

Emilia Kowalewska¹
Polish Academy of Sciences

Truth Revelation Procedures as a Rights-based Alternative to the Politics of (Non-)Memory²

1. Introduction

The field of memory studies in Poland offers an appropriate space within which to take up the problem of the *juridification*³ or *institutionalization* of collective memory in Central and Eastern Europe. This article seeks to contribute to present debates by considering the implementation of a subset of transitional justice practices in light of evolving normative standards. The article begins by outlining the research problem for investigation and by presenting the chosen theoretical framework, data and methods of analysis. Constraints on transitional justice that shaped *frames of remembering*⁴ within the central case study are presented in the second section. The third section presents the *right to know/(the) truth* as an emerging socio-legal norm at the international level. The subsequent section presents, in regional perspective, three types of truth-oriented transitional justice procedures. The concluding section draws together the findings and offers conclusions regarding the restorative potential of acknowledging demands for legally authoritative accounts of the past.

1.1. Law, public discourse and memory

While legal instruments, legal discourse, and legally mandated institutions play a major and sometimes controversial role in shaping collective memory, the relationship between law and memory is complex and under-theorized. This article reflects on the question of whether a post-authoritarian newly democratic state has any legal obligation to shape social or collective memory of the past regime, and if so, in what form.

¹ ORCID number: 0000-0001-8339-9771. E-mail: e.kowalewska@isppan.waw.pl

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³ A.M. Magnussen, A. Banasiak, *Juridification: Disrupting the Relationship between Law and Politics?*, "European Law Journal" 2013/3, pp. 325–339.

⁴ See: E. Goffmann, *Frame Analysis: An Essay on the Organization of Experience*, cited in: B. Misztal, *Memory and the Construction of Temporality, Meaning and Attachment*, "Polish Sociological Review" 2005/149, p. 42.

One need not look far to recognize the practical relevance of this research problem. Viewed in comparative perspective, Poland's political transformations in 1989 and the years of institution-building that followed, raise the problem of how a society should come to terms with its own recent history, including through processes of institutionalized remembering – or forgetting. The role of law in this process is a specific one and remains a major area of scholarly debate⁵ and controversy⁶. Law is rarely examined specifically as a vehicle of memory; moreover its role has been construed as that of “increasing the *expressive weight* of some version of history, *irrespective* of that version's substantive weight”⁷. In response to such challenges, this paper aims to offer a reflective and objective appraisal of law's role in preserving and communicating collective memory rooted in knowledge about the past.

Law is inextricably linked to the past⁸. As Adam Czarnota⁹ notes, experiences from the past and redressing wrongs of the past form the essence of law: legal norms and institutions provide a mechanism for systematic remembrance and forgetting of past wrongs. The Western legal tradition has developed specific techniques, maxims, and safeguards in this regard: statutes of limitations, principles of non-retroactivity, *nullum crimen, nulla poena sine lege*. The authority of law plays a significant role in strategies for dealing with the past¹⁰. While procedural and evidentiary techniques within the law are typically tied to individual rather than collective memory¹¹, law is concerned with the past to the extent that the past helps to regulate present and future *social* relations¹². The role of law is particularly significant in relation to sustaining or changing group identity through the regulation of collective memory¹³ and as a principal element in the process of societal learning. Nevertheless, the relation between collective memory and the law has not been studied in any systematic way. The above observations fail to define *how* the law might or should contribute to or regulate social memory, or how memory shapes or takes up the form of law itself.

While public discourse, analysed through the frame of *memory studies*, constitutes the primary “matrix within which facts and norms relevant to the past are expressed”¹⁴ – a matrix dominated by the *politics of memory* – this article discusses aspects of post-communist Poland's “dealing with the past” through the lens of *transitional justice*. While moral and cultural battles over the past illustrate what Jürgen Habermas described as the public use of history¹⁵, the socio-legal field of transitional justice is grounded in

⁵ See: S. Karstedt (ed.), *Legal Institutions and Collective Memories*, Oxford–Portland (OR) 2009; A. Sarat, T.R. Kearns (eds.), *History, Memory, and the Law*, Ann Arbor 1999; E. Heinze, *Epilogue: Beyond Memory Laws: Towards a General Theory of Law and Historical Discourse*, in: U. Belavusau, A. Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge 2017, pp. 413–433.

