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ARTICLE

Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015

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Abstract
The article discusses the part played by collective memory in the current threat to the rule of law in Poland. The starting point is the concept of commemorative lawmaking and a critical discussion of the use of the concept of memory laws in recent scholarship. An analysis of framing operations performed by PiS memory politics offers examples of how the notion of commemorative lawmaking can be deployed in order to explore techniques of legal governance of memory, including bricolage (illustrated by the case of Polish Constitution of 1997), retouch (exemplified by recent reform of Polish judiciary) and re-stylization (analysis based on the Act on National Institute of Remembrance of 2018). The article concludes with an exploration of the intrinsic connection between the threat to the rule of law in Poland and memory politics of the current Polish government, accompanied by a discussion of possible further developments in the field of law and memory studies.

1 Introduction

Developments in Poland since November 2015 do not cease to raise concern both in Poland and abroad. Quite understandably, as the democratic backslide proceeded towards dismantling laws by way of politically orchestrated destruction of institutions, political and institutional side of the process took up most attention both in scholarship and in the international media. One of the first institutions to be targeted by the national-conservative governing party Law and Justice (Prawo i

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Sprawiedliwość, hereafter "PiS") after its victory in 2015 presidential and parliamentary elections was the Constitutional Tribunal, and the first act of the constitutional crisis was the conflict between the new governing party and the Tribunal (Bucholc and Komornik 2016). The struggle concluded at the end of 2016 with a victory of PiS, whose nominee overtook the Tribunal's presidency and turned it into a "governmental enabler" (Sadurski 2018b). The fate of the Tribunal illustrates the double bind between institutions and constitutional order. On the one hand, the constitution is by definition the basic law and the source of validity criteria in a legal system. This role of the constitution as an ultimate tie-breaker in validity issues has been theorized by Niklas Luhmann, who deemed modern constitutionalism to be the last step in the autonomization of legal systems and their emancipation from politics and morals (Luhmann 1990). The law prescribes the rules of the state's institutional order while the constitution is the source of validity of these rules. On the other hand, the effect of a constitution depends on institutions complying with the said rules, including, in particular, the institutions endowed with a power to conduct constitutional review. Interdependence of institutions and constitutional law is circular, and the circle often turns out to be a vicious one: Polish Constitutional Tribunal failed to defend the constitution for which it stood, because it failed to defend itself as an institution, and it failed, because the only valid defense it could mobilize was the constitution itself.

The same argument could be made *a fortiori* in respect of any other law within a constitutional system. To put it bluntly: as long as laws go unchallenged, their dependence on institutions remains latent. But as soon as they are challenged, there is nothing to support laws but the institutions. If they fail, the laws may well succumb, as the current Polish constitution did, after having been deprived of the institutional defense mechanism in the form of constitutional review performed by the Constitutional Tribunal. The state of the rule of law ultimately depends on the condition of institutions. The most recent act of the demise of the rule of law in Poland began in the second half of 2017: the so-called "reform of the judiciary", to which I will come back in the second section of this article, also consists in dismantling institutions which are left defenseless by the deficient rule of law, while the law has nothing but these very institutions to rely on (see Bucholc and Komornik 2018). But what the institutions do is not reducible to the normative content of the law, be it in the broadest possible meaning of the term. If we were we to stay within the Luhmannian circle of self-defining law, no answers could be given to any question regarding the conditions for functionality of institutions on which the effect of law depends. Drawing on the works of Gephart (2006, 2012), I believe that these answers must be sought in culture, and more specifically in the interplay between norms, institutions and cultural resources, in particular the resources of collective memory.

The link between political culture and collective memory has long been noted in the memory studies (Olick 1999: 336). However, this example has only followed by studies of legal cultures to a limited extent, despite a number of outstanding works exploring laws and legal practices related to remembering, in particular in the context of constitutional law, transitional justice and lustration, human rights, and so-called memory laws (see e.g. Belavusau and Gliszczyńska-Grabias 2017; Czarnota

2007; Kastner 2015; Koposov 2017; Löytömäki 2014; Osiel 1997; Savelsberg 2017; Savelsberg and King 2007). The relationship between rule of law and collective memory is still a relatively new field of research, although there is no scarcity of scholarship addressing the impact of political, cultural and social environment on the development, success and failure of democracy and the rule of law. In the hope of contributing to this promising field, I propose to focus on the memory politics of PiS and its connection to the party's legislative activity. My goal is to shed light on the role of collective memory and memory politics in the threat to the rule of law in today's Poland, in order to demonstrate on this very pertinent case the importance of interdisciplinary studies of law and memory, engaging both with juristic definitions of rule of law and with theories developed in the fields of social and cultural studies. I commence by a brief discussion of the link between the rule of law and collective memory as devised in recent socio-legal scholarship. I proceed to introduce the idea of commemorative lawmaking as an example of framing law by collective memory, to be followed by an analysis of framing operations performed by PiS. I subsequently offer a typology of techniques applied in PiS memory politics, exemplified by recent legislation.

2 Rule of Law and Memory Revisited

Central and Eastern Europe remains one of the centers of the memory boom of the last few decades, reflected, among the other things, in the proliferation of social and cultural memory scholarship as well as commemorative practices (Arnold-de Simine 2013). The boom was given an additional impulse in the region when the post-socialist countries accessed the European Union, thus finding themselves in the new regional memory framework (see Mink 2015; Pakier and Wawrzyniak 2015). Even though predominance of Western European experience in the conceptual apparatus as well as empirical focus of memory studies is still noticeable (Mälksoo 2009; Olick 2015), memories of other societies are winning more space in the European narrative, improving the social scientific understanding of the fundamental interdependence between collective identities, collective memories, memory politics and historical politics. In this article, I use the term "memory politics" to refer to political actions aimed at managing and controlling (governing) the contents of collective memory, while "historical politics" or "history politics" refers to political actions aimed at shaping and advocating a particular vision of the past in a form of a historical narrative, which may and usually is a part of memory politics. For the sake of brevity, I will stick to the general term "collective memory".[1] I will follow Jeffrey Olick in consistently referring to collective memory as distinct from "collected memory" (Olick 1999), but otherwise including a fairly broad range of cultural phenomena. This situates my approach in the tradition of what Olick calls "genuinely collective memory" studies, focusing on "public discourses about the past as wholes or to narratives and images of the past that speak in the name of collectivities"

[1] For an outline of conceptual framework of memory studies see Olick et al. (2011).

(Olick 1999: 345), whereby the size of collectivities acting as carriers of memories may vary greatly, from a small group to a society.

