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Nostalgic Constitutional Identity

1. Introduction

The text deals with the link between the notions of constitutional identity and nostalgic collective memory. Starting from the notion of nostalgia in a postmodern society present in a recent work of Zygmunt Bauman, I show that the point of reference for contemporary political projects is no longer the future but the past. Longing for a lost homeland becomes a dominant social emotion. This change has consequences for the law. According to Adam Czarnota, legal discourse can be seen as institutionalized experiences and collective memories. This is especially true of constitutions which, as “autobiographies of power”, contain visions of the past. Modern constitutions, especially in post-communist countries, perceive the past as unjustifiably taken away by external intervention (communism). The preferred value is to turn to this past and to regain lost sovereignty. Such a narrative is in conflict with the identity of the European Union, which is based not on returning to the past, but on its rejection (including the history of colonialism and Nazism). It is these differences in the temporal structures of the narrative that cause conflicts between the constitutional identity of the EU and that of the individual Member States. The paper ends with an analysis of the consequences of such politics of nostalgia and possible defence mechanisms against it.

2. Postmodern social condition

The word “nostalgia” was created in the 16th century and originally meant a mental disorder. It gained political and social significance only from late 18th century². Immanuel Kant laid the foundations for such use of the word with his statement that a new vision of public space, based on the “free use of reason”, introduces both freedom and the associated unpredictability. This may cause a longing for an earlier, simple time. Kant was also the first one to support a progressive vision of history. According to him, looking back and yearning for the past is wrong: although future based on reason can cause anxiety, it is objectively better than the past³. Georg W.F. Hegel merely reinforced this argumentation⁴. This way of thinking about the past and the future dominated intellectual discussions in the Western

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² M.P. Natali, *History and the Politics of Nostalgia*, “Iowa Journal of Cultural Studies” 2014/1, pp. 10–25.

³ L. Dupré, *Kant's Theory of History and Progress*, “The Review of Metaphysics” 1998/4, pp. 813–828.

⁴ G.W.F. Hegel, *The Philosophy of History*, New York 1956.

world for the next two centuries. However, according to many this time may be over: it is the past, not the future, that matters more and more. The social philosopher Zygmunt Bauman, reflecting on our contemporary condition, indicated that “Angel of History” described by Walter Benjamin, changed the direction of its flight in the post-modern society. In the still modern narration of Benjamin, the angel representing the history of mankind, is flying backwards towards the future, while looking towards the past. This means that history looks up to the past but makes its way inevitably towards the future. At present, in Bauman’s opinion, the angel of history has its face directed at the future and makes its way to the past. Bauman points that out because of this change:

It is now the future, whose time to be pillorized seems to have arrived after being first decried for its untrustworthiness and unmanageability, that is booked on the debit side. And it is now the past’s turn to be booked on the side of credit – a credit deserved (whether genuinely or putatively) by a site of still-free choice and investment of still-undiscredited hope⁵.

According to Bauman, directing politics towards the past, in order to seek legitimization, results from the post-modern condition of contemporary Western societies. This condition relies on previously denied nostalgia – sentimental feeling of longing for a lost homeland. Processes of individualization and globalization make an individual feel fearful and deprived of his/her roots. On the one hand, traditional normative systems and strong family links are dissolving. On the other, the fate of individuals depends to a greater and greater extent on unpredictable global crises of late capitalism. In the post-modern society, community is defragmenting and an individual is confronted with culturally different Other. Forces shaping the fate of an individual appear as uncontrollable. In this state of affairs, individuals are seeking stability in the past. They miss lost homeland. The past, which cannot be confused with history, is always idealized and is susceptible to manipulation:

Once stripped of power to shape the future, politics tends to be transferred to the space of collective memory – a space immensely more amenable to manipulation and management, and for that reason promising a chance of blissful omnipotence long (and perhaps irretrievably) lost in the present and in the times yet to come. (...) What a relief, therefore, to return from that mysterious, recondite, unfriendly, alienated and alienating world, densely sprinkled with traps and ambushes, to the familiar, cosy and homely, sometimes wobbly but consolingly unobstructed and passable, world of memory: our memory – and so my, as I’m one of ‘us’, memory; our memory – memory of our, not their, past; a memory – to be possessed (that is, used and abused) by us and by us alone⁶.

