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# The Puzzle of Punitive Memory Laws:

## New Insights into the Origins and Scope of Punitive Memory Laws

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In recent years and decades, authoritarian regimes and illiberal democracies have passed and enforced punitive memory laws, intending to ban certain interpretations of past events or sheltering official versions of history against challenges. This comes with no surprise in countries whose governments undermine pluralism and assume the existence of a historical truth that is stable over time, invariable, and self-explanatory. But why do liberal democracies, committed to political pluralism and open debate, pass laws that penalize challenges to certain interpretations of the past and restrict freedom of speech? This article argues that liberal democracies may do so yielding to bottom-up pressure by courts and to regulate civil law disputes for which existing legislation and jurisprudence may not suffice. Based on case studies from Germany, France, Switzerland, Poland, Ukraine, Russia, Turkey, Rwanda, and the former Yugoslavia, we also found punitive memory laws in liberal democracies narrower and more precise than in nonliberal states.

**Keywords:** *memory laws; criminal law; liberal democracy; memory politics*

### Introduction

In recent years, many countries have passed and enacted memory laws, either to promote certain state-sponsored interpretations of past events or to ban statements

about the past with or without any criminal sanctions.<sup>1</sup> Uladzislaw Belavusau and Aleksandra Gliszczyńska-Grabias describe them, more broadly, as acts that enshrine state-approved interpretations of crucial historical events.<sup>2</sup> This definition leaves it open whether such memory laws are laws in the narrow sense of the term, imposing certain obligations and conferring certain rights on natural and legal personalities or whether they remain mere declarations by lawmakers. In this article, we will not deal with non-binding memory laws, parliamentary resolutions, and declarations but with the punitive strand of memory laws, those that impose criminal sanctions. They are mostly, but not solely, directed against Holocaust denial. Among such anti-denial laws, one can also find a new Polish law criminalizing the denial of atrocities committed by “Ukrainian collaborationist movements” against Polish citizens and Jews in some parts of Poland’s eastern territories during the end of World War II, Rwandan legislation against denying the existence of the 1994 genocide, and Polish, Russian, and Ukrainian laws whose aim is to prevent the reputation of the respective nation and/or its (state-declared) heroes from being sullied by criticism. The laws that protect the reputation of past heroes usually also contain to some extent (either in the legislation or the ensuing jurisprudence) statements about the past, for which the state’s monopoly of coercion is used to either ban or protect them.

All memory laws have something in common, no matter, whether they ban the denial of crimes or promote heroism. They assume certain past events to be more important for society than others, either because these events are regarded as a threat to important societal and political values that the government wants to uphold or because they are regarded as a kind of official truth that should be protected from any challenge. The mere existence of such laws is likely to create a body of legally enforced knowledge that the law shelters from the public’s scrutiny and removes from the realm of historical dispute. Judges and lawyers may try to change, amend, and challenge such a body of legally defined knowledge, while the law deprives historians, citizens, and journalists of the right to do so. From this perspective, every memory law, punitive or not, creates a tension between the principle of free speech, press freedom, and academic freedom on the one hand and the values the law seeks to protect. This tension mounts when liberal democracies, which cherish these three freedoms, enact memory laws that include punishment and are therefore likely to trigger chilling effects on the public, historians and journalists, running counter to liberal democracies’ commitment to pluralism and open debate. Nevertheless, liberal democracies also have passed and implemented punitive memory laws.

This tension, while sometimes present in the literature about memory laws, has so far never been explained through a comparative approach. Instead scholarship about punitive memory laws has focused on their content, legal significance, and the tension between national legislation and supranational jurisprudence, with the latter almost entirely focusing on the European Court of Human Rights.<sup>3</sup> This article takes a different approach: We neither investigate this tension nor punitive memory laws’ consequences for the three above-mentioned freedoms. Instead, we inquire into the reasons why liberal democracies allow this tension to arise.

We proceed in the following way. First, we present the puzzle that we intend to solve: Why do liberal democracies pass and enact punitive laws which run counter to their commitment to free speech, pluralism, and open debate?

To explain this apparent contradiction, we use nonliberal regimes that have enacted punitive memory laws as a control group and examine the reasons, circumstances, and scope of their laws. After scrutinizing the scope of punitive memory laws' application in liberal-democratic and nonliberal countries, we examine the context of the legislation process and establish whether these laws were imposed in a top-down process or constituted lawmakers' responses to bottom-up pressure by civil society, legal activism by the courts, or public opinion. Then we present our conclusion, which explains the difference between the enactment and application of punitive memory laws in liberal and nonliberal countries and how they differ in scope.

### **The Liberal-Democratic Puzzle**

There is a multitude of punitive memory laws—enacted by all kinds of political regimes—and they all have in common the aim of limiting the scope of interpretation of underlying events by imposing criminal sanctions on some of these interpretations. But there is no clear link between the significance of these underlying events and the penalization of some of its interpretations. In other words, in some countries, certain past events are criminalized because they are important owing to their scope and their significance for the country's politics of history, while other countries with similar politics do not resort to criminal law to protect public memory about past events of a comparable scope.