⁶ See: A. Szczerbiak, *Politicising the Communist Past: The Politics of Truth Revelation in Post-Communist Poland*, London 2018.

⁷ E. Heinze, *Epilogue...*, p. 415. This approach may be interpreted as an extension of the criticized but influential perspective articulated in: E. Hobsbawm, T. Ranger, *The Invention of Tradition*, Cambridge 1983. See further: B. Misztal, *Memory...*, pp. 39–40.

⁸ M. Krygier, *Law as Tradition*, “Law and Philosophy” 1986/2, pp. 237–262.

⁹ A. Czarnota, *Between Nemesis and Justitia*, in: A. Czarnota, M. Krygier, W. Sadurski (eds.), *Rethinking the Rule of Law after Communism*, Budapest 2005, p. 126.

¹⁰ A. Czarnota, *Between Nemesis...*, p. 126.

¹¹ A. Czarnota, *Prawo, historia a pamięć zbiorowa. Przyczynek do związków między historią a socjologią prawa* [Eng. *Law, History and Collective Memories. A Contribution to the Historical Sociology of Law*], “Miscellanea Historico-Iuridica” 2014/1, pp. 203–216.

¹² A. Czarnota, *Prawo...*, p. 205.

¹³ A. Czarnota, *Prawo...*, p. 209.

¹⁴ E. Heinze, *Epilogue...*, p. 415.

¹⁵ V. Tismaneanu, *Truth, Memory, and Reconciliation: Judging the Past in Post-communist Societies*, in: L. Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, Abingdon 2009.

a discourse that assumes *depoliticization* to be an intrinsic value¹⁶. Nevertheless, the spheres of law and public discourse are inextricably linked. Czarnota suggests that it is collective memory, through the medium of a historical public narrative, that grants law its legitimacy and guarantees its normative coherence¹⁷. The extent to which this relationship works both ways deserves further exploration.

1.2. Theoretical framework

Given that truth revelation, as a primordial goal of transitional justice¹⁸, is intimately linked to the question of memory, the article takes up the above research problem by considering the indirect impact on memory construction of a subset of transitional justice mechanisms, namely, *truth revelation procedures*¹⁹. The effectiveness of these procedures depends upon, but is not guaranteed by, the authority of law²⁰ and emerging legal norms.

The complex nature of state obligations for shaping societal memory may be conceptualized through deployment of a central theoretical category: the *right to truth*. Considered from the perspective of its normative potential, recognition (or denial) of such a right may vindicate (or deny) broader individual and collective rights through processes aimed at preserving and making accessible knowledge about former political regimes and systemic aspects of past oppression. The field in which this theoretical claim is explored is that of transitional justice in East and Central Europe – with a focus on Poland in the first two decades following the democratic transition. While there are many possible ways for consolidating democracy through enacting political reconciliation in the context of such a transition, the practices considered in this study are those that are directly oriented to preserving or revealing knowledge or truth about past events. While bringing to light truths about injustice that were previously suppressed is a form of acknowledgment that addresses specific wounds and brings about various forms of *primary restoration*²¹, such processes are also likely to effect *secondary restorations* at the individual and collective level, including increases in legitimacy and trust, and other forms of social capital²². The restorative contribution of truth revelation procedures underpins their potentially critical role in the development of rights-based models for dealing with the past.

1.3. Methodology

The study adopts a case-study methodology to explore the theoretical claim regarding the right to truth as a possible category against which to evaluate the impact

¹⁶ K. Andrieu, *Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011*, “Human Rights Quarterly” 2016/2, pp. 261–293.

¹⁷ A. Czarnota, *Prawo...*, p. 208.

