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Collective Memories, Institutions and Law

We speak so much of memory because there is so little of it left⁴.

Pierre Nora

1. The aim of the paper

For several decades, sociologists, culture researchers, literary scholars and historians have been dedicating more and more attention to the phenomenon of collective memory. In recent years lawyers have joined the group. It results from the fact that the expectations in relation to the legal system regarding assessment of the past are more and more frequent, and the past itself becomes a subject of legal regulations. We observe today increased presence and significance of ethnic and political communities in the public space⁵. And, as each of these communities has its own vision of the past, conflicts between collective memories occur. It seems that the space available for presentation of one's past is limited and not each community will have an opportunity to do so or to win recognition on such grounds. When such conflicts appear, the public opinion turns to an arbiter who will be able to resolve the problem and it is the legal system that plays this role. Thanks to sanctioning a determined vision of the past in law, the past becomes petrified and therefore is less susceptible to other interpretations. In societies of late modernity, referring to collective memory becomes an important factor of legitimization of authority⁶. The past plays a role of a reservoir of values, ideas, habits and schemes to which political power refers more and more willingly.

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⁴ P. Nora, *Between Memory and History: Les Lieux de Mémoire*, "Representations" 1989/26, p. 7.

⁵ D.P. Johnson, *Contemporary Sociological Theory. An Integrated Multi-Level Approach*, Lubbock 2008, pp. 543-566.

⁶ Z. Bauman, *Retrotopia*, Cambridge 2017.

This paper aims at explaining the concepts of collective memory, institutions, politics, law and interconnections between them. Through a short explanation of a network of mutual relations between these notions, we want to show how law and collective memories interact and how the relation between them is formed. At the same time, we see three modes of relations between collective memories and law, which we may describe accordingly as: 1) past before the law, 2) memory laws and 3) law as collective memory.

2. Introduction: individual and collective memory

Can law have a memory, and if so, in what form? To attempt to answer this question we have to first consider the relations between individual memory and collective memory. A dispute whether collective subjects (communities, nations) function and develop in the same manner as individuals is one of the most controversial sociological, psychological and philosophical discussions. Sometimes this discussion is captured as a dispute between reductionism and emergentism⁷ or between monist and dualist position. The crucial question for both positions is whether the cognitive abilities may be attributed to individuals only or to social groups, communities as well. We understand cognitive abilities as mental abilities and processes such as perception, understanding or remembering. In this dispute, the essential answer is not the one regarding the forms of existence of a community, nation or society, but the one describing the ways of functioning, perception of reality and change by collective subjects. If we say that the society “demands obedience” or “aims at stabilization” then do the verbs “demands” and “aims” regard an ability of a collective subject or are these only mental shortcuts or metonymies? We are particularly interested in the answer to the question: to what extent can a society or a social group act, think or remember?

The dualistic position recognizes the uniformity of individuals and social structures. In this view, a society does not possess such cognitive abilities as are attributable to an individual, and talking about “acting” or “remembering” by groups is at most a mental shortcut. Only individuals interact, act and remember. Collective memory is viewed here as memory shared by a majority of individuals within a given group. In such a case we would talk not about memory of law but memory of the members of a given legal culture. However, what makes individuals remember? The consequently dualistic position would indicate other individuals as transmitters of memory. The dualistic position omits mediating role of institutions such as schools or state authorities. Therefore, one weakness of this position is that it does not take into consideration a social “division of labour” in the field of memory. Memories are also formed by the influence of institutions (schools, museums) and by artefacts (street names, monuments), and these actions cannot be reduced to actions of separate individuals. Phenomena such as an arising “memory boom”⁸ and the emergence of the whole memory industry⁹ and historical policies¹⁰ indicate that institutions play an increasingly important role in shaping what individuals remember.

⁷ A. Giza, *Czy społeczeństwu można przypisać podmiotowość?* [Eng. *Can Society Be a Subject?*], “Zarządzanie Publiczne” 2014/3, pp. 72–85.

⁸ A. Huyssen, *Twilight Memories. Marking Time in a Culture of Amnesia*, London 1995.

⁹ Ch.S. Meier, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, “History and Memory” 1993/2, pp. 136–152.

¹⁰ N. Maurantonio, *The Politics of Memory*, in: K. Kenski, K.H. Jamieson (eds.), *The Oxford Handbook of Political Communication*, Oxford 2017, online edition available at: <https://tinyurl.com/y2bqro2k>, accessed on: 19 May 2020.

Therefore, from the epistemological point of view it is more beneficial to assume the monist position, according to which a society has cognitive attributes and that it e.g. may remember something. A society is connected with an individual by a relation of dialogue, and the institutions mediate this process. Mary Douglas indicates that reconciling a dissonance between an individual and a society occurs at the level of actions. Each action, according to this anthropologist, has two aspects: the cognitive aspect, expressed in an individual's aim of domesticating and ensuring predictability of his/her surroundings and of minimizing risks, and the transactional aspect, expressed in the need to aim at maximizing a profit, at achieving one's goal by undertaking action and therefore by a tendency to take risks¹¹. Social institutions help to reconcile these two aspects because that they create an individual's environment. As we know from the evolution theory, environment remains in constant interaction with an individual. Thanks to this interaction an individual may at all come into existence. Thus, environment creates general frames for actions of an individual, who in turn may affect (to a certain, limited extent) the environment itself. A dialectic relation occurs between the environment (institutions) and an individual, as they mutually affect each other. Institutions are at the same time socially "stronger" as they exercise control, among others, over the knowledge base and moral standards of an individual. Douglas shows how this occurs:

Any institution then [when it is going to keep its shape] starts to control the memory of its members; it causes them to forget experiences incompatible with its righteous image, and it brings to their minds events which sustain the view of nature that is complementary to itself. It provides the categories of their thought, sets the terms for self-knowledge, and fixes identities¹².