Israel protects the memory of the Holocaust by a punitive law that bans Holocaust denial,<sup>4</sup> while Bosnia-Herzegovina has so far refrained from doing the same regarding the genocide in Srebrenica. Rwanda bans genocide denial in the framework of a law severely punishing genocide ideology,<sup>5</sup> while Ukraine, which declared the Great Famine of the early 1930s “a genocide against the Ukrainian people” and its denial as “unlawful,” did not enact any criminal law provisions which would effectively penalize Holodomor denial.<sup>6</sup> In addition, Ukraine's law no. 314-VIII introduced the basis for legal prosecution of people who publicly reject the legality of Ukraine's fight for independence in the twentieth century.<sup>7</sup> This provision is vague and somehow similar to the provision in the law on Holodomor. They are nevertheless punitive because by declaring the incriminated conduct “unlawful,” both laws facilitate the imposition of civil law sanctions and disciplinary sanctions on a trespasser.<sup>8</sup> In contrast Ukraine's law no. 317-VIII, which criminalizes the production, distribution, and public use of the symbols of the communist and national-socialist totalitarian regimes introduces clear-cut criminal sanctions of up to ten years, if a representative of public authority commits them, if an organized group commits them repeatedly or uses mass media for the commission of these crimes. The law amended article 436-1 of Ukraine's criminal code and even foresaw the possibility of property confiscation.<sup>9</sup>

Croatian authorities have not enacted any punitive memory laws, but there have been several attempts to do so related to the Croatian War of Independence as well as the Second World War. Two parliamentary declarations nominally define the narrative related to the so-called Homeland War (*Domovinski rat*), the official Croatian name of the conflict lasting from 1991 to 1995 that resulted from Yugoslavia's dissolution. The Declaration on the Homeland War (enacted in 2000) and the Declaration on Operation Storm (enacted in 2006) define the conflict as an unwanted defensive war against Serbian aggression. During 2015, right-wing politicians attempted to make public officials' statements contrary to the parliamentary declarations punishable by a fine, but quickly abandoned this initiative.<sup>10</sup> In 2018, the government-appointed Commission for Dealing with the Past issued a "Document of Dialogue," which suggested regulations about the legality of symbols (both communist and fascist) from Croatia's past after Ustaša symbols had appeared next to the Jasenovac concentration camp.<sup>11</sup> Although the centre-right government had declared that it would include the Commission's recommendations to regulate the use of controversial symbols into the criminal code, it never did.<sup>12</sup>

It is impossible to explain these differences across countries by pointing to the underlying historical events and their significance for victims, survivors, or for the collective memory of the respective society. Neither memory laws' sanctions nor the probability of states enacting them are proportional to the significance, the number of victims, or the damage associated with the underlying past events with which these laws deal. While the Holocaust, whose memory is now protected by criminal law in most European countries, caused more victims than the genocide in Srebrenica, the memory of which does not enjoy the protection of criminal law, the Rwandan genocide, whose denial is punished, caused fewer victims than the famine in Ukraine, whose denial does not trigger sanctions under criminal law.

The key to explaining the emergence and development of punitive memory laws may therefore consist in the character of the state which passes and enacts them, rather than in the past events which these laws concern. Eva-Clarita Pettai's framework, which divides memory laws into anti-hate speech memory laws, post-communist memory laws, and anti-liberal memory laws, according to the justifications with which they were enacted and the goals they aim to achieve, provides some possible guidance that may lead to such an explanation. She claims punitive memory laws serve two main purposes: to "enforce a myth of national heroism/victimhood and defend perpetrators of state crimes against critical scrutiny" and to "protect 'the nation' from the influence of liberal ideas of pluralism and open historical discourse."<sup>13</sup> These are purposes that fit almost perfectly into the agenda of governments in nonliberal regimes, but they are hardly applicable to liberal, pluralist democracies. Eric Heinze has framed such provisions as "self-exculpatory" memory laws. He distinguishes such laws, which punish or discipline those who accuse states of having committed human rights abuses, from "self-inculpatory" memory laws, when speakers are punished for denying the state's criminal conduct, such as Holocaust denial laws.<sup>14</sup> "Self-exculpatory" laws are certainly a

domain of authoritarian countries, whose governments try to regulate the flow of opinions and arguments, restrict or ban interpretations which are not in line with official policies and pre-empt criticism of the regime and its predecessors in the past, which could undermine the incumbent government's legitimacy. It comes as no surprise that authoritarian governments use their leverage over lawmakers to impose self-exculpatory and punitive memory laws to shelter a state-sponsored and hardly ever pluralist collective memory from the challenges of open debate and academic scrutiny. However, some liberal democracies also use punishment to ban or reinforce certain statements and interpretations about past events. Therefore, the political system cannot explain why punitive memory laws come into being, but it might well be helpful for explaining how such punitive memory laws come into being and why they are shaped differently in liberal countries than in other political systems.

Liberal, pluralist democracies have increasingly resorted to non-punitive, declarative memory laws, especially regarding atrocities committed in other countries. The most prominent example is the massacre of Armenians during World War I in the late Ottoman Empire, which the parliaments of various countries have declared "genocide." The emergence of these non-punitive laws is sometimes explained by pointing to the wish to protect minority interests.<sup>15</sup> This argument often surfaces in debates and jurisprudence concerning Holocaust denial, and it is invoked by supporters of such laws. It often serves as a justification for passing such laws, but it does not explain why they are passed: In France, Switzerland, Germany, Greece, and many other countries that either protect the Holocaust or the massacres against Armenians from denial, there are many more (and often even bigger) vulnerable minorities than just Jewish and Armenian people, but despite that there have been no attempts so far to shelter Sudanese, Ukrainians, Rwandans, Burundians, or Roma from denial of massacres that affected their communities in the past.

