Memory Laws and the Rule of Law

The Politicisation of Constitutional Review of Memory Laws

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German Federal Constitutional Court's review of memory laws – Poland's Constitutional Tribunal review of memory laws – politicisation of the judicial review of memory laws – gouvernement des juges – abusive judicial review

INTRODUCTION

This article examines the judicial review of memory laws by constitutional courts and argues that it is prone to politicisation – understood as the process in which the room for political (non-legal) manoeuvre and decision-making is widened[1] – as opposed to juridification, the process in which issues are settled according to pre-established 'objective' legal principles and rules.[2] This assertion is founded upon the

[1]K. Palonen, *Das 'Webersche Moment': Zur Kontingenz des Politischen* (Westdeutscher Verlag 2003) p. 175.

[2]K. Abbott and D. Snidal, 'Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars', in J. Dunoff and M. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge University Press 2013) p. 35, for more details on politicisation and juridification, *see* the first section *infra*.

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analysis of how two very different constitutional courts – the German Federal Constitutional Court and the Polish Constitutional Tribunal after 2015 – have dealt with memory laws, which refer here to legal regulations that inscribe a state-approved interpretation of history into law, most often entailing restrictions of the rights and freedoms of individuals.[3] The article contextualises and juxtaposes legal techniques used by those constitutional courts to navigate a highly sensitive intersection of the rights and freedoms of individuals and historical policy.

It argues, first, that in the German case, politicisation of judicial review of memory laws assumes a 'simple' form when the court departs from its own established legal reasoning to align with the overarching historical policy imperative that holds paramount significance for the state's identity: to preserve the memory of the crimes committed during the National Socialist era. By rendering judgment on the prohibition on approving, glorifying or justifying the Nazi regime, the German Federal Constitutional Court further bolstered its legitimacy. In the Polish case, the politicisation of the review of memory laws is qualified. It is but one example of 'abusive judicial review', a feature of rule of law backsliding democracy. Here, institutions, most notably the Constitutional Tribunal, are subordinated to the political demands of the executive branch. The article discusses two instances of abusive judicial review, which show that the politically subordinated Constitutional Tribunal instrumentalises human rights to advance the ruling majority goals related to its historical policy. Second, the article delves into why the political dimension is so crucial when assessing memory laws, including by constitutional courts.

This article, in a first step, briefly discusses memory laws and the concept of politicisation in the two different dimensions: simple politicisation and abusive judicial review. Second, it examines the case law of the Federal Constitutional Court – and, to some extent, the Federal Court of Justice – which, by creating exceptions for the memory of Nazi crimes, appears to have been influenced by political considerations; and then explores how the politically subordinated Polish Constitutional Tribunal, with the abusive judicial review, sustains populist mnemonic constitutionalism of the rule of law backsliding era. The final part asks to what extent politicisation is an inherent feature of the judicial review of memory laws, followed by the conclusions.

[3]For definitions of memory laws *see* U. Belavusau and A. Gliszczynska-Grabias, 'The Remarkable Rise of "Law and Historical Memory" in Europe: Theorizing Trends and Prospects in the Recent Literature', 47(2) *Journal of Law and Society* (2020) p. 325 at p. 333 ff; M. Bán and U. Belavusau, in *Bloomsbury History: Theory and Method* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4104552, visited 11 January 2024.

Memory laws

Memory laws are a highly contentious form of legal intervention that generates significant debates and disagreements, including on the constitutional level. Even classic memory laws, widespread in Europe,[4] such as the Holocaust and other past crimes denial bans, continue to raise resistance.[5] The scepticism and objections to memory laws arise from their various, often political, functions. Memory laws officialise the state's historical narrative and may restrict historical debate and the freedom of historical research and stifle competing narratives. Some memory laws disproportionality restrict rights and freedoms. Moreover, some memory laws perpetuate simplified and manipulated narratives about the past,[6] especially with respect to sensitive, divisive or controversial issues, such as the state's implication in human rights violations.[7] Critics also reproach memory laws for making official an interpretation of the past preferred by the dominant group in society or the ruling political party at the expense of accounts of minorities or excluding views of opposition parties.[8] Memory laws are also seen as excessive regulation or unjustified criminalisation. Critics argue that memory laws' objectives could be achieved by non-legal or at least non-punitive means.[9] In the past decade, a new wave of controversial memory laws has mushroomed in Central and Eastern Europe, notably in the context of the rule of law backsliding, populism in power, and non-liberalism.[10] Many of the new memory laws advanced dominant national historical narratives supported by ruling populist parties and used by them to justify policies that lowered achieved democratic standards.[11] Such

[4]'Holocaust Denial in Criminal Law Legal Frameworks in Selected EU Member States' (European Parliamentary Research Service January 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698043/EPRS_BRI(2021)698043_EN.pdf, visited 11 January 2024.

[5]N. Koposov, 'Historians, Memory Laws, and the Politics of the Past', 5 *European Papers – A Journal on Law and Integration* (2020) p. 107.

[6]U. Belavusau and A. Gliszczyńska-Grabias, 'The Remarkable Rise of "Law and Historical Memory" in Europe: Theorizing Trends and Prospects in Recent Literature', 47(2) *Journal of Law and Society* (2020) p. 325.

[7]A. De Baets, 'Self-inculpatory Laws Do Not Exist, Free Speech Debate', 12 December 2019, https://freespeechdebate.com/2019/12/self-inculpatory-laws-do-not-exist/, visited 11 January 2024.

[8]Y. Gutman, 'Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?', 50(3) *Law & Society Review* (2016) p. 575.

[9]A. De Baets, 'Laws Governing the Historian's Free Expression', in B. Bevernage and N. Wouters, *The Palgrave Handbook of State-Sponsored History after 1945* (Palgrave Macmillan 2018) p. 39.

[10]N. Koposov, 'Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia', 36 *East European Politics and Societies* (2022) p. 272.

[11]*See* A. Gliszczyńska-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)' (Publishing House of the Institute of Law Studies Polish Academy of Sciences 2023).

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governments, in particular in Hungary and Poland, heavily relied on 'mnemonic constitutionalism', understood here as placing the authority and legitimacy of a state into the boundaries of a certain historical paradigm.[12]

Two very different players: the German and Polish constitutional courts

Most scholarship on memory laws discusses the role of the legislative and executive branches of power, political parties, and social movements in shaping them. In its stead, this article focuses on the judicial branch. It contextualises and compares the approaches to judicial review of memory laws of the Federal Constitutional Court and the Polish Constitutional Tribunal after 2015 for several reasons. German and Polish political and legal cultures are particularly strongly preoccupied with dealing with the often tragically intertwined past and preserving historical memory. The individual and collective memory of the past greatly influences contemporary domestic and international policies in Berlin and Warsaw. The legal regulation of historical memory and reckoning with the past stirs public debates in both countries. Furthermore, memory laws and other forms of states' attempts to shape historical memory often spur domestic and international 'memory wars', including between those two states.

A comparison of the judicial review of memory laws in Germany and Poland also offers a valuable perspective because of the significant differences between their recent memory politics and laws and the bias of the constitutional courts. Memory politics and laws in Germany primarily serve as a reminder of the atrocities committed during the National Socialist past and as a form of assumption of responsibility for them.[13] In a similar vein, in the initial decades after the fall of Communism, democratic Poland fashioned its memory laws – especially the Holocaust and other historical crimes denial prohibition and bans on propagating fascism and totalitarian regimes – on the militant democracy mechanisms that existed in established democracies in Europe, notably in Germany.[14] However, during the democracy backsliding period since 2015, Poland has adopted populist memory laws, such as a law accused of intending to limit historical debate on the complicity of Poles in certain atrocities and crimes of the Second World War, notably the Holocaust[15] and a law serving populist retribution under the pretext of finalising de-Communisation process.[16]

[12]U. Belavusau, 'Mnemonic Constitutionalism and Rule of Law in Hungary and Russia', 1 *Interdisciplinary Journal of Populism* (2020) p. 16 at p. 18.

