

## **Law is trapped in history and history is trapped in law:**

Historical narratives in illiberal legal practices in Hungary and Poland

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**Abstract:** This paper explores the reciprocal relationship between law and history, highlighting how historical beliefs influence political and legal decision-making. This interdependence is evident in the historical development of legal systems, the incorporation of historical discourse in legal texts, and the legal governance of historical matters. The paper illustrates the integration of historical dimensions and myths into constitutional imaginaries, particularly in Hungary and Poland. There, historical beliefs have driven transformations towards illiberal national myths, influencing political and legal reforms. The study underscores the relevance for legal and constitutional scholars not to overlook the reciprocal relationship between law and history.

**Keywords:** History, Myth, Legal language, Illiberal regimes, EU, Constitutional identity

**Summary:** 1. Introduction; 2. Law is trapped in history and history is trapped in law; 2.1. Historical particular development of law; 2.2. Historical story in legal discourse; 2.3. Legal governance of history; 2.4. History and its dilemmas; 3. Myth-making in Hungary and Poland; 3.1. The historical break from communism; 3.1.1. Hungary; 3.1.2. Poland; 3.2. The counter historical and constitutional trend; 3.3. Hungary's historical constitution; 3.3.1. History, not rule of law; 3.3.2. Historical legacy establishes collective norms; 3.3.3. A new EU myth; 3.3.4. Alternative historical contestation; 3.4. Poland's historical constitutional reinterpretation; 3.4.1. The historic policy and the score of wrongs; 3.4.2. Historical grievances and constitutional identity as grounds for legal reforms; 4. Conclusions.

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## 1. Introduction

An Advocate General at the CJEU recently emphasized the power of narratives, drawing from Harari's popular history book to argue that “human beings are bound together by stories, something that doesn't exist. Law is the perfect example”<sup>2</sup>. This also aligns with her legal realist perspective, challenging the notion of a singular answer to legal questions as a myth. Despite adjudication conventions and text as a corrective force, objectivity in legal rulings is compromised by ideology and bias, especially when faced with multiple options, leading to decisions based on subjective notions of “good”.

Her remarks reveal a dynamic and reciprocal interrelationship between the domains of law and history, whether consciously or subconsciously undertaken by legal actors, and whether considered preferable or not. It suggests that the stories we tell and the legal norms we introduce are inextricably intertwined; the narratives embedded in our collective consciousness not only reflect in our legal systems but also actively contribute to their evolution. The symbiotic influence of law and history, encompassing considerations of morality, memory, myth, and narrative, manifests itself particularly once we look at the contemporary socio-political landscape, characterized by the rise of populism and semi-authoritarianism. It signifies a noticeable transition from the post-war “memory and democracy” era to an epoch now characterized by the dominance of “populism and memory” since the early 2000s.

Exploring how historical beliefs influence political and legal decision-making remains a relatively uncharted territory. While traditionally a domain of the humanities, social and political scientists have increasingly turned their attention to this exploration. Legal and constitutional scholars should not overlook this trend.<sup>3</sup> Despite the dominance of other incentives in politics and legal practice, dismissing ‘the past’ as inconsequential is a mistake, especially with the rise of ‘identity’ discourse since the 1990s.<sup>4</sup>

Against this backdrop, our paper explores the significant role of history and storytelling in legal reforms and adjudication within the contemporary hybrid regimes of Hungary and Poland. Commencing by highlighting the (growing) significance of the politics of history in law, our paper engages first in a theoretical exploration of these dimensions within the EU context (section 2). Subsequently, we delve into the two case studies: the first examines the integration of historical narratives into Hungary's new legal lexicon, encompassing the “Hungarian historical constitution” and its conflicts with the EU regarding asylum and migration policy (section 3). The second case study explores how historical narratives have pre-dated and shaped legal reforms in Poland (section 4). The selection of these case studies is warranted. A distinctive feature of hybrid regimes in the CEE region is to use historical narratives for the ‘reconstruction’ of societies. Concluding (section 5), our analysis reveals how history is deeply entwined with constitutional practice, shedding light on its complexity and impact on (EU) law. Our paper enhances comprehension of this interplay's significance and risks, particularly given the rise of semi-authoritarian trends in the EU.

## 2. Law is trapped in history and history is trapped in law

This section delves into the reciprocal influence of law and history. The exploration begins by contemplating the historical and particular evolution of law within societies (2.1.). It then transitions to an examination of how myth - encompassing imagination, collective memory and historical narrative - contributes to and surrounds the construction of law (2.2.). Furthermore, attention is drawn to the observation that the field of history can become increasingly subject to legal regulation in the dynamic interplay between historical discourse and law (2.3.). Lastly, the section reflects on dilemmas arising from these relationships (2.4.)

### 2.1. Historical particular development of law

The foundational premise of law includes the ideals of objectivity and a certain detachment from societal influences, seeking impartiality to safeguard the well-being of both individuals and civil society.<sup>5</sup> In practice,

<sup>2</sup> <https://www.europafelix.eu/2027039/12515050>

<sup>3</sup> F. KRAWATZEK, G. SOROKA, *Circulation, Conditions, Claims: examining the Politics of Historical Memory in Eastern Europe*, in *East European Politics and Societies*, Vol.36, 2022, pp. 198–224, p. 218.

<sup>4</sup> M.R. SOMERS, *The narrative constitution of identity: A relational and network approach*, in *Theory and Society*, vol. 23(5), 1994, pp. 605-649. The idea that identity guides our action (e.g. ‘I act because who I am’ as opposed to a rational interest of power) has gained importance, one in which identity is narratively constructed and experienced.

<sup>5</sup> A. SLAUGHTER, *A liberal theory of international law*, in *Proceedings of the ASIL Annual Meeting 94*, 2000, pp.240–249; L. CHENG & D. MACHIN, *The law and critical discourse studies*, in *Critical Discourse Studies*, 20:3, 2023, pp.243–61

however, law often becomes a series of compromises aimed at sustaining the legitimacy of a specific social order, evolving as interest groups in society reframe it. It permeates everyday life and is subject to policing and moralization by intermediaries. Despite its formal role in enforcing common norms, law intricately intertwines with prevailing knowledge systems and societal positioning.<sup>6</sup>

This realization prompts a critical perspective that raises concerns about the imposition of ‘Western’ or ‘universal’ values that may impose “false universalities”, which may inadvertently suppress diverse local or national identities. It also warns against law “starving in a vacuum of abstraction,”<sup>7</sup> neglecting the diverse cultural and historical contexts that shape legal principles. These concerns have permeated legal discourse. For instance, the explicit introduction of the concept of respect for national constitutional identity in the EU reflects an attempt to navigate this delicate balance between universal legal principles and the preservation of locally developed historical applications of the law, serving as a mechanism to legally articulate national identity within the EU's constitutional multi-level dialogue.<sup>8</sup>

## 2.2. *Historical story in legal discourse*

Concerns regarding law existing in a “vacuum of abstraction” echo a broader critique of a technical perspective on law, progressively articulated through concepts like constitutional imagination and the imaginary.<sup>9</sup> This critique posits that the potential of imagination in shaping legal frameworks is often underestimated, particularly neglecting the cultural, symbolic, and imaginative dimensions embedded in constitutions. In light of constitutional imaginaries, “constitutions ought to be understood as much more fragile, open to contestation, and in need of a much higher level of societal identification and adherence, than often presumed by constitutional ‘engineers’ as well as by political actors in general.”<sup>10</sup>

In fact, in ensuring the stability and effectiveness of constitutional frameworks, modern constitutions seem to increasingly incorporate historical references.<sup>11</sup> Preambles explicitly articulate narratives, expressing historical foundational goals such as independence, self-governance, liberty, and overcoming historical adversity. Narrative dimensions also shape the substantive content of constitutional provisions.<sup>12</sup>

The constitutional imagination actively employs historical narrative, symbols, collective memory, ritual, and myth to form political reality<sup>13</sup>— a practice termed “mythopoetic legitimation” by Bennet, referring to the use of myth as a form of legitimation through history.<sup>14</sup> Legitimation, defined as a process through which actions and actors gain legitimacy or are marked by illegitimacy based on socially constructed values and norms, involves constructing a narrative that resonates with constituents.<sup>15</sup> Myths, in this context, aim to moralize and make sense of historic-reality, offering valid<sup>16</sup> sacred, and true sense-making stories.<sup>17</sup>

As narrative tools, myths contribute to constructing a shared reality, i.e. society, influencing perceptions of

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255, p. 243.