The prevention of denial was no urgent matter in any of the countries whose lawmakers approved "Armenian genocide"—resolutions, unlike Holocaust denial, whose prevalence often triggered amendments to punitive memory laws, for example, in Germany and France. In other liberal democratic countries, the respective memory laws remained declarative.<sup>16</sup> They contributed to the emergence of Emanuela Fronza's hierarchy of commemorative events, but they did not in any way restrict freedom of speech or media pluralism and can therefore be regarded consistent with the value commitments of liberal, pluralist democracies.<sup>17</sup>

We may therefore conclude that liberal democracies sometimes enact punitive memory laws, justifying them with claims about minority protection. But sometimes, they do not do that and refrain from protecting all minorities for which banning denial of past atrocities would be meaningful. Many liberal democracies have never enacted such laws at all. The puzzle is: If not because of minority protection, why then did those liberal democracies with punitive memory laws pass them? The reason must lie elsewhere.

## Hybrid Systems' Punitive Memory Law Puzzle

Limiting the space of historical interpretation and open debate about the past is unsurprising for political systems whose rulers try to undermine pluralism and assume the existence of a historical truth that is stable over time, invariable, and self-explanatory. There is no tension between these systems' commitments and the use of punitive memory laws. The puzzle with such systems is a different one: Some of them do not resort at all to punitive memory laws. There is no such law in Hungary, a hybrid electoral system with barely competitive and increasingly authoritarian features. Before its transition in 2019, Sudan neither criminalized calling the atrocities in Darfur a genocide, nor did it impose a specific interpretation of these atrocities (though at various points in time, censors intervened against blaming the Al-Bashir government for the violence).<sup>18</sup>

It is of utmost importance for this article's argument to emphasize that it is not our intention to explain the variance in the emergence and content of punitive memory laws in countries that cannot be labelled liberal democracies. In this article, we do not try to explain why and how illiberal regimes, outright dictatorships, and authoritarian regimes (no matter whether competitive and/or electoral) differ in their approach to punitive memory laws; why some illiberal countries refrained from enacting such laws while others did; or why some illiberal countries' memory laws are more punitive than others'. This would require a different methodology and a different article structure; it would force us to focus on illiberal countries only and it would require us to elaborate a categorization of each country in terms of its political system, engulfing us in the highly controversial debate about the features that distinguish the different categories of political regimes and political systems from each other. In addition, it would contribute nothing to our argument, because hardly any of those illiberal countries' political systems that we put under scrutiny in this article was stable over time, not even during the period that is relevant for our argument. In 1951, when Turkey enacted its first punitive memory law, the country was about to democratize, shifting from a one-party system to political pluralism, while now the same law is often used to stifle political dissidence under increasingly authoritarian circumstances.<sup>19</sup> The situation in Ukraine is similar, but even more dynamic: The Ukrainian laws we analyze in this article were passed during the political transition from a hybrid regime with authoritarian features to a pluralist multiparty democracy but are now implemented under the conditions of a pluralist presidential democracy. According to Rwanda's constitution, the country is a democracy but its parliament is partly elected and partly co-opted, and the provisions shaping the government's composition are based more on principles of power sharing than on majoritarian democracy. Poland has become a hybrid regime, but it still differs a lot from the pluralist presidential democracy in Ukraine and the increasingly authoritarian presidential system in Russia. To avoid lengthy and controversial deliberations about the character of each of these countries, which would not affect our argument anyway, we

divided the cases we examine in this article into two categories: countries that are undoubtedly liberal democracies (Germany, Switzerland, and France) and illiberal countries, without defining their political systems in more detail.<sup>20</sup> We assume liberal democracies to be countries whose political systems are based on functional institutional checks and balances, the rule of law and an independent judiciary, with entrenched rules and institution for the protection of minorities and the constitutional order, where the interplay between these institutions efficiently safeguards political pluralism. In such countries, the probability of an alternation of power in elections is high because elections are competitive and difficult to forecast, while the cost of defection from the established institutional framework for potential spoilers is high.

### **How Punitive Memory Laws Work**

Emmanuela Fronza has proposed to distinguish memory laws according to their intended impact on public opinion: whether it was the lawmakers' objective to protect a consensus in society or to ban dissidence.<sup>21</sup> But memory laws hardly ever provide a clear interpretation of past events. They ban certain statements and interpretations of past events, but usually do not offer any precisely defined replacement. Banning denial of the Ukrainian Holodomor or the Rwandan genocide does not amount to the promotion of an official narrative which would define the constitutive elements of the Holodomor or the Rwandan genocide. In 2003, Rwandan lawmakers provided some guidance to citizens who were uncertain about the underlying genocide definition, when they replaced the notion of "Rwandan genocide" by "genocide against the Tutsi," making it clear the law would protect the emerging worldwide consensus according to which the Tutsi had been the genocide victims.<sup>22</sup> The Ukrainian provisions concerning the Great Famine do not contain such guidance, they only ban denial of the famine as a genocide, but do not promote a specific official narrative.<sup>23</sup>

Punitive memory laws are often fuzzy and give prosecutors and courts much leeway in the practical implementation of their legal provisions. This is most visible in the case of Turkey, where almost any label for Kemal Atatürk can lead to criminal sanctions, even calling him just "this man."<sup>24</sup> In a similar way, the Polish IPN-law in the form in which it remained in force after parliament had amended and the Constitutional Court had corrected it, leaves it to the fantasy of each citizen, which Ukrainian organization should be regarded as "collaborationist," and whether downplaying its atrocities against Polish citizens amounts to denial.<sup>25</sup> The law does not protect any coherent narrative, it does not even clearly circumscribe the interpretation that lawmakers intended to ban.<sup>26</sup>