To integrate the study of memory with an insight into the rule of law is a task of the day. As Martin Krygier remarked, "long before there were written constitutions, and before law was considered a way of purging problematic pasts and fashioning successful futures, the Western legal and political tradition knew demands for the rule of law" (Krygier 2005: 265). The long tradition of reflection on the rule of law provides reliable classical footing for an attempt to explain how the relation of law and memories of the past has evolved. Even though Montesquieu, the universal patron of socio-legal studies, did not include memories in the number of factors which form the spirit of laws, he nevertheless did mention "the manner of living of the natives, (…) religion of the inhabitants, their inclinations, (…) manners, and customs" (Montesquieu 1777: 8). Montesquieu saw the rule of law as based on a certain form of legalism, insisting that complex and specialized legal regulations combined with a separation of powers offer the citizens protection against tyranny, guarantee political freedom and security of property and business dealings (see Waldron 2016). At the same time, his comparative scheme relied on an assumption that the rule of law thus understood is intrinsically connected to a large set of what we would call social and cultural determinants.[2] In this proto-sociological account the rule of law results from an institutional order supported by the way of living of the people fueled by their culture.

The very idea to study collective memory, as proposed by Halbwachs (1992), was prompted by the realization that the way of living of various collectivities included references to their common and not just individual past. Rule of law and memory are therefore both part of the same problem: how is rule of law connected to this part of the way of living of the people which deals with the past. This connection was stressed, *inter alia*, in 2014 in Communication of the European Commission, introducing a new EU framework to strengthen the rule of law in the member states.[3] In the Introduction to this document the rule of law is acclaimed as "one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based" (p. 2).

This sentence declares the ways of living of the peoples of united Europe to include a common constitutional tradition, a part of which is the rule of law. What rule of law means is defined based on the institutionalized common legal tradition of the EU as exemplified by the case law listed in Annex 1 to the said Communication: "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law" (p. 2). But already in 2014 it

[2] And, of course, natural determinants to which political philosophy attached much attention at the time.

[3] Communication from the Commission to the European Parliament and the Council, introducing a new EU framework to strengthen the rule of law in the member states, COM (2014) 158 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN (accessed 19.06.2018).

was clear that some ways of living of some European peoples support the rule of law thus defined, but some do not. Introduction of the framework to strengthen the rule of law marked the end of what Wojciech Sadurski, commenting on the developments in Austria after the 1999 elections and on Article 7 of the Treaty on the European Union, called the "comfortable illusion" of "the perceived commonality of political and legal cultures of the original like-minded members [of the EU], and new members recruited subsequently from within Western Europe", which "created a sense of confidence in the proper behavior of Member States" (Sadurski 2010: 386). Between 2014 and 2018, infringements on the rule of law happened in in many EU countries, and two Member States, Poland and Hungary, adopted a course of "systematically undermining constitutional checks on the power of their leaders and deliberately turning all state institutions into arms of the party" (Scheppele and Pech 2018). While this new situation calls for an immediate legal analysis, it also proves the point made by Adam Czarnota who argued that both the necessity and the inability to deal with the past is a key aspect of constitutionalism in post-socialist and other transition countries, and who stressed the relations between dealing with the past and the rule of law (Czarnota 2005: 124). The same point was made by Grażyna Skąpska, who wrote about the pivotal role of memories of the past engaged against governments in restitution cases (Skąpska 2005: 227). To extend this point even further, collective memory is a crucial part of cultural resources on which legal, constitutional and institutional orders are based, and can be an important asset for the rule of law but also a hindrance in its way. At the same time, it is intrinsically connected to the figurations in which memories are produced and reproduced, to the habits of using symbols in social practices and to the processes consisting in shifting the weights of power and influence between groups and individuals. In taking this perspective, I am drawing on my earlier work on normative orders and collective remembrance, inspired by Norbert Elias's sociological theory (Bucholc 2015). Elias's name as a student of good manners in the process of civilization is not accidental in this paper: Sadurski was right to observe that the populist turn in Poland was marked by a "a catastrophic drop of the norms of civility of discourse, and an accompanying loss of trust" (Sadurski 2018a: 7). Both civility and trust are crucial to the civilizing process and to survival of democratic rule of law, and both of them, as Elias demonstrated in his late work, depend on remembering understood as deployment of symbols of the past (Elias 2007, 2011).

3 Framing, Memory Laws and Commemorative Lawmaking: Conceptual Clarifications

In order to apply the concept of collective memory to study of law, I am drawing on the work of Dutch narratologist Mieke Bal, who advocates the use of the concept of framing as a more actor-oriented, active and dynamic alternative to context (Bal 2002: 135–136). Bal describes framing as a performance of agents who are themselves "set up" by their own actions, in accordance with the double meaning of the English verb "to frame". Framing is performed by putting objects, ideas or symbols in compositions suggestive of a particular interpretation: this may also be done by

way of un-framing the interpretations already in place, depriving them of their current meanings and putting them in a different company, in which they would evoke different connotations. In this article, the notion of framing will be applied to laws, and the framers in the cases under discussion will be using material coming from collective memory.

A number of attempts have been made to conceptualize the relationship of law and memory. Joachim Savelsberg and Ryan D. King coined the term "applied commemorations", defined as "implicit or explicit commemorations in the context of decision-making situations such as legislative sessions or legal proceedings" (Savelsberg and King 2007: 191). The agents "applying the commemoration" in these cases are the official agents acting in their official capacity: MPs, judges, public prosecutors and others whose messages sent to other actors or to the public relate the laws to memories of the past. The notion of commemoration is taken broadly, as any performance that brings the past back and makes people remember it. However, the notion of "applied commemorations" is insufficient to grasp the multitude of links between collective memory and lawmaking or, as the case may be, interpretation, application and enforcement of law. Clearly, the past is addressed by the law in many ways besides being commemorated in the context of decision making in parliaments or courts of law.

Another useful notion, much *en vogue* in recent scholarship, is that of "memory laws".[4] In their introduction to an excellent volume on *Memory and Law* (2017), Aleksandra Gliszczyńska-Grabias and Uladzislau Belavusau wrote:

> The legal governance of history is often addressed under the tag of memory laws (French *lois mémorielles*; German *Erinnerungsgesetze*, etc.). Such laws enshrine state-approved interpretations of crucial historical events. They commemorate the victims of past atrocities as well as heroic individuals or events emblematic of national and social movements (…).
>
> Memory laws affect us in various, often controversial ways. They sometimes impose criminal penalties on speech or conduct deemed offensive to the plight of heroes or victims. In that punitive form, memory laws impose limits on democratic freedom of expression, association, the media, or scholarly research. Yet memory laws reach beyond the bounds of criminal law. Children everywhere grow up reading state-approved texts designed to impart not merely a knowledge, but an interpretation of history. Governments everywhere designate national memorial ceremonies or authorize the construction of public monuments (Belavusau and Gliszczyńska-Grabias 2017: 1).