In such visions, the past is always lost, but regainable. Frequently, reclaiming the past is said to depend on ousting elites, which “stole” the past from community, making society deviate from its natural way of development or from its political form. Populist banners such as “Make America Great *Again*” or “Take *Back* Control” imply an imperative of returning to the unfairly lost past. Politics liberated from a necessity of conceiving plans for the future gets limited to resetting of community to default settings. To be precise – the past becomes the future.

Is there one past or many? Making an analysis of political use of the past at the end of the previous century, social geographer David Lowenthal observed that the idealized vision of the past becomes a driving force of political rivalry⁷. In his opinion, narratives on the past

⁵ Z. Bauman, *Retrotopia*, Cambridge 2017, pp. 6–7.

⁶ Z. Bauman, *Retrotopia*, pp. 53–54.

⁷ D. Lowenthal, *The Heritage Crusade and the Spoils of History*, Cambridge 1998, pp. 227–250.

are permeated with three irreconcilable perspectives: 1) national (the state), 2) ethnical, and 3) universal (global) one. The global perspective differs clearly from the first two and relates to historical and cultural heritage of “humankind”. It makes representatives of various communities, in different parts of the globe, recognize e.g. the weight of the Second World War, the importance of statutes of Buddha in Bamiayn or the significance of Homer’s *Odyssey*. This perspective is often criticized due to a process of selection or hidden domination, which stands behind a selection of such and not other artefacts or stories. Here, particularly important are the conflicts regarding who should possess artefacts of global heritage: should it be a contemporary (modern) state, on the territory of which they were created, or heirs of the past colonial powers who appropriated these artefacts. Lowenthal indicates that inasmuch as the global past is of an integrational (or colonial) nature, then ethnical and national pasts are of explicitly exclusive nature. This is revealed already at the level of the official ethnical language, which becomes the only fully legal means of communication in the state. Language is something more than just a means of communication: it becomes a carrier of identity of a given community. Therefore, who does not know a given language, cannot fully participate in the life of a given community. In the ethnical and nationalistic perspective, identification with the past of a specific community gives rise to an obligation of fidelity towards its heritage. A community’s past becomes a gift which enables an individual to come into existence and which cannot be refused. Its acceptance, in turn, gives rise to obligations towards the past generations. If an ethnical community is related to a state, then this kind of heritage becomes sanctioned by the state. Political nationalism appears at the moment of recognition that the past of a community is homogenous, stable and unsusceptible to interpretations and that this past justifies full ruling over a given territory by such adamant community. This vests in representatives of this community the privilege to exercise power over this territory.

The conflict between the outlined perspectives results from the fact that memory about the past is treated as an object of possession, and thus an object of knowledge. This makes the logic of memory often rely on the economic logic of exclusivity and shortage. The past as a physical object of possession may have only one owner. Moreover, recognition of one memory leads to forgetting another one. The final stakes of such memory policy is domination over political resources collected by a political community. These resources include territory, social distinctions and artefacts of the past. Who controls narration on the past has claims to these resources and hence political legitimization to exercise power. To be effective, such control must petrify the desired vision of the past, with law becoming the means for such petrification is more and more frequently. It is not surprising at all: if in the post-modern society political significance the past increases, then such change must be reflected in legal forms used. It is law that ensures a possibility of public announcement, formalization and structuring of relations of power, in particular at the constitutional level.

3. Law as memory

Adam Czarnota observed that law may be seen as institutionalized collective memory⁸. Legal normative rules have their roots in the experiences of the past. In particular, they are repeatable patterns which facilitate surmounting conflicts similar to those of the

⁸ A. Czarnota, *Prawo jako instytucjonalna pamięć i narzędzie kolonizacji pamięci* [Eng. *The Law as an Institutionalized Memory and a Tool to Colonize Memory*], in: L. Koczanowicz, K. Liszka, R. Włodarczyk (eds.), *Między rozumieniem a porozumieniem. Eseje o demokracji niekonsensualnej* [Eng. *Between Understanding and Agreement. Essays on Non-Consensual Democracy*], Warszawa 2015, pp. 79–91.

past. Czarnota observes that the past in law is always subordinated to the present. When a new problem or conflict appears, it activates a need to reach to a legal reservoir of solutions, which are then adjusted to the present needs. Law is established to be always remembered. For mitigating conflicts, legal forgetting is equally important. Legal institutions, such as statute of limitations, are tools for classifying conflicts into those which may be resolved by applying substantive law and those which lack such opportunity. It indicates that the legal system is selective.