It is therefore worth mentioning that punitive memory laws in liberal, pluralist democracies are usually very precise and narrower than in autocratic, illiberal democracies and hybrid regimes.<sup>27</sup> The EU's framework decision of 2008 against the



denial of international crimes and the Holocaust does not criminalize denial of any of these atrocities as such, but makes criminal sanctions contingent on the perpetrator's intentions.<sup>28</sup> It envisages punishment only if denial is rooted in the perpetrator's wish to "publicly condone, deny or grossly trivialise" the crimes enumerated in the framework decision, when such a conduct is directed against a minority and "likely to incite to violence or hatred against such a group." Such a conduct can (but need not) be sanctioned by a member state, if it is likely to "disturb public order" or if it is "threatening, abusive or insulting." Mere denial is therefore not enough to trigger sanctions; additional criteria must be met. The concept of "likely to disturb public order" is a clear hint at German legislation, which followed the same logic, long before the framework decision was even discussed. Denial of the Holocaust and other international crimes only led to criminal sanctions under German domestic law if the perpetrator intended to "disturb public peace" or "attack the constitutional order."<sup>29</sup> These additional conditions for punishment are the result of the jurisprudential meanders that triggered the underlying legislation and later its various amendments. The evolution of Germany's punitive memory law, whose core consists in Art. 130 of the Criminal Code (*Strafgesetzbuch*), also provides an explanation about why liberal-democratic states with strong institutional rule-of-law safeguards may pass legislation imposing restrictions on certain statements about the past and thus—at least to some extent—limit the scope of freedom of speech.

### **Making Punitive Memory Laws**

New legislation can enter into force because of a top-down approach, when a government that enjoys the necessary majority in parliament passes new laws no matter whether they are endorsed by the public or a president or dictator imposes new regulation based on decrees or orders that do not require parliamentary scrutiny. New legislation can also come into effect as a result of grassroots pressure from either citizens' initiatives, interest groups, legislative initiatives from members of parliament or judicial activism by judges and courts, when they trigger new legislation by issuing controversial verdicts contradicting predominant legal values or the intentions of lawmakers. For this article, we also regard legislation for which there was no visible majority in opinion polls when they were enacted, as imposed from above, while legislation supported by the public will be regarded as the result of grassroots pressure. We hypothesize that lawmakers would respond to public opinion by passing the respective legislation when the latter was driven by demand rather than supply.<sup>30</sup>

In almost every case, in which a new punitive memory law came into being, the respective legislation was the result of governments' top-down decision making.<sup>31</sup> In Turkey, the law protecting Atatürk's memory was the culmination of a personality cult, which had already started during his life. His statues and busts adorned

many public spaces, and his pictures hung in every government office. The tendency to glorify him was briefly interrupted after his death in 1938 when his successor İsmet İnönü replaced Atatürk's picture on banknotes and stamps with his own image. The politicians who defeated İsmet İnönü during the first free elections in 1950 reinstalled the Atatürk cult. In 1951, they made insult to Atatürk's memory a punishable offence that was very widely used in relation to historical statements and interpretations.<sup>32</sup> The law was imposed top-down although it reflected Atatürk's popularity. Turkish prosecutions involving attempts to criminalize certain statements about or interpretations of the past often rely on the Atatürk law as their legal basis, among others.

In Russia, attempts to shelter the myth of the Soviet Union's anti-fascist war from challenges by people equating fascism with communism (and Stalinism) have enjoyed relatively high support in opinion polls.<sup>33</sup> President Vladimir Putin clearly approved a demand-driven memory law when he signed the final version of the Yarovaya Act in May 2005, which punishes with "correctional labor" of up to one year or a fine any denial of crimes established by the judgment of the Nuremberg Tribunal and bans dissemination of knowingly false information about the Soviet Union's conduct during World War II, as well as "insults to symbols of Russia's military glory."<sup>34</sup> The new law had almost unanimous support in the Duma<sup>35</sup> and was, according to opinion polls, supported by 80 percent of respondents. It fit well into the government's official memory policy, but it is difficult to label it as merely supply-driven.<sup>36</sup>

In Ukraine, transitional legislation, which forbids sullyng the reputation of anti-Soviet war heroes, banned communist symbols and Holodomor denial, was accompanied by some but no majoritarian support in opinion polls, and at that time neither lustration nor de-communization laws (of which the punitive articles concerning history formed parts) were regarded as a priority by respondents.<sup>37</sup> The post-Maidan Verkhovna Rada adopted the transitional justice laws, five months after early elections in October 2014. Many activists who had become popular during the Euromaidan entered the new parliament and proposed a package of anti-communist laws. After the Russian intervention in Ukraine's east, the initiators of these laws regarded them as mechanisms that could support the state in designing and spreading unifying narratives during foreign aggression.<sup>38</sup> Similarly, the adoption of the Law condemning communism (no. 317-VIII) was expected to help, among other things, to "eliminate the threat for the sovereignty, territorial integrity and national security of Ukraine." One can explain the 2006 Holodomor law in a similar way. Then president Viktor Yushchenko strongly promoted it as a kind of "founding myth" of contemporary Ukraine. There is no evidence for these laws as demand-driven.