Apart from the fact that memory laws thus defined will always be explicit applied commemorations in the meaning of Savelsberg and King, a question could be asked what makes the relation of memory laws to memory so special that it justifies

[4] For a very broad and brief review of the spectrum of this problematic, see the debate on "Memory laws" on Verfassungsblog, https://verfassungsblog.de/category/debates/memory-laws-debates/ (accessed 19.06.2018).

creating a new concept. The same question could be posed to other authors active in the field of law and memory studies. For example, Anna Wójcik describes memory laws as "laws endorsing certain narratives about the past, often aimed at strengthening the collective identity of a nation or community" (Wójcik 2018b). In fact, the notion of memory laws seems to cover almost all cases in which memory of the past is involved in the normative content of positive law, including the practice of its implementation, application or enforcement,[5] provided that it is related to an interpretation of "crucial historical events" endorsed by the state (or, as may safely be assumed, another law-making agency) in a form of an identity-relevant narrative of the past.

Two main arguments could be raised against this very broad definition.

First, there are legal regulations with decisive impact on how the past is remembered and represented which are highly identity relevant but need not have a readily exposable link to any narrative of historical events, such as laws regarding commercial, land and mortgage registers, marriage registers, inheritance etc. Collective memory is not only used, but also produced by the law, but it would be simplistic to equate legal governance of memory with references to state-sponsored tales of glorious or inglorious past. In fact, not to put too fine a point on it, the very fact that the law was, from a certain point on, written down or (much later) codified, constituted a huge coup of legal governance of memory, although it would push the definition too far to classify the great codifications of 19th century as memory laws.[6] To paraphrase Michel Foucault's dictum, large part of legal governance of memory is a "strategy without a strategist", a more or less unintended consequence of formal aspects of the law and not of its contents.

Second, Belavusau and Gliszczyńska-Grabias offer a classification of post-war memory laws which contains many diverse types of regulations (2017: 12ff.), among which one major distinction can be made. Some of them do no more than endorse a certain vision of the past and declare it official: for example, "the constitutional revision of the national history" (Belavusau and Gliszczyńska-Grabias 2017: 13). But laws which declare a certain vision of the past as the official view of the state or other lawmaking agent and proclaim it to be true, need not necessarily prohibit alternative views from being expressed (it is not always forbidden to lie, to be wrong or to have a different opinion than the state). The fact that, for example, the constitution of Croatia of 1990 declares that:

> [t]he millennial national identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience in various political forms and by the perpetuation and development of the state-building idea grounded in the historical right of the Croatian nation to full sovereignty, has manifested itself'[7]

[5] A similar conceptual variety characterizes the contributions to the debate mentioned in Footnote 2 above.

[6] On the media of law and their effect see Vesting (2011ff), Vissman (2000, 2011).

[7] English translation provided at and quoted after http://croatia.eu/article.php?lang=2&id=25 (accessed 19.07.2018).

In a number of events, does not in itself prevent any person from saying otherwise. Whether it even decreases the probability of such an occurrence is debatable and cannot in any case be taken for granted. The point is, however, that some laws go much further. They not only express commitment to a certain vision of the past, but they also prohibit any other vision from being voiced. The goal and the function of such laws is distinct from other applied commemorations: they are aimed at eliminating alternative narratives of the past from public circulation. They do not just declare a certain view of history to be right: they declare other views to be inadmissible. Thus, they provide for a direct transposition of the vision of the past enshrined in a law into a governance of expression of memory. While causal link between the vision of the past advocated by the state in a form of *leges imperfectae* and the memories of a society is far from obvious, the effectiveness of a direct transposition of that vision into an enforceable law is much less contestable.

I believe this distinction should not be underrated. Consequently, I would insist that in order to avoid blurring the edges of the concept of memory laws beyond operationability its application should be limited. Even though an official ban on public remembrance of individuals and events has long been known in human history, Belavusau and Gliszczyńska-Grabias rightly indicate (2017: 12ff.) that the regulations introduced as a response to the experience of Shoah became the model for many similar forms of legal governance of memory. At present, there is a large class of legal norms in which the expression of memories of the past is a direct object of regulation, and the explicit goal of the regulation is to ban certain memories from being expressed.[8] These memory laws *proprio* sensu enforce an official interpretation of the past by way of prohibiting alternative views of the past from being expressed, be it by punitive measures or otherwise (e.g. by financial restrictions, rules of urban planning, etc.). Precisely for this reason it would be inadvisable to define memory laws narrowly as "laws criminalizing statements about the past" (see Koposov 2017: 25) because it is not so much the nature of the sanction (criminal or not) that should be the defining property of memory laws as the express eliminative goal of regulation.

Such limitation would also speak against including into the category of memory laws the "judicial and legislative engagements with memory" taking place in the course of criminal proceedings as a part of transitional justice processes (Belavusau and Gliszczyńska-Grabias 2017: 14). The difference between criminal proceedings against a single perpetrator on a specific set of charges subject to penal sanction according to an applicable law and a general endorsement of a certain vision of history in a sanctionless and unenforceable form is evident both from the point of view of regulatory technique and social function of the regulation. Criminal proceedings do produce a certain vision of the past which can have an effect on collective memory (see Osiel 1997). The same is undoubtedly true of declarations such as constitutional preambles and, to some extent, constitutions in general (see e.g. Häberle

[8] I believe that it is important to note that paradigmatic memory laws, e.g. prohibiting Holocaust denial, do not regulate memory, but its expression: the state of memory is the anticipated result of the limitations imposed on its expression.

1982: 240ff.; Vorländer 1999: 7ff., 2002, 2004). Criminal proceedings, memory laws and applied commemorations such as constitutional preambles are all plausible means of memory politics. This is the common denominator of all legal phenomena discussed above and many others, including school curricula, public memorials and national holidays. But to call them all memory laws would make any *differentia specifica* of the term vanish.

On the other hand, narrowing the connotation of the term "memory laws" down so radically leaves a number of cases which are neither applied commemorations nor memory laws, but which are still best understood in the context of memory politics not because of what or how they regulate, and to what end, but because of how they are framed in "public discourses about the past (…) that speak in the name of collectivities" (Olick 1999: 345). I am using the notion of commemorative lawmaking to address the laws and regulations which do not directly govern the expression of memories of the past, and which are not related to the past by way of explicit or implicit statements by official agents acting in their official capacities. The notion of commemorative lawmaking covers the cases in which the connection between law and memory is construed by way of framing beyond the lawmaking itself.

To sum up: in my understanding, a law criminalizing Holocaust denial is a memory law (it prohibits expression of a certain view of the past), and an applied commemoration (a certain view of the past is expressly involved in the normative content of the law and both explicitly and implicitly referred to in the process of lawmaking). A lustration law, on the other hand, is not a memory law. It usually does not prohibit anyone from remembering or declaring in any form whatsoever that they were, say, an active collaborator of a totalitarian regime. Moreover, a lustration law in its basic form need not even prohibit a public endorsement of a past regime. A lustration law is, of course, an applied commemoration, because it will usually be explained, either explicitly or implicitly, by a reference to a specific view of the past. But it is directed against people, not against their views. The goal of lustration can be that the truth about the past be told and that lies be curtailed, but this goal not very specific: in many branches of law in many legal cultures truth is a cherished value and lying is discouraged or sanctioned.