¹⁸ See: D.A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, “Ethics & International Affairs” 1999/13, pp. 43–64, cited by: S. Buckley-Zistel, T. Koloma Beck, C. Braun, F. Miet, *Transitional Justice Theories: An introduction*, in: S. Buckley-Zistel, T. Koloma Beck, C. Braun, F. Miet (eds.), *Transitional Justice Theories*, Abingdon 2014, p. 5.

¹⁹ For an overview of transitional justice procedures, see: M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej* [Eng. *Models of Transitional Justice*], Poznań 2017; M. Krotoszyński, *The Transitional Justice Models and the Justifications of Means of Dealing with the Past*, “Oñati Socio-legal Series” 2016/3, pp. 584–606.

²⁰ A. Czarnota, *Prawo...*, p. 212.

²¹ D. Philpott, *Just and Unjust Peace. An Ethic of Political Reconciliation*, Oxford 2012, pp. 171–174.

²² D. Philpott, *Just and Unjust Peace...*, pp. 171–174.

of law on collective memory in a transitional context. By narrowing the study to the field of transitional justice, and exploring the implementation of three types of procedure with particular reference to the chosen case study (Poland), considered from a comparative perspective, the article contrasts an emerging international norm with particular application of that norm within a unique historical context in which it has not featured prominently within formalist legal reasoning. Data analysed includes judgments of regional and domestic courts and commissions as well as documents produced by international bodies of legal experts, including those operating under the United Nations Charter. The central theoretical category is also explored with reference to expert discussions of normative developments in the field covering the initial decades following political transitions to democracy. Following purposive sampling identifying the most authoritative judgments and texts²³, content analysis (including coding) and legal interpretation have been used to identify ways in which the norm under investigation has been applied and interpreted by various legally mandated bodies, thereby shaping normative developments. Empirical data regarding the central case study and its regional context is taken from early expert reports as well as published empirical and theoretical studies on legal approaches to dealing with the past in the region. By contrasting normative accounts outlining state obligations to secure the right to (the) truth, with empirical accounts of locally implemented practices, the study facilitates an assessment of the extent to which truth revelation procedures may aid a given society in the development of a rights-based legal model for societal remembering. Such goals reflect the overall goals of transitional justice as a field and provide a counterpoint to politically oriented models of memory reconstruction that have become apparent in recent years²⁴.

1.4. Characteristics of the chosen case study

In Central and Eastern Europe, life under externally imposed communist rule was marked by censorship, surveillance, and suppression of fundamental freedoms by the state authorities and security police. In Poland, the largest of CEE countries, levels of surveillance increased in the 1980s prior to the collapse of the system. Effective investigations into political crimes – including disappearances – were circumvented with the help of political control mechanisms over the procuracy and judiciary²⁵. Once the political system changed following the celebrated Roundtable Talks of 1989, the challenge facing the successor governments was that of dealing with past human rights abuses – and the memory of these abuses – within a framework that would be politically viable and harmonious with the goals of democratic consolidation and the rule of law²⁶. It is in this context that the research problem is investigated below.

²³ See: Article 38(1) of the Statute of the International Court of Justice.

²⁴ See further: M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, “Hague Journal on the Rule of Law” 2019/1, pp. 85–110. Marta Bucholc considers criminal proceedings, memory laws, and “applied commemorations” such as constitutional preambles, as all fitting within the category of *memory politics*. The present article focuses instead on a subset of transitional justice procedures.

²⁵ See: S. Frankowski, *The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski’s Sądownictwo w Polsce Ludowej (The Judiciary in Peoples’ Poland) (1989)*, “Arizona Journal of International and Comparative Law” 1991/8, pp. 33–52.

²⁶ W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht 2005; S.R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, “Georgetown Law Journal” 1999/87, p. 710.