<sup>6</sup> G. TURKEL, *Michel Foucault: Law, Power, and Knowledge*, in *Journal of Law and Society*, vol. 17(2), 1990, pp.170–193; CHENG & MARTIN, *op. cit.*, p. 244.

<sup>7</sup> SOMERS, *op.cit.*, p. 612.

<sup>8</sup> L.F.M. BESSELINK, National and constitutional identity before and after Lisbon, in *Utrecht Law Review*, 2010, vol. 6(3), pp. 36-49.

<sup>9</sup> P. BLOKKER, *Political and Constitutional Imaginaries*, in *Social Imaginaries series Rowman and Littlefield*, 2021, Available at SSRN: <https://ssrn.com/abstract=3784225>; M. LOUGHLIN, *The constitutional imagination*, in *The Modern Law Review*, Vol. 78(1), 2015, pp. 1–25.

<sup>10</sup> P. BLOKKER, *op. cit.*

<sup>11</sup> N. M. LAZAR, *Time Framing in the Rhetoric of Constitutional Preambles*, in *Law & Literature*, Vol. 33(1), 2021, pp. 1-21.

<sup>12</sup> L. FONTAINE, *The Constitutional Imaginary versus the Fiction of Constitutional Law*, in *Jurisprudence, Revue Critique*, vol. 2, 2016, p.2; P. Blokker, *op. cit.*, p.12: These “norms and rules are often equally grounded in ‘fictional concepts’ that relate directly to reality, but at the same time reinvent that reality”.

<sup>13</sup> M. LOUGHLIN *op. cit.*, p.3.

<sup>14</sup> S. BENNET, *Mythopoetic legitimation and the recontextualisation of Europe’s foundational myth*, in *Journal of Language and Politics*, Vol. 21(2), 2022, pp. 370-389. Mythopoesis is a form of legitimation through “narratives of history that are taken as truth and accepted as canonical stories that are the bedrock of social groupings”, p.371.

<sup>15</sup> S. BENNET, *op. cit.*, pp. 370-72.

<sup>16</sup> C. FLOOD, *Political Myth*, New York, 2002, p.5.

<sup>17</sup> S. BENNET, *op. cit.*, p. 373.

the past, present, and future. They guide, sustain, and legitimize structures and actions of contemporary political and legal institutions. Consider the substantial body of literature about the role of myths in nation-building, as exemplified by Anderson's (1983) well-referenced work, *Imagined Communities*.<sup>18</sup> Anderson proposes that nations and their political embodiment, the state, are intentionally constructed to be perceived and experienced as immortal, absolute, and concrete.<sup>19</sup> This perspective undeniably influenced initially a perception of international law as a system of independent unitary states and its nations, demanding the utmost respect<sup>20</sup>.

Invoking myths is not only characteristic for national legal systems. EU law itself harbors an etiological European myth. One of European cooperation initiated in the 1950s that marks a departure from its previous history, particularly the wars of the twentieth century. This entails a “claim of common experience of suffering, with the Holocaust being constructed as a European tragedy”.<sup>21</sup> The EU consistently asserts that this “moral drama” of the early to mid-twentieth century serves as the valid justification for its existence rather than mere economic integration, emphasizing shared European values and moral imperatives for reconciliation and overcoming historical conflicts. In doing so, the EU challenges the primacy of individual national identities in favor of a more cohesive European identity. This EU story is anti-nationalistic, and for some it is anti-national as well.<sup>22</sup>

The EU also subscribes to secondary myths, including a commitment to human rights, which partly stems from the shared experience of the Holocaust. Within and beyond the EU myth-making, this experience contributed to the decay of self-congratulatory national narratives and to the formation of a ‘cosmopolitan’ memory centered on the shared tragedy of the Holocaust and other crimes against humanity. Informed by the concept of state repentance for past wrongs<sup>23</sup>, the Western European history of human rights portrays the ‘nation state’ as the archetypal wrongdoer.<sup>24</sup> The postwar antifascist legislation that forms the core of international human rights law have been born of this culture of memory.<sup>25</sup>

Another example of a secondary myth is European exceptionalism, rooted in a common European space, ancient history, the enlightenment, the renaissance, and modernity.<sup>26</sup> As Tuori described, the proclaimed universal human rights regime that developed post-WWII in Europe, as well as European integration, involved a narrative of reconnecting to Roman law tradition and a shared European heritage. ‘Universal’ liberal democracy was conveyed through a European historical identity narrative.<sup>27</sup>

### 2.3. Legal governance of history

While historical discourse can inspire legal discourse, a parallel trend is emerging wherein history itself is progressively falling under the purview of legal regulation.<sup>28</sup> This dual dynamic is particularly evident in the initial Holocaust denial laws. Through criminalizing the denial of Holocaust-related facts, they have contributed to the establishment of a collective memory that is distinctly humanistic and centers around the victims of historical atrocities and the concept of state repentance. The legal regulation of history also entails

<sup>18</sup> B. ANDERSON, *Imagined Communities*, London, 1983.

<sup>19</sup> S. BENNET, *op. cit.*, p.374.

<sup>20</sup> E.g. W. WILSON, *Fourteen Points*, Washington D.C., 1918.

<sup>21</sup> S. BENNET, *op. cit.*, p.377.

<sup>22</sup> S. BENNET, *op. cit.*, p. 377; U. BECK, *Understanding the Real Europe*, in *Dissent*, 2003; As noted by Kølvråa, the myth ignores other parts of history, for example the Cold War, as well as the fact that some states had different reasons for joining the EU or other historical co-operation between European nations and populations. C. KØLVRAA, *European Fantasies: On the EU's Political Myths and the Affective Potential of Utopian Imaginaries for European Identity*, in *Journal of Common Market Studies* Vol.54(1), 2016, pp.169–84, p.173.

<sup>23</sup> N. KOPOSOV, *Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia*, in *East European Politics and Societies*, Vol. 36(1), 2022, pp. 272-297.

<sup>24</sup> M. MUTUA, *Human Rights: A Political and Cultural Critique*. Philadelphia, 2002, p10. In Mutua's view the history of human rights presents the state as the classic rapist, a savage.

<sup>25</sup> N. KOPOSOV, *op. cit.*, p.289; S. HOLMES & I. KRASSTEV, *Explaining Eastern Europe: Imitation and Its Discontents*, in *Journal of Democracy*, Vol. 29(3), 2018, pp. 117-128.

<sup>26</sup> V. DELLA SALA, *Europe's Odyssey?: Political Myth and the European Union*, in *Nations and Nationalism*, Vol.22(3), 2016, pp. 524–41, p.531.

<sup>27</sup> K. TUORI, *The invention of the European legal tradition and the narrative of rights*, in *Journal of European Studies*, Vol. 52(3-4), 2022, pp. 204-218.

<sup>28</sup> N. KOSOPOV, p.273: “in line with the growing juridification of our societies”.

the post-1989 framework in Central and Eastern Europe of laws addressing the communist past, prohibition of the denial of communist crimes, reflecting a culture of liberal nationalism. The criminalization of certain statements about the past itself has “contributed to the reactivation of the notion of the sacred in our societies, a notion that can, and often does, generate and legitimize an emotional need for suppressing opinions commonly assessed as blasphemous”.<sup>29</sup>

#### 2.4. History and its dilemmas

Evidently, the evolution and sustainability of law are intricately intertwined with historical discourses. These processes are not devoid of risks or dilemmas.