[13]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 58.

[14]Gliszczyńska-Grabias et al., *supra* n. 11, p. 24.

[15]K. Kończal, 'Mnemonic Populism: The Polish Holocaust Law and its Afterlife', 29 *European Review* (2021) p. 457.

[16]M. Krotoszyński, 'Transitional Justice and the Constitutional Crisis: The Case of Poland (2015-2019)', 21 *Archiwum Filozofii Prawa i Filozofii Społecznej* (2019) p. 22.

Furthermore, the legitimacy and recognition of the constitutional courts in both countries could not be more different today. The German Federal Constitutional Court is a widely respected institution that has served as a role model for constitutional courts in many jurisdictions in Europe. Some decisions of that court have raised controversies in recent years, in particular with respect to the primacy of EU law.[17] However, the independence of the Federal Constitutional Court and its respect for the EU law and institutions has never been seriously disputed.[18] In contrast, since 2015, the majority in Poland, ruling until the end of 2023, has subordinated the Constitutional Tribunal to the extent that it is no longer a part of the checks and balances of a democratic state.[19] In 2021, the European Court of Human Rights held that participation in the examination of constitutional complaints by three people unlawfully elected to the office of judge of the Constitutional Tribunal led to a breach of the rights of applicants guaranteed by the ECHR.[20] Since 2018, the Constitutional Tribunal has been subject to the procedure of Article 7(1) TEU regarding the threat to the EU value of the rule of law, protected by Article 2 TEU. In 2023, the European Commission referred Poland to the European Court of Justice in relation to the Constitutional Tribunal and its case law challenging EU law on judicial independence.[21]

Theoretical perspective

Politicisation

The concept of politicisation has been used in various contexts and sub-disciplines, including political theory, comparative politics, political sociology and

[17]This was the case, in particular, for the Federal Constitutional Court's ruling of 5 May 2020 – 2 BvR 859/15 on the Public Sector Purchase Programme (PSPP) of the European Central Bank in which the Court considered decisions of the European Central Bank and the Court of Justice of the European Union as 'ultra vires' and hence not binding; *see* P. Dermine, 'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union', 16 *EuConst* (2020) p. 525; an infringement procedure introduced by the European Commission in June 2021 was closed in December 2021 'in light of the strong commitments' to the primacy of EU law provided by Germany, *see* European Commission, *Rule of Law Report 2022 – Country Chapter Germany*, p. 22 f.

[18]F. Meinel, 'The Merkel Court: Judicial Populism since the Lisbon Treaty', 19 *EuConst* (2023) p. 111.

[19]The Polish Constitutional Tribunal was illegally staffed and neutered in 2015. It has had a new president since December 2016. *See* Sadurski, *supra* n. 13, p. 58.

[20]M. 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 o.o.* v *Poland*', 18 *EuConst* (2022) p. 132.

[21]ECJ, Case C-448/23, pending.

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legal theory.[22] Its meanings are just as numerous – while some use it to denote the polarisation of opinions, interests or values,[23] others more generally use it to describe the creation of public controversy.[24] The concept is primarily understood here as contrasting with juridification, hence reflecting the conflict between politics and law.

From the point of view of this theoretical dichotomy, politicisation is the process by which the room for political manoeuvre[25] is widened and choice is introduced.[26] This article is particularly interested in the politicisation in judicial decisions of constitutional courts, in which judges introduce this choice and, as a result, widen their own room for manoeuvre. Politicised court decisions are based on non-legal motives rather than on objective, pre-determined rules or principles, as is the case with juridification.[27]

Politicisation, understood in that sense, can have a positive or negative connotation, as there is no simple answer to whether it is beneficial or harmful to democracy and the rule of law.[28] On the one hand, critical thinkers, such as Jürgen Habermas and Otto Kirchheimer, considered juridification a mode of depoliticisation, a tool for perpetuating class relations and fixing authority sharing. According to Kirchheimer, the legal formalisation and neutralisation of all things would entail a mere 'legal mechanism' and 'legal machinery'; this would be the beginning of the epoch of the rule of law.[29] Politicisation can therefore be considered as having

[22]C. Wiesner, 'Introduction', in C. Wiesner (ed.), *Rethinking Politicisation in Politics, Sociology and International Relations* (Springer International 2021) p. 1 at p. 2.

[23]P. De Wilde, 'No Polity for Old Politics? A Framework for Analyzing the Politicization of European Integration', 33 *Journal of European Integration* (2011) p. 559 at p. 566; N. Gheyle, 'Conceptualizing the Parliamentarization and Politicization of European Policies', 7 *Politics and Governance* (2019) p. 227 at p. 230.

[24]E. Van Rythoven, 'On Backlash: Emotion and the Politicisation of Security', 5 *European Review of International Studies* (2018) p. 139 at p. 151; M. Dunn Cavelty and M. Leese, 'Politicising Security at the Boundaries', 5 *European Review of International Studies* (2018) p. 49 at p. 50.

[25]K. Palonen, *Das 'Webersche Moment': Zur Kontingenz des Politischen* (Westdeutscher Verlag 2003) p. 175.

[26]P. Liste, 'In-Between Juridification and Politicisation: Zooming in on the Everyday Politics of Law', in C. Wiesner (ed.), *Rethinking Politicisation in Politics, Sociology and International Relations* (Springer International 2021) p. 245 at p. 249; in that sense *see also* M. Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Cambridge University Press 2018) p. 139 at p. 140.

[27]On the politicisation of judicial decisions, *see* J. Ferejohn, 'Judicializing Politics, Politicizing Law', 65 *Law and Contemporary Problems* (2002) p. 41 at p. 63.

[28]C. Wiesner, 'Introduction', in C. Wiesner (ed.), *Rethinking Politicisation in Politics, Sociology and International Relations* (Springer International 2021) p. 1 at p. 6.

[29]O. Kirchheimer, 'Zur Staatslehre des Sozialismus und Bolschewismus', in W. Luthhardt, *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung* (Suhrkamp: 1976 (1928)) p. 36.

democratising effects[30] and saving a constitutional regime from dystopian legal machinery. On the other hand, politicisation can also harm the rule of law and democracy, especially when the courts are politicised players, and the line is blurred between applying the law and law-making. In such circumstances, judges may overstep their authority, compromising the separation of powers and democratic standards.

More importantly, the imagining of a strict dichotomy between law and politics, and therefore between juridification and politicisation, has increasingly been questioned. Indeed, it is a 'well-established [dis-]belief in both legal theory and socio-political discourse that judges are just experts and courts are institutions which are and should be detached from politics'.[31] Politics inevitably enter into the law at many points. When a legal rule is indeterminate and leaves room for various interpretations, political and expedient considerations become more significant. The law thus interacts with politics and has been considered 'the continuation of political intercourse, with the addition of other means'.[32] This holds even more significance when it comes to the review of laws against constitutional texts that are largely vague and indeterminate. In the same vein, the process of juridification of politics, where courts 'gain political control over the constitutional arena'[33] can be regarded as the converse aspect of the politicisation of the judiciary.

However, it is claimed here that despite the inevitable entanglement of law with politics, there is a domain in which judicial decisions can be considered as politicised because their politicisation could have been avoided. This is the case where the response provided by the law or judicial precedents is relatively clear and a court nevertheless deviates from that response while considering a given case under review in order to reach a certain result. Even where the motive behind these decisions is precisely to affirm a difficult political choice made by the legislator, the decision remains driven by non-legal considerations and, it is claimed here, can therefore be considered as politicised.

[30]Wiesner, 'Introduction', *supra* n. 28, p. 6.