2. Transitional justice constraints in regional perspective

The proliferation of legal and political norms characterizing the *third wave of democracy* took the shape of demand for systemic reform in Poland, which, following strikes and workers' rights movements of the 1970s gathered momentum with the mass mobilization of the Solidarity (*Solidarność*) trade union movement in the summer of 1980. Although this civic momentum was quashed with the declaration of Martial Law in December 1981, the need for systemic reform became increasingly apparent through the catastrophic economic situation in the second half of the 1980s²⁷. As the frequency and intensity of social unrest grew, the centrally planned economic system dominated by the *nomenklatura* began to adapt from within. With time, certain communist leaders judged that they had sufficiently strong incentives to enter into dialogue with members of the democratic opposition. Exit strategies for the ruling elite were devised as part of the 1989 Roundtable Talks between *Solidarność* representatives and communist party rulers²⁸. The democratic opposition in Poland worked successfully to accommodate the outgoing leaders' demands in order to secure the possibility of free elections²⁹, simultaneously facilitating a "soft landing" for representatives of the *ancien régime* in the context of the democratic transformation³⁰ and preserving the conciliatory *spirit of the Roundtable*³¹.

The main protagonists of democratic reforms in Poland in 1989³² chose to draw a line³³ on the past. The particular constraints imposed by a negotiated transition³⁴ played a major role in shaping the choice, design and perception of potential transitional processes in Poland and the reluctance of successor governments to focus on exposure of and accountability for systemic injustices of the former regime. Observers claimed that, at the level of state power, little attempt was made to deconstruct the complex reality of the former system³⁵. In failing to preserve the integrity of state-security archival records during the initial months of transformation, and by arguing against attempts to expose the social networks of intimidation and collaboration³⁶ that had sustained the *ancien régime*, the first generation of political reformers passed up opportunities to preserve an institutionalized memory of a system that had for decades conditioned their daily life. Furthermore, by failing to implement legal procedures to revisit, document,

²⁷ W. Osiatyński, *The Roundtable Talks in Poland*, in: J. Elster (ed.), *The Roundtable Talks and the Breakdown of Communism*, Chicago 1996.

²⁸ W. Osiatyński, *The Roundtable Talks*..., p. 59.

²⁹ N. Calhoun, *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, New York 2004, p. 93.

³⁰ See: M. Nalepa, *Skeletons in the Closet*, Cambridge 2010, p. 2; S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman 1991, pp. 211–231.

³¹ W. Osiatyński, *The Roundtable Talks*..., p. 41. Wiktor Osiatyński explains that Bronisław Geremek, Zbigniew Bujak and Tadeusz Mazowiecki, negotiating for *Solidarność*, promoted a "conciliatory vision" of negotiations that was oriented toward a common search for best available solutions.

³² R. David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)*, "Law & Social Inquiry" 2003/2, p. 390.

³³ For an overview of the "thick-line" model of transitional justice, see: M. Krotoszyński, *Transitional Justice Models and Analytic Philosophy. Towards Theory*, "Polish Political Science Yearbook" 2017/2, pp. 9–21.

³⁴ J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge 2004, p. 193.

³⁵ See: J. Kochanowski, *Penal Law in Confrontation with the Nightmares of the Past and the Challenge of the Present Day*, "Managerial Law" 2002/5, p. 22, fn. 8.

³⁶ By 1985, the number of full time agents of the communist security police (*Służba Bezpieczeństwa*, SB), had grown to 25,600 in a total population of around 37 million. L. Stan, *Poland*, in: L. Stan (ed.), *Transitional Justice*..., pp. 76–77; A. Dudek, A. Paczkowski, *Poland*, in: K. Persak, L. Kamiński (eds.), *A Handbook of the Communist Security Apparatus in East Central Europe, 1944–1989*, Warsaw 2005, p. 288.

acknowledge, condemn, and compensate for past wrongs, the reformers continued the politics of *non-memory*. Such choices, while explained by the circumstances, risked undermining the legitimacy of reforms and successive governments³⁷. The emergence of new challenges imposed by economic liberalization, and the related problems of corruption, reprivatization and rising social inequalities, further reduced the likelihood of public acknowledgment of human rights abuses and patterns of repression induced or committed by state officials and their agents.