In common law this feature of a legal system may be even clearer due to legal precedents. In a civil law system, successful institutionalization of solving a problem leads to its transformation into an abstract rule and thus exclusion from social context, which becomes area of legislation and politics. Finally, it leads only to a different perspective of the notion: clearer division between establishing and applying laws. The general scheme remains the same. Based on Czarnota's considerations we can state that the law is a system of transforming local experience and memory into national and universal memory. Experience is always put in a specific time and place. Law is created through the process of translating a concrete experience into abstract legal rules. However, the local and concrete moment never disappears and remains in the form of a concept of "validity".

Czarnota notices that collective memory ensures that a legal system is coherent on two levels: a chronological and an axiological one. The first one results from the fact that collective memory creates a sense of continuity, and thus identity of the subject of law. The second level results from the fact that thanks to a narrative covering a hierarchy of values, collective memory allows avoidance and elimination of axiological contradictions in the legal system through interpretations⁹. Both levels demand a notion of the stable identity of the subject behind the system of law. Here, the roles played by memory in law are revealed, in particular, in public law, which is the ideological foundation and condition for the functioning of contemporary legal systems. This law stipulates directly the relations between an individual and the political community, determines the political bases and their possible mechanisms of operation. Public law defines general frames for the functioning of contemporary western societies in dual sense: it ensures frames of legality for politics and gives grounds to positive law regulating relations between individuals. For a political action to be able to be deemed legal, it has to be compliant with the rules of public law or be able to change these rules¹⁰. Actual execution of obligations between individuals demands, in turn, that there exist bodies which have monopoly in such execution¹¹.

Public law is extensive, as it covers the whole of the state (the Leviathan). In order to maintain its consistency and effectiveness a certain rule unifying these various regulations is necessary. Such rule, in formal dimension, is superiority of the constitution, and in material dimension, collective memory and, based on it, constitutional identity. The idea of constitution as the highest law ensures that citizens and state officers have a possibility of eliminating legal regulations and their interpretations if they could disturb consistency of the legal system and make it ineffective. Constitutional memory and identity, in turn, ensure axiological schemes that make the legal system coherent. In this sense, constitutional memory and identity are emanations of the memory of the state, and in particular

⁹ A. Czarnota, *Prawo...*, p. 83.

¹⁰ D. Howarth, *The Politics of Public Law*, in: M. Elliot, D. Feldman (eds.), *The Cambridge Companion to Public Law*, Cambridge 2015, pp. 43–46.

¹¹ M. Loughlin, *Foundations of Public Law*, Oxford 2010, p. 2.

the memory of axiological preferences of a given community and the basic structures of public space. The constitution is the register of these principles and preferences.

4. Constitutional identity

Constitution is sometimes described as “autobiography of power”. This expression places constitution in a temporal perspective and indicates that the notions “constitution”, “power” and “time” are interconnected. A constitution is always symbolically assigned to a certain historical moment. Therefore, we talk about the American Constitution of 1787, the Constitution of the Republic of Poland of 1997 or the Fundamental Law of Hungary of 2011. These events make up the ontic dimension of a constitution, indicating the moment from which it comes into existence. In the historical perspective a constitution is generally connected with events which Bruce Ackerman calls a “constitutional moment”¹². This is the moment in which an extraordinary mobilization of the people took place and which is the source of modern political legitimization. It does not matter whether this kind of moment historically really occurred; what matters is that it is remembered in this way. In a constitutional moment, the people break with the previous order – political form – and, using directly their power over themselves, renounce this power for the benefit of the constitution and the authorities it establishes. It is a unique moment in dual sense: its coming into existence demands that specific conditions be met (“wear and tear” of the previous political form). The purpose of the political dynamics liberated in this situation is self-limitation. If the process of constitutionalization is successful, it should not be repeated. So the constitutional moment is at the same time ahistorical and closely related to its historical conditions, it is both universal and local. Therefore, such mobilization may be perceived as the ontological dimension of constitution. If constitution “takes off” and becomes observed and applied, then its very existence will make this moment remain in collective memory and will function as 1) legitimization of present relations of power and 2) a reminder that when relations become unjust people may again rise and overthrow the present order imposing a new one. Frequently, constitutions contain a description of these moments, which additionally enhances a given political vision by placing it in a non-temporal, political and moral space, that is, in collective memory. Placing such narrative in the contents of the constitution is related to a will to become cut off from the previous political form (often imposed by external and colonial domination) through its moral stigmatization.