So, institutions manage individuals' memory, "delete" experience contrary to its logic, and establish instead certain general categories of memory or, as will be shown below, social frameworks of memory. Therefore, in the approach suggested by Douglas, at the moment of crisis – deficit of knowledge or a conflict between standards – institutions make crucial decisions. Douglas uses here the social theory of Emil Durkheim and states that he "had another way of thinking about the conflict between individual and society. He transferred it to warring elements within the person. For him the initial error is to deny the social origins of individual thought"¹³.

Recognition of a significant role of social process in shaping an individual's identity is already commonly accepted in cognitive psychology¹⁴. If institutions influence individuals and may have cognitive abilities, then institutional memory co-shapes individual memory.

3. From social frames to politics of memory

The issue of dependency of individual memory on its social origins was developed by Durkheim's follower – Maurice Halbwachs – who developed the concept of social frameworks of memory¹⁵. Even the most intimate reminiscences of an individual exist

¹¹ M. Douglas, *How Institutions Think*, New York 1986, p. 19.

¹² M. Douglas, *How Institutions...*, p. 112.

¹³ M. Douglas, *How Institutions...*, p. 10.

¹⁴ P. DiMaggio, *Culture and Cognition*, "Annual Review of Sociology" 1997/1, pp. 263–287.

¹⁵ M. Halbwachs, *On Collective Memory*, Chicago 1992.

thanks to collectively shared notions and topics, which create the infrastructure of individual memory. These notions and topics form conventions under which remembering may occur. Such an approach makes it possible to bring into light the institutionally shaped elements, which co-create the social frameworks of memory. Moreover, selecting what we will remember or forget depends on social conventions, which indicate what is and what is not worth keeping in memory. The act of remembering occurs under social frameworks, and individual reminiscence is presented by means of language, which is a social (and not individually created) convention and therefore constitutes another element co-creating the frameworks of memory.

Halbwachs, just as Durkheim, believes that a society is based on coercion understood as external social facts, by means of which it is imposed on individuals how they should think, act or feel. Memory is constructed in the present moment, so the image of the past may look different from “what really happened”. Idealization, which is one of the basic dispositions of memory, consists in removing elements of coercion from the image of the past. Frequently it has an educational dimension. For example, stories about the past are constructed in a way in which characters meet tragic fate always as a consequence of their choices, and not circumstances in which they happened to find themselves. Such stories contain warnings against repeating such choices and consolidate defined values. Thus, the past gets neutralized and ensures a sense of continuity. Halbwachs, using Durkheim’s thesis of social coercion, indicated that there was no possibility of researching psychology (so neither memory) of an individual as an isolated, singular being, but that it always should be conducted taking into consideration social frameworks in which an individual functions. These include, among others, language, tradition, family model, religion, institutions, and, as we will try to show, law.

However, what differentiates modern societies from the ones described by the French sociologist is the fact that at present social frameworks of memory are becoming more and more visible. For the public opinion it is no surprise that museums, archives, monuments, symbols and names of public places are objects of cross- and intra-state disputes.

Paul Connerton reaches similar conclusions as Douglas and Halbwachs, although starting from a different theoretical perspective. Connerton points out to the problem of embodiment of social frameworks of memory, indicating their direct influence on an individual body. In his opinion collective memory is shaped by corporal practices of commemoration:

If there is such thing as social memory, I shall argue, we are likely to find in a commemorative, ceremonies; but commemorative ceremonies prove to be commemorative only in so far as they performative; performativity cannot be thought without a concept of a habit; and habits cannot be thought without a notion of bodily automatism¹⁶.

In order for it to come into being and to be maintained, collective memory demands activity. Connerton’s view emphasises the problem of relation between collective memory and power. If memory has a practical and material dimension, it means that it is possible to try to influence it and control it. Practices of commemorating have their contents (event or character) and form (march, placing flowers, ceremony, etc.). Both contents and form may not be a result of a natural organic and spontaneous social

¹⁶ P. Connerton, *How Societies Remember*, Cambridge 2003, pp. 4–5.

process, but they may be imposed externally by a political power. Political history, from the French Revolution to communism in Central and Eastern Europe, provides many examples of attempts at imposing such collective practices, frequently after transformations and revolutions. What unites these various attempts is law. Each political attempt at introducing and petrifying collective memory resorts to a widespread use of legal forms, which stems from the fact that law ensures ritualization and repeatability of human behaviours. Also, by linking present political changes with events from the past, a new regime obtains a legitimizing argument resulting from *longue durée*. Thus, new forms of power present themselves as immanent for a given community.

The process of “transformation” of collective memory into legal norms and rules is commonly described as juridification or institutionalization¹⁷. Juridification means extracting a certain set of social practices from the “living society” and regulating them by objectivized legal norms. As observed by Gunther Teubner, juridification is characterized by ambivalence¹⁸. On the one hand, formalization of law limits the options for actions of social actors. What used to be spontaneous, now is subjected to regulation and may be evaluated as compliant/non-compliant with law. On the other hand, such formalization gives social actors ready-made options for action. The formalism of modern law and the related idea of equality mean that juridification gives clear, formal powers to groups which before had been deprived of them. Social actors gain the opportunity to make claims – they may formulate their demands through a legal system.