There are some ambiguous cases, though. The Polish IPN law in its initial, very punitive version (which entered into force and was then immediately amended because of external pressure), was the result of a clear-cut top-down process, during which the government of the ruling "Law and Justice" party used the vehicle of a

parliamentary initiative (of its own members of parliament) to speed up the legislative process and circumvent the requirement of broad consultations within the government and among the public. It restricted the opposition's speaking time, and president Andrzej Duda immediately signed the law (then sending it to the Constitutional Court for scrutiny).<sup>39</sup> This happened because the government apparently feared the bill would not enjoy enough public support, which turned out only partially correct. But the bill also enjoyed considerable support from opposition MPs when parliament voted on it and a large (though not majoritarian part) of respondents in opinion polls also supported the bill. Forty percent of respondents were in favor of punishment for statements sully the Polish state and nation (which the law foresaw) and an absolute majority of 53 percent urged the president to sign the bill, after parliament had approved it.<sup>40</sup>

There are no opinion polls available about the Rwandan public's attitude towards the law against "genocide ideology." In the new Rwandan Constitution of 2003, the preamble stated the Government's intentions to combat "genocide ideology." In addition, the "law against genocide ideology" was a response to a study that the Rwandan Senate commissioned and that revealed the entrenchment of genocide ideology in Rwandan society.<sup>41</sup> There never was any grassroots initiative calling for the enactment of such a law, and the law can clearly be identified as supply-driven, similar to Israel's Law on the Denial of the Holocaust (no. 5746-1986) of 1986, which includes sanctions of up to five years of imprisonment.

While Turkey forms one extreme point of top-down imposed punitive memory laws, Germany is on the opposite end of our model. When the need arose in the postwar Federal Republic of Germany (FRG) to include provisions protecting the Jewish minority in Germany from libel and discrimination, the country's criminal code only comprised an old provision forbidding "class struggle" and propaganda directed against the upper classes. The provision stemmed from the German Empire before World War I, when it had been frequently invoked to harass the social democratic movement. After 1949, it could also be used to harass communist parties, which was probably the main reason why it was never revoked. All attempts by opposition parties to abolish or expand its scope to other forms of incitement to hatred had failed, when Friedrich Nieland, a businessman from Hamburg, sent out leaflets and letters to politicians in which he blamed "international Jewry" for the war and denied the Holocaust.<sup>42</sup>

Members of the Jewish community in Hamburg filed a lawsuit under the 'insult' article of the Criminal Code (Art. 185), but the court of first instance found that Jews from Hamburg were not entitled to sue, because the pamphlet had targeted "international Jewry," and the plaintiff had not proven to be one of its members. The verdict was upheld in the second instance, making it clear that, based on existing legislation, the courts would struggle to adjudicate such cases in a way that the public and the political establishment could endorse.<sup>43</sup> The Nieland case triggered an amendment, which the Bundestag unanimously approved in May 1960, replacing the formula criminalizing incitement to violence against "classes" by a broader clause, forbidding calls for hatred and violence against "parts of the population." The judges

forbade “assaulting the human dignity of others” if such assaults were connected to incitement of hate, violence, offense, to utterances of disdain or slander. Punishment could then stretch from three months up to five years, and the possibility of imposing a fee was abolished. The new article had become more individualistic. Where the old article 130 had only protected religious groups (but Jews had been excluded from this privilege), the new version protected everybody’s “human dignity.”<sup>44</sup> Henceforth, Jewish citizens were entitled to sue in cases like Nieland without the need to prove their identity or group affiliation. Later, article 130 was amended several times to adapt it to new developments (like the emergence of the Internet) and other shortcomings in jurisprudence.<sup>45</sup>

Because of a lack of opinion polls about the different amendments of Art. 130, it is impossible to trace whether these changes were demand- or supply-driven, but the history of these amendments makes it clear that legislation emerged because of grassroots pressure triggered by the courts’ jurisprudence. Existing legislation in the 1950s had made it impossible for courts to solve civil law conflicts in a way that would satisfy the public and the political establishment, and the Bundestag had amended Art. 130 of the criminal code to relieve victims of transgressions like the one Nieland had committed from the need to initiate cumbersome civil lawsuits, which required them to prove their Jewishness.<sup>46</sup> The FRG’s punitive memory law came into being because of the courts’ failure to solve civil lawsuits in a satisfactory way.

The enactment of the French Gayssot Act followed the same pattern.<sup>47</sup> In 1978, Robert Faurisson, a professor at the University of Lyon, denied the existence of the gas chambers in an article in *Le Monde*. Three years later, Faurisson was sentenced to a symbolic fee by a court that had refused to investigate the veracity of Faurisson’s claims and to adjudicate whether Holocaust denial was a crime. He had been taken to court by several anti-racist organizations that had filed civil complaints against him.<sup>48</sup>

After lengthy discussions in and outside parliament, the 1972 Plevin Act, which had criminalized racial, ethnic, religious, and national discrimination, was amended and a provision added that made punishable denial of international crimes (as adjudicated by the Nuremberg Tribunal) and of crimes committed by perpetrators sentenced by French and international courts.<sup>49</sup> Here, too, criminal law had responded to the courts’ failures to solve a civil litigation. In Switzerland, a provision like the German one entered into force in 1994 after an even more grassroots-driven process, a popular referendum. The ensuing amendment of the criminal code did not criminalize mere denial, but required proof of a denier’s abusive intention or of his wish to denigrate the victims.<sup>50</sup>