As opposed to both memory laws and applied commemoration, commemorative lawmaking consists in transforming laws into means of memory politics by relating them to a certain memory apart from the normative content of the law and references to memory in the lawmaking process. The discourse surrounding the legislation can be saturated with symbols, words, concepts and phrases referring to a vision of the past and made to bear upon the legislation by a set of techniques which I propose to divide into three categories: bricolage, retouch and re-stylization.

4 Bricolage, Retouch and Re-Stylization

Memory politics of PiS has developed and adapted to various political and social configurations. In what follows, I present the examples of bricolage, retouch and re-stylization in order to demonstrate the link between law and memory and to put the notion of commemorative lawmaking to empirical use. The cases have been collected so as to show the nuances of the interplay between applied commemorations, memory laws and commemorative lawmaking.

4.1 Bricolage

The concept of bricolage was introduced to social sciences by the French anthropologist Claude Lévi-Strauss, who used it to refer to what he believed was characteristic of the "mythological thought": the skill of using "whatever is at hand" (Lévi-Strauss 1966: 17) notwithstanding its original nature and scope of application in order to create a novel solution to whatever problem may present itself. A bricoleur does not act in compliance with any preconceived set of rules: she puts pre-existing items—things, signs, symbols, thoughts, ideas and thinking patterns—together in new ways, putting them to any use as the current need dictates. A bricoleur is by definition an opportunist.

PiS draws on the available memory resources for items which can relatively easily be transformed into a part of alternative historical narratives. A recent example includes the work on the memories of World War II in Poland. The recurrent speculations regarding the Polish claim on war reparations due from Germany in 2017[9] is but one of the many examples of how memories of the last world war are revived by reframing them as a highly pertinent issue of day-to-day politics (see Stoll et al. 2016).[10] Naturally, PiS did not invent these memories but only combined them. As a result of which the social carrier for these newly combined memories had to be invented, too: there was and probably still is no group in Poland which would hold a view of the past according with its rendition by PiS. It therefore directed its efforts at projecting its vision of memory on Polish society as a whole: collective memory would become national memory.

Research of national collective memories, the headline under which a large part of memory studies operate nowadays, relies on the assumption that nations as imagined communities (see Anderson 1991) have sociological substrates in the form of national societies sharing common collective memories. Norbert Elias's much disputed notion of state societies reverberates unacknowledged in this kind of argument

[9] See https://www.reuters.com/article/us-poland-germany-reparations/polish-lawmaker-due-reparations-from-germany-could-stand-at-850-billion-idUSKCN1GE1NC [accessed 04.08.2017].

[10] Other examples include the Warsaw Uprising of 1944 (see Żychlińska 2009, Arnold-de Simine 2013), or the so-called „Doomed Soldiers" (see Kobielska 2016). For a brief account of the official narrative on Doomed Soldiers in English see the official website of Polish Foreign Ministry, http://en.mon.gov.pl/news/article/2016-03-07-the-national-day-of-remembrance-for-the-doomed-soldiers/pdf/ [accessed 26.02.2018].

(Elias 2013). The same assumption underpins the memory politics of PiS. But, while scientific risk of essentializing nations and producing an artifact of national societies may be reduced by accommodating plurality of memories and multitude of social carriers of memory, including not only nations, but also regional and local communities, classes, families, religious and ethnic groups and social movements, political consequences of nationalizing memories may very serious if they leave no place for plurality. PiS strives to provide Polish society with a single common memory frame in order to advance the thesis that nation and society are coextensive and homogenous, and that they are united by a single common history which may be adequately and truthfully (the category of truth features greatly in PiS rhetoric) narrated by a single storyteller from a single perspective. The main role of the revived memories of World War II is to upkeep the ideal of national unity, homogeneity and singleness. But the same effect can be achieved by using items coming from a very different period: probably the most illustrative case of memory bricolage is the way in which PiS managed to reframe the Polish Constitution of 1997.

The link between memory politics and constitutional law is straightforward enough. Positive law is a paradoxical creation best summarized by Luhmann, for whom the development of positive law leads logically to the emergence of modern constitutionalism as a final stage of evolutionary positivisation of law (Luhmann 1990). The fiction severing validity of law from any non-legal considerations, a prerequisite to autonomy and self-referentiality of the legal system, results in the systemic impossibility to evoke non-legal ground for validity of law, including the political context of its drafting and adoption. The law determines what is and what is not the law. This obvious fiction depends for its effect on the compliance of social actors. If they fail to comply for any number of political, economic or cultural reasons, the splendid isolation of the legal system is compromised.

In the case of Poland, a combination of factors undermined the autonomy of law in the Luhmannian sense. Poland's indigenous legal culture, either in private or public law, was discontinued long before the coming of the age of great codifications. Poland entered XIX century as a partitioned land with no state independence and little or no self-government, depending on the time and the region. Moreover, even the proud tradition of constitutionalism, dating back to the Constitution of the 3 May 1791, arguably has little consequence today. The May Constitution was the last will of Polish Enlightenment, a monument to political philosophy alienated not only from the local juristic customs and social environment, but also from the political reality. Its cultural image, fixed by song, iconography, and school education, it that of a proud emanation of national accord and the act of benevolence of the enlightened elites. However, this glorious constitution was never tested in practice; it was a phantasm of order, and maybe owing to its phantasmal nature it became the Polish constitution *par excellence*. It has a national holiday in its honor, the 3rd of May, which is also the day when Catholic Church in Poland honors the Blessed Virgin Mary Queen of Poland.

Current Polish Constitution of 1997 has no holiday of its own. Its 20th anniversary in 2017 went virtually unnoticed. It would be worthwhile to examine systematically the impact of the myth of May Constitution on its late successor, for the contrast could not be more striking. The 1997 Constitution was adopted in the

atmosphere of political conflict in which the general public only took a moderate interest, but which was channeled in heated argument around the so-called *invocatio Dei* in the preamble (Hałas 2005; Blokker 2008). In the end, the invocation to God is and is not there at the same time. The respective phrase of the preamble reads: "We, the Polish Nation - all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources (…)."[11] Even though the values may be universal, it could be noted, their sources are much less so. The preamble metonymically depicts the spirit of the Constitution as the child of the Round Table of 1989, with its careful wording and detailed regulatory approach designed to establish political compromise but in fact fostering division.