Leszek Koczanowicz distinguishes between social time and political time¹³. The first one is related to daily interactions and is connected with acting. Individuals, thanks to knowledge of the past of their community, may act in a more efficient manner. The shared past ensures to them a network of connections with others, which structures the community. The second type of memory refers to texts and political gestures and is connected with narration. It is the vision of the past which may be found in official school books and during public events. In other words, social time is of a pragmatic nature and enables acting, and political time is of a semiotic nature and enables assigning meanings. If time determines human temporality as to the form, then memory determines temporality as to the contents. Using the above distinction in the realm of

¹² B. Ackerman, *We the People. Volume 1: Foundations*, Cambridge (Mass.) 1993.

¹³ L. Koczanowicz, *Politics of Time: Dynamics of Identity in Post-Communist Poland*, New York–Oxford 2008.

collective memory, we may distinguish social memory and political memory. The first one constitutes a reservoir of what a society remembers, what it communicates in its daily interactions. The second type of memory is related to selection of events and historical figures, which legitimizes power, ensuring it to be a story about continuity. Social memory, however, is more blurred and slightly different for each community, whereas political memory is more compact, as it has to have a narrative structure. This structure is simultaneously political and moral – it relies on simple dichotomies such as we/they and good/bad. Both types of collective memory have consolidating and integrating functions. They mark frames for individual actions and communicate a community's expectations towards an individual.

A constitution functions both on the plane of social memory and that of political memory. In social memory, a constitution may function independently of whether it is present in the dominating political narration. On the plane of political memory, through constitution groups of power may try to implement a defined interpretation of the past to the society. In order to illustrate this, let us remain in the Polish context, which abounds in various constitutions. The Constitution of 3 May 1791 functioned in the memory of Polish intellectuals in the period when the independent Polish state did not exist. It was then a symbol of state sovereignty lost by the “nation” and a political obligation to aim at independence. It gained such position thanks to culture-forming processes intensifying in the second half of the 19th century under which, against the official narratives of the occupying states, the Constitution of 1791 was identified with an independent Polish state and obtained the status of a political programme demanding completion¹⁴. The memory of this constitution was the social memory of the lost homeland. Whereas the Constitution of the Polish People's Republic imposed by Stalin in 1952 covered the history of Poland not only as a fight of “the Polish working people” for “liberation from national slavery, imposed by Prussian, Austrian and Russian partitioners-colonizers”, but also about “exploitation by Polish capitalists and land-owners”. It was a politically imposed remembrance in which the past was only a bad memory. Here, the subject of constitution was changed from “nation” to “working people”, resulting in a vision of the past adjusted to this subject. These examples demonstrate: 1) that vision of the past contained in the constitution does not have to correspond to social memory and may be in conflict with it, and 2) that in the purely political construction of “constitutional memory” its subject plays an important role.

Gary Jeffrey Jacobson observes that constitutional identity is connected with an issue of change of constitution¹⁵. Distinguishing a specific constitutional identity is always political in the sense that such identity becomes a set of privileged concepts due to which one may perform interpretations of constitution and evaluation of what is compliant or non-compliant with it. Constitutional identity is then a point of reference for the dynamics of political processes and the accompanying transformations of fundamental law. In other words, identity is consumed temporarily. Jacobson views constitutional identity as stretched between stability and invention. On the one hand, a stable point of reference is necessary here, ensuring unchangeable identity of the subject of constitution in various moments of history. On the other, the subject has to be able to adjust its

¹⁴ S.A. Wislocki, *Kościuszko, Król i 3 Maja* [Eng. *Kościuszko, The King and the Third of May*], “Niepodległość i Pamięć” 2000/16, pp. 59–66.

¹⁵ G.J. Jacobson, *Constitutional Identity*, “The Review of Politics” 2006/68, pp. 361–397.

actions to changeable social conditions. Constitutional identity simultaneously satisfies a need for political integration and separation.