We may now distinguish three approaches to the relation between law and collective memories. These are, at the same time, the ways in which law institutionalises collective memory and in which collective memory and law can be examined. The first view consists in evaluating the past in a court trial. The second one is creating legal rules which promote or demand commemoration of a specific vision of the past. The third approach perceives law itself as institutionalized collective memory.

4. Past before the law

The past may appear directly as a subject of a court trial. On the grounds of one case, a whole historical period is evaluated. Most frequently it relates to criminal cases. The best-known example of such a proceeding is the trial of Adolf Eichmann, in which an evaluation of individual behaviour of one Nazi officer became the basis for evaluation of the whole system of the Third Reich¹⁹. It was not only Eichmann who stood before the court in 1961, but the whole Nazi past, which in the eyes of the global public opinion was embodied by one man²⁰. Sometimes it is not only a man embodying the past who is subject to evaluation, but also his/her memories. In 2002 the French general Paul Aussaresses, the veteran of the Algerian War, was sentenced not for applying torture (he was freed of the charge by the amnesty soon after the end of the conflict), but for

¹⁷ J.J. Savelsberg, R.D. King, *Law and Collective Memory*, “Annual Review of Law and Social Science” 2007/3, p. 190.

¹⁸ G. Teubner, *Juridification. Concepts, Aspects, Limits, Solutions*, in: G. Teubner (ed.), *Juridification of Social Spheres*, Berlin 1987, pp. 3–48.

¹⁹ An excellent and still discussed relation of this trial is available in: H. Arendt, *Eichmann in Jerusalem. A Report of the Banality of Evil*, New York 2006.

²⁰ G. Fraser, *Why Adolf Eichmann’s final message remains so profoundly unsettling*, “The Guardian”, 28 January 2016, <https://tinyurl.com/Guardian280116>, accessed on: 19 May 2020.

justifying doing so in the published memoirs²¹. One can think of many other court trials during which it was the past that got adjudicated on, such as: the Nuremberg Trials, the Tokyo Trial before the International Military Tribunal for the Far East, and the trials before Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

When the past is evaluated under normal court procedures, one encounters obstacles stemming from the evidence theory accepted by the legal scholars and the judiciary, and from the concept of individual responsibility, on which Western jurisprudence is based. Sometimes before the trial it is necessary to remove political obstacles to the issue of a judgement. A previous regime has to fall down, and a dominating group has to lose power to make it possible to judge past crimes. In the meantime witnesses die and documents get lost. Frequently, evidence is created in another social and political system and therefore may have a different meaning that needs to be considered during the trial. The participants in the proceeding play the roles of historians who have to acquire and maintain a critical approach to the sources. Another problem results from the fact that the past events are the effect of actions of many people. Who is responsible for the given past act? A person who actually performed it, the one who gave an order, or maybe a parliament that passed a law enabling a given action to be performed, or even the citizens who accepted such a policy? The rationality of legal proceedings aims at individualization of responsibility. Even if we assumed that such individualization was possible, then frequently encountered problems include death of the person directly responsible or objective impossibility of indicating such a person. In this case, a traditional legal process should be discontinued. Thus, a legal system is often unable to cope with ethically justified social expectations of judging the past. Justice is not done for procedural reasons. The price for it may be social loathing of a legal system and its inability to perform an integrative function²².

Subjecting the past to judgment of a court may affect a society in two ways. Savelsberg and King indicate that the very fact of charges being pressed against a politician may make him/her lose credibility in the eyes of the general public²³. During a trial, a charismatic leader is limited to the role of an accused and does not control the situation. The trial demonstrates his/her helplessness. He/she is also forced to listen to the accusations against him/her and the public opinion becomes familiar with the raised arguments. On the other hand, researchers also indicate that such a trial may be easily used by accomplices to disclaim any criminal responsibility for the regime. If political leaders are judged, then wider social mechanisms legitimizing political violence disappear from the eyes of the public opinion.

In an attempt to respond to social demands of justice and exceed the procedural limitations, a legal system may create *quasi*-court institutions. These institutions have some of the characteristics of courts, such as formalised proceedings and judgments being passing by someone with legal knowledge, but they do not have to follow strict evidence-taking rules, and proceedings before them do not have to end with assigning individual responsibility. Truth and reconciliation commissions, which have been

²¹ French veteran fined for excusing torture, BBC News, 25 January 2002, <http://news.bbc.co.uk/2/hi/europe/1781607.stm>, accessed on: 19 May 2020.

²² A. Czarnota, *Between Nemesis and Justitia. Dealing with the past as a constitutional process*, in: A. Czarnota, M. Krygier, W. Sadurski (eds.), *Rethinking the rule of law after communism*, Budapest 2005, pp. 123–134.

²³ J.J. Savelsberg, R.D. King, *Law...*, pp. 192–193.

operating in various parts of the world since the 1980s, have been such *quasi-court* bodies, which have proceeded not only against someone, but rather in favour of a case. Their purpose has not been strictly legal, but political and legal, related to achieving transitional justice²⁴. The logic of such proceedings has been oriented not only to discovering the “truth” about the past, but also to maintaining social integration after the fall of a criminal regime and doing at least partial justice (“reconciliation”) to the victims.