[31]M. Belov, 'Introduction', in M. Belov (ed.), *Courts, Politics and Constitutional Law, Judicialization of Politics and Politicization of the Judiciary* (Routledge 2020) p. 1.

[32]K. Abbott et al., 'The Concept of Legalization', 54 *International Organization* (2000) p. 401 at p. 419, referring to von Clausewitz's famous dictum that war is a continuation of politics.

[33]K. Lachmayer, 'Disempowering Courts – The Interrelationship between Courts and Politics in Contemporary Legal Orders or the Manifold Ways of Attacking Judicial Independence', in Belov (ed.), *supra* n. 31, p. 38.

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Simple politicisation

Naturally, the degree of this deviation from pre-determined rules can vary. At the lower end of the scale, we find decisions that transform courts from an authority that reviews cases within pre-existing constitutional restraints to one that makes more sovereign decisions, deviating from prior constitutional law and jurisprudence and setting its own legal standards determined by political rather than legal considerations, but leaving the democratic character of the state intact.[34] This situation is reminiscent of a *gouvernement des juges*[35] if the decisive feature of 'governing' is, as is the traditional perspective, seen in politics,[36] this term being understood here to mean sovereign decision-making determined by considerations of expediency, as opposed to decisions determined by law. Against this backdrop, the *gouvernement des juges* can be considered an expression of politicisation.[37]

The tension that this 'simple' form of politicisation creates about the rule of law, at least in text-oriented continental legal systems, is obvious, as politicisation more generally compromises the separation of powers. Where 'governing judges' deviate from the constitutional text to follow political considerations, they

[34]J. Rivero, 'Judges Who Wish Not to Govern', 54 *Le Conseil Constitutionnel et Les Libertés* (1984) (originally a note appearing in 134 *Actualite Juridique, droit administratif* (1975)); O. Depenheuer, 'Grenzenlos gefährlich – Selbstermächtigungen des Bundesverfassungsgerichts', in C. Hillgruber (ed), *Gouvernement des juges: Fluch oder Segen* (Ferdinand Schöningh 2014) p. 79 at p. 81 f, 102.

[35]The concept was created by E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Marcel Giard & Cie 1921); on its diverse meanings in history, *see* M.H. Davis, 'A Government of Judges: An Historical Re-View', 35 *American Journal of Comparative Law* (1987) p. 559 at p. 562. They range from any judicial constraint upon executive or legislative power (Davis., p. 559) over the mere power of constitutional review of laws (C. Hillgruber, 'Gouvernement des juges: Fluch oder Segen', in C. Hillgruber (ed.), 4 *Schönburger Schriften zu Recht und Staat* (2014) p. 11 at p. 13), to the development of a progressive position by a court (A. Nußberger, 'Regieren: Staatliche Systeme im Umbruch?', in *Machtverschiebungen, Referate und Diskussionen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Mannheim vom 6–9 Oktober 2021* (2022) p. 7 at p. 28.

[36]R. Smend, 'Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform', in R. Smend (ed.), *Staatsrechtliche Abhandlungen*, 2nd edn. (Duncker & Humblot 1968) p. 68 at p. 79; P. Badura, 'Regierung', in R. Herzog (ed.), *Evangelisches Staatslexikon II*, 3rd edn. (Kreuz-Verlag 1987) p. 2951 at p. 2954; however, more recently, 'government' is also framed as non-political and more administrative activity: *see*, on the German Federal Constitutional Court's perspective in this sense, Meinel, *supra* n. 18.

[37]R. Pinto, 'The End of the Government of Judges', 66 *R. Dr. Pub.* (1950) p. 833 uses precisely the term 'government of judges' for a politicised judiciary: *see* Davis, *supra* n. 35, p. 568.

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become part of the constitutional legislator,[38] despite the generally tenuous democratic legitimacy of the constitutional courts.[39]

Just like the line between politics and law more generally, the line between 'simple' politicisation and an 'ordinary' constitutional review can swiftly become blurred. Since constitutional provisions are often concise and subject to varying interpretations, judicial interpretation is typically required to give them practical effect.[40] Such interpretations are then not only determined by systematic considerations, intended to best reconcile the constitutional interpretation with prior precedents, but also by teleological considerations which are inevitably influenced by the subjective – and therefore political – views of the judges. In principle, this approach is legitimate: assessing the persuasiveness of the decisions of constitutional courts mainly by whether they fit within prior precedents would further foster the already widespread 'positivism of constitutional courts': the tendency of constitutional scholarship and courts to consider decisions of constitutional courts as standard-setting, pretending these courts to be vested with *pouvoir constituant*.[41] However, the border to politicisation appears to be crossed where the wording, context, telos and *travaux préparatoires* of the relevant constitutional text strongly supports precedents and the court deviates from the latter in a result-oriented decision. Because, in this case, political considerations appear to prevail over legal arguments, and this, in the long run, contributes to a sliding delegitimisation of the relevant court.[42] Based on this understanding, judges may be considered as politicising even when they affirm the constitutionality of a law.

Qualified politicisation: abusive judicial review

The degree of politicisation is intensified with respect to abusive judicial review. David Landau defines 'abusive constitutionalism' as a form of regime which uses

[38] *See* Depenheuer, *supra* n. 34, p. 103.

[39] On the legitimacy of the Federal Constitutional Court, *see* C. Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court', in M. Jestaedt (ed.), *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2020) p. 131; for a comparative analysis in post-Communist Europe, *see* W. Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer 2003).

[40] W. Kahl, 'Vom weiten Schutzbereich zum engen Gewährleistungsgehalt', 43 *Der Staat* (2004) p. 167 at p. 194; B.-O. Bryde, *Verfassungsentwicklung* (Nomos 1982) p. 80 ff.

[41] For this observation on German constitutional literature, *see* B. Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit', 28 *Der Staat* (1989) p. 161 at p. 162-164; Depenheuer, *supra* n. 34, p. 104 f; *see also* Kahl, *supra* n. 40, p. 196, using the term to denote abstract and general decisions by the German Federal Constitutional Court accompanied by self-referential citations.

[42] On this effect, *see* Depenheuer, *supra* n. 34, p. 109.

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means that are either constitutional or ambiguously constitutional to change the character of the democratic state, including by removing or hollowing out human rights guarantees.[43] Landau and Rosalind Dixon have expanded this theory and introduced the concept of 'abusive judicial review' related to the abuse by a constitutional court of its powers in making decisions to the detriment of the constitutional standards of democracy.[44] Politically captured and subordinated constitutional courts cease to perform the function of independent checks and balances and help the executive to consolidate power. Abusive judicial review is an example of the use of traditional mechanisms of legal constitutionalism whenever convenient, and to achieve political goals. It is considered a feature of populist constitutionalism.[45] Captured constitutional court judges formally legitimise controversial actions and politics of the government, and effectively replace parliament in the process of deliberating on projects that are considered too politically costly for the ruling majority.

Abusive constitutional review takes many forms. For instance, judges can deviate from the established case law of the court on core matters – such as judicial independence and compatibility of the national constitution with the evolving principles of international law – exhibiting a marked shift in their approach. Judges can also adopt delay tactics by taking an unreasonably long time to decide on a sensitive case. Abusive judicial review presents an extreme form of politicised adjudication and is harmful to the rule of law, contributing to undermining judicial independence and impartiality, eroding public trust in the judiciary and legitimacy of judicial decisions. Furthermore, abusive judicial review is a means of pursuing a policy that is detrimental to the rule of law and standards of human rights and one of the mechanisms for dismantling liberal constitutional democracy.

Politicisation of the constitutionial review of memory laws

The Federal Constitutional Court's admission of specific anti-Nazi law

The Federal Constitutional Court, as compared to many of its international peers, has assumed a particularly active role in shaping constitutional law. Its decisions, which are characterised by general findings of principle that go beyond the specific case, have often been one step ahead of the legislature and even of constitutional

[43]D. Landau, 'Abusive Constitutionalism', 47 *UC Davis Law Review* (2013) p. 189 at p. 193.