Due to a dynamic aspect of this notion, to develop constitutional identity, its text itself is not sufficient. What is required is the presence of some subject with authority, who adjusts unchangeable identity to changeable circumstances. It is not surprising then that this role is played mainly by constitutional courts. Reasons for which constitutional courts use the notion of constitutional identity may be various; however, this notion is always a tool of defence against a potential destruction of existing, or forming new, constitutional practice and relation of power connected with it. For example, the Supreme Court of India developed the notion of constitutional identity (“basic structure doctrine”) when considering changes to the constitution. It was the notion enabling it to announce unconstitutionality of such changes¹⁶. Constitutional identity becomes then “deep structure” on which written constitution is based and thus a standard, partially independent of the text, through which it is possible to evaluate procedurally correct proposals of changes of the text itself. This notion serves as a defence of the constitutional order. The constitutional court of Hungary used this notion to justify superiority of the Hungarian law over the law of the European Union. Thanks to this notion the court obtained competence to examine the EU law with regard to the Hungarian constitution, which enabled it to reject applicability of this law¹⁷. Constitutional identity is a notion used to evaluate the validity of certain regulations. Thus, it petrifies hierarchical relations of power, providing a possibility to decide what is and what is not part of a given legal system.

Each identity is created at the moment of distinguishing it from something else. Similarly, constitutional identity needs its Other from which it may separate. The Other may be an external or internal enemy from the past, one’s own dishonourable past or unattainable metaphysical ideal. Michel Rosenfeld indicated that:

Modern constitutionalism (...) cannot avoid the confrontation between self and other as a consequence of its inherent pluralism. On one level, the pluralist constitutional self encounters as the other the tradition that held together the premodern sociopolitical order. This other can be referred to as the ‘external other’. On another level, constitutional pluralism requires that a group constituting a collective self recognize similarly positioned groups as other selves, and/or that each individual self treat the remaining individuals as other selves. In contrast to the external other, this latter other dwelling within the constitutional polity can be called the ‘internal other’¹⁸.

We may only add here that post-modern constitutional self encounters the third Other, the other of the abandoned and impossible future, towards which the modern self was heading.

If unchangeable identity has to adjust to new conditions, then the same process has to relate to the constructed other. In other words, identity is created thanks to conflicts, which are of structural nature. Rosenfeld indicated aptly that constitutional identity is established in the process of continuous construction, deconstruction and

¹⁶ V. Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, “Journal of the Indian Law Institute” 2007/3, pp. 365–398.

¹⁷ I. Strumpf, *Sovereignty, Constitutional Identity and European Law*, “Hungarian Review” 2020/3, http://hungarianreview.hu/article/20200515_sovereignty_constitutional_identity_and_european_law, accessed on: 16 May 2020.

¹⁸ M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Abingdon 2010, p. 38.

reconstruction, which occur due to a dissonance between the text of constitution (as it is) and constitutionalism (as it should be)¹⁹. How do we know, however, what it should be? Constitutionalism results from collective memories (political and social ones), which constitute its cultural base. Constitutional identity is then a process of applying the provisions of constitution in changeable circumstances, taking into consideration the past collective experiences, in particular, the conflicts which represent a reservoir of moral preferences, interpretation schemes and imaginaries, relating to a desired social order and relations with other political entities.

5. Memory conflicts in Europe

Having defined the notions of nostalgia, collective memory and constitutional identity, we can now look at how these notions interweave, using examples of conflicts of memories in Europe. At present, the intersection of collective memory and constitutional identity generating most conflicts is the issue of relation between national law and EU law. As indicated, in particular constitutions law can be seen as already institutionalized collective memories. Thus, a question arises which memory will be considered the basis for construction of supranational legal order that the EU is. In particular, the admission of the post-communist countries to the EU in 2004 and 2007, revealed significant discrepancies as to the preferred vision of the past and the future in Europe.

Anna Młynarska-Sobaczewska argues that almost each of the preambles of post-communist countries' constitutions is based on the thesis of continuity of existence of a given nation and community, and of the suffering experienced under authoritarian rule²⁰. These constitutions are permeated with the sense of lost greatness – independence, which is treated as one of the principal political values. The fact that nations of the region, having such long history, were deprived of sovereignty, must appear as an act of injustice. This injustice is aggravated by a subsequent disaster – the experience of totalitarianism. Simultaneously, the societies of the region are permeated with the desire for democracy and autonomy. Hence, the independence regained after 1989 must appear as a success and political imperative – obligation of its continuous maintenance.