Researching the interaction between law and collective memory in this perspective, demands selecting a case to be subjected to analysis. Then, it is possible to choose events from the past to be subjected to judgement. If this past is vivid for a community, then such a case, as a rule, attracts public attention and its coverage becomes the subject of media discourse. The more controversial a given case is, the better it illustrates a certain bigger social conflict between groups that judge the past differently. The courtroom becomes an arena of this conflict and legal significance of a given case goes beyond the issue of the very criminal responsibility of individual people. Therefore, such a trial is equally the field of legal and cultural battles. The way it is resolved may be an expression of processes of “domesticating” trauma by the culture of a given society.

5. Memory laws

In 2007 the Spanish Parliament passed the Law on Historical Memory (Spanish: *Ley de Memoria Histórica*²⁵), which recognized the martyrdom of the victims of the Spanish Civil War and of the regime of general Francisco Franco. This law also prohibited the use of Francoist symbols on public buildings and the organization of any political events at Franco’s burial place. In 2016 the Polish Parliament passed the Law Prohibition the Promotion of Communism, which stated that names of public utility buildings, structures and facilities could not commemorate people, organizations, events or dates symbolising communism or any other totalitarian system²⁶. A local government, responsible for naming such structures, had 12 months to change them and supervision over the process was exercised by government administration. These two legal instruments are similar in their focus on (physical and symbolic) regulation of public space in such a manner as to promote in it a specific vision of the past, evaluating it in very clear moral categories (“good” and “bad” commemoration). Instruments of this type are collectively called “memory laws”.

In literature, memory laws are defined as “state-approved interpretations of crucial historical events”, which moreover “commemorate the victims of past atrocities as well as heroic individuals or events emblematic of national and social movements”²⁷. This

²⁴ P. Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, New York 2011.

²⁵ Full name: Law 52/2007 od 26 December that recognizes and broadens the rights and establishes measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship (Spanish title: *La Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas a favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*, Agencia Estatal Boletín Oficial del Estado 27 de diciembre de 2007).

²⁶ Full name: Act of 1 April 2016 on the Prohibition of Promotion of Communism and Other Totalitarian Systems Through the Names of Organizational Units, Subsidiary Units of Municipalities, Names of Buildings, Localities, Facilities, and Through Monuments (Polish title: *Ustawa z 1.04.2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki*, tekst jedn.: Dz. U. z 2018 r. poz. 1103).

²⁷ U. Belavusau, A. Gliszyńska-Grabias, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in: U. Belavusau, A. Gliszyńska-Grabias (eds.), *Memory Laws. Towards Legal Governance of History*, Cambridge 2017, p. 1.

type of laws raise controversies as their coming into force causes concerns about their instrumental use for the purpose of political censorship and limitation of freedom of speech. Addressing such doubts may attract attention to the rules of application of law and legal reasoning, like supremacy of the constitution and the principle of proportionality. If a state wants to violate these rules, then memory laws may only be a pretext. Marta Bucholc aptly points out that the existing definitions of “memory laws” are very wide²⁸. The scholar draws attention to the fact that there exist legal constructions such as ownership and inheritance relations, which also, though less openly and in a less obvious or direct manner, carry a specific vision of the past. Besides, declaring an almost “official vision of the past”, does not have to mean exclusion of other visions. In order to maintain utility of the notion of memory laws, Bucholc suggests limiting its application only to these regulations which “enforce an official interpretation of the past by way of prohibiting alternative views of the past from being expressed, be it by punitive measures or otherwise (e.g. by financial restrictions, rules of urban planning, etc.)”²⁹. We may differentiate juridification of the past from memory laws. The law very often gets petrified, it promotes or excludes specific visions of the past, which may be done openly³⁰ or secretly³¹. In the case of memory laws, such juridification must be open, contained in a legal text or institution, and it must exclude alternative narrations of the past – it occurs most frequently through criminal law or through limitation of access to the public space and resources.

Why are memory laws of an exclusionary nature? It is a result of the victimhood logic, which penetrates late modern, post-conventional societies³². Stina Löytömäki stated³³ that this logic results from many tendencies: 1) the fact that the discourse on human rights, whose significance has been growing for several decades, assumes – while evaluating history – the perspective of dominated groups, 2) formulation of an ethical “duty to remember”, and also 3) the activity of non-governmental organizations. The development of human rights discourse granted the individuals a possibility to stand against a state before international courts. Thus, it granted them a chance to publicly pursue and present the suffered wrongs, including those incurred due to their religious, ethnic, national or sexual affiliation, whether or not shared by a given community. Identity built on victimhood is the material for creating legal claims. It seems that in particular on these grounds there may occur conflicts of memory. The victimhood logic is a zero-one feature and based on an economy of shortage. One is a victim or not, and recognition for victims in the public space is limited. Conflicts explode in situations in which a dominating majority refuses to a given community a right to obtain the status of a victim or when in a given conflict the position of victim is the subject of rivalry between

²⁸ M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, “Hague Journal of the Rule of Law” 2019/11, pp. 85–110.

²⁹ M. Bucholc, *Commemorative Lawmaking...*, p. 92.

