma.gov.ru/news/48045/>. The amendments to the Constitution add provisions as follows: "(A) The Russian Federation, united by a thousand-year history, preserves the memory

squeezed into a bigger package of constitutional changes, which can be considered part of a broader façade intended to convince the public of the urgency for the referendum.³⁹ While the referendum was initially scheduled for 22 April 2020, supposedly in order to discuss the amendments with Russian citizens, it was postponed to 25 June 2020 due to the COVID-19 pandemic. According to the official results of the referendum, nearly 78% of voters backed the constitutional reforms, thereby allowing Putin to remain in power until 2036. The Kremlin hailed the vote a triumph and Putin thanked Russians for their "support and trust", adding that they were "improving the political system, firming up social guarantees, strengthening sovereignty and territorial integrity".⁴⁰

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

‘This year, we will celebrate the 75th anniversary of Victory in the Great Patriotic War. For Russia, 9th of May is the greatest and sacred holiday. We are proud of the generation of victors and honour their feat, and our memory is not only a tribute to our heroic past, but it also serves our future, inspires us and strengthens our unity. It is our duty to defend the truth about the Victory; otherwise what shall we say to our children if a lie, like a disease, spreads all over the world? We must set facts against outrageous lies and attempts to distort history. Russia will create the largest and most complete set of archival documents, film and photo materials on the Second World War, accessible both for our citizens and for the whole world. This work is our duty as a winning country and our responsibility to the future generations’.⁴¹

While the annual military parade in Moscow was unprecedentedly rescheduled due to the ongoing pandemic,⁴² Putin’s rhetoric is characteristic of the populist narrative promulgated by his regime in recent years. The narrative of Russian official historiography that continues to use the terminology of the “Great Patriotic War 1941-1945” postulates a self-exculpatory rhetoric with two goals: to position the Soviet Union as the major, if not outright ‘winner’ and victim of World War II, as well as to cement the denial of Russian culpability. The latter involves erasing the history of the Molotov-Ribbentrop Pact, the Russian involvement in the occupation

of our ancestors who transmitted to us our ideals and faiths in God, as well as continuity in developing the Russian state, along with recognizing the historically established state unity. (B) The Russian Federation honours the memory of the defenders of the Fatherland, ensures the protection of historical truth. Diminishing the significance of the feat of the people in the defense of the Fatherland is not allowed.”

³⁹ In parallel, Putin’s propaganda has railed against what his government perceives as foreign attempts to diminish the enormous sacrifice made by the USSR in World War II.

⁴⁰ See *BBC News*, Putin Strongly Backed in Controversial Russian Reform Vote, 2 July 2020, available on: <https://www.bbc.com/news/world-europe-53255964> (accessed on 28 October 2020).

⁴¹ See *President of Russia*, Presidential Address to the Federal Assembly, 15 January 2020, available on: <http://en.kremlin.ru/events/president/news/62582> (accessed on 28 October 2020).

⁴² Belarus, where Lukašenka’s regime has been providing a similar type of Soviet propaganda regarding “Great Patriotic War”, was the only country to hold the parade on 9 May 2020, despite the pandemics. See *Uladzislau Belavusau and Maksim Karliuk*, The State of Denial Amidst the Military Parade: COVID-19 in Belarus, *Verfassungsblog: On Matters Constitutional*, 20 May 2020, available at: <https://verfassungsblog.de/the-state-of-denial-amidst-a-military-parade-covid-19-in-belarus/>.

of Poland, and the atrocities committed by the Soviet Army and the NKVD in the inter-war and World War II period. Thus, the ‘sacred’ victory of the Great Patriotic War has formed a central ideological pillar of the current regime.⁴³ The 2020 referendum has elevated this pillar to the realm of mnemonic constitutionalism, comparable to the self-exculpatory narrative of the Hungarian Constitution that was promulgated 10 years earlier, also achieved by virtue of a referendum.⁴⁴ Furthermore, in advance of the Russian referendum, Putin published an article ‘teaching’ the whole world “real lessons from the 75th anniversary of the Great Patriotic War.”⁴⁵ This cementing of ‘historical truth’ occurred immediately after the military parade at the Red Square, preparations for which continued since March, despite the coronavirus pandemic.⁴⁶