The Constitution's open-endedness made it particularly susceptible of a bricoleur's intervention. Bricolage usually involves focusing on an item (an event, an idea, a legal act) susceptible of reframing due to its narrative ambivalence. Historical genesis of the Constitution, its link to the Round Table made it relatively easy to discredit it by saying, as the leader of PiS Jarosław Kaczyński did in 2013: "[The Constitution] petrified pure post-communism. Polish state apparatus was never built anew, it is a mutation of the communist one" (*Biznes*…). The memory bricoleur puts the Constitution in the context of the communist past, discarding its novelty and taking it out of the frame of change into the frame of continuity and preservation of status quo. The intrinsic historical connection between the Constitution and the political developments in the immediate aftermath of 1989, including political wars between various opposition factions is simply put aside: bricoleurs do not observe the intrinsic links between the items, they only focus on their functional potential. By the same token, when the laws on Constitutional Tribunal were amended by PiS in late 2015, the whole process was presented as an instance of restorative justice, abolishing the legacy of post-communism supposedly embodied by the Tribunal (see Sadurski 2018b; Bucholc and Komornik 2016). Reiteration of the motif of post-communism can be found in many other instances, including, among other things, the reform of the judiciary discussed in Sect. 3 below or the reform of higher education of July 2018 (see Bucholc 2017). The tendency to stress the one and only aspect of reality, in this case the ubiquity of post-communism, is a manifestation of a goal-oriented monomania combined with almost infinite flexibility that constitutes a mark of a bricoleur.

The situation after 2015 begged the question why the Constitution was defended so weakly. First and foremost, its presence in the collective imagery of Polish society was not prominent (see Witte and Bucholc 2017). Habit and usage which could support it were too recent to hold against the conspicuous lack of symbolic resources supporting specific constitutional principles, including the rule of law. In particular, it lacked the usual foothold of constitutions in long-standing democracies: institutional and cognitive embedding in the legal professions with their education, knowledge and know-how, and with their internal, group-related frames of memory, which

[11] Official translation available on the Website of Polish Parliament, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [accessed 19.02.2018].

are potentially capable of resisting the external impositions by agents of state-sponsored memory politics.

Of course, the very distinction between internal frames of memory of legal professionals and the external frames of memory, whether generated by the politicians, by the civil society or otherwise may seem artificial in light of the fact that legal professionals do not live and act in a cultural void, and that they are neither immune to cultural or political pressures, nor unaware of them. However, in the interplay between "internal" and "external" cultural influences on and frames of law a certain tension is at work, and depending on the institutionalization and autonomy of the legal field this tension may resolve either towards a greater importance of the internal frames of law, including its language, tropes and motifs, institutions and habits, procedures and usages, or toward the greater influence of the surrounding fields of politics, religion, economy, etc., with their corresponding framing effects. Legal professions have both a vested interest in and a good chance at defending the rule of law (see Dieng 1997). This is one of the good reasons why legal professions are usually targeted by regimes striving to undermine the rule of law. This is also why the story of decline and fall of the rule of law is so often a story of decline of the legal profession (for the notable case of Weimar Republic see Ledford 1995).

As far as rule of law as a constitutional principle of Polish state was concerned, the legal professions had very few assets at their disposal. Both in 1989 and in 1997 the connection to any pre-war constitutional experience of Poland, such as it was, was virtually non-existent and the interpretations of the rule of law had to be transplanted from abroad, mostly from German doctrine of *Rechtstaat* (Brzezinski 1998: 165ff; Morawska 2003). No modern indigenous rule of law tradition presented itself as an alternative, as Polish constitutions of old could be divided into those which never took effect, those which were only effective for a very short time, and those which did not respect the rule of law, including the predecessor of the 1997 one, the Constitution of the Polish People's Republic of 1952.[12] There was simply no chance for either society or the jurists to get habituated to the rule of law. Constitutional provisions and norms failed to anchor themselves in any project of collective identity (Hałas 2005), but they also had relatively little time to take a prominent place in the professional education and practice. Paradoxically, it was not until the constitutional crisis of 2015 was unleashed when the anti-government protesters raised the Constitution to the rank of a postulated core identity item both for the lawyers and for the general public.

The dynamics of Polish constitutionalism after 1997 and especially after 2015 is probably best grasped by Robert Cover's distinction between jurispathic and jurisgenerative aspect of the law. Cover wrote:

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that

[12] A so-called „Small Constitution" was adopted in 1992, which repealed the Constitution of 1952, certain provisions of which were to remain in force until the new constitution was in place.

> give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live (Cover 1983: 5).

Sometimes, however, the law as a system of rules and the law as a world-of-life become two different and distinct worlds. Cover contrasts the jurisgenerative aspect of the law, a term coined to express the intuition akin to Eugen Ehrlich's much older idea of "living law" (*lebendes Recht*) (Ehrlich 1989), with the jurispathic role of legal institutions whose role it is to suppress the law made in the course of social practices. Jurispathic function of state and state courts is an answer to legal plurality, to "the multiplicity of laws, the fecundity of the jurisgenerative principle" (Cover 1983: 40). This argument also applies to what Cover calls "the creation of constitutional meaning" (1983: 25). Constitutions—not as texts, but as sets of norms—are also a product of jurisgenerative and jurispathic practices. From this point of view, I would argue that the 1997 constitution was exceedingly jurispathic and the processes after 2015 show a certain rise in variously oriented jurisgenerative constitutional practices, some of them overtly hostile to the rule of law and some supportive of it. After 2015, a rise of social interest in and concern with the constitutional problematic in Poland was unprecedented and there were at least some attempts to create constitutional meaning from below, particularly in the anti-government opposition. The long-term effects of this sudden wave of "constitutional patriotism" are hard to foresee and the odds are against such a sudden change of long-established legal consciousness of Polish society (see Skąpska and Gadowska 2007).[13] Also, some evident jurisgenerative movements in the field of constitutional law, such as the "judicial self-defense" focusing on the concept of "emergency judicial review" (Koncewicz 2017) had, on the whole, a limited overall impact.

Weakness of the Constitution, both before and after 2015, translated into a relatively weak standing of the Constitutional Tribunal and its final defeat in the struggle against the government. Some leading legal scholars, including the former judge of Constitutional Tribunal Ewa Łętowska, attributed this outcome partly to the former position of the Tribunal, its nonexistent PR-policy and cryptic sentencing style (Szymaniak 2015). Once the conflict with the government was unleashed, it was too late to mobilize the authority necessary to defend either the constitution or the Tribunal. Both genesis and wording of the Constitution od 1997, and the institutional image of the Constitutional Tribunal made the rule of law vulnerable to a challenge based on a delegitimizing historical narrative, thus opening the way to a constitutional change by *fait accompli* or, as another former judge of Constitutional Tribunal Mirosław Wyrzykowski prefers to put it, a "non-constitutional change of constitutional order".[14]

[13] A very good sample of Polish research on legal consciousness of Polish society after 1989 can be found in a special issue of "Studia Socjologiczne" (2/2007 (185)) guest-edited by Grażyna Skąpska i Kaja Gadowska, with contributions by Jacek Kurczewski, Krystyna Daniel, Maria Barańska, Maria Łoś, Adam Czarnota and Martin Krygier.