Against this background, decades of suppressed memories on the individual and collective level awaited recognition in the new political context³⁸. Compounding the silent trauma left by World War II and the Shoah, the memory of minorities or events that could not easily be accommodated into the Soviet-imposed regime's ideological framework was relegated from public discourse. As Claus Offe and Ulrike Poppe observed, the state socialist regimes generated a huge demand for specialists devoted to silencing truth: they were "paranoic about dissent, treason, manifest acts of disloyalty, and internal enemies", and spent "enormous resources and efforts on surveillance, control, indoctrination, and the sanctioning of any challenges to the canonized self-portrayal and its allergy to non-partisan observation"³⁹. In the context of transformation, there was no clear strategy for dealing with the millions of files that had been collected by various branches of the socialist states and secret services throughout Central and Eastern Europe⁴⁰. Communist crimes committed in Poland between 1956 and 1989 were routinely left unprosecuted in the first decade following the Roundtable Talks. On the state level, almost a decade passed before the Polish legislature enacted the law establishing the Institute of National Remembrance (Polish: *Instytut Pamięci Narodowej*, IPN) that began its operations in 2000.

3. The right to know the truth: emergence of a socio-legal norm

While a conciliatory approach underpinned concessions and approaches to dealing (or not dealing) with the past in the context of Poland's democratic transformation, the evolution of distinct normative standards at the international level has led to recognition of a state obligation "to ensure the inalienable right to know the truth about violations"⁴¹ committed by functionaries of former regimes. Truth commissions, commissions of enquiry, and trials of representatives of military dictatorships reveal a distinct normative dimension – that of *truth revelation* – in legal processes directed toward reckoning with the past. In the Inter-American region in particular⁴², the concept of a *right to truth*⁴³

³⁷ A. Młynarska-Sobaczewska, *Autorytet państwa. Legitymizacyjne znaczenie prawa w państwie transformacji ustrojowej* [Eng. *State Authority: The Legitimizing Significance of Law in the State of Political Transformation*], Toruń 2010, p. 450.

³⁸ A. Heribert, *Divided Memories: How Emerging Democracies Deals with the Crimes of Previous Regimes*, in: S. Karstedt (ed.), *Legal Institutions...*, p. 86. Adam Heribert notes that "the 80 to 100 million victims of Stalinism still wait to be rehabilitated and even properly recognised" (p. 86).

³⁹ C. Offe, U. Poppe, *Transitional Justice After the Breakdown of the German Democratic Republic*, in: A. Czarnota, M. Krygier, W. Sadurski (eds.), *Rethinking the Rule of Law...*, p. 158.

⁴⁰ See: M. Albon, *Truth and Justice: The Delicate Balance*, Budapest 1992; S. Karstedt, *Introduction: The Legacy of Maurice Halbwachs*, in: S. Karstedt (ed.), *Legal Institutions...*, p. 18.

⁴¹ *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher (E/CN.4/2005/102) with *Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1), United Nations Economic and Social Council, 8.02.2005. The latter are referred to hereinafter as *UN Impunity Principles*.

⁴² For a chronological overview see: J.E. Mendez, *An Emerging 'Right to Truth': Latin-American Contributions*, in: S. Karstedt (ed.), *Legal Institutions...*

⁴³ I consider the expressions "right to truth", "right to the truth", and "right to know" to be synonymous.

began to crystallize in line with individual, group and societal demands for truth and accountability in the aftermath of crimes committed under autocratic regimes⁴⁴.

The right to truth as an emerging socio-legal norm can be traced back to longstanding and legally binding provisions of international law of armed conflict articulated in the Geneva Conventions. It is an internationally recognized element of the obligation of states to combat impunity⁴⁵, to investigate effectively violations of human rights and to uphold a right to effective remedy and reparations. As a synonym of the *right to know*, its substance conforms to that of the right to information and expectations of transparency in the public sphere. While it may be conceived of as a conglomerate of existing legally-recognized rights, according to the United Nations, “the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right... and should be considered as a non-derogable right and not be subject to limitations”⁴⁶. In the international and Inter-American human rights systems, denial of the right to truth has been associated with the violation of the prohibition of cruel, inhuman and degrading treatment⁴⁷. Politically implemented mechanisms of truth telling have also been considered a form of reparation for victims of injustice⁴⁸: respect for the right to truth denotes “an important means of reparation” and guides legal interpretations of state obligations with regard to both the *scope* of investigations and the *form* of public communication of findings, public acknowledgements, and memorialization of past injustices⁴⁹.