In Central Eastern Europe, political identity is then built on references to traumatic memories. It is the communism that is the Other for collective memory in the region. According to Młynarska-Sobaczewska, the notions such as democracy, rule of law or basic legal rights are too formal to constitute the frame for constitutional identities: in all these countries, these notions have similar meanings and therefore they mark the borders of a community to an insufficient degree. It may be added that in the period of creating their constitutions, these states did not really invent new institutional and political solutions or reconstituted the old ones, but rather imported the solutions from the Western states. Reference to collective memory served to legitimize these solutions by indicating that there existed a stable subject (nation) which could introduce them and thus that these solutions are self-established and not imposed. Moreover, they are needed, as a protection against the return of authoritarianism.

¹⁹ M. Rosenfeld, *The Identity...*, pp. 37–67.

²⁰ A. Młynarska-Sobaczewska, *Normatywizacja pamięci zbiorowej w preambułach do konstytucji państw postkomunistycznych* [Eng. *Normative Collective Memory in Preambles to Constitution of Post-Communist States*], "Przegląd Prawa Konstytucyjnego" 2014/2, pp. 233–250.

The revolution in 1989 was for the states of the region a return to the past in triple sense. Firstly, the lost independence was reinstated. Destroyed continuity of the state was possible thanks to stability of the source of political power – the nation. This stability was guaranteed by commemorating cultural practices, and in particular, by literature sustaining the narration on the lost golden age and religious practices. Secondly, communism was rejected and thus political imagination in the region retreated from orientation on the future only. Communism itself was clearly oriented and rejecting it was connected with rejection of its basic temporal structures. In communism the past was perceived only as the arena of fight of classes; hence the whole attention and political imagination was focused on building a society of the future. Thirdly, the states of the region were incorporated into the global capitalist system, which opened them to post-modern social conditions explored by Bauman. The 1989 Revolution was therefore a fulfilled nostalgia, a moment of return to a lost homeland.

For Central Eastern Europe an experience forming constitutional identity is its memory about the communism, whereas for Western Europe it is the memory about Nazism (and colonialism). These memories may be in conflict. Nazism had a different temporal structure in which the past was a model for political imagination, not the future. The example of possible conflict may be the European Day of Remembrance for the Victims of Stalinism and Nazism proclaimed by the European Parliament in 2009. The reason why this day was established was to harmonize and ensure mutual recognition, but instead it gives rise to conflicts which still persist even several years later²¹. In 2017, the Minister of Justice of Greece, Stavros Kontonis, refused to participate in the conference devoted to communist crimes because it was considered arbitrarily politically exclusive and because it “runs contrary to the values of the EU”²². This results from the fact that collective memory of the community from which Kontonis originates, evaluates communism in a more ambiguous way than the inhabitants of Central Eastern Europe. His attitude is also an expression of rejection of recognition that collective memories are pluralist and is an attempt at universalization of his own perspective.

In 2016, the previous Secretary General of the Council of European Union Javier Solana formulated the diagnosis that the European project was permeated by nostalgia after “good old times”²³. This nostalgia affects European leaders who want to return to the times from before the growth of anti-EU social moods. In Solana’s opinion the consequence of this nostalgia is sticking to obsolete solutions, which cause the growth of nationalistic tendencies. The observation made by Solana deserves further development. It seems that the core of the mechanism observed by this politician is a strive at universalization. The authorities of the EU, not taking into consideration specific regional conditions, aim at unification of legal orders. Aiming at unification is a consequence of the experience of fragility of democracy. Democratic order may soon be transformed into its contradiction. Liberal mechanisms, such as checks and balances and economic co-operation, which are the ideals underlying the EU, are to counteract

²¹ S. Mörsdorf, *European Day of Remembrance for the Victims of Stalinism and Nazism – Controversy and Indifference after August 23, 2017*, Estonian Institute of Historical Memory [Estonian: Eesti Mälu Instituut] <http://mnemosyne.ee/en/controversy-and-indifference-after-august-23-2017/>, accessed on: 16 May 2020.

²² *Justice minister turns down invite for EU conference on crimes of Communist regimes*, The Greek Observer, 18 August 2017, <https://thegreekobserver.com/blog/2017/08/18/justice-minister-turns-invite-eu-conference-crimes-communist-regimes/>, accessed on: 16 May 2020.