On the one hand, the utilization of historical memory, myth, and narrative has served to enhance the legitimacy of laws, foster social identification, and promote adherence. Myths play an “integrative” function, with specific historical memory used and deemed necessary to aspire to and bolster abstract and universal concepts. For instance, the memory of the Holocaust, regarded in the European psyche as “history’s most terrible conflict,” led to the realization that “the only salvation lay in the transcendent truth of our essential sameness, despite it all”.<sup>30</sup> In fact, Goodale, along with others, argues that “the basic premise of an empirical (and thus also historical) demonstration of human rights universality is itself mistaken”.<sup>31</sup> However, since abandoning the notion of universal human rights is undesirable, he points to the significance of maintaining belief in universal human rights as a challenging but necessary narrative; “the enduring struggle to keep the flame of human rights universality burning through the long, dark night of history depends on the ability of some to keep telling the myth and equally on our collective willingness to keep listening to it”.<sup>32</sup>

On the other hand, the utilization of historical memory, myth, and narrative carries inherent risks. Memory is susceptible to personal bias and manipulation, and even if collective memory has been constructed through pluralistic interaction, a necessarily somewhat sedimented collective historical memory tends to favor particularity.<sup>33</sup> This has significant ramifications, as memories and myths can become “a strongly sedimented narrative for only a limited audience.”<sup>34</sup> Over time, they may lose their persuasive power, and, as Bennet notes, “a subject cannot be separated from its historical narrative; and if it does become separated (through the passage of time) or if this symbiotic relationship becomes demystified, the subject loses its legitimacy”.<sup>35</sup>

Alternatively, institutional actors may become entrenched in foundational myths, hindering responsiveness to modern challenges. Bennet points out that the EU, for instance, has become a prisoner of the past it has mythologized: “as the memory of the [Second World] War fades, so too does the resonance of the horrors, and thus the affective potential of the foundational myth is diminished”.<sup>36</sup> While the current war initiated by Russia against the newly designated EU-candidate Ukraine leaves options open, Kølvråa convincingly argued peace is now so taken for granted that the risk of war is not seen as realistic and “‘never again’ has apparently for some time been a mundane – if not banal – statement”.<sup>37</sup> As such, the EU myth can be perceived as a myth for an older generation or even a specific generation of EU-level actors, constituting an elite myth.<sup>38</sup>

Finally, myth and narrative can, depending on the intentions of the myth-makers, naturally not only have integrative but also subjugative and exclusionary functions.<sup>39</sup> They can be weaponized to promote illiberal, exclusive, and identarian beliefs. In this context, populism, with its emotional appeal, seems more at home in the realm of symbolism, memory, and myth than democracy. Ad hoc statutes criminalizing certain claims about the past are a case in point, they operate largely on the level of political symbolism rather than rational

<sup>29</sup> N. KOSOPOV, *op. cit.*, p.290.

<sup>30</sup> M. GOODALE, The Myth of Universality: The UNESCO ‘Philosophers’ Committee’ and the Making of Human Rights, in *Law & Social Inquiry*, vol. 43(3), 2018, pp.596–617, p.615.

<sup>31</sup> M. GOODALE, *op. cit.*, p.615.

<sup>32</sup> *Idem*, p. 616.

<sup>33</sup> S. BENNET, *op. cit.*, pp. 374, 385; N. KOSOPOV, *op. cit.*, p. 290.

<sup>34</sup> S. BENNET, *op. cit.*, p.385.

<sup>35</sup> *Idem*, p. 372.

<sup>36</sup> *Idem*, p. 385.

<sup>37</sup> C. KØLVRAA, *op. cit.*, p. 175.

<sup>38</sup> S. BENNET, p. 385.

<sup>39</sup> *Idem*, p.374; C. FLOOD, *op. cit.*, p. 37.

discourse.<sup>40</sup>

These controversies have never left the academic field of history untouched, with varying perspectives vying for prominence within the discipline. Some explicitly advocate for the necessity of moral judgment, accusing certain historians of either concealing or justifying past atrocities.<sup>41</sup> On the opposing side, there are those who assert that ethical values should not compromise the scientific pursuit of the truth.<sup>42</sup> A middle ground is occupied by some, suggesting that the search for truth should consciously, or cannot avoid to, incorporate a commitment to deeply held human values.<sup>43</sup>

Over time, the utilization of historical concepts and narratives inevitably evolves. The “proliferation of relatively more abstract and universal social and political concepts”, which “began in the late eighteenth century with the emergence of future-oriented philosophies of history”<sup>44</sup>, has recently experienced a reversed trend.<sup>45</sup> Historical concepts and events themselves possess a dual nature, referring to both abstract and potentially universal meanings, as well as concrete occurrences. For example, the concept of absolutism encompasses both unlimited monarchy in theory and the governance of Louis XIV in practice, but its usage is typically confined to contexts not too distant from Sun King's France in both space and time.<sup>46</sup>

Arguably, if we consider history through the lens of a moral science,<sup>47</sup> the intricate specifics of life and the particularity of historical events suggest that histories don't provide ready-made moral templates. Instead, their role is to present, illustrate, and illuminate moral questions and problems for contemplation.<sup>48</sup> As Becker puts it: “Knowledge of history cannot be [...] practically applied and is therefore worthless except to those who have made it, to a greater or lesser degree, a personal possession.” Indeed, “by liberalizing the mind, deepening sympathies, and fortifying the will, it enables us to control not society, but ourselves—a much more important thing”.<sup>49</sup>

### 3. *Myth-making in Hungary and Poland*

In the following sections, we turn our focus to Hungary and Poland, utilizing Bennet's mythopoetic legitimation framework to analyze the influence of historical discourse on constitutional and legal practices. We start by providing a brief overview of the “memory and democracy” era in the 1990s in Hungary and Poland, marking the historical departure from communism (3.1). Subsequently, we introduce the ‘countertrend’, the “populism and memory” era (3.2.), and proceed to illustrate, through a few examples, how a new illiberal ‘legitimizing myth’ shapes the constitutional order and legal reforms in Hungary and Poland. Specifically, we will explore how a new ‘legitimizing myth’ is translated into legal practice (Hungary) (3.3.) or influencing the legal debates (Poland) (3.4.).

#### 3.1. *The historical break from communism.*

##### 3.1.1. *Hungary*

As expressed by Kundera, a prevalent memory endured in Central Europe during the era of Soviet-imposed communism, where the region felt severed from its fundamental European cultural and civilizational roots.<sup>50</sup>

<sup>40</sup> N. KOSOPOV, *op. cit.*, p. 290.

<sup>41</sup> J. J. SHEEHAN referencing Lord Acton for example in his speech *How History Can Be a Moral Science*, <https://www.historians.org/research-and-publications/perspectives-on-history/october-2005/how-history-can-be-a-moral-science#note1>; D. BLOXHAM, *History and Morality*, Oxford 2020, p. 9.

<sup>42</sup> H.C. LEA, *Ethical Values in History*, in *The American Historical Review*, vol. 9(2), 1904, pp. 233-246;

<sup>43</sup> G. WRIGHT, *History as a Moral Science*, in *American Historical Review*, vol. 81(1), 1976; D. BLOXHAM, *op. cit.*, p. 363.

<sup>44</sup> N. KOSOPOV, *op. cit.*

<sup>45</sup> *Op. cit.*

<sup>46</sup> *Op. cit.*, p. 275.

<sup>47</sup> G. WRIGHT, *op. cit.*

<sup>48</sup> J. J. SHEEHAN, *op. cit.*

<sup>49</sup> C. BECKER, *A New Philosophy of History*, in *The Dial*, 1915, p.148.

<sup>50</sup> Illustratively, the Hungarian News Agency transmitted in its final dispatch in 1956 just before Russian troops obliterated it: “We are going to die for Hungary and for Europe.”, M. KUNDERA, *The Tragedy of Central Europe*, [https://dl1.cuni.cz/pluginfile.php/656024/mod\\_resource/content/1/Kundera%20The%20Tragedy%20of%20Central%20](https://dl1.cuni.cz/pluginfile.php/656024/mod_resource/content/1/Kundera%20The%20Tragedy%20of%20Central%20)

The fall of communism brought forth the compelling rallying cry ‘return to Europe’ throughout Central and Eastern Europe, Hungary included. In practice, this commitment signified an embracing of the principles of liberal democracy and the emulation of values and institutions inherent in Western European societies.

Following the disintegration of the communist regime, Hungary undertook significant amendments to its first permanent written 1949 constitution, originally adopted by the Hungarian communist party. The revised preamble of the Hungarian constitution in 1989 aimed “to promote the peaceful political transition into the rule of law, realizing the multiparty system, parliamentary democracy, and a social market economy.”<sup>51</sup>

However, unlike its Eastern European counterparts, Hungary did not manage to undergo a symbolic constitutional overhaul in the 1990s. Instead, incremental steps were taken to eliminate remnants of communism. The Hungarian Constitutional Court played a pivotal role, actively transforming the amended constitution of 1989, unofficially dubbed the ‘89 constitution, by systematically reviewing surviving elements of the old legal system.<sup>52</sup> The Court, characterizing the regime change as a “rule of law revolution”,<sup>53</sup> elevated the rule of law to a foundational normative principle. This principle could be invoked as the sole basis in constitutional procedures leading to the annulment of laws. It evolved into a prominent and frequently referenced<sup>54</sup> concept in jurisprudence, serving as a philosophical umbrella for the entire constitutional order.<sup>55</sup>