## Conclusion

At first glance, there seems to be a tension between liberal-democratic and pluralist democracies, which cherish freedom of speech, academic freedom, and press freedom but adopt punitive laws that restrict the scope of what can be said and

published about the past and interfere with the realm of historians and, hence, the freedom of academic research. But a closer look at the way liberal democracies, illiberal democracies, and autocratic governments shape and implement such punitive memory reveals differences that diminish these tensions. In liberal democracies, punitive memory laws enter into force as a result of bottom-up dynamics that are often triggered by the courts' failure to solve civil lawsuits in a way that would satisfy the wider public and the political establishment of the respective country. We do not claim here that all punitive memory laws emerged as a result of such grassroots pressure (because we did not examine all countries that have enacted such laws). But we do claim that nonliberal regimes' punitive memory laws can be demand- or supply-driven, while liberal democracies only yield to grassroots pressure, either from public opinion or court jurisprudence. Jurisprudence leading to punitive memory law legislation seems to be a feature of liberal democracies only. In all the nonliberal-democratic countries which we examined, it was either the government that initiated the adoption of such laws or they were the product of bottom-up pressure from the public or interest groups. This, however, is a preliminary finding from our comparative analysis of the countries which we could scrutinize in this article. Future research, involving additional countries (and punitive memory laws now in the making) may fine-tune our conclusion.

Our research also revealed a considerable variance in punitive memory laws' scope and the severity of the sanctions among nonliberal countries. In addition, some have never enacted such laws. It remains open whether the character of the political regime explains the variety of memory law landscapes across nonliberal regimes or whether the reason for these cross-country differences stems from other factors. The question is intriguing but beyond the scope of this article.

Our claim is not that all nonliberal governments impose such laws against the will of their citizens' majority, but that those who introduce such laws do so regardless of whether such laws enjoy public support or not and regardless of whether the public supports precisely their bill or just any possible punitive memory law, as in Poland, where the public supported punishment for sullyng the nation but did not support the bill the government presented. In some of the countries examined in this article, governments in nonliberal democracies imposed punitive memory laws onto a reluctant or indifferent citizenry (Ukraine); in others, they did so with considerable public support (Poland and Russia).<sup>51</sup>

In liberal democratic countries, memory laws should therefore not only be regarded as the result of a rise in nationalist tendencies, but they can also be an attempt to solve civil lawsuits that the existing law does not regulate in a legitimate way.<sup>52</sup>

There is yet another divide concerning the scope of such legislation between liberal democratic and nonliberal regimes. Germany, Switzerland, and France do not criminalize mere denial of the Holocaust and international crimes, if such denial is not part of a broader radical or extremist agenda with otherwise criminal (offense to

victims) or political (threat to public peace and the constitution, or racism) objectives. The same is true for the EU framework decision of 2008, which includes similar preconditions for punishment.

When nonliberal regimes pass punitive memory laws, they rely on much broader concepts of criminal denial, which trigger excessive and disproportional punishment by courts. While French, German, and Swiss courts punished prominent perpetrators with clear political agendas, Ukrainian courts used the newly established legislation to punish mainly low-ranking perpetrators without any political agenda, in a similar way to Turkish courts.<sup>53</sup>

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## Notes

1. N. Kopolov, *Memory Laws, Memory Wars* (London: Cambridge University Press, 2018), 112; M. Bucholc, “Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015,” *Hague Journal on the Rule of Law* (2008): 8.

2. U. Belavusau and A. Gliszczyńska-Grabias, “Introduction: Memory Laws: Mapping a new Subject in Comparative Law and Transitional Justice,” in *Law and Memory*, ed. U. Belavusau and A. Gliszczyńska-Grabias (London: Cambridge University Press, 2017): 13–24.

3. There are only a few articles about the African Court of Human and People’s Right’s jurisprudence about *Ingabire v. Rwanda*; see J. M. Allen and G. H. Norris, “Is Genocide Different—Dealing with Hate Speech in a Post-Genocide Society,” *Journal of International Law and International Relations* 7 (2011): 146–75; H. Mbori, “Ingabire Victoire Umuhoza v. The Republic of Rwanda,” *American Journal of International Law* 112, no. 4 (2018): 713–19.

4. We list all punitive memory laws, their original names, translation into English, and some relevant details in annex 1. The Israeli law is position 20 in this annex.

5. The Rwandan legislation is listed in positions 3–10 of annex 1.

6. Law of Ukraine No. 376-V on the 1932–1933 Holodomor in Ukraine, as submitted to the United Nations. See: Letter dated 21 September 2007 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, [https://digitallibrary.un.org/record/609010/files/A\\_62\\_369-EN.pdf](https://digitallibrary.un.org/record/609010/files/A_62_369-EN.pdf). The Ukrainian memory laws are listed in the positions 11–15 of annex 1.

7. Position 12 of annex 1.

8. The precise wording of Art. 2 is the following: “The public denial of the Holodomor of 1932–1933 in Ukraine is recognized as an insult to the memory of millions of victims of the Holodomor, a humiliation of the dignity of the Ukrainian people and is unlawful.” It must be kept in mind that declaring conduct “unlawful” without attaching criminal sanctions to it may still expose transgressors to punishment, for example, in the context of a libel lawsuit or because of disciplinary measures. This link also existed in the (now erased) provisions of the Polish IPN Law, which declared certain forms of denial (if carried out in an artistic or scientific context) unlawful, but not punishable. Offenders were sheltered from prosecution but not from disciplinary action nor from civil lawsuits, which the law strongly encouraged, allowing private organizations to replace the state in litigation.

9. Position 15 of annex 1.

10. For example, the suggestion that the war had been a civil war instead of an act of Serbian aggression would have been punishable.

11. Dokument dijaloza, online at <https://vlada.gov.hr/UserDocsImages/Vijesti/2018/02%20velja%C4%8Da/28%20velja%C4%8De/Dokument%20dijaloza.pdf>. (accessed 17 December 2019).