²³ J. Solana, *The EU has a dangerous case of nostalgia*, World Economic Forum, 27 April 2016, <https://www.weforum.org/agenda/2016/04/javier-solana-the-eu-has-a-dangerous-case-of-nostalgia/>, accessed on: 16 May 2020.

such (undesirable) transformations. Yet, they encounter resistance on the part of the post-communist states. This is because such universalization may encounter resistance from the countries which perceive this threat not as an internal issue (democratic transformation), but an external one (colonial intervention). Recommendations with regard to the system and constitution are then filtered by the experience of long-term domination and appear as a threat to recently regained sovereignty.

Public memory of the EU is penetrated by dual nostalgia. It relates both to populist nationalistic currents and to the establishment of the EU. Nationalistic currents miss “old good times” of the lost “indigenous land” when the EU did not disturb the state sovereignty and limited itself to agreeable economic co-operation of the Member States. The acts of the EU which trespass against this vision and blur a clear division of competences, are perceived as usurpation of a bureaucratic Leviathan which lacks democratic legitimization. On the other hand, officials and intellectual establishment of the EU nostalgically miss the “good old times” when the Member States observed the rule of law and subjected themselves without discussion to the power of the European Court of Justice and other bodies of the EU. These were the times when the states were unified in their respect for the liberal value of democracy. Both nostalgies are related to particular imagined geographies, which in the end are of ideological nature. Nostalgia is exclusive, as one can miss only one homeland in this manner. Therefore, the discussed nostalgies are exclusive of one another.

One may claim that the “old EU” countries base their identity on rejection of a different Other than the “new Member States”. Rejecting Nazim and colonialism means rejecting the focus on reconstructing the past and focusing on constructing a common future. Rejecting communism means rejecting the construction of a utopian, common future and focusing on the reconstruction of the abandoned past. It is not difficult to notice that these positions have opposite temporal vectors. Moreover, the position of the old EU may remind the new Member States of the rejected Other and vice versa. Both positions are nostalgic in the sense that they signify a longing for a “not yet” accomplished or “already lost” homeland – this perfect land is always somewhere and sometime else than here and now. In both of these positions, what is absent is more valuable than the present, which can never reach the perfect image. Both positions are deeply “historical” in the sense of “historicity” as defined by Frederic Jameson, a renowned scholar of the meanders of postmodern culture:

Historicity is, in fact, neither a representation of the past nor a representation of the future (although its various forms use such a representation): it can first and foremost be defined as a perception of the present as history; that is, as a relationship to the present which is at length characterized as a historical perspective²⁴.

Conflicts of memory are, therefore, conflicts of the present in which what is at stake is not an adequate representation of the past but the current attempt at power and distribution of power. This dual dynamic of collective memories and nostalgia penetrating them puts the constitutional narratives dominating in the EU and in the post-communist states on the collision course. This clash is reflected in the competition of constitutional identities: liberal constitutional identity promoted by the bodies of the EU on the one hand – and, on the other, attempts to work out the regional version by

²⁴ F. Jameson, *Postmodern, or, the Cultural Logic of Late Capitalism*, Durham 1991, p. 284.

the Member States. The Hungarian constitutionalist Tímea Drinóczi indicated various models of relations between the European constitutional identity and its state equivalents²⁵. It may be a model of co-operation or confrontation. Drinóczi indicates as an example of the first one the activity of the Italian Constitutional Court. It is based on the idea of communication and means a dialogue between two identities. The example of the latter model are Hungary and Germany (as well as, one may add, Poland). This model is based on the idea of scarcity and introduces a mechanism of competition for a limited space of the “right” identity. It seems that the dissimilarity of these models may be connected with harmonisation of collective memories. However, the very conflict between memories does not have to be perceived negatively. If identities are created in conflicts, then such situation is an opportunity for the European constitutional identity. Conflicts allow to reveal differences in preferences and hidden assumptions, thanks to which these preferences and assumptions may be subjected to criticism. Criticism is of a tempering nature. If what is subjected to criticism survives, it will be consciously accepted and will become part of the identity. Therefore, conflicts frequently have a forming potential and are the only way out of nostalgia penetrating our postmodernist political and legal culture.