[44]D. Landau and R. Dixon, 'Abusive Judicial Review: Courts against Democracy', 53 *UC Davis Law Review* (2019) p. 1313 at p. 1320.

[45]A. Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts', 19 *EuConst* (2023) p. 25.

scholarship.[46] As much as this has made the court, domestically and internationally, a widely respected 'guardian of the constitution',[47] critics have accused the Court of engaging in 'judicial activism' and of instituting a '*gouvernement des juges*'.[48] Earlier decisions of the Federal Constitutional Court, such as those in abortion cases,[49] and more recent ones, such as on climate protection,[50] or the 'right to be forgotten II', inventing a new standard of review of a constitutional complaint,[51] have sparked considerable debate. On the other hand, the Court remained remarkably passive during the Covid-19 pandemic, applying a reduced standard of review, especially in its most important decisions on the Federal 'emergency brake measures'.[52]

While the criticism that the Federal Constitutional Court exercises governance is thus not new, it is noteworthy how willing it has proved to consider political factors when examining memory laws which are designed to preserve the memory of the crimes committed during the National Socialist era.

Although this analysis is focused on the constitutional review of memory laws, it is instructive to start with a brief look at the jurisprudence of the Federal Court of Justice, which was the first to depart from its conventional case law and introduce distinctive safeguards for the preservation of the memory of the Holocaust and its victims. Although the specific criminal offence of Holocaust

[46]Schlink, *supra* n. 41, at p. 163; for the recent transformation into a court that has been strongly oriented towards a separation of powers between a representative legislature and a bureaucratic, administrating and non-political government during the Merkel era, *see* Meinel, *supra* n. 18.

[47]In the German context, this term (in German: *Hüter der Verfassung*) was first coined during the period of the Weimar Republic relating not only to a possible constitutional court but also to the Reich president (*see* e.g. the essay by Carl Schmitt who later became a firm supporter of National Socialism, 'Der Hüter der Verfassung', 55 *Archiv des öffentlichen Rechts* (1929) p. 161); today, it mainly refers to the Federal Constitutional Court, *see* e.g. O. Lembcke, *Hüter der Verfassung: Eine institutionentheoretische Studie zur Autorität des Bundesverfassungsgerichts* (Mohr-Siebeck 2007).

[48]*See*, for example, M. Jestaedt et al., 'Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht' (Suhrkamp 2011); Depenheuer, *supra* n. 34.

[49]In these decisions (BVerfGE 39, 1 of 1975 and BVerfGE 88, 203 of 1998), the Federal Constitutional Court, strongly relying on the human dignity of the embryo, held that the compromises found by the legislator, according to which abortion was not criminal or, respectively, legal within the first 12 weeks, were unconstitutional.

[50]Federal Constitutional Court, Order of 24 March 2021 – 1 BvR 2656/18 (*Klimabeschluss*).

[51]Federal Constitutional Court, Order of 6 November 2019 – 1 BvR 276/17 (*Recht auf Vergessen II*), ruling that, to the extent that fundamental rights of the Basic Law are inapplicable because of the precedence of EU law, the Federal Constitutional Court reviews the domestic application of EU law by the German authorities on the basis of EU fundamental rights (headnote 1); *see* D. Thym, 'Friendly Takeover, or: the Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review', 16 *EuConst* (2020) p. 187.

[52]Federal Constitutional Court, Orders of 19 November 2021 – 1 BvR 781/21 (*Bundesnotbremse I*) and 1 BvR 971/21 (*Bundesnotbremse II*).

denial was introduced in Germany as late as in 1994, from as early as 1958, the Federal Court of Justice held that Holocaust denial could be criminal. Where identification with Nazi ideology or the claim that Germany was being 'gagged' and 'blackmailed' could be established, the Court subsumed the denial under the offence of incitement to hatred.[53] If such a qualification could not be established, the Federal Court of Justice qualified Holocaust denial as a criminal insult to the detriment of Jews living in Germany today.[54] In the latter case, the Court had to significantly loosen its customary requirement that, for a collective group to be protected against insult, it needed to 'stand out from the general public in such a way that the number of individuals concerned is clearly delimited'.[55] To justify a deviation from this rule, the Court considerably relied on Germany's past, asserting that all Jews currently residing in Germany constituted a sufficiently well-defined group, regardless of whether they or their forebears had suffered persecution during the Nazi era, 'in view of their unusually difficult fate, imposed on them by National Socialism'.[56] Later, the Court added even more precisely that:

> such a statement [Holocaust denial] directly attacks the personality of the people who were particularly marked by the persecution of the Jews in the 'Third Reich'. This unique fate shapes the right to respect of each of them, especially vis-à-vis the citizens of the state on which this past weighs. . . . It is part of their [Jews living in Germany] personal self-image to be understood as belonging to a group of people singled out by fate, towards whom all others have a special moral responsibility, and which is part of their dignity. Respect for this self-image is for each of them virtually one of the guarantees against a repetition of such discrimination and a basic condition for their life in Germany.[57]

As convincing as this jurisprudence appears, the great pain that the Federal Court of Justice took to justify why it could deviate from its ordinary jurisprudence indicates that its aim was mainly to arrive at a fair and politically adequate result: that Holocaust denial was criminal, even without it being a specifically codified offence in Germany's criminal law.

[53]Federal Court of Justice, Judgment of 12 December 2001 – 1 StR 184/00, *Neue Zeitschrift für Strafrecht* (2001) p. 305 at p. 307.

[54]Federal Court of Justice, Order of 28 February 1958 – 1 StR 387/57, BGHSt 11, 207, *Neue Juristische Wochenschrift* (1958) p. 599 at p. 599.

[55]Federal Court of Justice, Judgment of 8 May 1952 – 5 StR 182/52, *Neue Juristische Wochenschrift* (1952) p. 1183.

[56]BGHSt 11, 207, *Neue Juristische Wochenschrift* (1958) p. 599 at p. 599.

[57]Federal Court of Justice, Judgment of 18 September 1979 – VI ZR 140/78, BGHZ 75, 160, *Neue Juristische Wochenschrift* (1980) p. 45 at p. 45 f (on a civil proceeding, however, relying on the criminal offence of insult).

The Federal Constitutional Court went even further than this. A specific Holocaust denial ban was introduced (§ 130(3) of the Criminal Code) in 1994. In 2005, the legislator added the criminal prohibition to approve, glorify or justify the Nazi regime where it disturbs public peace in public or in an assembly and violates the dignity of the victims (§ 130(4) of the Criminal Code). It did not prove overly challenging for the Federal Constitutional Court to confirm the constitutionality of § 130(3) of the Criminal Code, the prohibition of Holocaust denial.[58] At that time, the established case law of the Federal Constitutional Court held that knowingly made false statements of facts – of which Holocaust denial was a clear example – were not protected by freedom of speech unless the statement of fact was linked to or based on an opinion.[59] However, the challenge to the constitutionality of § 130(4) of the Criminal Code in the Federal Constitutional Court's *Wunsiedel* case created a dilemma. The condonation, glorification or justification of the Nazi regime could only be understood as an opinion, which, unlike false statements of facts, entered into the scope of freedom of speech under Article 5(1) of the Basic Law. However, while freedom of speech could be restricted under Article 5(2) of the Basic Law, this constitutional provision only admitted restrictions based on 'the general laws'.[60] In earlier decisions, the Federal Constitutional Court had defined a law as 'general' if it 'neither prohibited an opinion as such, nor was directed against the statement of the opinion, and rather served the protection of a legal interest which is to be protected as such, regardless of any particular opinion'.[61] With this formula, the Federal Constitutional Court had essentially decided on a controversy that had existed since the Weimar Republic between those pleading against the prohibition of specific opinions, as they held the State was supposed to be neutral about opinions and ideologies (*Sonderrechtslehre*), and Rudolf Smend's view. The latter considered freedom of speech to contain only a relative promise[62] so that it could

[58]Federal Constitutional Court, Order of 25 March 2008 – 1 BvR 1753/03, juris, para. 43.