### 3.1.2. Poland

The transformations in the political landscape of Poland following the fall of the Iron Curtain were characterized by the clear aspiration to replace the existing political system with its complete opposite. Unlike Hungary, the Polish Senate symbolically carried out a ‘break with the past’ by means of a political declaration.<sup>56</sup> Polish senators declared a lack of any continuity between the People’s Republic of Poland and the Republic of Poland. Justifying their stance, they emphasized that they regarded “the state established in the aftermath of World War II on Polish lands and functioning between 1944–1989 as an undemocratic state with a totalitarian power system, part of the global communist system, devoid of sovereignty, and not adhering to the principle of the Nation’s supremacy”.<sup>57</sup>

In this vacuum, the new constitutional construction sought to draw upon well-established concepts grounded in European legal heritage, while in practice aligning with the contemporary democratic values of the ‘West’. The principles derived from the past socialist state “axiology” were considered not part of this European legal heritage; ‘Democracy’, the ‘rule of law’ or the ‘independence of the courts’ had suffered distortions during the communist regime and masked entirely disparate meanings.<sup>58</sup> Moreover, with the aim for a strategic alignment with Europe it became necessary to overcome the distinctive dualistic constitutional approach, which delineated a clear separation between national and international law. While a seemingly reasonable structured dichotomy, it had been instrumentalized by the communist authorities to interpret and apply legal rights in a selective manner.<sup>59</sup> The break with the dualistic approach was meant to create a legal system that seamlessly integrated national and European principles, including ensuring fundamental rights

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<sup>51</sup> Despite the lack of symbolic constitutional overhaul, it was still a document shaping the rule of law. G. HALMAI, *The Hungarian approach to constitutional review: the end of activism?*, in W. SADURSKI (ed.), *Constitutional Justice: East and West*, Den Haag, 2002; K. KOVÁCS, G.B. TÓTH, *Hungary’s Constitutional Transformation*, in *European Constitutional Law Review*, Vol.7(2), 2011, pp. 183-203, p. 202.

<sup>52</sup> C. BOULANGER, *Europeanization Through Judicial Activism? The Hungarian Constitutional Court’s Legitimacy and the ‘Return to Europe’*, in: W. SADURSKI, A. CZARNOTA, M. KRYGIER (eds.), *Spreading Democracy and the Rule of Law?* Dordrecht, 2006, pp. 263–280.

<sup>53</sup> Decision HCC 11/1992. (III. 5.) decision, Point III.1.

<sup>54</sup> F. GÁRDOS-OROSZ, *Jogállamiság*, In: F. Gárdos-Orosz, I. Halász, (eds.) *Bevezetés az alkotmányjogba: alapfogalmak* [Introduction into constitutional law: definitions], Budapest, 2019, pp. 49-59., p. 59.

<sup>55</sup> N. CHRONOWSKI, *Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről* [The rule of law – Thoughts on the legal developments in Hungary and the European Union], Budapest, 2016, pp. 32-42.

<sup>56</sup> P. FIEDORCZYK, *Roconciliation with the Communist Past: Polish Way*, in *Zeitschrift der Savigny – Stiftung für Rechtsgeschichte: Germanistische Abteilung*, vol.125(1), 2008, p. 297.

<sup>57</sup> Resolution of the Republic of Poland of 16 April 1998.

<sup>58</sup> H. SUCHOCKA, *Polska Konstytucja z 1997 roku jako element europejskiego dziedzictwa konstytucyjnego* in *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 80(1), 2018, p. 18.

<sup>59</sup> *Idem*, p. 18.

rooted in a perceived European legal heritage.

At the same time, however, the Polish Constitution was supposed to serve as a living testament to the rich historical identity of the Polish nation, which the communist regime had so forcefully oppressed. Central to this identity were the struggles for independence, cultural heritage, and an unwavering commitment to democratic principles. Recognizing the Constitution as a vehicle for expressing this collective identity, deliberate references to historical experiences and values were interwoven throughout its text.

The inclusion of historical references served a twofold purpose. Firstly, it was a conscious effort to acknowledge and honor the sacrifices and triumphs of the past. An illustration of this is evident in the introductory words of the Constitution: 'grateful to our ancestors for their work [...] for the culture rooted in the Christian heritage of the Nation and universal human values, drawing on the best traditions of the First and Second Republic (...)'. As can be seen from the above, the influence of Christian culture was recognized as equally pivotal factor in shaping constitutional identity. This act of remembrance was intended to instill a sense of continuity, connecting the contemporary legal framework with the historical trajectory of the nation. Secondly, the historical references were strategically employed to root the Constitution in the shared experiences and aspirations of the Polish populace, a shared commitment to democratic values, cultural heritage, and the ongoing pursuit of national goals.

### 3.2. *The counter historical and constitutional trend*

Since the 2000s, the socio-political landscape in Hungary and Poland has shifted from the post-war “memory and democracy” era to the era of “populism and memory”.<sup>60</sup> As Krastev and Holmes have argued, this backlash has stemmed, among other factors, from a perception of and frustration with inauthentic attempts to mimic the West in recent decades, rather than embracing and safeguarding national authenticity and identity—a discourse often rooted in historical narratives.<sup>61</sup>

Populist national movements capitalize on the current “crisis of the future,” characterized by “a decay of abstract notions and universal values and the growing importance of “local logics” and particularistic identities”.<sup>62</sup> Exploiting a mental climate favoring the sacred, identity, and particularism, these movements also take advantage of a punitive trend initiated by liberal democracies by introducing speech bans (see: Poland<sup>63</sup>) into national criminal codes in the late twentieth century.<sup>64</sup>

The commemorations of communism's collapse shifted from emphasizing a future of democracy and a market economy on the twentieth anniversary in 2009 to a more critical discourse on the thirtieth anniversary in 2019; indeed “commemorative debates feature[ed] prominent discussions of the transition’s negative aspects, including economic crises, demographic deficits, and the perceived loss of communal purpose and meaning.”<sup>65</sup>

Central and Eastern European countries had previously cultivated a memory culture centered on liberal nationalism, promoting national narratives in the face of oppressive international communism, rather than the “cosmopolitan” EU-sponsored memory of the Holocaust.<sup>66</sup> In fact, the “EU's democratic mnemonic frames”, “provoked a populist backlash against narratives seen as disparaging the nation.”<sup>67</sup> Against the backdrop of a failure to constitute a pan-European memory project<sup>68</sup>, “many former Warsaw Pact members wanted to have

<sup>60</sup> N. KOSOPOV, p. 273.

<sup>61</sup> S. HOLMES, I. KRASDEV, *The Light That Failed: Why the West Is Losing the Fight for Democracy*, New York, 2020.

<sup>62</sup> *Op. cit.*, p.275; J. F. SEBASTIAN, J. F. FUENTES, *Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck*, in *Contributions to the History of Concepts*, vol. (2), 2006, p. 119. See on the rise of memory, F. Hartog, *Regimes of Historicity: Presentism and Experiences of Time*, New York, 2015.

<sup>63</sup> See section 3.4.2.

<sup>64</sup> N. KOSOPOV, pp. 290-291.

<sup>65</sup> F. KRAWATZEK, G. SOROKA, *op. cit.*, p. 205

<sup>66</sup> N. KOSOPOV, *op. cit.* p. 276, p. 273; F. KRAWATZEK, G. SOROKA, *op. cit.* p. 206; D. LEVY, N. SZNAIDER, *The Holocaust and Memory in the Global Age*, Philadelphia, 2006.

<sup>67</sup> F. KRAWATZEK, G. SOROKA, *Op. cit.*, p. 214.

<sup>68</sup> *Op. cit.*, p. 206; F. PESTEL, R. TRIMÇEV, G. FEINDT, F. KRAWATZEK, *Promise and Challenge of European Memory*, in *European Review of History: Revue européenne d'histoire* vol. 24(4), 2017, pp. 495–506; D. LEVY, N. SZNAIDER, *Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory*, in *European Journal of Social Theory*, vol.5(1), 2002, pp. 87-106.

the EU more overtly recognize the suffering of those states that endured communism”.<sup>69</sup>

A resurgence of antagonistic memories is shaping narratives that victimize the past to serve national interests. Statutes deflect responsibility for historical injustices onto others, enabling nation-states to evade accountability for crimes against humanity.<sup>70</sup> Leaders exploit traumatized nationalism to whitewash history, framing the populist and ‘the people’ as unambiguously ‘good’. By invoking a timeless historical enemy, policy and legal decisions are justified as revenge against the perceived ‘evil other,’ simplifying complex historical and contemporary realities.