³⁰ For example, on 26 January Australia celebrates National Day – national day commemorating arrival of the British fleet. However, some perceive the date as the date of start of colonisation of Aboriginal people. For them it is not “Australia Day”, but “Invasion Day”. This view, however, cannot be expressed in public. See: *Invasion Day 2020: where you can find this year's marches and rallies*, “The Guardian”, 24 January 2020, <https://tinyurl.com/Guardian240120>, accessed on: 19 May 2020.

³¹ Any legal regulations on ownership law contain in them demands of recognition of social relations, which led to such and no other distribution of goods.

³² M. Paździora, *Constitutionalism in a Post-Conventional Society*, “The Critique of Law. Independent Legal Studies” 2019/1, pp. 121–133.

³³ S. Löytömäki, *Law and the Politics of Memory*, New York 2014, p. 93.

two mutually exclusive identities. No wonder then that it activates political processes of legal petrification of the status of a victim so as to make the position unchallenged. As Löytömäki writes:

Analysing victimhood as a social, political and legal construction repoliticizes debates about victimhood, memory and justice and helps to understand ways in which the law contributes to depicting the past as a series of traumas and injustices that to be repaired, and is complicit in the construction of identities of victimhood. Those identities are increasingly constructed through references to human rights criteria and categories. Moreover, for those that identify themselves as victims, the law is a tool in struggles for recognition, and a mean of having their narrations heard and officially recognized³⁴.

Collective memory which reveals itself in memory laws is strictly connected with a desire of recognition. Francis Fukuyama observed that in people, a desire of recognition may have two forms, which he called accordingly “isothymia” and “megalothymia”³⁵. The first one means a desire to be recognized as equal, the second one is a desire to be recognised as better. In liberal societies institutional solutions are based on primary laws and rules of law are compliant with the isothymia principle. Each member of a community is equal before the law. At the same time, these societies are permeated with the desire to rise above the ordinary and to secure for themselves a special position. This becomes particularly evident in competitive principles of market economy. The problem with megalothymia consists in the fact that recognition of exceptionality of one subject means recognition of inferiority of others. And it is not about symbolic honouring, but drawing practical, political consequences out of it. Therefore, Fukuyama indicates that societies based on the megalothymia principle are characterised by elitism and uneven distribution of goods. The development of individuals in such societies is upfront limited according to affiliation. The principles indicated by Fukuyama function also with reference to collective memories. A demand of recognition of one’s memory by a given community does not have to mean taking away this right from others. It may be based on the isothymia principle, where a community wants to have a right to present one’s memory in public without any claims to the memories of others. If, however, such a claim is based on the megalothymia principle, then meeting such a demand results in refusing that right to other groups. The vision of the past of a recognised group becomes the only possible one in a given public space. It may be justified by ethical or political motives. The significance of traumatic events from the past may cause a justified sense of their special status, giving them legally distinguished status. The solution may be to combine such legal sacralization with permission for scientific research, which can potentially lead to a different vision of the past.

Granting collective memory a legal status takes the form of legal acts such as constitutions, statutes or laws which implement them. They may be analysed legally by considering the meaning of the major notions they use, their relation to the whole legal system and consistency with it or realistic possibilities of fulfilling the purpose assumed by legislators. Such laws, as we already indicated, petrify a specific vision of the past. Such petrification is often connected with exclusion of alternative narrations. Such laws may be the subject of research, taking into consideration how they influence the freedom of speech, artistic freedom or freedom of scientific research. Creating such

³⁴ S. Löytömäki, *Law...*, p. 94.

³⁵ F. Fukuyama, *Identity. The Demand of Dignity and the Politics of Resentment*, New York 2018.

documents is preceded by a legislative process in which differing visions of the past and different judgements may be expressed. This process may be subject to evaluation with regard to democratic standards, which demands analysing who and according to what principles is admitted to such a debate.

Memory laws are attempts at solving the conflict of memory through legal petrification of one of the competing visions of the past. Enacting such a law does not equal a straight victory of one group or identity over others. Following the logic of juridification described by Teubner, the process of establishing a memory law may empower certain groups. Adoption of such laws is often preceded by social and cultural process of revealing/manifesting identities based on being a victim. In this process a group may protest and, thanks to it, it gains access to the public space. Moreover, when the law is passed it may be challenged in court and then the past stands before a judge, who is obliged to apply the rules of evidence. Thus, such identity has a chance to prove its victimhood. Memory laws are of an exclusionary nature only at the very basic legal level. At the social level, their exclusionary character depends on many factors, such as judicial independence, legal culture, organization of civil society, international community etc. Law is not omnipotent in regulating the past. If the political system aims at dominating citizens and eliminating their memories, it is not only a problem of law, but, above all, of social structure and power relations.

6. Law as collective memory

Historians of law, describing past customary laws, show that they were the effect of communities' experiences. Taking into account their observations, practices and past experiences stored in collective memory, societies decided to transform these elements into external norms so as to make them usable in similar situations in the future. Law thus understood is institutionalized collective memories. The past not only constitutes a reservoir of principles for acting and solving conflicts, but it is also a source of legitimisation.