6. Conclusion: beyond politics of nostalgia

In a psychoanalytical perspective, nostalgia can be understood as a feeling of incompleteness and a longing for the lost object²⁶. As in the case of memory, representativeness is not an important thing here, it does not matter whether the object really had the characteristics that the subject misses. Nostalgia has primarily a psychological function. The vision of the harmonic and perfect past makes it possible to endure the feeling of the current loneliness and loss. This kind of “defensive” nostalgia must turn into mourning, a process of accepting that the past can no longer be recovered. If the subject does not want to accept it, nostalgia is “pathological” and changes into melancholy. In Freud’s language, one can say that the lack in the world becomes a rift in the subject²⁷.

By projecting this idea onto the issue of constitutional identity we can distinguish two policies of nostalgia that are generated by visions of the past contained in fundamental laws. The first policy treats nostalgia as a defence mechanism in the initial period of the constitutional subject’s fulfilment. The past is a source of value, normative consistency and motivation to act. Such a policy may seem especially useful in moments of political transformation and revolution. It legitimizes the new political order. But not for long: excessive idealization of the past can lead to rejection of the present in the name of the lost ideal. Present becomes the Other of the constitutional subject. Such politics is pathological as it destroys the possibility of political action, because every change, even the slightest departure from the ideal is treated as treason. The development is then blocked. The constitutional identity must be able to change and adapt to new conditions. Pathological nostalgia stops this process, thus destroying this identity.

²⁵ T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, “German Law Journal” 2020/21, pp. 105–130.

²⁶ I. Conceicao, *The Uses of Nostalgia*, “Journal of Integrated Social Sciences” 2017/1, pp. 89–97.

²⁷ S. Freud, *Mourning and Melancholia*, in: *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XIV (1914–1916): On the History of the Psycho-Analytic Movement, Papers on Metapsychology and Other Works*, London 1962, p. 246.

So how can protection from “pathological” nostalgia be provided? In the constitutional aspect we are interested in here, we can list a few indications. For example, preferring adaptive methods of interpretation of the constitution over methods focused on reconstructing the original intention. Adaptive methods require recognition and analysis of the present. Such recognition alone does not mean that the past does not matter but that it should be adapted to the new conditions. Another, similar legal method is to prefer reasoning based on analogy rather than reasoning based on the mechanical application of unchanging rules. Since the universal rule does not change, it acquires a metaphysical status and can only be replicated. In contrast, reasoning by analogy at its base assumes the impossibility of a simple repetition – the situation is always slightly different from the one encountered in the past. Another remedy against pathological nostalgia is to accept the multicentricity of contemporary legal systems. Postmodern constitutional systems are a complex network of old and new precedents-experiences, theories of law, rules resulting from agreements and international organizations and democratic grassroots pressures. Each of these sub-systems can carry a different vision of the past and there is no reason to believe that without arbitrary domination some meta-system can resolve possible conflicts between them. The solution is to acknowledge the polyphonic nature of collective memories and to try to work out a different kind of memory economy than the one based of exclusivity and shortage – which is more and more in line with the need to work out different principles of real economy. This also requires the recognition that the same multi-layered character of the subject of the constitution, that it is always constructed, deconstructed and reconstructed from the past but for the requirements of the present and any such act must be temporary. Thus, there is no metaphysical, timeless entity that would guarantee a correct social order forever.

What all these elements have in common is that they are part of an attempt to create a constitutional identity that would oppose “pathological” politics of nostalgia, i.e. conscious taming and redirecting of the past, while recognizing its cultural domination. Since the past is becoming an indispensable reference point for the culture of late modernism, the constitutional imagination should consciously try to react to this phenomenon.

Nostalgic Constitutional Identity

Abstract: The paper deals with the link between the notions of constitutional identity and nostalgic collective memory. Starting from the notion of nostalgia of postmodern society as used in social theory, it shows that this cultural condition is reflected in in constitutions. The point of reference for contemporary political projects is no longer the future but the past. Longing for a lost homeland becomes a dominant social emotion. The author shows that this vision of the past is present in constitutions, especially in post-communist countries. It influences constitutional identity and, due to different temporal structures, is in conflict with the constitutional identity of the EU. The article ends with an analysis of the consequences of such a politics of nostalgia and the possible defence mechanisms against it.

Keywords: constitutional identity, collective memories, nostalgia

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