Such a counterconstitutional trend, attacks the idea of law as apolitical and impartial. This trend includes a re-politicization of the law by inflecting it with sources outside the law, such as political power and history. Additionally, it entails reclaiming political sovereignty and democratic decision-making, challenging the limitations imposed by the imagined boundaries of the rule of law, and critiquing the liberal emphasis on individualism over collectivism for its perceived divisive impact on unity. Within this framework, liberal democracy is faulted for contributing to the erosion of a nation’s historical roots, while a competing legitimizing myth aims to restore an idealized historical or cultural order.<sup>71</sup>

### 3.3. Hungary’s historical constitution

Since 2010, Hungary has undergone a notable transformation marked by the rise of an illiberal populist ‘constitutional imaginary’, meticulously crafted by Viktor Orbán to establish mythopoetic legitimacy. Orbán has championed a shift towards ‘illiberal democracy’<sup>72</sup> and ‘Christian democracy’,<sup>73</sup> interweaving political-historical narratives deeply rooted in Hungarian sociohistorical discourse. His political rhetoric extends beyond tapping into existing socio-economic discontent, delving into the manipulation of Hungarians’ memories related to the post-communist transition. Contesting the achievements of the Constitutional Court and Hungary’s constitutional order in eradicating communist remnants, Fidesz strategically leveraged the ‘post-communist’ argument, accusing liberal democracy and prior socialist-liberal governments of complicity in a perceived loss of control and limited sovereignty during and after the transition.<sup>74</sup>

Orbán capitalized on a growing desire for national identity and collective self-esteem, stemming from both communist suppression and the perceived imposition and imitation of Western values in the post-transition era. Linking the implementation of the 2012 Hungarian constitution to a narrative of breaking free from post-communism and reclaiming Hungarian identity, the new constitutional framework underscores historical significance and asserts continuity since the founding of the first Hungarian state in 1000. History becomes pivotal to contemporary collective identity, shifting away from individual-centered liberal constitutionalism to invoke Christian and national traditions predating the communist era, signaling a move toward collective constitutionalism.

The new constitutional framework and its application are not isolated from contemporary European political struggles, particularly those related to asylum and migration. Orbán strategically positions himself as a defender of Hungary and Europe, framing his stance as a heroic culture war against ‘hegemonic and liberal power holders in the European Union’ who purportedly fail to preserve the Christian-inherited European and Hungarian ‘way of life.’<sup>75</sup>

Despite the various aspects of these phenomena being researched and analyzed, our focus here is on the use of history as a direct moral framework in Hungarian legal adjudication, specifically at the Hungarian

<sup>69</sup> F. KRAWATZEK, G. SOROKA, *op. cit.*, p. 214; M. MÄLKSOO, A Baltic Struggle for a ‘European Memory’: The Militant Mnemopolitics of the Soviet Story, in *Journal of Genocide Research*, vol.20(4), 2018, pp. 530–44.

<sup>70</sup> N. KOSOPOV, p. 280.

<sup>71</sup> P. BLOKKER, *op. cit.*

<sup>72</sup> <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>

<sup>73</sup> <https://2015-2022.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/>

<sup>74</sup> P. KREKÓ, ‘The Stolen Transition’ – Conspiracy Theories in Post-Communist and Post-Democratic Hungary, in *Social Psychological Bulletin*, vol. 14(4), 2019, pp. 1-13; G. HUNYADY, *Stereotypes during the decline and fall of communism*, London, 2002; S. HOLMES, I. KRASSTEV, *op. cit.*

<sup>75</sup> C. LAMOUR, *Orbán Urbi et Orbi: Christianity as a Nodal Point of Radical-right Populism*, in *Politics and Religion*, vol.15(2), 2022, pp. 317-343, p. 338.

## Constitutional Court.

We analyze four<sup>76</sup> Hungarian Constitutional Court (HCC) rulings from 2016 to 2021, concentrating on asylum seekers' and migrants' rights within the EU legal framework and tackling constitutional identity disputes. These rulings shed light on evolving legitimizing myths and concepts in legal assessment. In 2016, responding to the Hungarian Ombudsman, the HCC assessed Hungary's constitution concerning the EU's 2015 refugee and migration relocation decision, asserting its authority to review joint exercises of power with the EU and emphasizing the protection of constitutional identity. The 2019 rulings, prompted by concerns from the Hungarian Minister of Justice and Amnesty International Hungary, focused on the interpretation of illegal migrants and Hungary's restrictive legislation aiding asylum seekers and migrants. The HCC clarified that granting asylum is not a constitutional obligation for non-Hungarian citizens from safe third countries and allowed additional restrictive measures in combating illegal migration. The 2021 ruling, addressing a petition from the Hungarian Minister of Justice against the EU Court of Justice's condemnation of Hungary, underscored Hungary's right to determine its population and unilaterally exercise shared competences with the EU when the EU allegedly fails to protect the self-identity rights of those in Hungary.

### 3.3.1. History, not rule of law

The use of history as a moral and legitimizing framework is apparent through the appropriation of the concept of constitutional identity within the EU, recognized in the Lisbon Treaty. This signifies a shift from a universally linked rule of law identity that embeds Hungary in European obligations to a historic constitution that deserves protection, encompassing a historical (illiberal) Christian identity beyond the constitution.

The HCC does not refer to protecting rule of law as part of its constitutional identity in its rulings. Instead, the decision in 2021 explicitly states: “the adoption of the Fundamental Law [in 2012] can be seen in itself as an effort to safeguard, protect and restore our nation’s constitutional right to self-determination, especially in relation to our historical constitution”.<sup>77</sup> The constitutional identity is interpreted as “the constitutional self-identity of Hungary” which “is a fundamental value not created by the Fundamental Law” but “merely acknowledged by the Fundamental Law”. One that “cannot be waived by way of an international treaty – [...]”.<sup>78</sup>

As such, the concept of constitutional identity is not being limited to the constitutional text. Judges need, or can, take aboard the complex (including potential illiberal) constitutional and cultural history of Hungary in their adjudication by reference to the preamble and “achievements of our historical constitution”.<sup>79</sup> Following the Seventh Amendment to the Hungarian Constitution, the HCC can also call to account every state body to protect this constitutional identity as well as the Christian culture of Hungary, as interpreted by the Court.<sup>80</sup> These elements are expressly put in connection with Article 4 of the EU Treaty<sup>81</sup>, the EU’s protection of national constitutional identity, and an inalienable core of a constitutional identity which the German constitutional court propagates.<sup>82</sup>

As an illustration, the 2016<sup>83</sup> and the 2021 decisions mention István Werbőczy's book “Tripartitum” as an achievement of the historical constitution (a collection of common law in Hungary assembled in 1517), including the book’s references to the Charter of King Ulászló I in 8 March 1440 “that Hungary and Poland would unite their forces against the Turks” and its recognition “that from then on Hungary bore the title of ‘propugnaculum Christianitatis’”, to argue that Hungary has been a Christian republic and ‘the bastion of Christianity’, for centuries<sup>84</sup>.

<sup>76</sup> Decision 22/2016. (XII. 5.) AB, paras. 1-118 ;Decision 2/2019. (III. 5.) AB, paras. 1-123; Decision 3/2019. (III. 7.) AB, paras. 1-123; Decision 32/2021. (XII. 20.) AB, paras. 1-111.

<sup>77</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 108.

<sup>78</sup> Decision 22/2016. (XII. 5.) AB, paras. 1-118, para. 67.

<sup>79</sup> *Idem*, para. 64.

<sup>80</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 77.

<sup>81</sup> *Idem*, para. 97-98.

<sup>82</sup> *Idem*, para. 101. On inalienable, they are “values that make up Hungary’s constitutional identity” and “have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived”.

<sup>83</sup> Decision 22/2016. (XII. 5.) AB, paras. 1-118, para. 110.

<sup>84</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 102.

### 3.3.2. *Historical legacy establishes collective illiberal norms*

The HCC (re)appropriates individual Fundamental Rights under a historical context and puts forward a new fundamental rights notion in 2021: the human dignity of the individual Hungarian as expressed through its self-identity. This self-identity is contextualized in an already existing alleged traditional historical environment that shaped this self-identity:

*“The traditional social environment the individual is born into and which is independent of the individual shapes the self-definition of the individual, and the self-definition of the individuals who make up society creates and then shapes the collective identity, that is, the identity of the given community and the given nation”*<sup>85</sup>. This collective social environment is seen as *“a natural and State-protected quality of life”*<sup>86</sup> in which the *“State has an obligation of institutional protection in order to ensure that”*<sup>87</sup> the democratic and human dignity rights of Hungarians and the *“fundamental function of the State affecting the public order”* are protected.<sup>88</sup>

This implies here an environment that needs protection against (unwanted) foreigners who by their presence threaten the existing traditional social environment if Hungarians do not democratically consent to it.