It should be noted that in spring 2014, the Russian Duma (the lower chamber of the parliament) adopted a memory law that remains pivotal for the legal governance of historical memory in Putin’s Russia and should also be viewed as part and parcel of a broader framework for mnemonic constitutionalism in Russia.⁴⁷ This law introduced a prison term for, *inter alia*, the ‘denial of facts’ related to the Red Army’s actions during the war or for the ‘desecration of the symbols of military glory’,⁴⁸ the latter of which has been playing a peculiar role in the memory wars with Ukraine during the recent conflicts over Crimea and Donbass.⁴⁹ Most significantly, the law amended the Criminal Code to impose punishment through a fine of up to three hundred thousand roubles or the deprivation of liberty for up to three years via Article 354-I entitled ‘Rehabilitation of Nazism’. This provision in the Penal Code makes it a criminal offence *to deny*:

[...] the facts established by the Judgement of the International Military Tribunal for the trial and punishment of major war criminals of European

⁴³ Ilya Nuzov, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], Radio Svoboda, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

⁴⁴ See part on Hungary above.

⁴⁵ Vladimir Putin, The Real Lessons of the 75th Anniversary of World War II, The National Interest, 18 June 2020, available at: <https://nationalinterest.org/feature/vladimir-putin-real-lessons-75th-anniversary-world-war-ii-162982>

⁴⁶ For an excellent summary of Putin’s politics of memory on the eve of the 2020 constitutional referendum, see Ilya Nuzov, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], Radio Svoboda, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

⁴⁷ Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: www.rg.ru/2014/05/07/reabilitacia-dok.html (in Russian). The law is sometimes referred to as Yarovaya Act, following the name of Irina Yarovaya, a deputy from the ruling “United Russia” party that played a central role in its promotion.

⁴⁸ Article 3 in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: www.rg.ru/2014/05/07/reabilitacia-dok.html.

⁴⁹ See Nikolay Kuposov, Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia, Cambridge University Press, 2017; Ilya Nuzov, Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe, Human Rights Law Review, 19, 2019. 231-253; Lina Klymenko, Cutting the Umbilical Cord: The Narrative of the National Past and Future in Ukrainian De-communisation Policy, in Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias (eds.), Law and Memory: Towards Legal Governance of History, Cambridge University Press, 2017. 310-328.

countries of the Axis, the approval of crimes established by the above-mentioned Judgement, as well as dissemination of knowingly false information on the activities of the USSR during the Second World War, committed publicly.⁵⁰

The law further increases the punishment to up to five years of imprisonment if “the same deeds [have been] committed by using one’s official position or via mass media, as well as with an artificial fabrication of prosecution evidence.”⁵¹ Furthermore, the law stipulates that:

Public distribution of information expressing manifest disrespect toward society regarding Russia’s days of military glory and the commemorative dates associated with the defence of the Fatherland or public insults to the symbols of Russia’s military glory are punishable by a fine up to three hundred thousand roubles [...] or by correctional labour for up to one year.⁵²

One telling fact regarding this provision is that Article 354-1 mimics Article 190-1 of the Criminal Code of the Russian Soviet Federative Socialist Republic, through which the USSR punished the “spreading of knowingly false fabrications” about the Soviet system and was a tool widely used against dissidents.⁵³

The amended Russian Constitution clearly reflects the new wave of memory wars in the CEE region, manufacturing new “external enemies” during this illusionary “defence of the Soviet past”. Yet, most importantly, the constitutional amendments signal a significant deterioration for the rule of law generally, as well as human rights standards more specifically, in Russia. This type of mnemonic constitutionalism is particularly problematic for freedom of speech and freedom of assembly, as even before the 2020 referendum, six years earlier Russia had adopted a memory law criminalising alternative narratives that criticise rather than glorify the actions of the Soviet Army during the “Great Patriotic War”. It is therefore emblematic for mnemonic constitutionalism in Russia even before 2020 that national memory regulation has been penalising “wrong” views on Russia’s Soviet-era history, and whitewashing the legacy of Communism and the Soviet Union, instead of protecting millions of victims of Stalinist atrocities.

⁵⁰ Article 354-1, Ugolovnyi Kodeks Rossiyskoy Federatsii (Criminal Code of Russian Federation), available at: http://www.pravo.gov.ru/proxy/ips/?docbody=&link_id=1&nd=102041891 (in Russian).

⁵¹ Article 1.2. in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: www.rg.ru/2014/05/07/reabilitacia-dok.html.