[14] An interview for the Internet Portal Oko-press, 29.08.2017 https://oko.press/prof-miroslaw-wyrzykowski-pozakonstytucyjna-zmiana-ustroju-staje-sie-faktem-o-tym-trzeba-debatowac-panie-prezydencie/ [accessed 26.02.2018].

4.2 Retouch

A retouch consists essentially in enhancing the hueing of the item in question (an institution, an event, a person or an idea) by endowing it with a certain surplus of meaning, often presenting the retouch as an act of fairness and restoration of historical justice. The technique can be exemplified by commemorative lawmaking in the case of so-called "reform of the judiciary" launched by PiS in 2017, in which retouch was applied to the courts, the judges, and—indirectly—the legal profession in general (for details, see Bucholc and Komornik 2018).

Retouch does not necessarily require re-framing. In the case of Polish judiciary, the frame was prepared, on the one hand, by consistent media coverage of various failures of the court system, including cases of misconduct of justice and corruption, which, as is the way of such things, never failed to inspire journalistic outrage. A few high-profile cases amply demonstrated the inability of the judiciary to communicate the reasons for its decisions and upkeep the authority of law in the heat of media and political debates. Tomasz Koncewicz diagnosed this state of affairs in late Spring 2017 as a "growing anti-judicial sentiment" (Koncewicz 2017). As a result, as shown by reliable representative surveys in 2017, the courts were not popular with the respondents, more than 80% of whom were drawing their knowledge about it mostly from the media (CBOS 2017: 5–6, 36). Comparative international research conducted both by the European Commission and by the Council of Europe, as well as the results of the European Value Survey, arguably support most of the domestic criticisms, while presenting a picture of the judiciary which was, on the whole, oscillating around the EU mean or median values (see CEPEJ 2016; EU Justice Scoreboard 2016; ESS 2011; Eurobarometer 2016). Comparative quantitative picture of Polish judiciary was far from ideal, but far from disaster, too.

Another crucial development was that towards the end of 2016, the courts and, in particular, the Supreme Court of Poland assumed the role of guardians of the constitution and the hard core of opposition against governments unconstitutional practices (see Witte and Bucholc 2017; Koncewicz 2017). It resulted in a wave of popular support for the courts in Summer 2017, when the reform of the judiciary was initiated whose political goal would be a takeover of control over the judiciary by the executive (for a detailed description of the reform see Bucholc and Komornik 2018). Thousands of Poles stood in front of courthouses with candled in their hands, judges spoke publicly and directly to people, also (which was unprecedented) in open air. This public upheaval was not without success: President vetoed a part of the controversial legislation and proposed a new version of his own, citing "public anxiety" as the reason for his action. However, both the contents of presidential drafts of the bills of law reforming the judiciary, which were finally adopted on 8 December 2017,[15] and the detailed analysis of the grounds given for the reform indicate that there was no fundamental difference between the government and the

[15] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Dz.U. 2018, poz. 3), ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Dz.U. 2018, poz. 5).

president regarding the direction of the reform and, more importantly, regarding the framing of their reformatory efforts. On 20 December 2017 the EU Commission announced the initiation of proceedings against Poland based on Art. 7 (1) of the Treaty on European Union.[16] In late June 2018, the more tangible consequences of this decision, if any, still remain undetermined. It seems that the Commission may even opt for a détente on the matter of rule of law in Poland as a result of an internal split (Koncewicz 2018), although the bitter struggle around the Supreme Court continues. Nevertheless, hope remains that European institutions, this time the Court of Justice of the European Union, may serve the cause of rule of law in Poland by way of individual prejudicial questions of Polish courts seeking interim relief in a form of temporary suspension of the operation of a national statute (Wójcik 2018a). The effect and impact of this procedure, however, ultimately depends not only on the ECJ position, but on the pro-active attitude of Polish judges and their ability to resist the pressure increased by the domestic political framing of the reform of judiciary.

The anti-judicial frame of PiS reform was composed of three elements: a politically negative picture of judges, a socially negative picture of judges and a negative evaluation of the judiciary. All three were evoked, among other things, in the grounds of presidential draft of the Supreme Court Act,[17] where the aforementioned pre-reform media content hostile to the judiciary was addressed by hints, allusions and innuendos.[18] The political picture stressed the allegedly post-communist ethos of the judges, allegedly preventing them from cherishing the values of democratic rule of law. The social picturing referred to the alienation of judges in material and intellectual terms, again allegedly preventing them from seeing eye to eye with an average Pole. Finally, the negative evaluation consisted in repeating the criticisms already well-established in the public debate, regarding low quality of the judicial output, caused by lack of democratic control and any direct link to the sovereign, meaning technically the electorate and materially the Polish Nation. This resulted in lack of "sensitivity" to the needs of the people and, consequently, a "very low" trust in the justice system. All three elements are underpinned by the idea that judges should present a certain value-standpoint, coextensive with the values cherished by the man in the street, and the express goal of the reform was to "sensitivize"

[16] Press release on the European Commission Website http://europa.eu/rapid/press-release_IP-17-5367_en.htm [20.02.2018].

[17] All phrases in quotation marks in this paragraph are quotations from the Grounds for President's Draft Act on the Supreme Court, Parliamentary File No. 2003 (Prezydencki projekt ustawy o Sądzie Najwyższym, druk sejmowy 2003) of 26 September 2017, available on the official Website of Polish Parliament at http://orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%24File/2003.pdf [accessed 19.02.2018]. Translations are mine.

[18] To quote just two examples of the President making use of allusion to common knowledge of media users: "It is difficult to put aside public comments by the prominent members of the judiciary, in which common citizens and their material status were treated with disregard or even disdain", or "(…) inability of judges of the Supreme Court to sanction the disciplinary infractions of judges, which could be observed when judges who were publicly compromised were nevertheless not deprived of their office, or persons from their own circle stayed in their office whose private life included circumstances (such as having committed an unintentional offence) which should have made them resign". (p. 3 and p. 4 of the Grounds for President's Draft Act on the Supreme Court, see footnote 14 above).

the judges and to break their opposition to any change, an opposition supported by "broad legal circles". All lawyers thus became a clique stubbornly defending the status quo. In using this well-established frame PiS achieved a high level of communication efficiency. It would retouch bits and ends of knowledge about the judiciary which were sure by then to have become a part of most recent social memory, such as cases of judicial misconduct and miscarriage of justice.[19]

In the case of reform of the judiciary commemorative lawmaking rests ultimately on increasing the groupness effect by an opposition between what Elias and John L. Scotson called "established and outsiders" (Elias and Scotson 2008, on application to Poland after 2015 see Bucholc 2016). The image of homogenous, undivided and morally deserving Polish society is opposed to the negative image of courts, judges and lawyers, an undeserving elite posited as "others" against whom the identity of society is to be forged. Poles, who used to be the victims of foreign and domestic oppression, are still oppressed by the rich, insensitive, alienated post-communists: historical analogy is not a part of lawmaking here, but is evoked skillfully by retouching the items involved in the lawmaking, such as the picture of judges included in drafting the new laws. The powerful message is that nothing has changed in Poland after 1989, at least not for the good: a revision of the transformation is produced by retouch operation just as it was produced by bricolage in the case of the Constitution.