In addition, the individual self-determination of the Hungarian is restricted within a historical constitutional identity. According to the court *“the right to self-determination deriving from human dignity”* implies responding *“to the endowments determined by one’s traditional social environment”* and *“can only be achieved through a process of mutual reflection with the relevant social factors”* and *“as a member of the community”*<sup>89</sup>. While the state has to ensure that citizens *“participate, in the framework of democratic exercise of power, in the decisions essentially affecting his or her right of self-determination”*<sup>90</sup>, the problem in the Hungarian context is that the democratic quality of this framework is in reality severely dysfunctional. At the same time, the duty of state protection of the traditional environment must *“be assessed in the context of Hungary’s constitutional identity”*; including the aforementioned historical achievements and Christian culture.<sup>91</sup> The risk: individual self-determination of Hungarians to self-identity and a deviation of ruling party dominant cultural discourse, including for example solidarity towards Muslim migrants or asylum seekers, could severely be restricted.

### 3.3.3. *A new EU myth*

The contestation of the EU’s cosmopolitan narrative is also evident, emphasizing an EU of nation states and a Christian Europe. This involves utilizing the concept of national constitutional identity in EU law discourse and re-appropriating the legal principle of sincere cooperation, impacting the constitutional relationship with Member States like Hungary.

The HCC first of all refers to Hungary’s historical freedom fights. Allegedly this inspires the constitutional review of the shared competences with the EU and facilitates the rejection of EU law. As noted in para 99 of the 2021 ruling, *“taking into account Hungary’s historical struggles”*<sup>92</sup> and in para 109 *“struggles for the defence and restoration of self-determination”*<sup>93</sup>, the Court recognizes the *“aspiration to safeguard the country’s sovereign decision-making powers”* as *“itself part of the country’s national [and constitutional] identity”*<sup>94</sup>. This discourse supports the argument that *“joint competence [EU membership] may not restrict the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure is itself part of Hungary’s constitutional identity.”*

In a 2019 decision, the Court already emphasized that *“the Member States are masters of these treaties”*<sup>95</sup>.

<sup>85</sup> *Idem*, para. 41.

<sup>86</sup> *Idem*, para. 43.

<sup>87</sup> *Idem*, para. 39.

<sup>88</sup> *Idem*, para. 43.

<sup>89</sup> *Idem*, para. 39.

<sup>90</sup> *Idem*, para. 43.

<sup>91</sup> *Idem*, para. 43.

<sup>92</sup> *Idem*, para. 99.

<sup>93</sup> *Idem*, para. 109.

<sup>94</sup> *Idem*, para. 99.

<sup>95</sup> Decision 2/2019. (III. 5.) AB, paras. 1-123, para 24 (Reasoning [32]).

More prominently, in the 2021 decision the HCC referred to established principles of EU law, such as ‘sincere cooperation’<sup>96</sup>, to claim that Hungary has the right to unilateral action in policy domains that it shares with the EU. While ‘sincere cooperation’ (Article 4(3) TEU) addresses both the EU institutions and the Member States, its significance was hitherto mainly viewed in proper EU inter-institutional cooperation and the idea that the Member States should actively contribute to the EU objectives and therefore pro-actively implement its policies. The Court provides the opening however for the view that the EU institutions should instead demonstrate more ‘sincere cooperation’: i.e., grant space for Hungary to achieve the objectives of its own (historical) constitutional identity: *“interpretation of reserved sovereignty is also explicitly in line with the principle of sincere cooperation under Article 4 (3) TFEU.”*<sup>97</sup>

Moreover, the HCC implicitly connects a (historical) Hungarian claim of European identity to the EU’s own identity. For example, the idea of joining Christian Europe a thousand years ago is perceived as consequential to become a respectable EU Member State. This is mirrored in a 2019 decision<sup>98</sup> and in the 2021 decision the paragraph is partly repeated, referencing the 2019 decision.<sup>99</sup> The paragraph also talks about Hungary’s ‘defence of Europe’ which (implicitly) sends the message that today the EU and Hungary should fight (illegal) migration:

*“[16]The formation of the State of Hungary had been the first act by which the Hungarian nation expressed its European identity [...].we are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. It is also a part of our national values that our nation has over the centuries defended Europe in a series of struggles and enriched Europe’s common values with its talent and diligence, [...].” As a direct consequence of this European identity, Hungary made consistent efforts after the change of the political system to take part in the European integration and our accession was approved by a decisive national referendum.<sup>100</sup>”*

#### 3.3.4. Alternative historical contestation

The newly developed historical legal principles and repertoires of evaluation can simultaneously be employed to challenge their established meanings. For example, the Hungarian Helsinki Committee in proceedings for the Court contested the meaning of the historical constitutional identity by the ruling party, arguing that it implies respect for the rule of law and the developed rights for asylum seekers: *“The freedoms listed in the catalogue of fundamental rights are an achievement of the Hungarian historical constitution and safeguarding them is part of Hungarian constitutional identity [...]. [While] by creating the concept of constitutional identity the Constitutional Court clearly aimed at extending fundamental rights and protect the rule of law, the Government’s petition aims at the opposite: the practical elimination of the most basic rights of asylum seekers”*<sup>101</sup>.

Even the HCC provided openings for contestation of the current illiberal constitutional imaginary.<sup>102</sup> In the 2021 ruling the Court points to a mutual solidarity between states to admonish Hungary to contribute to *“reassuring settlement of the situation of asylum seekers in its territory”*<sup>103</sup> and went further to state that: *“There are many examples of the active expression of mutual solidarity and the welcoming of the persecuted throughout Hungary’s history, and the concepts consistent with this are an integral part of our public law literature. (See for example Part VI of St Stephen’s admonitions to his son, Prince Imre)”*.

The paragraph refers to the letter of King St. Stephen, founder of the Hungarian state, to his son on how to be a good ruler. The referenced Part VI is *“About welcoming and protecting guests”*. These constitutional historical texts could allow for a more multicultural constitutional imaginary and an appreciation of refugees and migrants. For example, the King has written among others: *“Guests and newcomers bring such profit that*

<sup>96</sup> And also, the effectiveness of EU law.

<sup>97</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 83.

<sup>98</sup> Decision 2/2019. (III. 5.) AB (25 February 2019), para 16.

<sup>99</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 96.

<sup>100</sup> Decision 2/2019. (III. 5.) AB (25 February 2019, para 16.

<sup>101</sup> Hungarian Helsinki Committee, Amicus Curiae brief, 2021, p.10, [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/Amicus\\_curiae\\_EN\\_final.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/Amicus_curiae_EN_final.pdf)

<sup>102</sup> Whether as part of a cynical ‘compromise’ strategy to protect the social order and to conceal a ‘trojan horse discourse’, see Luining & Van Hout forthcoming 2024, or as a sincere opening to a more ‘liberal’ or ‘consensual’ discourse.

<sup>103</sup> Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 49.

*their appreciation deserves to be called the sixth royal virtue [...] they bring various languages and manners, virtues and weapons, by which they enrich the country and increase the grandeur of the court. The unilingual and unicultural country is weak and perishable. Therefore, I order you, my son, to benevolently protect and respect the newcomers so they would rather stay with you than elsewhere [...]*"<sup>104</sup>

In conclusion, mythopoetic legitimization is evident in the HCC's rulings, where alleged historical constitutional accomplishments are established as a basis for adjudication. This fosters new illiberal collective norms and an EU myth through the appropriation of the concept of constitutional identity. However, the newfound historical legitimizing vocabulary can be subject to contestation and may serve different purposes. Nonetheless, its practical success within Hungary's current semi-autocratic political landscape might be minimal.

### 3.4. Poland's historical constitutional reinterpretation

Much like Hungary, the constitutional imaginary of Poland underwent substantial transformations during the period from 2015 to 2022, under the governance of the PiS party. Under the guise of historical narratives, PiS party embarked on a deliberate campaign to reconstruct societal values, fostering a sense of national identity rooted in specific historical interpretations. Such mythopoetic legitimization was instrumental in cultivating a distinct nationalistic and conservative identity aligned with the party's vision and justify legal amendments, consolidate political authority, and redefine the democratic institutions.

In the subsequent analysis, we provide concrete instances illustrating the formulation of a distinct historical narrative, beginning as early as 2005 and further solidified in 2015-2022 (section 3.4.1) which was strategically utilized in the implementation of some pivotal national reforms post-2015, including legal reforms (section 3.4.2).

To achieve this, we examine the political literature of these periods on the historical context, along with primary sources, including the party's 2005 program document (with a focus on its delineation of 'historical policy'), as well as specific political statements made by the party's representatives and excerpts from Constitutional Tribunal rulings.