⁵² Article 1.3. in Federal’nyi zakon ‘O vnesenii izmeneniy v otdel’nyie zakonodatel’nyie akty Rossiyskoy Federatsii’ [Federal Law ‘On the Introduction to Certain Legislative Acts of the Russian Federation’], article 1.1., Rossiyskaya gazeta, 7 May 2014, available at: www.rg.ru/2014/05/07/reabilitacia-dok.html.

⁵³ Ugolovnyi kodeks RSFSR ot 27 oktyabrya 1960 g. [Criminal Code of the RSFSR of 27 October 1960], available at www.lawrussia.ru/bigtexts/law_3558/page3.htm. About this aspect, see also *Nikolay Kuposov*, Defending Stalinism by Means of Criminal Law: Russia, 1995-2014, in *Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 307; *Alina Cherviatsova*, Memory as a Battlefield: European Memorial Laws and Freedom of Speech, *International Journal of Human Rights*, 2020. 1-20, at p. 12.

5. Conclusions

In using and abusing history for the sake of building a ‘new constitutional order’, Hungary and Russia undoubtedly differ in many important respects. Russia (although a member of the Council of Europe) is not an EU state and the nature of the referenda in Hungary and Russia deserve separate evaluation/assessment. Likewise, it should be emphasised that in Russia, unlike Hungary, mnemonic constitutionalism has proceeded without a fully-fledged change but rather by virtue of novelisation of the constitutional text *per se*, with a myriad of amendments after a referendum. In addition, several non-constitutional yet truly draconian legal steps and legislative initiatives have occurred in Russia, including substantial amendments to the Criminal Code in relation to Russian history. Nonetheless, the Russian mode of constitutionalising the historical past through a populist referendum has had the same effect as in Hungary, namely, reinforcing mnemocracy.

In this context, the most disappointing response has been the failure of the EU and Council of Europe to respond to the rise of mnemocracy in Hungary and Russia. It remains questionable to what degree these European institutions can challenge the reinforcement of mnemonic constitutionalism in their Member States (the EU for Hungary, in particular regarding Article 7 TEU, and the Council of Europe for Hungary and Russia). For EU Member States such as Hungary, this question emerges primarily in light of the esoteric defence of “national identity [...] inherent in constitutional [...] self-government” afforded to Member States in the post-Lisbon set-up of Article 4(2) of the Treaty on European Union. However, the current wave of mnemonic constitutionalism in CEE clearly weakens attempts to build consensus within European historical narratives and accompanies the decline of democracy (in particular, in Hungary and Poland). It is even questionable whether the EU has mechanisms to support freedom of historical research beyond the EU (in the case of Russia), and whether the Council of Europe may well be entirely toothless with regard to a preventive defence of academic freedom (as Russia is a Member State of the Council of Europe).

Other countries in CEE have also demonstrated interest in the translation of historic and self-righteous mythologies into their national laws and historical policies, including via international judicial matters. In particular, Poland has promulgated a number of memory laws that postulate a similar self-inculpatory rhetoric regarding exclusive innocence and heroism of the Polish nation in the inter-war period and during World War II, attempting even to criminalise the attribution of the guilt over crimes against Jews to Poles during the War.⁵⁴

⁵⁴ On memory laws in Poland, see in particular, several of my earlier publications: U. Belavusau, *The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation?*, in *Security and Human Rights*, 2019, p. 36–54; A. Wójcik and U. Belavusau, *Posponer los Cambios de Nombre de las Calles Tras la Transición de la Democracia: Lecciones Legales de Polonia*, in Jordi Guixé i Coromines, Jesús Alonso Carballés and Ricard Conesa Sánchez (eds), *Diez Años de Leyes y Políticas de Memoria (2007–2017)*, Ediciones La Catarata, 2019, p. 27–39; U. Belavusau and A. Wójcik, *La Criminalisation de l'Expression Historique en Pologne: La loi Memorielle de 2018*, in *Archives de politique criminelle*, 2018, p. 175–188; U. Belavusau, *Rule of Law in Poland: Memory Politics and Belarusian Minority*, in *Verfassungsblog*, 21 November 2017, <http://verfassungsblog.de/rule-of-law-in-poland-memory-politics-and-belarusian-minority/>.