The vision of law as stabilized customs made the law codification, progressing since the 19th century, encounter resistance. An example of a dispute is the famous discussion between two prominent lawyers of their time: Anton Friedrich Thibaut and Friedrich Carl von Savigny³⁶. This discussion related to whether after the fall of the French hegemony in Europe the Napoleon's Code should be kept in Germany, whether a new code should be created, or whether to go back to an earlier law, which was a mixture of Roman, canonical and common law. Thibaut, starting from the Enlightenment assumptions, opted for a new code, and explained this providing practical reasons. In his opinion a new code would enable consolidating the German state into one community and would be a confirmation of its sovereignty. Principles underpinning such a code should be compliant with universal principles of reason. Von Savigny objected to this approach and to the concept of codification. He argued that such a basic law could not be imposed instrumentally by a legislative body. Law is created from below through daily works of legal professionals who interpret the will, customs, and history of a community. The source of this law is tradition of a given community, its customs, and beliefs (German: *Sitte und Volksglaube*). Thus, the law grows and dies together with a given

³⁶ F.C. Beiser, *The German Historicist Tradition*, Oxford 2012.

community – being strictly connected with its culture, including language or customs. What remains for a state is to co-ordinate this community, and not to create it.

The discussion between Thibaut and von Savigny is not only historic, but it is also an exemplification of two approaches to the origins and sources of law. In the context of collective memory, we may say that while Thibaut perceived law as deprived of memory, anchored only in present political interest, for von Savigny law was objectivized historical community awareness. Interestingly, he indicated that this awareness was expressed by legal professionals. Even though future lawmakers did not share von Savigny's views³⁷, this does not mean that with regard to indication of social origins of law and roles of legal professionals in its application, the arguments of the German lawyer are not valid today. It just means that this approach needs to be updated.

In modern states, law starts to play not only a co-ordinating role, but it becomes an instrument of social change as well. In other words, part of law is not related to collective memory, but it does regulate social relations to achieve pre-defined current goals. Does this mean, however, that law is completely detached from collective memory? It seems that it is not, that a narration regarding experiences from the past is still necessary to legitimize law. Such narration delivers normative integrity, as it combines part of law based on experiences from the past with law oriented at achieving certain social goals. It is best visible in case of "legal transplants": legal institutions created in other political communities and based on their past experience, and transplanted to a new, different legal system. Such transplantation is effective when adjustments are made to new existing conditions, i.e. the transplanted institution is subjected to interpretation based on collective memory of a given political community.

In late 1970s, Philippe Nonet and Philip Selznick presented their model of development of law: from repressive through autonomous to responsive law³⁸. The first stage – repressive law – was based completely on the experiences from the past and, as Durkheim says, its purpose was to preserve a given state of social relations. The subsequent two stages are already more loosely related to past experiences. Still, however, even then, collective memory gives law both legitimization and normative integrity. For example, the experience of the 20th century totalitarianisms and the related memory of extermination of individuals in the name of collective ideology consolidated the belief among the general public and the political élite that mechanisms ("safety valves") must be introduced in the functioning democracies. Thus, modern constitutional democracies are anchored in what Judith Skhlar called "liberalism of fear"³⁹. Unlimited power may lead to repetition of events from the past. Therefore, division of power, international protection of human rights and rule of law are necessary – they are factors which influence, acting as a hindrance, and set a limit for possible political decisions. We may perceive liberal constitutionalism (direct application of constitution, constitutional judiciary) as institutionalized collective memory, in which the memory of unlimited power dictates the current rules of conduct.

However, it has to be remembered that memories (collective and individual) are not identical with the past events. What is remembered depends on many factors: social

³⁷ W.J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, "Saint Louis University Law Journal" 1953/2, pp. 335–359.

³⁸ P. Nonet, P. Selznick, *Law and Society in Transition Toward Responsive Law*, New York 1978.

³⁹ J.D. Skhlar, *The Liberalism of Fear*, in: N.L. Rosenblum (ed.), *Liberalism and the Moral Life*, Cambridge 1989, pp. 21–38.

frameworks, within which a reminiscence is now created, the reasons why past is recalled, etc. Frequently, representative adequacy of such memory is irrelevant. Memory is not fixed and changes depending on social changes. The essence of collective memory is not adequate recreation of the past, but its use in order to legitimize present action. As a result, many conflicts of memory occur, particularly if such memory gets instrumentalized. Conflicts explode in particular when a state is unable to recognize and accept the social significance of a need to commemorate a certain event from the past. However, what makes such need come into existence in the first place?

In his book *The Ethics of Memory*⁴⁰, Avishai Margalit, an Israeli philosopher and social theorist, explored an ethical dimension of memory. In Margalit's opinion, a duty to remember occurs due to "thick" social relations in which an individual lives. A family or a religious community may store, and demand maintenance of, a memory of the past. Moreover, it is thanks to the shared past that such relations may exist at all. Therefore, the demand to remember and to take up such a duty is ethically justified. Collective memory results from caring about a community. From the perspective of a "thin" relation, the issue is less obvious. These are relations not with members of a given community, but with strangers. As observed by Margalit, these relations do not include a clear duty to remember. However, this duty appears in the case of events which consolidate us as *humankind*. It is in particular drastic events, crimes against humanity, such as Shoah, that create "moral memory" of humankind. It results from the fact that during these events the very idea of humankind gets attacked, as groups of people are refused affiliation to human race. Therefore, the demand to commemorate the victims is morally justified. Through such act, basic moral principles, such as recognition of another as a human being, are affirmed.