#### 3.4.1. The historic policy and the score of wrongs 2005 -2015

In the years before PiS came to power for the first time in 2005, they decisively rejected the prevailing liberal European approach to dealing with a traumatic past, characterized as 'reconciliation through forgetfulness'. Instead of embracing a narrative that prioritized putting historical conflicts behind for the sake of the European integration, the party chose to assert Poland's distinct historical narrative centered around the atrocities it suffered under totalitarian regimes and confront or redress perceived wrongs. The trauma of communism became the focal point of memory politics.

PiS's approach to historical policy from 2005 encompassed two key aspects. First, there was an effort to promote awareness of Poland's history domestically. The intention was to create a shared historical consciousness among the people, fostering a sense of national identity deeply rooted in a particular interpretation of Poland's past. Secondly, by popularizing a specific historical narrative internationally, the party aimed to influence how Poland was perceived by the international community.

With these objectives in mind, PiS stood as the only party directing its efforts towards shaping the historical image and reputation of Poland. The term "historical policy" itself entered the Polish political lexicon in 2005, when it became an official part of the party program during the parliamentary elections.<sup>105</sup> The program highlighted 'Poland's merits in the fight against Nazi and communist totalitarianism'<sup>106</sup>. It also emphasized a proactive stance against historical revisionism and a commitment to safeguarding Poland's historical narrative on the international stage:

*"We will pursue a thoughtful, effective historical policy both domestically and internationally. (...) The international aspect of historical policy includes all activities aimed at popularizing, beyond Poland's borders, particularly significant facts from our history. Poland played a unique role in the 20th-century history of struggles against criminal totalitarian systems. However, we are currently witnessing attempts to relativize*

<sup>104</sup> <https://epa.oszk.hu/00000/00010/00003/hist.htm>

<sup>105</sup> PiS Party Program of 2005 *IV Rzeczpospolita. Sprawiedliwość dla Wszystkich* ([online](#)).

<sup>106</sup> *Idem*, p. 49.

*responsibility for the outbreak of World War II and the crimes committed during its duration*".<sup>107</sup>

Jarosław Kaczyński, the leader of the party, himself has repeatedly underscored the significance of the cultivation of Polish pride:

*"we need to consolidate Polish national consciousness, build the pride of Poles. Other nations, even those with historical challenges, do this. Schools should impart to young Poles a specific body of knowledge that allows them to find their place in the national community, understand Polish symbols, and comprehend Polish historical and literary references."*<sup>108</sup>

Upon assuming power in 2005, this discourse also extended to national commemorations and anniversaries, particularly those associated with World War II, serving as strategic tools for promoting its distinctive historical narrative. These events functioned as significant platforms to fortify the party's vision of Poland as a nation characterized by a singular historical identity. According to this narrative, Poland has weathered victimization from external forces while exhibiting resilience in the face of adversity. The framing of Poland as both a victim and a resilient entity contributed to the party's proud national narrative, reinforcing its image as a defender of national values and historical truth. PiS politicians draw a clear boundary between themselves, the proprietors of the 'true' vision of the past, and other actors who nurture 'improper', 'false' versions of history<sup>109</sup>.

Beyond fostering awareness of Poland's history and shaping a specific narrative on the international stage, the PiS party's historical policy was also utilized as a political tool to mobilize the electorate, criticize opponents, and establish a foundation for the constitutional overhaul.

Indeed, from the party's inception, its' strength as a political actor to mobilize support was not solely derived from its policies or electoral promises but was deeply rooted in its ability to tap into and address the multifaceted historical grievances of the populace. Through the invocation of past injustices, PiS combined historical grievances to shape a narrative where they position themselves as victims. Such narratives shaped the party's populist discourse and resonated with individuals seeking validation for their grievances of different kinds. The party effectively tapped into the collective memory of its base, offering a narrative that not only acknowledged their perceived injustices but also positioned PiS as the solution and the defender of their rights.

However, in doing so, the party which consistently avowed its dedication to confronting historical revisionism, assumed paradoxically a stance of historical revisionism itself. In this sense, elements related to the injustices suffered by the Polish community are considered foundational for collective memory, such as the idea of the Polish nation as an innocent victim of external oppression during communism, while other aspects are either downplayed or excluded from the discourse<sup>110</sup>. This "collective amnesia" manifests in various forms.<sup>111</sup> For instance, the nation's involvement in the Holocaust is approached with a defensive stance and confronting the nation's historical involvement with communism is deliberately avoided.

Moreover, in the hands of PiS, history has become a component of an aggressive political style, condemning political opponents. A pivotal example was, when during the 2005 presidential campaign, political opponent Donald Tusk was accused of omitting information about his grandfather's service in the Wehrmacht. In the same vein, in 2007 Kaczyński portrayed his party as a continuation of the ethos of the Home Army<sup>112</sup> and characterized political opponents of his government as heirs to "the traditions of the Communist Party of Poland, radical left-wing (...) the traditions of those who later, for at least some time, accepted the People's Republic of Poland, even in its most brutal period".<sup>113</sup> As such PiS sought to position themselves as the rightful

<sup>107</sup> *Idem*, p. 110.

<sup>108</sup> Jarosław Kaczyński's *exposé* from 19 July 2006, reprinted in: J. MARSZAŁEK-KAWA, P. SIEMIĄTKOWSKI (eds.) *Exposé Prezesów Rady Ministrów 1989–2019*, ([online](#)), 2021, pp. 255-277.

<sup>109</sup> L. RADONIĆ, „Nasze” i „odziedziczone” muzea – PiS i Fidesz jako mnemoniczni wojownicy.", in *Teksty Drugie*, vol. 4, 2020, ([online](#)), p. 130.

<sup>110</sup> D. KARNOWSKA, *Polityka zagraniczna Prawa i Sprawiedliwości w latach 2005–2011. Próba bilansu*, in *Nowa Polityka Wschodnia*, vol. 2(3), 2012, p. 44.

<sup>111</sup> M. KRÓL, *Patriotyzm przyszłości*, Warsaw, 2004, p. 76.

<sup>112</sup> The Home Army (Polish: Armia Krajowa) was the dominant resistance movement in German-occupied Poland during World War II.

<sup>113</sup> M. BIAŁOUS, I. SADOWSKI, *Na karuzeli krzywd. Historyczne źródła podziałów społeczno-politycznych w Polsce* in *Studia Politologiczne*, vol. 29, 2013, p. 83.

heirs to a certain historical legacy, appealing to sentiments associated with anti-totalitarian or anti-communist resistance.

Finally, historical discourse became a reservoir of arguments for PiS to systematically criticize the liberal constitutional order. The party contended that the post-1989 political transition, marked by the adoption of the 1997 constitution, did not signify a genuine breakthrough or departure from the previous oppressive political system. According to PiS, the political changes in 1989 were insufficient in dismantling the structures of the communist regime entirely. The 1997 Constitution was presented as a 'rotten' political compromise that failed to adequately address the historical injustices of communism. The democratic transformation itself was seen as the continuation of a system marked by what they referred to as 'post-communist arrangements'. Consequently, structures inherited from the communist era were said to persist, influencing all aspects of contemporary Polish society - political, economic, and cultural.

Since 2005, under PiS and conservative elites, ideas circulated about the creation of a 'Fourth Republic' following a 'moral revolution' aimed at eliminating the "oligarchic network of comradesly ties" of the post-communist Third Republic.<sup>114</sup> The idea of establishing a Fourth Republic draws parallels to the history of the Piłsudski<sup>115</sup> supporters from the period following May 1926 when a coup was enacted.<sup>116</sup> Both Piłsudski supporters and PiS perceived a discrepancy between the structure of the existing state and their own programmatic-ideological guidelines. While the proposed constitutional change did not come to fruition, the project of the Fourth Republic, endured and gained renewed vigor after the triumphant 2015 elections.

#### 3.4.2. *Historical grievances and national constitutional identity as grounds for legal reforms*

The ideal of the Fourth Republic, rejecting the notion that a genuine break from (post-) communism had occurred, served as a legitimizing myth for PiS in justifying constitutional overhaul. However, PiS, despite winning the elections in 2015 with a landslide, faced a significant obstacle: the lack of a constitutional parliamentary majority required to change the Constitution. This inability of constitutional overhaul or amendments prompted the party to adopt alternative strategies aimed at achieving a 'real' transformation aligned with their vision.

Hence, in justifying their judicial reform, which involved violations of both the constitution and EU law, they referred to alleged systemic flaws in the judiciary inherited from the post-communist era. According to the party, a comprehensive restructuring of the judiciary was imperative to eliminate perceived vestiges of the communist era and establish a legal framework in harmony with their vision of a just and sovereign Poland.