Another vivid example of the building up a mnemocracy is the case of Ukraine with its recent package of memory laws. As noted by Alina Cherviatsova:

To cope with the communist past and create a new pantheon of national heroes, Ukraine is re-writing its history, selectively choosing among the several memories those that can foster its national identity and cohesion. This is a controversial process which divided Ukraine's society and resulted in so-called memory wars – a clash of the state-sponsored historical narratives – with Russia and Poland.⁵⁵

This process coincides with the rebuilding of the constitutional and political order in Ukraine, revealing a close nexus between the implementation of memory laws and the attempt to establish a Ukrainian form of mnemocracy. Furthermore, the Ukrainian model of mnemonic constitutionalism – with its strong package of de-communisation laws and involvement of the Constitutional Court⁵⁶ – partially copied its Polish equivalent, particularly by establishing a vocal (Ukrainian) Institute of National Remembrance.⁵⁷ The proliferation of memory institutes in CEE is at times ironic. Such entities essentially mimic each other in their remembrance of the totalitarian past despite their varying – and sometimes mutually contradictory, as the Polish-Ukrainian comparison demonstrates – engineering of national identities.

It is also particularly emblematic for the rise of mnemonic constitutionalism along memory wars in CEE that Vladimir Putin has justified his latest constitutional project via a plea towards historical memory and “historical truth”. In June 2020, Putin stressed that voting for amendments to the Russian Constitution was tantamount to “preserving the memory of their ancestors and expressing respect for the defenders of the Fatherland”.⁵⁸ Somewhat similar to Hungary (and Poland), the recent wave of Russian mnemonic constitutionalism disguises broader amendments contrary to rule of law standards, for example, on the “nullification” of presidential terms and the expansion of presidential powers on the right to initiate the dismissal of judges of the Constitutional Court. However, this Russian example of mnemonic constitutionalism has broader implications for the entire area of memory governance in CEE and will undoubtedly deepen existing divisions and disputes. As demonstrated by Nikolay Koposov, countries such as Czechia, Hungary, Latvia, Lithuania, and Poland criminalised communist crimes as a reaction to Putin's neo-imperial ambitions, and also as a result of memory wars with Moscow.⁵⁹ Ironically, the 2020 amendments to the Russian Constitution by Putin mimic the 2011 constitutional amendments implemented by Hungary's Orbán, which

⁵⁵ See A. Cherviatsova, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, *European Papers*, 2020.;

⁵⁶ See A. Nikoliak, *Ukraine's Constitutional Court, Historical Narrative-Making, and the Law*, in *MELA*, 2019, <http://melaproject.org/blog/601>.

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

⁵⁸ *Ilya Nuzov*, “Bez Prava na Pravdu” – o popravkakh k Konstitutsii [Without a Right to the Truth: About Constitutional Amendments], *Radio Svoboda*, 29 June 2020, available at: <https://www.svoboda.org/a/30685618.html> (accessed on 28 October 2020).

⁵⁹ See N. Koposov, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, 2020, p. 107, et seq.

relate to the historical continuity of a “thousand-year” statehood and references the Christian God, reminiscent of the Hungarian constitutional avowal.⁶⁰

In recent years, mnemonic constitutionalism has been used, on one hand, as a sword of democratic backsliding and, on the other, as a shield during memory wars in CEE. It is indisputable that the entanglement of memory and history in current politics in countries with authoritarian ambitions is an extremely attractive tool for controlling not only social moods, but also the entire narrative translating into all other elements of the state functioning in a specific legal and political space. Sadly, the examples of Hungary and Russia remain tempting role models for other countries in the region. These trend of mixing memory, history, and politics can also be understood as another step towards the dismantling of European integration (evident in the Hungarian and Polish examples). Overt disregard and violation of European law are reinforced by departure from efforts to consolidate the European *demos* that started decades ago.⁶¹ This EU *demos* builds its community values on various historical memories but nevertheless seeks to overcome differences, animosities and wounds from the past. Memory laws encompass legal, political, historical, sociological, linguistic, economic and even artistic facets which merit comparative study. The continuous exploration of mnemonic constitutionalism and its nexus to the rule of law and democratic standards, embracing and transcending memory laws, leaves plenty of food for thought and fascinating enigmas for further research and critical exploration.

⁶⁰ See Miklós Könczöl, Dealing with the Past In and Around Fundamental Law of Hungary, in *Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias* (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, 2017. 246-262.

⁶¹ J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in *European Law Review*, 1995, p. 219-258.