12. In 2019, Austria passed a law banning two Ustaša symbols before the annual commemoration at the town of Bleiburg, but for the time being Croatia has rejected any efforts to ban these symbols.

13. E.-C. Pettai, “Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia,” in *Memory Laws: Criminalizing Historical Narratives*, ed. E. Barkan and A. Lang (London: Routledge, forthcoming, 2020): 5–6.

14. E. Heinze, “Should Governments Butt Out of History?,” <https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/> (accessed 3 December 2019).

15. Y. Gutman, “Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?,” *Law & Society Review* 50, no. 3 (2016): 575–607; E.-C. Pettai, “Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia,” in Barkan and Lang, *Memory Laws*, 5–6; Council of Europe, Commission européenne pour la démocratie par le droit, *La protection des minorités* (Strasbourg: les éditions du Conseil de l’Europe 1994).

16. In this article, we create a dichotomy between liberal-democratic countries that have passed punitive memory laws (France, Germany, and Switzerland) and countries that have done so but that we do not regard as liberal democracies. We do not intend to define these countries’ political regimes precisely, because it is not our objective to explain the emergence of punitive memory laws among nonliberal regimes, which would also exceed the scope of this article and require a different argument. Therefore, the question of whether Rwanda, Turkey, Ukraine, and Russia are hybrid regimes, illiberal democracies, or authoritarian regimes would exceed the scope of our argument.

17. E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (Dordrecht: Springer, 2018) (kindle edition).

18. K. Bachmann and M. A. M. Ahmet, “Frames from Sudanese Media Concerning the Conflict in Darfur,” in *International Criminal Tribunals as Actors of Domestic Change: The Impact on Media Coverage*, vol. 2, ed. K. Bachmann and G. Kemp, I. Ristić (Berlin: Peter Lang, 2019), 71–124.

19. Position 1 in annex 1.

20. This seems also justified because the Freedom House Index has counted these three countries as free without much variance over time, while the others are ranked as either “partly free” or “not free” (sometimes with shifting ranking positions).

21. Fronza, *Memory and Punishment* (kindle edition), loc. 88.

22. Position 6 in annex 1.

23. The Law of 2018 (see position 10 in annex 1) criminalizes diverging interpretations of the causes and events as such diversions fall under the crime of genocide denial. Describing a genocide as another crime such as “mass violence” constitutes the crime punished under the law of genocide ideology (see position 9 in annex 1) and related crimes of 2018. In this context, calling the genocide of 1994 mass violence is a crime.

24. B. Karataş, “Atatürk’e ‘Bu adam’ sözüne 15 ay hapis,” *Hurriyet*, 28 January 2008, <http://www.hurriyet.com.tr/gundem/ataturke-bu-adam-sozune-15-ay-hapis-8117901> (accessed 28 November 2019); for an English press article on the case, see S. Tavernise, “Turkey to Alter Speech Law,” 25 January 2008, <https://www.nytimes.com/2008/01/25/world/europe/25turkey.html> (accessed 28 November 2019).

25. The Law on the Institute of National Remembrance (Instytut Pamięci Narodowej, IPN), which has become famous in international media under the label “Polish Holocaust Law,” originally threatened people falsely blaming the Polish state or nation because of crimes that others had committed with fees and prison sentences. It was revoked after strong pressure from the Israeli and US governments and the Constitutional Court, which feared it could be used against Holocaust survivors talking about Polish anti-Semitism. The Constitutional Court quashed the part concerning sanctions for the denial of crimes against Ukrainians because of its lack of precision. However, the “Ukrainian” article remained partly in force and now bans (without any exception for arts and science, which the revoked articles had included) denial of

genocide, which Ukrainian “collaborationist movements” had allegedly committed in Wolhynia against “citizens of the Second Republic” and of the massacres of Jews there. The Polish IPN Law can be found in position 18 in annex 1.

26. For the scope of the Polish IPN Law’s provision, see K. Bachmann, “Protecting the Nation’s Good Name. The Controversies about the Polish ‘Holocaust Law’ of 2018,” in *Criminalizing History: Legal Restrictions on Statements and Interpretations of the Past in Germany, Poland, Rwanda, Turkey and Ukraine*, ed. K. Bachmann and C. Garuka (Berlin: Peter Lang, 2020), 46–79.

27. For the purpose of this article, the notion of “hybrid regime” is used as an umbrella for all kinds of political systems that fall outside the notion of “liberal democracy” but are not openly autocratic. In order to be regarded as a “hybrid regime,” a country needs to have a form of governance that either does not include institutional checks and balances that guarantee the rule of law and minority protection or does include such provisions but renders them partly or entirely dysfunctional by circumventing them, for example, by shifting decision making away from official institutions to nontransparent bodies and decision-making mechanisms. Because the definition of “hybrid regime” encompasses such different regimes as those of Hungary and Poland on the one hand and Venezuela and Belorussia, on the other, we also refer to the concept of illiberal democracy (with unlimited majoritarian rule) as a subcategory of “hybrid regime.”

28. P. Lobba, “Punishing Denialism beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends,” *New Journal of European Criminal Law* 5, no. 1 (2014): 58–77.

29. K. Bachmann, “Protecting the State and Its Historical Identity. The Development of German Legislation and Jurisprudence Criminalizing the Denial of Past Atrocities,” in Bachmann and Garuka, *Criminalizing History*, 19–45.