The former Prime Minister Morawiecki has repeatedly talked about "judges from the martial law era" who were supposed to sit in the Supreme Court. In July 2018, following EU criticism, he said in the European Parliament in Strasbourg: "Do you know that those judges from the time of martial law who issued disgraceful judgments are in the Supreme Court defended by you? (...) Post-communism has not been overcome in Poland; we fight it through the reform of the judiciary"<sup>117</sup>. Similarly, in an article in the "Washington Examiner" in December 2017, he wrote that as a result of the Round Table talks, post-communists occupied judicial positions in free Poland.<sup>118</sup>

President Andrzej Duda expressed comparable views. During a press conference in Washington in June 2019, he remarked: "Not too long ago, just a few years back, I was surprised to discover that there is a whole group of judges in the Polish Supreme Court who were members of the communist party (...) They even passed judgments during martial law, convicting people and applying communist legislation. (...) Essentially, all our efforts aimed at retiring these individuals, but unfortunately, despite the passage of 30 years, their influence,

<sup>114</sup> <https://www.politico.eu/article/poland-going-forth-with-a-new-republic/>.

<sup>115</sup> Józef Piłsudski (1867-1935), initially a member of the Socialist Party, later a military leader (appointed Marshal in 1922). He played a central role in the struggle for Poland's independence and in the construction of the Polish state, holding several top offices such as the Commander-in-Chief of the Armed Forces and the Head of State. On May 26, 1926, he led a military coup, establishing an authoritarian regime known as "Sanacja" (Sanation).

<sup>116</sup> Ł. RESZCZYŃSKI, *Piłsudczyk a Prawo i Sprawiedliwość W poszukiwaniu podstaw do analogii*, in *Historia i Polityka*, vol. 5(12), 2011, p. 105.

<sup>117</sup> [https://www.europarl.europa.eu/doceo/document/CRE-8-2018-07-04-ITM-004\\_PL.html](https://www.europarl.europa.eu/doceo/document/CRE-8-2018-07-04-ITM-004_PL.html).

<sup>118</sup> <https://www.washingtonexaminer.com/opinion/1075707/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary/>.

established after 1989 when they rebranded themselves as the elite of the new state, remains substantial”.<sup>119</sup>

In context of EU criticism, the idea of national constitutional identity became prominent and led to a return to a more dualist constitutional approach by PiS. The captured Polish Constitutional Tribunal rejected EU interference, legitimizing the judicial reforms by PiS as in line with Polish national constitutional identity: “With best will for a pro-[EU] interpretation of the Constitution, it is not possible to interpret the powers of EU, [...] to suspend Polish laws concerning the system and jurisdiction of Polish courts”<sup>120</sup>. The Minister of Foreign Affairs argued for the Tribunal that the reorganization of the judiciary relates to constitutional identity and is in light of Art. 4 TEU up to the free assessment of the Member States.<sup>121</sup> Simultaneously, the Court of Justice of the European Union was admonished to listen to a proud historic Poland by the Tribunal: “The content of Article 2 TEU, while deriving from the content of the constitutions of national states, draws heavily on the content and interpretation of Article 2 of the Constitution of the Republic of Poland as one of the largest Member States of the European Union with a legal culture that is centuries old”.<sup>122</sup>

The idea of addressing the (post-)communist past concerned not only the judiciary, but many other fields. For instance, PiS has consistently portrayed its media reforms as a response to what it perceives as post-communist legacies. The “new” reformed media, considered a part of the “good change”, are in competition with the “old”, pathologically partisan system seen as a post-communist arrangement.<sup>123</sup>

Furthermore, the PiS party aimed to identify all individuals responsible for the suffering of the Polish nation before 1989 and to punish them for their loyal stance towards the authorities of the People's Republic of Poland. In 2017, PiS enacted legislation amending the law on social security for public officials and their families, particularly those working in the fields of police, security, intelligence, and fire protection, among others.<sup>124</sup> This law aimed to decrease retirement pensions for individuals who had served, even for a single day, in selected formations and institutions of the communist state during the period of 1944-1990. By advocating for individual accountability, the party sought to rectify perceived mistakes made in the 1990s.<sup>125</sup>

Finally, the PiS's historical policy, aimed at preserving a positive Polish national image, led to a legal governance of history. A memory law aimed at “protecting the good name of the Polish State and the Polish Nation” was introduced in 2018, criminalizing false accusations of Polish complicity in Nazi crimes. However, the inclusion of ‘and other offences’ in the law potentially shifted responsibility away from Poland in the atrocities that did occur. This aspect was criticized for suppressing freedom of speech and hindering historical research.<sup>126</sup>

In summary, mythopoetic legitimization has played an important role in Poland under PiS political rule, fostering a nationalistic and conservative identity aligned with the party’s vision and the idea to eliminate perceived vestiges of the (post)communist era. This narrative has been utilized to justify judicial capture, challenge EU authority and consolidate and monopolize political power in media, as well as in the legal governance of historical discourse.

#### 4. Conclusion

Historical beliefs can influence political and legal decision-making. A dynamic and reciprocal relationship exists between the realms of law and history, whether engaged in consciously or subconsciously by legal actors, and irrespective of whether it is deemed preferable or not.

We are faced with the inevitability that law, especially the proclaimed universal values of democracy, the

<sup>119</sup><https://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/andrzej-duda-wspolna-konferencja-donald-trump.3948>.

<sup>120</sup> Ref. no. P 7/20|14 VII 2021, 14 July 2021, concluding remarks.

<sup>121</sup> Ref. no. K3/21|7 X 2021, 7 October 2021, para. 4.4.

<sup>122</sup> Ref. no. P 7/20|14 VII 2021, 14 July 2021, para. 6.10.

<sup>123</sup> S. MOCEK, *Władza i media. Dyskurs polityczny wokół mediów publicznych w Polsce* in *Zoon Politikon*, vol. 8, 2017, p. 48.

<sup>124</sup> Act of 16 december 2016 to amend the act on social security of the functionaries of the police, internal security agency, intelligence agency, Counterintelligence bureau, Central anti-corruption bureau, border Guards, Government pro-tection bureau, national fire service and prison service and their families, Journal of laws of 2016, item 2270 (Pol.).

<sup>125</sup> D. GAWIN, *Wspólnota przeszłości: polityka historyczna*, in *Rzeczpospolita*, 2006, vol. 235, p. A12-A14.

<sup>126</sup> N. KOSOPOV, *op. cit.*, pp. 273-74.

rule of law, and fundamental rights, is developed and applied from a particular historical societal point of view. Furthermore, historical discourse influences legal discourse in various ways. Constitutional systems incorporate historical cultural, symbolic, and imaginative dimensions, considered conducive to achieving the necessary level of societal identification. These constitutional imaginaries utilize legitimizing myths derived from historical narratives and collective memory, guiding, sustaining, and legitimizing structures and actions of contemporary political and legal institutions. Finally, the domain of history can increasingly fall under the purview of legal regulation.

As a result, collective memory and historical narratives incorporated into integrative myths have been employed to promote national democracy, liberal democracy, and European integration. Simultaneously, legal regulation of history has upheld a culture of collective memory safeguarding sacred considered human values by criminalizing denials of atrocities. The symbiotic influence of law and historical narrative is particularly evident when examining the post-communist transition in Hungary and Poland during the 1990s and its subsequent shift to populism and semi-authoritarianism from the early 2000s onwards.

In the latter case, there is a shift towards illiberal, increasingly identitarian national myths with subjugative and exclusionary functions, exploiting historical grievances and traumatic memory. These myths legitimize or influence national political and legal reforms, as seen in Poland, or even direct constitutional adjudication, as exemplified by the historical constitution in Hungary. This leads to a replacement or contestation of liberal constitutionalism and the introduction of competing legitimizing myths concerning national democracy and even the EU itself.

Examining the impact of historical beliefs on political and legal decision-making remains a relatively unexplored territory; however, legal and constitutional scholars cannot afford to overlook this trend. Perhaps, it is history that is too important to be left solely to historians and cannot be ignored by lawyers.<sup>127</sup>

### *Acknowledgement*

This research has been supported by FWO (Research Foundation - Flanders) Senior Research Grant G058120N (Trojan Horse Discourse: The Use and Abuse of Contemporary Constitutional Discourse for Fundamental Rights Protection).

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<sup>127</sup> M. MALSCH, *Law is Too Important to Leave to Lawyers*, Den Haag, 2021.

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