[59]Federal Constitutional Court, Order of 3 June 1980 – 1 BvR 797/78, BVerfGE 54, 208 at p. 219; Order of 22 June 1982 – 1 BvR 1376/79, BVerfGE 61, 1 at p. 8; Order of 13 June 1994 – 1 BvR 23/94, BVerfGE 90, 241 at p. 247 f.

[60]In fact, Art. 5(2) of the Basic Law also allows restrictions based on laws protecting youths and personal honour; however, the Federal Constitutional Court, in its *Wunsiedel* order, held that these alternative legal bases for restrictions must also be 'general': Federal Constitutional Court, Order of 4 November 2009 – 1 BvR 2150/08, BVerfGE 124, 300 at p. 326 f; this interpretation has – rightly – been criticised in literature, *see* e.g. W. Höfling/S. Augsberg, 65 *JuristenZeitung* (2010) p. 1088 at 1092 f.

[61]Federal Constitutional Court, Judgment of 15 January 1958 – 1 BvR 400/57, BVerfGE 7, 198 at p. 209 (*Lüth*).

[62]J. Masing, 'Meinungsfreiheit und Schutz der verfassungsrechtlichen Ordnung', 12 *JuristenZeitung* (2012) p. 585 at p. 586; Masing was the rapporteur in the Federal Constitutional Court's *Wunsiedel* decision.

be restricted as soon as the protected legal interest prevailed over the freedom of speech.[63] With the Federal Constitutional Court's definition of 'general laws', the Court thus combined both elements, requiring the law to be neutral towards specific opinions and to protect a conflicting interest which prevailed. The problem with § 130(4) of the Criminal Code was that this provision could hardly be considered 'general' as it precisely outlawed a specific opinion, namely the view that the Nazi regime was to be approved. Nevertheless, the Federal Constitutional Court chose an unusual path to confirm the constitutionality of the law. It admitted that § 130(4) of the Criminal Code was not a 'general law' in the sense of Article 5(2) Basic Law.[64] However, given the 'unique injustices and horrors of the National Socialist regime', for which Germany was responsible and given the 'significance of this past, shaping Germany's identity', laws relating to the Nazi regime could be compatible with the freedom of speech even if they were not 'general'; the Court explicitly acknowledged these laws to be an exception from the rule.[65] This exception was justified by the fact that the Basic Law was a 'counter concept' to Nazi totalitarianism and the propagandist condonation of this regime had effects that exceeded the public battle of opinions and could not be governed by the ordinary limits of freedom of speech.[66]

Again, the result of this jurisprudence is not unconvincing, although the reasoning is remarkable. Even to a more significant extent than the Federal Court of Justice for the Holocaust denial, the Federal Constitutional Court, for the Holocaust approval, glorification and justification, found itself unable to resolve the case within the pre-existing constitutional framework. Instead, it quit this framework, creating a new exception. In doing so, the Federal Constitutional Court, like the Federal Court of Justice, came at least close to a 'simple' form of politicisation, decision-making deviating from prior constitutional law, influenced by political considerations.[67]

This extraordinary reasoning implies that the Federal Constitutional Court deemed the prohibition on the endorsement, glorification or justification of the Nazi regime to be lawful and essential in a state that had presented this regime. The reference to the Basic Law as a counter-concept to Nazism indicates that the Court saw such a counter-concept, involving the active rejection of the Nazi ideology, to be a part of the German state's identity, which it felt would be undermined if it annulled the relevant provision. The concept of state identity, as

[63]R. Smend, 'Das Recht der freien Meinungsäußerung', 4 *VVDStRL* (1928) p. 4 at p. 52.
[64]BVerfGE 124, 300 at p. 321-327.
[65]Ibid., p. 327-331.
[66]Ibid., p. 328 f.
[67]'Sovereign decision-making' is used here to denote decision-making determined by expediency instead of law which is, in principle, not the task of judges – albeit they indirectly exercise the people's sovereignty according to Art. 20(2) Sentence 1 of the Basic Law.

blurred and controversial as its meaning may be at its peripheries, can be understood as denoting the body of interests, values, self-understandings, and orientations from which the state acts and which are rooted in the state's history, culture, geography, economy or strategic context.[68] The Holocaust, understood as the 'breach of civilisation', has been considered the 'negative founding narrative' of the Federal Republic of Germany.[69] Thus, without any doubt, its commemoration forms part of the German state identity.

Abusive constitutional review and memory laws in Poland

Following the example of Western European democracies, notably Germany, Poland introduced centralised control over the constitutionality of laws. The Polish Constitutional Tribunal had been gaining strength and legitimacy until 2015.[70] However, in 2015, the new ruling majority decided to take control of the Constitutional Tribunal as one of the initial steps towards dismantling the rule of law in Poland, making the tribunal a central mechanism for pursuing state policy.[71]

Since 2016, the Constitutional Tribunal has been presided over by a person legally elected as a judge of the Constitutional Tribunal but incorrectly elected as its president, who has been publicly accused by fellow judges of the Constitutional Tribunal of illegal manipulation of the Constitutional Tribunal's benches to ensure that the rulings are in line with the government's aims.[72] The Constitutional Tribunal has ruled in several politically sensitive cases, for example confirming the constitutionality of changes in the judiciary enforced

[68]M.A. Brown, 'State Identity', in R. Jackson II and M. Hogg, *Encyclopedia of Identity* (SAGE 2010); for an overview on the literature about state identity *see* K. Ashizawa, 'When Identity Matters: State Identity, Regional Institution-Building, and Japanese Foreign Policy', 10 *International Studies Review* (2008) p. 571 at p. 571-573.

[69]For the historical context of this narrative, *see* P. Rhein-Fischer and S. Mensing, 'Memory Laws in Germany: How Remembering National Socialism is Governed through Law', *TOAEP Occasional Paper Series* (2021) p. 15 ff.

[70]T. Warczok and H. Dębska, 'Sacred Law and Profane Politics. The Symbolic Construction of the Constitutional Tribunal', 188 *Polish Sociological Review* (2014) p. 461.

[71]M. Florczak-Wątor, 'The Capture of the Polish Constitutional Tribunal and its Impact on the Rights and Freedoms of Individuals', in J. Mackert et al. (eds.), *The Condition of Democracy* (Routledge 2021) p. 127; A. Kustra-Rogatka, 'An Illiberal Turn or a Counter-constitutional Revolution? About the Polish Constitutional Tribunal before and after 2015', in M. Belov (ed.), *Courts and Judicial Activism under Crisis Conditions* (Routledge 2021) p. 100; W. Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) p. 63.

[72]Eight Constitutional Tribunal judges sent a public letter to the Constitutional Tribunal's President in April 2017, available at https://monitorkonstytucyjny.eu/archiwa/224, visited 11 January 2024.

by the government since 2017[73] and has been used to advance the unpopular policy of restricting legal abortion.[74] Furthermore, in line with the government's increasingly hostile stance towards the EU and the Council of Europe's control mechanisms, the Constitutional Tribunal has significantly departed from its previous jurisprudence regarding relations between the Polish constitution and EU law[75] and rejected the interpretation of EU law standards advanced by the European Court of Justice[76] and the interpretation of ECHR standards advanced by European Court of Human Rights[77] on judicial independence, because they were incompatible with the government's changes in the judiciary. In 2023, the European Commission referred Poland to European Court of Justice in relation to the Constitutional Tribunal for an alleged EU law infringement.[78]

Two applications regarding memory laws have been brought before the Constitutional Tribunal since its political takeover. The Tribunal's approach to those cases demonstrates the qualified politicisation of judicial review of memory laws, that is, in fact, an abusive judicial review.