4.3 Re-Stylization

Bricolage and retouch are accompanied by re-stylization. It lends credibility, helps maintain the impression of communality of items subjected to bricolage, and increases the aesthetic effect of unity which may sometimes make it easier to get away with problematic logic or factual inaccuracies. Styles, consistently applied, produce the effect of longevity and respectability, and by their repetitiveness they give an impression of stability.

A very recent example of re-stylization is the much-debated case of Polish legislation of 26 January 2018 penalizing attributing the participation in Holocaust to Polish nation of the Polish state[20] (see Gliszczyńska-Grabias and Kozłowski 2018). The starting point was the long-standing problem of inaccurate description of Nazi death camps in Poland as "Polish death camps". The parliament dominated by PiS decided to penalize expressions in which participation in Holocaust would be attributed to Polish state of Polish nation. This typical memory law was subsequently

[19] The memory was enhanced by a massive and highly controversial media campaign "Sprawiedliwe sądy" (Fair courts), whose truthfulness and legality was questioned by representatives of courts and by civil society organizations. Polish Press Agency report on the kick-off of the campaign in English can be found at http://www.pap.pl/en/news/news,1077427,polish-national-foundation-hits-the-web-with-info-on-court-reform.html (accessed 20.06.2018).

[20] 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 (Dz. U 2018, poz. 369).

framed to become an instance of commemorative lawmaking, which shows that it is possible for one and the same legal act to function as an element of memory politics in two distinct capacities.

This legislation is obviously a part of a larger agenda of presenting Poland as a "republic of the righteous" (Franczak and Nowicka 2016). The status of the victim is at stake here, yet another act of the old Polish-Jewish victimization rivalry (Forecki 2016). But the stake was set in the first place by the idea of a single, homogenous nation, essentialized as possessing certain ethical dispositions, including heroism, with an assumption that a heroic victim cannot be a cold-bloodied murderer at the same time. It is a great narrative success of PiS that the discussion around the legislation quickly evolved into endless recounts of Polish and Jewish victims of the war, into contradictory biographical recollections of cruelty and misery, sacrifice and self-interest, truth and lie. The idea that there is an intrinsic link between the Nation and the individuals, and that there is a truth about the Nation which translates directly into truth about individuals, went largely unchallenged.

But thus far it was just a reiteration of a motive of national unity, a part of the internal logic of memory laws, which essentially represent the official view of the lawmakers. Re-stylization came in later, when the law was passed and signed by the President and international protests, which were duly raised and registered, in particular by Israel and the US, created a new framing potential.[21]

Single, united Nation has been styled by PiS as coextensive with the political sovereign in the democratic polity. The word "sovereign" became one of the many buzzwords of the new regime. The directness of the link to the sovereign became the main criterion for determining legitimacy of state authorities, as shown in the discussion of the reform of the judiciary in the previous section: the parliament is a straight emanation of the sovereign, the executive is the emanation of the legislative, and the fact that the judiciary was deemed to be virtually unrelated to the Nation resulted in the urgent need to have it subjected to political control (Bucholc and Komornik 2018). Separation of powers, one of the foundations of the rule of law, is thus a direct threat to national sovereignty, and to negate it is, to paraphrase the title a paper by Allan Tatham, a way to regain sovereignty (Tatham 2013). A very simple system of equations results: Polish Nation is the democratic sovereign, and any foreign criticism of the laws made by the sovereign is an attack on the state and on the nation at the same time. Thus, as soon as the legislation made by Polish parliament was challenged internationally, it ceased to be the matter of truth and good name of Poland abroad, and it became the matter of Polish national sovereignty.

By this move, the whole battery of stylistic means characteristic of PiS political discourse pertaining to the notion of sovereignty in international relations was launched, including the denial of the "Abroad's" legitimation to take stand regarding or comment on Polish internal affairs, the rhetoric of "rising from our knees" and rejection of the "pedagogy of shame", together with a renewed castigation of liberal politicians and intellectuals as its agents. PiS idea of sovereignty and international

[21] See https://www.theguardian.com/world/2018/feb/01/poland-holocaust-speech-law-senate-israel-us [accessed 04.07.2018].

relations seems to base on an assumption that any interdependence is, by definition, a dependency, and any dependency should be fought against (see Bucholc and Komornik 2016).

An ironic coda to this masterpiece of memory framing followed in June 2018, when on the 27th of June 2018 in a record-setting one-day parliamentary procedure the internationally controversial provisions criminalizing allegations of Polish participation in the Holocaust were dropped. The amendment[22]przeciwko Narodowi Polskiemu oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, http://orka.sejm.gov.pl/opinie8.nsf/nazwa/2663_u/$file/2663_u.pdf [accessed 04.07.2018]. was welcomed by the Israeli government, and in a joint statement issued on the same day the two prime ministers, Israel's Benjamin Netanjahu and Poland's Mateusz Morawiecki, cherished the new entente between their two countries and declared their commitment to truth and historical justice as well as their rejection of anti-Semitism and anti-Polonism.[23] Jarosław Kaczyński, the leader of PiS, however, did not fail to stress that these fortunate developments also prove that "Poland is becoming a much more important country" and that "the politics of good change is an alternative to the European mainstream and also in some way to the American one".[24] In a nutshell, Kaczyński argued that Poland's withdrawal from the initial legislation under international pressure was a great success which affirmed and confirmed Poland's postulated status as a sovereign state of no little international consequentiality.

5 Conclusion: When Culture Catches Law Unawares

The three cases of PiS commemorative lawmaking, discussed above as illustrations of, respectively, bricolage, retouch and re-stylization, confirm that PiS are "mnemonic warriors", to use the term of Bernhard and Kubik (2014). They fight wars over memory and with memory, and memory framing is no less efficient a means to accomplish their tactical goals than direct memory governance by way of memory laws. At the same time, PiS are also mnemonic narcissists (Saryusz-Wolska et al. 2016). Their mnemonic regime is based on a narcissistic identity agenda: only those who have the right memories belong to the Polish Nation, and the one, united and true Polish Nation can only be authentic (and authenticated) if its memory is fully restored. Restoration, an inherently typical conservative motive, plays a crucial role in PiS memory politics (Bucholc 2018). Elsewhere, I have argued that this feature endows PiS agenda with a distinct conservative utopian trait as defined by Mannheim (1954).

[22] Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej—Komisji Ścigania Zbrodni

[23] See https://www.haaretz.com/israel-news/netanyahu-israel-welcomes-softening-of-polish-holocaust-law-1.6219584 [accessed 04.07.2018].