30. The concept of “demand- and supply-driven” legislation is derived from transitional justice approaches that distinguish between transitional legislation with and without public support. See M. Nalepa, *Skeletons in the Closet: Transitional Justice in Post-communist Europe* (Cambridge: Cambridge University Press, 2010), 97–161.

31. The precise titles of the respective laws, their translations, and the development of the legislative process can be found in annex 1 to this article.

32. M. Şükrü Hanioglu, *Atatürk, An Intellectual Biography* (Princeton, NJ: Princeton University Press, 2011): 185–86, 197. In 2005, the Turkish criminal code was amended and a new provision protecting the reputation of the Turkish nation and the state was introduced. The new provision’s basis was an old article from the 1926 criminal code. It was hardly ever used in the context of historical statements or interpretations of the past. Turkish prosecutors and judges also applied Art. 301 in cases involving history.

33. Kopolov, “memory laws,” 269–70.

34. *Ibid.*, 292.

35. Kopolov, “memory laws,” 292. There was one dissenting vote.

36. Russian Public Opinion Research Centre, report March 2014 r., [https://wciom.ru/zh/print\\_q.php?s\\_id=1056&q\\_id=73012&date=27.04.2014](https://wciom.ru/zh/print_q.php?s_id=1056&q_id=73012&date=27.04.2014) (accessed 4 December 2019), for the background of the law (and its links with the Kremlin’s campaign to frame regime change in Ukraine as a fascist takeover), see also I. Kurilla, “Zakon o ‘reabilitatsij nacizma’: Yego smysl y ozhidajemyje posledstvija” (policy paper 331, 8/2014), <https://www.ponarseurasia.org/node/7240> (accessed 4 January 2020); and the Lavada Centre’s analysis [no author]: “podmjena ponjatij. Patriotizm v Rossii,” <https://www.levada.ru/2014/05/27/podmena-ponyatij-patriotizm-v-rossii/> (accessed 4 January 2020).

37. Democratic Initiatives Foundations, “Shcho ob’yednuje ta roz’yednuje ukrajintiv,” <http://dif.org.ua/article/shcho-obednue-ta-rozednue-ukrajintiv> (accessed 30 March 2018).

38. According to the explanatory note accompanying the law on fighters for independence (no. 314-VIII), the lack of regulation of the legal status of such persons resulted in the emergence of “legal nihilism, . . . and in contemporary period of countering the external armed aggression—of clear separatist calls in the society.”

39. The Polish president has several avenues to request the Constitutional Court to scrutinize laws. The one he used in this case did not prevent the law from entering into force before the Constitutional Court’s verdict.



40. B. Roguska, "Wokół ustawy o IPN," Komunikat z badań CBOS 24/2018, [https://www.cbos.pl/SPISKOM.POL/2018/K\\_024\\_18.PDF](https://www.cbos.pl/SPISKOM.POL/2018/K_024_18.PDF) (accessed 14 January 2020).

41. Rwandan Senate: *Genocide Ideology and Strategies for Its Eradication* (Kigali, 2006) (copy on file with the author); see also P. Sullo, "Lois Mémorielles in Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny," *Leiden Journal of International Law* 27, no. 2 (2014): 419–45.

42. E. Stein, "History against Free Speech: The New German Law against the 'Auschwitz Lies,'" *Michigan Law Review* 85, no. 2 (1986): 282.

43. Stein, "History against Free Speech," 283.

44. Position 16 in annex 1.

45. J. Neander, "Mit dem Strafrecht gegen die 'Auschwitz-Lüge': Ein halbes Jahrhundert § 130 Strafgesetzbuch, Volksverhetzung," *theologie geschichte 1* (2011): 287–97, <http://universaar.uni-saarland.de/journals/index.php/tg/article/viewArticle/136> (accessed 7 January 2020); K. Gunther, "The Denial of the Holocaust: Employing Criminal law to Combat Anti-Semitism in Germany," *Tel Aviv University Studies in Law* 15 (2000): 51–66.

46. At that time, Art. 185 StGB was formally part of the criminal code, but its procedural aspect turned the underlying conflict into one between individuals. According to Art. 194 (1) StGB (in the contemporary version), Art. 185 could only be triggered by a request from the victim, not without request and not against the plaintiff's will. If there was no person who could request criminal prosecution under Art. 185 StGB, the offender could not be punished.

47. See position 22 in annex 1.

48. V. Igounet, *Robert Faurisson: portrait d'un négationniste* (Paris: Denoël, 2012).

49. Koposov, "Memory Laws," 83–85.

50. E. Fronza, "The Punishment of Negationism: The Difficult Dialogue between law and Memory," *Vermont Law Review* 30 (2005): 609; Council of Europe, Commission européenne pour la démocratie par le droit, *La protection des minorités* (Strasbourg: les éditions du Conseil de l'Europe 1994), 301. The Swiss law is in position 19 of annex 1.

51. See annex 2 to this article.

52. The nationalism argument was emphasized by G. Soroka and F. Krawatzek, "Nationalism, Democracy, and Memory Laws," *Journal of Democracy* 30, no. 2 (2019): 157–71. In our article, we do not address both authors' (intriguing and inspiring) claim about the transnational influence of memory laws, which resonates with the debate in international relations theory and human rights about Sikkink's "justice cascade" and transnational human rights proliferation. See K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World* (New York: Norton, 2011).

53. For data on law enforcement, prosecution, and adjudication of punitive law provisions in Germany, Poland, Turkey, Ukraine, and Rwanda, see Bachmann and Garuka, *Criminalizing History*.

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