In the first case, regarding the provisions of a 2018 amendment to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, which broadened the scope of the prohibition on denying past crimes, the Constitutional Tribunal issued a ruling promptly and took into consideration its settled case law on the principle of legality and legal certainty. However, this was an example of the executive branch using the ruling – the President of the Republic of Poland directed the motion to the Constitutional Tribunal – as a means of escaping a diplomatic 'memory war' between Poland and Ukraine, triggered by the governing majority's controversial amendment of the Act on the Institute of National Remembrance. In the second case, the Constitutional Tribunal used an abusive constitutional review tactic of taking an excessive amount of time to decide on a case sensitive to the government. The case concerns reducing the levels of pensions and benefits to people who are entitled to

[73]Kustra-Rogatka, *supra* n. 71.

[74]A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment that Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 17 *EuConst* (2021) p. 130.

[75]F. Zoll et al., *Primacy of EU Law and Jurisprudence of Polish Constitutional Tribunal: Recent Developments in the Light of the Polish Constitutional Tribunal's Case Law* (European Parliament. Directorate-General for Internal Policies of the Union 2022).

[76]A. Gliszczyńska-Grabias and W. Sadurski, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland', 19 *EuConst* (2023) p. 163.

[77]A. Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', 15 *Hague Journal on the Rule of Law* (2022) p. 51.

[78]ECJ, Case C-448/23, pending.

them on the basis of their work in certain branches of the Communist state in 1944–1990. The government claimed that this repressive measure aims at finalising 'de-Communisation' and increasing social justice in Poland.

The Act of 26 January 2018 amending the Act on the Institute of National Remembrance[79] polarised public opinion in Poland and provoked worldwide attention, primarily because the new Article 55a introduced the offence of 'publicly attributing and contrary to the facts, to the Polish nation and/or the Polish State, responsibility or co-responsibility for Nazi crimes committed by the German Third Reich or for other offences constituting crimes against peace, against humanity, or war crimes', as well as 'for grossly diminishing, in any other way, the responsibility of the actual perpetrators of those crimes', which was punishable with imprisonment for up to three years. Article 55a of the Act on the Institute of National Remembrance provoked strong reactions from Israel and the United States over fears that it would stifle the debate on the Holocaust and crimes committed by Poles against Jews.[80] However, the amendment also caused Ukraine's government to react because of the expansion of the tasks of the Institute of National Remembrance of documenting and investigating 'crimes of Ukrainian nationalists' and 'crimes of Ukrainian formations collaborating with the Third Reich' against Poles and in Poland in 1920–1950.[81] The political objective of this part of the amendment was to highlight the government's emphasis on the cultivation of memory regarding the ethnic cleansing of Poles perpetrated by Ukrainians in 1943–1945 in the Nazi-occupied Volhynia and Małopolska Wschodnia regions.[82] In 2016, the Polish Sejm officially classified the events as genocide.[83] The wording of the amendment also had consequences in

[79]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 amending the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation, the Act on Military Graves and Cemeteries, the Museums Act and the Act on Corporate Liability for Proscribed Punishable Conduct of 26 January 2018], *Journal of Laws* (2018) item 369.

[80]*See* K. Kończal, 'Mnemonic Populism: The Polish Holocaust Law and its Afterlife', 29 *European Review* (2021) p. 457.

[81]For a detailed discussion on the amendment, *see* I.U. Belavusau and A. Wójcik, 'La criminalisation de l'expression historique en Pologne: la loi mémorielle de 2018', 40 *Archives de politique criminelle* (2018) p. 175.

[82]*See* G. Motyka, 'Anti-Polish Operation in Volhynia–Apogee of the Massacre,' in G. Motyka, *From the Volhynian Massacre to Operation Vistula* (Brill Schöningh 2022) p. 87.

[83]Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 12 lipca 2013 r. w sprawie uczczenia 70. rocznicy Zbrodni Wołyńskiej i oddania hołdu Jej ofiarom, [Resolution of the Sejm of the Republic of Poland of 12 July 2013 on the commemoration of the 70th anniversary of the Volhynian Crime and payment of homage to its victims], *Journal of Laws* (2013) item 606.

criminal law and on freedom of speech. This was because of the specific structure of the provision prohibiting the denial of past crimes in Poland, which is linked to the mandate of the Institute of National Remembrance (Article 1.1a of the Act on the Institute of National Remembrance). The phrase 'crimes of Ukrainian nationalists' had no legal definition in the amendment and was not used or defined elsewhere in domestic law. However, if the Institute of National Remembrance is obligated to document and track such defined crimes, then the denial of these crimes is also subject to punishment.

In February 2018, the Law and Justice Party (PiS)-aligned President of the Republic of Poland Andrzej Duda referred a motion to the Constitutional Tribunal. The President raised concerns about the compatibility of Article 55a of the Act on the Institute of National Remembrance (the criminal prohibition on incorrectly attributing Second World War Nazi crimes committed by the German Third Reich to the Polish State or nation) and the part of the amendment with the wording 'Ukrainian nationalists' and 'Małopolska Wschodnia [region]', with constitutionally protected freedom of expression and legal certainty.[84]

Article 55a of the Act on the Institute of National Remembrance was repealed in the legislative procedure in June 2018.[85] Consequently, the Constitutional Tribunal discontinued proceedings on this part.

In January 2019, the Constitutional Tribunal found the remaining contested parts of the amendment to the Act on the Institute of National Remembrance, the wording 'Ukrainian nationalists' and 'Małopolska Wschodnia [region]', to be unconstitutional (K 1/18 case). In the reasoning, the Constitutional Tribunal relied heavily on its pre-2016 case law on the principle of legal certainty (Article 42.1 of the Constitution) and emphasised that the requirements for the certainty of criminal provisions also applied to related provisions that affect the reconstruction of the criminal norm, such as in the case of prohibition on denying past crimes (Article 55 of the Act on the Institute of National Remembrance).[86] The Tribunal argued that the lack of a precise definition of the concepts 'Ukrainian nationalists' and 'Małopolska Wschodnia [region]', contributes to the inability to identify elements of the prohibited act under Article 55, thus violating the constitutional principle of specificity of a prohibited act. The Constitutional Tribunal, however, regrettably did not use this

[84]Constitutional Tribunal, case K 1/18.

[85]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 [Act amending the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation and the Act on Corporate Liability for Proscribed Punishable Conduct of 27 June 2018], *Journal of Laws* (2018) item 1277.

[86]Constitutional Tribunal's ruling of 17 January 2019, case K 1/18.

opportunity to criticise the very idea of memory law criminally restricting historical debate. In this respect, the Constitutional Tribunal was consistent with its earlier, pre-2016 case law.[87] The petitioner (the President of the Republic of Poland) and other state bodies issuing opinions in the proceedings (the Sejm, the Prosecutor General, who also held the position of Minister of Justice and led a coalition partner of the PiS party in the government, and independently operating Commissioner for Human Rights) employed legal arguments pertaining to the formulation of criminal law provisions and legal certainty. The Constitutional Tribunal concurred to these legal arguments. The ruling in the K 1/18 case complied with constitutional and international human rights standards.