[24] Quotes from a radio interview with Jarosław Kaczyński of 29 June 2018, reported at https://www.tvp.info/37865894/prezes-pis-stuprocentowa-odpowiedzialnosc-za-holokaust-ponosza-niemcy [accessed 04.07.2018].

However, the conservative utopia of PiS remains a contested project up until now. There are still intellectuals and scientists ready to uncover what according to PiS would best be left alone.[25] Despite very strong nationalistic mainstreaming Polish culture is still far from unity. Therefore, the memory politics of PiS aims not only at the change of objective situation (what memories are expressed, and how), but also of the cognitive patterns of Poles (what the people are disposed to remember). That is why memory framing is crucial in order to produce an impression that the hectic lawmaking activity of PiS forms a consistent and ideologically coherent set of actions.[26] That is also the reason why an analysis of the link between memory and law must go beyond either memory laws or applied commemorations, in order to address the mutual effect of law and collective memory mediated by framing operations.

Belavusau has coined the expression "mnemonic constitutionalism" to capture the memory turn in constitutionalism in many countries of Central and Eastern Europe and elsewhere (2018). However, an analysis of "mnemonic turn" in legislation cannot be limited to critical reading of constitutions and statutes, and to theoretical accounts of how memory is expressed in laws. Memory is not only expressed in laws and governed by them It is also a powerful instrument which endows laws with (sometimes unintended) meaning and effect, and which can also reduce their consequentiality. The concept of commemorative lawmaking allows to accommodate this double function of law and to combine the study of legal texts and norms with a more flexible approach characteristic of social and cultural studies of law.

Flexibility is desirable exactly because the current state of knowledge about the relationship of law and memory opens many new research paths. To name but one out of the many: I believe that Eric Heinze made a very good point while discussing the perspective of law and historical memory as a scholarly discipline:

> Bearing in mind that general sense of the object of this new scholarly discipline, a further question arises about its status. Is the discipline nonetheless an essentially specialist one, raising questions only for small handfuls of initiates? Quite the contrary. Strictly speaking, anything 'past' forms part of history. In practice, however, the discipline of law and historical memory inevitably focusses on traumatic events, as we observe in virtually every publication on the topic (Heinze 2018).

History is not only about collective and cultural traumas (Alexander et al. 2004). Despite a tendency to equivocate memory and history in the newly established field of law and historical memory, memory about history is not necessarily memory of traumatic experiences, great events and universally recognizable

[25] The most renown among those was Jan Gross, whose book on the mass murder of Jews by their Polish neighbors in 1941 in the village of Jedwabne was but one example of what PiS calls the "pedagogy of shame" (Gross 2001), but more recent examples include a number of books, to mention just *Prześniona rewolucja* (2014) by Andrzej Leder, *Żydokomuna* (2012) by Paweł Śpiewak or *Legendy krwi* (2008) by Joanna Tokarska-Bakir.

[26] For the number of legal acts entering into force in Poland per year see Barometer of Law by Grant Thornton, available at http://barometrprawa.pl/ [accessed 04.08.2018].

processes, either. One obvious direction in which the study of law and memory could and should develop is to move beyond the scope of memory laws (however they may be defined) and beyond analysis of memory politics as intentional governance of memory to explore the interplay of law and memory outside of the problematic of systemic transitions, collective traumas and political history. This would also require a move beyond international and public law, currently dominant in law and memory studies.

However, notwithstanding the direction the studies of law and memory may take in the future, they will essentially always focus on the role which collective memory plays in the relationship between law, culture and institutions. In this respect, the Polish democratic backslide demonstrates the dangers of law drifting far from social life and cultural dynamic. Law is easily caught unaware by culture: when it becomes alienated, it is also deprived of symbolic means to assert its validity claims. Czarnota was right in 2007 when he wrote:

> It is commonplace for sociologists of law to argue that the operation or functioning of specific norms and legal institutions depends on the institutional and cultural context. That context in the Polish case, and probably in any other post-communist country, is rather fragile as far as democratic institutional infrastructure and legal culture are concerned (Czarnota 2007: 244).

However, what the current crisis of Polish rule of law illustrates is not only the fragility of democratic institutional infrastructure and legal culture, but also—and more significantly—the power of symbols which can be put to work against democracy and rule of law by way of skillful memory politics using commemorative lawmaking to achieve its goals. High priority given to memory by PiS is justified by its close link to lawmaking. But that does not explain the apparent efficiency of PiS memory politics. A thesis has been advanced according to which collective memory in Poland was long suppressed under the communist rule, and then failed to be accommodated by the liberal and socialist (post-communist) governments. Thus, memory politics became a no man's land, ready to be appropriated by the national conservatives, who were the only ones with a clear vision of history to match their political agenda (Łuczewski 2016). As a result, Polish collective memory, almost put out by real socialism and liberal modernization, would flourish under PiS rule, but reframed as a part of national-conservative program. Though I have my doubts about this, it is hard to deny that in the place of inconsistent and weak memory politics of former Polish rulers PiS has come up with a clear and persuasive vision well suited for the purposes of public communication. The success of this vision depended on its political enforcement, but also on the techniques used to shape it so as to increase its performative potential. Part of it was undoubtedly the success in providing what Mälksoo (2017) called "ontological security" achieved by mnemonic means. The only thing needed to establish a safe relation to the past and to secure the existence of the nation according to PiS political design was an adequate framing, which was performed using bricolage, retouch and re-stylization.

The following quote from a 2010 talk by Jarosław Kaczyński might serve as one final illustration of how the value of the rule of law can be put into perspective by a skillful reference to the past:

> There are no grounds in Poland for the existence of the rule of law, of a law-abiding state. It is worthwhile to consider what results were brought about by the practical application in our country of principles drawing on the concept of the "rule of law". In Poland during the last 20 years some elements of rule of law were construed. But these elements have rather particular effects, which may be connected to the consequences of the lack of lawfulness. As early as the 1980s the process of juridification of the communist system begun. Many things which were unregulated before were regulated, and some institutions were created, including the Constitutional Tribunal, the Ombudsman, the administrative courts (…). A situation emerged in which no decision could be taken without a legal basis. In this way the rational freedom of decision-making by the persons holding various state functions was limited (Kaczyński 2011: 227).

The rule of law, so Kaczyński, was imported to Poland on the high tide of liberalism and capitalism, and it was not successful. Not because the rule of law is intrinsically wrong (Kaczyński does not argue that), but because its implementation on the Polish ground was counterproductive. Moreover, the rule of law was implemented so as to impose limitations on the state powers, which limited the sovereignty of the nation. The talk reads almost as a promise that in a different society, with a different set of conditions, the rule of law might be a good idea, but not here and not now.

While we wait, an antidemocratic, populist legal culture is growing in Poland, one which rejects the rule of law, disregards procedures and mistrusts institutions. This culture is not a frenzy of political manipulation: it is solidly founded in the cultural resources of Polish society, including its memory resources. Polish crisis is a sobering demonstration of how little law can be trusted to do well if left to its own devices.

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