Collective memories are therefore a construction attributable to collective subjects such as nations, societies, groups. Memory is what cements a community and makes it last. It appears alongside individual memory, and both memories permeate and influence each other (social frameworks of memory). Social institutions have a significant influence on the shape of collective memories. Law may be seen as institutionalized emanation of the memory of a given community. Collective memory, shaped under the influence of experience, may affect the political form of states and basic legal principles. However, reminiscence and memory are not representations of the past events, emotions or situations nor their direct recall, but their reconstructions in a present context. Collective memories may be, however, an object of manipulation, particularly when they are used as the basis for legitimizing power.

7. The case of Central and Eastern Europe

There are several reasons why collective memories represent an object of special interest for the societies of Central and Eastern Europe. The change of geopolitical situation after 1989 gave the societies independent national states. This, in turn, made local identities – previously marginalized and often repressed by communist authorities – obtain a right to public presentation of their past. At the same time the societies were varied in ethnic and religious terms. Moreover, their states were characterised, at least since the 19th century, by frequent changes of their borders. This resulted in

⁴⁰ A. Margalit, *The Ethics of Memory*, Cambridge 2004.

the existence of many collective memories in the public space. The public space based on such pluralism became the space of rivalry between collective memories. Often, the memories comprised traumatic elements related to genocide, domination of other groups, and German and Russian totalitarianism.

On the one hand, as indicated by George Mink and Laure Neumayer, the influence of “reconciliation” discourses dominating in the 1990s prevented full-scale memory wars. Wide use of political and legal means such as “crime confession, requests for pardon and official consent to pardon”⁴¹, promoted by international organizations and global public opinion, led to individualization of responsibility and the past being locked down in courts and commissions. The judged past ceased to be politically relevant. On the other hand, in daily political discourse the recent past of the region was often quoted in order to stigmatize political opponents. Naming someone or his/her descendant “post-communists” became a political insult. Moreover, it seems that using such names shifted from people to institutions. For example, in the Polish public discourse, one may observe attempts to delegitimize institutions only because they were established before 1989. This created tensions between how the legal system could evaluate the past and social expectations in this respect, between the frames of liberal state based on the rule of law and daily political practice.

Countries of Central and Eastern Europe, which until recently had possessed scarcely any democratic experiences, after 1989 suddenly became liberal democracies limited by the principle of the rule of law. The previous practice which dominated the public was based on authoritarian systems. Experience, which acts as a link combining collective memory and law, could not be the basis for legal rules and standards, which therefore had only a declarative nature. Thus, the legal system was built based on “transplants” from and creative imitations of liberal systems of Western Europe. The fact that after the fall of communism in majority of the states of Central and Eastern Europe national institutes of memory were established and given powers and obligations related to management of the heritage of the communist past is a proof of how important institutional shaping of collective memory is in new democracies⁴².

Margalit argues that lack of direct participation in an event does not mean that this event will not become an element of collective memory of people other than the ones who participated in it. The example he quotes refers to Romania in 1989, where the crowd booed the speech of Nicolae Ceausescu, who for years had ruled the country despotically. This event, unthinkable before, became the moment of mobilization, the start of a revolution which in a course several days saw the despot overthrown. Based on this example, Margalit introduces a very fertile differentiation between common memory and shared memory. Common memory refers to all people who at the moment were present during the speech when Ceausescu got booed. Common memory is an aggregate of all these memories which result from direct experience and participation in a given event. However, this event became the start of a revolution and overthrow of the dictatorship. It happened as result of a transfer of those experiences onto others. Others were able to plug in the experiences of direct witnesses thanks to “the division of mnemonic labour, [which] is elaborate too”, and which is a characteristic of modern societies⁴³.

⁴¹ G. Mink, L. Neumayer, *Introduction*, in: G. Mink, L. Neumayer (eds.), *History, Memory and Politics in Central and Eastern Europe. Memory Games*, London 2013, pp. 1–2.

⁴² F. Czuńczyk, *Public Memory Sphere and its Legal Petrification. Few Remarks on the Legal Framework of the Institutes for National Remembrance Functioning in Poland*, “Visnyk of the Lviv University. Series Law” 2019/69, pp. 3–11.

⁴³ A. Margalit, *The Ethics of Memory...*, p. 54.

A direct channel through which this plugging occurs is, according to Margalit, communication. Communication enables the transfer of various perspectives from the participants of an event onto non-participants in such a manner that the latter may look at the event, from one of the many presented perspectives, as if they had participated in it themselves. Shared memory may “travel” among people in modern societies “through institutions, such as archives, and through communal mnemonic devices, such as monuments and the names of streets”⁴⁴. In the event of experience liberating from the fetters of dictatorship (booing Ceausescu), common memory was transformed into shared memory, and the event became a constitutional moment (using Bruce Ackerman’s famous term), leading to a change of the political and legal system. So the question arises, can law become a channel of communication which facilitates transfer of experiences, even if they were not shared by us?

Here, we may use two examples which enable us to demonstrate the role of experience as a link between collective memory and law. The first one is a successful transplant of memory, namely the institution of ombudsman. This institution is a commonly known “transplantation” carried out by many countries in the 20th century, based on Swedish experiences. This transplantation is naturally a process of transfer to an already existing tissue – another legal system. As a result, the shape and scope of operation of offices of ombudsman differ significantly between individual states. The Polish transplant was carried out still in non-democratic times. However, using the words of Tadeusz Zieliński, this institution turned out to be rather a “swallow of democracy” than a facade⁴⁵, which proves that lack of direct experience of the rule of law (in the communist Poland) did not make this transplantation ineffective.