At the same time, on a political level, the ruling perfectly aligned with the government's and the President's aim to improve relations with Ukraine strained by the actions of the ruling majority. It served as a prompt response to the controversial amendment to the Act on the Institute of National Remembrance and helped mitigate political fallout. The Constitutional Tribunal was used for damage control when the costs of memory wars with a key foreign partner proved too high. Consequently, centralised judicial review was abused to attain results that the ruling majority preferred not to pursue through alternative, more appropriate channels, such as a parliamentary vote. This reluctance probably stemmed from concerns about alienating specific voter segments who called for Ukraine to apologise for the genocide of Poles or advocated a more assertive historical and foreign policy of Poland regarding Ukraine.[88] The PiS party has actively participated in mnemonic populism, understood as poll-driven and anti-pluralist imaginings of the past.[89] The party had the necessary parliamentary majority to amend and repeal the controverial provisions, as it did with Article 55a of the Act on the Institute of National Remembrance in June 2018. However, PiS, through the friendly President of the Republic of Poland, preferred to have the Constitutional Tribunal resolve the diplomatic issue with Ukraine while, simultaneously, it did not wish to compromise its public image in the eyes of the constituencies for whom demanding full recognition by Ukraine of historical crimes committed against Poles is important.

In the second case, politicisation and the abuse of the judicial review involved an unjustified delay in issuing a decision in a case of significant importance to the constitutional and internationally protected rights and freedoms. The case

[87]Constitutional Tribunal's ruling of 19 September 2008, case K 5/7.

[88]On PiS governing majority historical policy and its international relations dimension *see* D. Cadier and K. Szulecki, 'Populism, Historical Discourse and Foreign Policy: The Case of Poland's Law and Justice Government', in L. Klymenko and M. Siddi (eds.), *Historical Memory and Foreign Policy* (Cham: Springer International Publishing, 2022) p. 49.

[89]On the concept of mnemonic populism, *see* K. Kończal, 'Mnemonic Populism: The Polish Holocaust Law and Its Afterlife', 29 *European Review* (2021) p. 457.

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concerned the Bill that was a part of the PiS government's flagship historical policy of, allegedly, finalising belated de-Communisation almost three decades after the regime change. The case originated from a question posed in January 2018 by the Warsaw Court of Appeal considering appeals against decisions of the Social Insurance Institution, which reduced retirement pensions and benefits received in connection with work in certain uniformed formations and institutions of the Communist state in 1944-1990.[90] This controversial policy was a result of the 2016 amendment[91] to the Bill on reducing retirement pensions adopted in 2009 when centrist liberal party was in power. In the justification to the 2016 amendment, its authors argued that it aimed at increasing social justice and was a form of reckoning with the past. However, the populist and repressive nature of the adopted mechanism – there was no individualised assessment of the behaviour of the people affected that would justify the reduction and the retirement pensions had already been reduced in 2009 – suggests that it was a tool of revenge, applied on an arbitrarily designated group, instead of a transitional justice mechanism, as the government claimed.[92]

Why was such a mechanism adopted 27 years after the change of the political system in Poland? The leader of the populist, anti-liberal right-wing PiS party, governing Poland from 2005 to 2007 and from 2015 to 2023, originates from the circles of the democratic opposition during the Communist era. The agenda of the PiS party, founded in 2001, primarily centres on the negative appraisal of the Communist period and the subsequent processes and outcomes of the constitutional, political, economic and societal transformation of Poland to a free-market liberal democracy. This critique is directed towards the elites of the democratic state after 1989 and political opponents of PiS, notably the Left, but even more forcefully today towards the centre-right party, the Civic Platform (PO), that was in power from 2007 to 2015 and is a part of a coalition government since 2023. In a distinctly populist manner, this criticism is aimed at political and legal elites, whom the PiS party accuses of failing to conduct a swift, comprehensive, and

[90]Constitutional Tribunal, case P 4/18.

[91]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.

[92]For an analysis of the Bill *see* A. Wójcik, 'Reckoning with the Communist Past in Poland Thirty Years after the Regime Change in the Light of the European Convention on Human Rights', 39 *Polish Yearbook of International Law* (2019) p. 135.

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decisive reckoning with Communism, including for the prolonged process of adopting lustration laws.

Moreover, in 2007, the Constitutional Tribunal deemed the provisions of the lustration law passed by the ruling PiS majority to be in violation of the constitution, preparing the ground for the PiS government's attack on the Tribunal since 2015. The PiS party points to the mistake of not barring elites of the Communist system – and even their descendants – from taking positions at the forefront of political, economic, or cultural life in the Third Republic after 1989. The concept of 'genetic patriotism' is invoked to argue that politicians and supporters of PiS, often due to their family histories and environment in which they were brought up, are genuine patriots predestined to govern the country. This is intended to contrast with the 'ministry children,' who are allegedlly the descendants of individuals employed in the security services of the Polish People's Republic and other important segments of the state administration.[93] This division is intended to polarise public opinion and, despite the passage of time, solidify the divide into 'patriots' who are allegedly the only ones to defend the interests of the Polish society and state, and allegedly treacherous individuals supposedly serving foreign interests, labelled as 'communists.'

Another critical current of the PiS's narrative about Poland is a harsh critique of the so-called social costs of transitioning from a centrally planned to a market economy, borne in significant part by rural labourers and industrial workers.[94] In contrast with Russia or Ukraine, comparable oligarchic power has not developed in Poland after 1989. Still, PiS has criticised the distribution of money and power, rising inequalities, undermining social cohesion, austerity policies and liberalised forms of employment following the 2008 financial crisis. After PiS lost power in 2007, it has adeptly harnessed strong negative emotions and the memory of daily hardships among segments of Polish society, particularly the elderly population in rural areas and smaller towns. The alleged completion of the process of de-Communisation by PiS party, including the withdrawal of certain groups' financial privileges, should be interpreted within this broader context. PiS presents itself as party of the common people, delivering on the promise of 'restoring dignity', including through direct social transfers, but also cultural and historical policy. The de-Communisation policy of PiS since 2015 has included a Bill obliging the removal of material and symbolic remains of Communism in public spaces,[95] the amendment to the Act on the Institute of National Remembrance which also expanded the mandate of the Institute

[93]On PiS policy, *see* A. Folvarčný and L. Kopeček, 'Which Conservatism? The Identity of the Polish Law and Justice Party', 16 *Waikato Law Review* (2020) p. 159.

[94]*See* A. Kwiatkowska et al., 'Hollowed or Redefined? Changing Visions of Democracy in the Political Discourse of Law and Justice', 30(3) *Democratization* (2023) p. 458.

[95]K. Kończal, 'Persistent Legacies of Communism, or the Ongoing Purification of Public Space in Post-1989 Poland', 30 *European Review* (2022) p. 490.

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of National Remembrance to document and investigate crimes committed against Polish citizens or on Poland's territories from the onset of the Russian revolution in November 1917 to 1990, and the discussed amendment reducing retirement pensions and benefits.

In February 2018, the Court of Appeal in Warsaw requested the Constitutional Tribunal to verify whether the provisions of the 2016 Bill reducing retirement pensions and benefits complied with the principle of a democratic state governed by the rule of law (Article 2 of the Constitution), as well as those of equality and the prohibition of discrimination (Article 32 of the Constitution).[96] The referring court also questioned the legality of the 2016 Bill, since an investigation into the process of its adoption was ongoing. As of January 2024, the Constitutional Tribunal has not ruled in the case (case P 4/18). The composition of the bench in this case has been changed four times, and the judge rapporteurs have been changed twice. In the absence of any action on the part of the Constitutional Tribunal, domestic courts in Poland have been overruling the decisions to reduce the retirement pensions and benefits, becoming involved in a dispersed constitutional review. In July 2022, the European Court of Human Rights ruled that the persistent lack of action of the Constitutional Tribunal in case P 4/18 contributed to the excessive length of the appeal proceedings before the domestic courts, which was in breach of Article 6 ECHR. The European Court of Human Rights also ruled that there was no effective remedy, which constituted a breach of Article 13 ECHR.[97]

The prolonged inaction on a politically sensitive motion is a method of abusive judicial review. From a strict legal perspective, the Constitutional Tribunal cannot declare the 2016 amendment constitutional, as it violates individual rights and freedoms protected by the Constitution and international human rights law. The Constitutional Tribunal might also recognise that rendering a decision on this matter could provoke significant political repercussions, given the PiS party's steadfast commitment to its historical policy and the popularity of the restriction of retirement pensions and benefits among important parts of its electorate. Therefore, the Constitutional Tribunal might strategically decide to abstain from making a decision altogether, sidestepping a direct challenge to the PiS' historical policy and avoiding an overt conflict with the party.