Responding to societal demand for *historical clarification*⁵⁰ in the aftermath of the military dictatorships of the 1970s and 1980s, both the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights (IACtHR) have interpreted the 1969 American Convention on Human Rights⁵¹ (ACHR) to imply that victims of human rights abuses *and their relatives* have an individual right to know the truth about crimes committed under a preceding regime⁵². This “individual dimension” of the right to truth derives from the right to humane treatment (Article 5 of the ACHR) and the right to a remedy under Articles 8 (right to a fair trial) and/or 25 of the ACHR (right to judicial protection), taken together with Article 1 (state obligation to respect rights)⁵³. Court judgments imply that the state has an obligation to conduct thorough investigations to name perpetrators and to reveal the conditions in which gross violations

⁴⁴ See: A. Jacqmin, *When Human Claims Become Rights. The Case of the Right to Truth over “Desaparecidos”*, “Oñati Socio-legal Series” 2017/6, pp. 1247–1272.

⁴⁵ *UN Impunity Principles*.

⁴⁶ *Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights* (UN Doc. E/CN.4/2006/91), United Nations Economic and Social Council, 8.02.2006. See also: *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 15 December 2005 (A/RES/60/147); *UN Impunity Principles*.

⁴⁷ View of the Human Rights Committee of 21 July 1983, *María del Carmen Almeida de Quinteros et al. v. Uruguay* (Comm. No. 107/1981, UN Doc CCPR/C/OP/2), para. 14, cited in: J. Sweeney, *The Elusive Right to Truth in Transitional Human Rights Jurisprudence*, “International and Comparative Law Quarterly” 2018/2, pp. 360–361.

⁴⁸ M.U. Walker, *Truth Telling As Reparations*, “Metaphilosophy” 2010/41, pp. 525–545.

⁴⁹ J. Sweeney, *The Elusive Right...*, p. 367, citing *inter alia*: judgment of the IACtHR of 25 November 2003, *Myrna Mack Chang v. Guatemala* (Merits, reparations and costs), paras. 274–275.

⁵⁰ M. Krotoszyński, *The Transitional Justice Models and the Justifications...*

⁵¹ American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

⁵² The right to truth has been derived from Articles 8 and 25 of the ACHR in the following cases: judgment of the IACtHR of 25 November 2000, *Bámaca Velásquez v. Guatemala* (Merits), para. 201; judgment of the IACtHR of 14 March 2001 *Barrios Altos v. Peru* (Merits), para. 48. See similar language and more recent applications in: judgment of the IACtHR of 14 November 2014, *Rodríguez Vera et al. v. Colombia*, para. 509.

⁵³ J. Sweeney, *The Elusive Right...*, p. 372.

of human rights were committed – even in cases in which the triggering event took place prior to the adoption of the relevant regional human rights convention on which the Court’s jurisdiction is based⁵⁴.

The Inter-American Commission has gone further by recognizing the “societal dimension” of this right, expressly recognizing that entire *societies* have the right to know the truth about mechanisms used to suppress human rights under a former regime. The Inter-American Court started to “require states both to find and to make known the truth, not only to victims and families in the case at hand, but to society as well”⁵⁵. In the words of the former President of the Court, Judge Sergio García Ramírez, later cited by domestic courts in the region,

the so-called right to truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently⁵⁶.

By 2007, the Inter-American Court had acknowledged that,

the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities. Moreover, the investigation must be undertaken by the State as its own legal obligation⁵⁷.