The second example, which we deem an unsuccessful transplantation, is the resolution of the Polish Supreme Court of 20 December 2007 (KZP 37/07). This example proves that the rules of democratic rule-of-law state were not fully adjusted, as can be seen in the argumentation applied in the statement of reasons for this resolution. The resolution regarded the evaluation of judges who during the communist martial law adjudicated on the basis of the Decree of the Council of the State⁴⁶. This act was introduced in breach of a number of procedural rules and significantly restricted civil liberties. Its aim was to stifle the protests of the democratic opposition. The ruling in question has removed the responsibility for the application of this act from judges. According to Jerzy Zajadło, the author of a critical commentary on this resolution, the arguments applied by the Supreme Court were a “legal hybrid, as it turns out that the decree on martial law was valid not only according to the legal order of Polish People’s Republic, but also according to the contemporary standards”⁴⁷. To use a literary comparison, with respect to this resolution this hybrid shows lack of narrative competences in applying a homogenous argumentation from the area of democratic rule-of-law state. Lack of (legal) collective memory may be a reason for such an unsuccessful transplantation.

One may therefore say that modern law itself, particularly in Central and Eastern Europe has a limited causative power. It is the result of social processes, rather than their origin/source. However, if we reformulate the question and consider what conditions are

⁴⁴ A. Margalit, *The Ethics of Memory*..., p. 54.

⁴⁵ T. Zieliński, *Ombudsman – możliwości i granice skutecznego działania*, [Eng. *The Ombudsman: Possibilities and Limits of Effective Action*], “Państwo i Prawo” 1994/9, pp. 3–15.

⁴⁶ Full name: Decree of the Council of State of 12 December 1981 on Martial Law (Polish title: Dekret Rady Państwa z 12.01.1981 r. o stanie wojennym, Dz. U. z 1981 r. Nr 29, poz. 154).

⁴⁷ J. Zajadło, *Pięć minut antyfilozofii antyprawa* [Eng. *Five Minutes of Anti-Philosophy of Anti-Law*], “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2008/1, pp. 161–173.

necessary to make law effective, it turns out that legal order, understood in a wide sense as legal text and behaviour of legal professionals, is anchored in collective experiences and memories. Legal discourse has to at least respect these experiences: it cannot limit itself to shallow legal formalism, but it has to try to meet these experiences, based not on rejection, but on recognition of collective memories and conflicts between them.

8. Conclusion: law between remembering and forgetting

Everyday legal discourse is permeated with references to the past. Determining the original intention of a lawgiver demands recreation of past conditions in which a given regulation was enacted. During each court trial the past appears in testimonies of witnesses or in documents. Almost every legal professional, regardless of the legal culture, analyses past rulings in order to solve a problem. There are more such examples. Legal discourse realizes that human ability to recreate the past is imperfect – hence the rules for evidence proceeding, legal reasoning or legal presumptions.

So far, we have discussed the relation of law to collective memory. The considerations referred mainly to remembering and solving conflicts of memory through legal means. However, another aspect of collective memory in which law plays an important role is often overlooked – the forgetting. Legal means related to forgetting include e.g.: 1) amnesty, under which a penalty is cancelled, 2) announcement of bankruptcy, thanks to which the past debts are annulled, and 3) usucaption, thanks to which a previous owner loses his/her rights. These are only a few examples of legal institutions thanks to which a society may forget. Twenty years after he wrote the book on memory, Paul Connerton, whom we mentioned before, started to examine forgetting⁴⁸. In his opinion, modern societies created a whole set of ways to eradicate reminiscences of collective past from an individual. It relates mainly to global economic elites, middle class, economic immigrants, and political refugees. Memory in pre-modern times was based on stability and unchangeability of social roles and positions. Modernity based on capitalist economy started the process of “watering down” previously sacred hierarchies. Development of big cities, digital technologies, service-based economy, and secularization led to deep changes in the social structure. As identity was replaced by empty identifications, memory was replaced by its implants. In Margalit’s language it would mean replacing “thick” social relations with “thin” ones.

This explains the role of law. At the times of progressing social forgetting, the past may be entrusted to law. Who knows, maybe thanks to it memory will be saved? But is law able to fulfil this hope? The answer to this question does not depend on theory, but on social processes and practice, which become clearly visible only after their completion. We may, however, cautiously say that law will never replace collective memory, but may become its prothesis. This results from the Proteus identity of modern law. Law is stretched between remembering and forgetting. It expressed collective memory and tries to affect it. It enables society to liberate itself from the past and to petrify it. It keeps social experiences organic and is a tool of their transplantation. Collective memory transcends law itself and is visible in other cultural artefacts, such as literature and architecture. Law is institutionalized memory and a tool of external operations on it. It is only a tool, but we have no better at our disposal.

⁴⁸ P. Connerton, *How Modernity Forgets*, Cambridge 2009.

Collective Memories, Institutions and Law

Abstract: This paper aims at explaining the concepts of collective memory, institutions, politics, law, as well as relations between them. By means of a short explanation of a network of mutual relations between these notions, we want to show how law and collective memories interact and how the relation between them is formed. At the same time, we see three modes of relations between collective memories and law: 1) past before the law, 2) memory laws and 3) law as collective memory. The first view consists in evaluating the past under a court trial. The second one in creating legal rules which promote or demand commemoration of a specific vision of the past. The third approach perceives law itself as institutionalized collective memory.

Keywords: collective memories, institutions, memory laws, politics of memory

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