Despite significant differences in their legitimacy, independence, and impartiality, as well as their institutional settings, German and Polish constitutional courts are prepared to consider political factors in the judicial review of memory laws. However, the extent of this phenomenon and its mechanisms differ.

[96]Constitutional Tribunal, case P 4/18.
[97]ECtHR 21 July 2022, No. 48762/19, *Bieliński* v *Poland*.

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Politicisation: an intrinsic feature of constitutional review of memory laws?

This analysis demonstrates the importance of the political in the judicial review of memory laws in starkly different German and Polish rule of law and institutional contexts. In the case of Germany, the importance of prohibiting the condoning of the Nazi regime corresponds to centring the state and its culture on reckoning with Nazi atrocities, remembering victims, and dealing with expressions of antisemitism today. The German Federal Constitutional Court expanded its legal reasoning to accommodate those overarching societal and cultural convictions.

The Polish example shows a different aspect of politicisation, where institutions and mechanisms of constitutional democracy are abused to please the formerly ruling party's interests. The Constitutional Tribunal adapted to the historical policy of a ruling party, which prioritised pursuing political objectives over adhering to the obligations arising from constitutional and international human rights standards. The tribunal instrumentalised legal and human rights considerations to justify an outcome favoured by the executive branch. However, it declined to deliberate on a case that could result in a setback for the former government's historical policy and potentially elicit disapproval from voters, even though the case also concerns the right and freedoms of individuals.

The specific circumstances of both cases – Germany's specific stance on its past and its obligation to uphold the memory of Nazi crimes, first and foremost the Holocaust, and Poland's period of the rule of law backsliding and related institutional setting – warrant asking whether it is inherent in the nature of memory laws for politicisation to play a role and, if so, to what extent. Naturally, examining selected case law on the memory laws of two constitutional courts is far from giving a sufficient basis for a general and conclusive answer. However, this article makes two suggestions.

On the one hand, it appears that the extent to which the judicial review of legal measures is susceptible to political considerations largely depends on the incentives for judges to consider political or societal factors rather than solely legal ones. In the mnemonic context, these incentives are comparatively high. Memory laws and other means of pursuing the state's historical policy apply to matters of grave importance to the state and individuals – human dignity and the personal honour of the victims of past crimes, collective memory about the past, and state identity. The use of memory laws serves as a litmus test for the regime's character and its interpretation of constitutional values. In this light, it is hardly surprising that memory law cases are sensitive and high-profile, and that constitutional court judges may be willing to take political considerations into account when examining them, as in the German case, perhaps to avoid or mitigate the risk of political and societal backlash with regard to

their decisions, or, as in the Polish case, to maintain its usefulness and legitimacy in the eyes of the only judge that matters: the political authority.

On the other hand, the available techniques facilitating the injection of political considerations into judicial review constitute relevant factors making memory laws more easily politicised. Approaches that attach importance to political considerations within the legal framework can be distinguished from those that leave the area of law entirely.[98] As for the former, first, there are cases where the law itself leaves room for subjective assessment by the courts. This is the case, for instance, in matters that are heavily dependent on proportionality, when the law only requires that the pursued aim is legitimate, the conflicting legal interest is not affected to a greater extent than necessary, and the advantages of the measure must outweigh the disadvantages. The constitutionality of memory laws largely depends on the proportionality of the interference with the freedom of expression or other conflicting freedoms, as is the case for most interferences with rights and freedoms. Second, the interpretation of legal elements is another technique to introduce political considerations into the judicial review. The brief textual basis of the relevant framework of constitutional and human rights – most importantly, freedom of speech and the conflicting right to privacy – gives the jurisprudence on memory laws no alternative than to rely heavily on interpretation. Third, when multiple factors contribute to the problematic nature of a law, the court has some political discretion in determining the grounds for its unconstitutionality. The Constitutional Tribunal's decision of January 2019, that the wording 'Ukrainian nationalists' lacks precision illustrates that relying on formal defects in the contested memory law rather than substantive concerns could enable the court to choose a course of action that minimises the government's political fallout. Fourth, while approaching the limits of the law, the court can also create exceptions from the established standards based on teleological considerations. The Federal Constitutional Court's case law on the ban on condoning the Nazi rule serves as a notable illustration of this exceptionalism within the framework of memory laws. On the other hand, courts may leave the realm of law and the rule of law altogether in abusively giving priority to political considerations. The previously mentioned delay in judicial review, as demonstrated by case P 4/18 regarding the lowering of the retirement pensions and other benefits, is an example of this practice in the context of memory laws.

Not all of these techniques are necessarily unique features of the judicial review of memory laws, as they are also applied in the review of other groups of politically sensitive laws. However, together with the subject matter of memory laws, the fact that they are an expression of the state's official historical policy that is linked to

[98]This distinction is reminiscent of the debate on whether the state of exception is located within or outside the law: *see* G. Agamben, *State of Exception*, translated by Kevin Attell (University of Chicago Press 2005) p. 22 f.

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the very state identity as the legislator interprets it, and their impact on the rights and freedoms of individuals, these considerations make the judicial review of memory laws appear exceptionally prone to politicisation. A politicised judicial review of memory laws, however, clearly affects the rule of law, for example, by risking the impairment of the principle of legality, especially the supremacy of and compliance with the law, legal certainty, the impartiality of the judiciary,[99] fundamental rights and allows the separation of powers to be compromised.[100]

Conclusion

This article postulates that the political context of mnemonic governance, of which memory laws are an expression, has significant implications for judicial review. Drawing on the examples of Germany and Poland, it argues that the constitutional review of memory laws is particularly prone to be influenced by political considerations, which means that, to a significant extent, it is determined by considerations of expediency without legal constraints. Still, the legitimacy, independence and setting of the German Federal Constitutional Court and the Polish politically-captured Constitutional Tribunal significantly differ in the court rulings examined; different forms of politicisation are manifested in the judicial review, which conflicts with the rule of law to varying degrees.

The German Federal Constitutional Court's ruling on the constitutionality of a specific anti-Nazi memory law is an example a 'simple' form of politicisation, understood as the move of courts away from being an authority of review within pre-existing constitutional restraints to sovereign decision-making, deviating from prior constitutional law and settled case law, setting their own legal standards, and being influenced by political rather than purely legal considerations. This form of politicisation is much less detrimental to the rule of law than the extreme form exemplified by the politically-captured Polish Constitutional Tribunal's approach to memory law cases that is abusive judicial review, which erodes trust in the independence and impartiality of the judiciary and contributes to a further slide away from rule of law standards in an already severely deteriorated democracy.

The comparison of these two constitutional courts does not allow far-reaching conclusions to be drawn, although it at least suggests that the two examples of politicisation examined may not be isolated cases. Instead, both the high level of sensitivity of the context of memory laws and the fact that the legal framework of freedom of expression leaves room for various (legal and non-legal) techniques to take into account political considerations, suggest that politicisation could be an inherent

[99] *Rule of Law Checklist* (Venice Commission 2016) p. 17 ff, 25 ff, 38 ff.

[100] Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, 23 August 2004, UN Doc. S/2004/616, p. 4.

feature of the constitutional review of memory laws and can therefore also apply to other jurisdictions.

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