The recognition of the right to truth has been bolstered by further regional case law: legally authoritative interpretations of the right have coupled it to the right to personal integrity of the next of kin; the right to access justice and an effective remedy; and the right to seek and receive information under Article 13 of the ACHR⁵⁸. Likewise, the requirements of the right have been made more explicit through evolving interpretation at the domestic and international level of the nature of the state obligation to combat impunity⁵⁹. Indeed, official United Nations guidelines to assist states in developing effective measures for combating impunity (*UN Impunity Principles*) devote the first five of thirty-eight principles to obligations that include at their core the right to know the truth about violations.

⁵⁴ Judgment of the IACtHR of 15 June 2005, *Moiwana Community v. Suriname*, recalled in: J. Sweeney, *The Elusive Right...*, pp. 371–372.

⁵⁵ D. Cassel, *The Inter-American Court of Human Rights*, in: *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, Washington 2007, p. 161.

⁵⁶ See separate concurring opinion of Judge Sergio García Ramírez in: judgment of the IACtHR of 25 November 2005, *Bámaca Velásquez v. Guatemala* (Merits), para. 19. For an overview of domestic jurisprudence applying the right to truth, see: *Digest of Latin American Jurisprudence on International Crimes*, Washington 2010, pp. 245–250.

⁵⁷ Judgment of the IACtHR of 11 May 2007, *Rochela Massacre v. Colombia* (Merits, reparations, and costs), para. 195.

⁵⁸ Judgment of the IACtHR of 20 November 2012, *Gudiel Álvarez et al. (Diario Militar) v. Guatemala* (Merits, reparations and costs), para. 202; judgment of the IACtHR of 24 November 2010, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil* (Preliminary objections, merits, reparations and costs), para. 201.

⁵⁹ See: *UN Impunity Principles; General Comment No. 31: The Nature of General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), UN Human Rights Committee, 26 May 2004, paras. 15, 18; *UN Basic Principles and Guidelines on the Right to a Remedy...* (A/RES/60/147), points: II (3) (b), II (4) and IX (22) (f); *International Law and the Fight Against Impunity: A Practitioners Guide*, International Commission of Jurists, Geneva 2015; *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members*, International Commission of Jurists, Geneva 2016.

4. Truth Revelation Procedures in regional perspective

In addition to criminal trials, transitional justice mechanisms denoted as truth revelation procedures (or truth-seeking mechanisms⁶⁰) can play a particular role in the early stages of political transition to preserve a record of past violations and the enduring personnel networks that enabled the system to operate as it did. Monika Nalepa and Marek Kaminski identify three types of truth revelation procedures: 1) lustration, 2) truth commissions, and 3) laws regulating the opening of secret files. Their shared objective is said to be “the reconciliation between members of the society who held opposing views of the past regime”⁶¹.

The approach to these mechanisms is an important indicator of the weight given to truth revelation as a value⁶² to be pursued through legal means in the context of political reconciliation and democratic consolidation. In the transitional justice or international human rights framework, truth is typically understood in the classical sense: as accurate information or knowledge about the past (what really happened). For a legislature concerned with securing the rule of law and democratic governance, truth revelation procedures – if designed appropriately – may provide a rights-based and victim-oriented alternative to the “art of forgetting”⁶³ or non-memory⁶⁴. Such procedures are, in this sense, a legally grounded alternative to memory policies oriented toward *polity legitimacy*⁶⁵ and nation-building; their restorative goals reach significantly beyond the generation of moral capital for society and political capital for its new elites. International guidelines on the state’s duty to preserve memory⁶⁶ and respect the right to truth provide a useful standard against which to assess such mechanisms.

4.1. Lustration

Lustration is a screening method that typically depends on the content of party and secret police files – sometimes, as in Poland, in conjunction with an assessment of the veracity

⁶⁰ M. Krotoszyński, *Transitional Justice Models and Analytic...*

⁶¹ M. Kaminski, M. Nalepa, *Judging Transitional Justice: An Evaluation of Truth Revelation Procedures*, Irvine 2004, p. 3, <https://escholarship.org/uc/item/9w9270cf>, accessed on: 20 April 2020. Cf. R. David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary and Poland*, Philadelphia 2011, p. xii. Roman David argues that only “reconciliatory” models have the potential to lead to reconciliation.

⁶² Michał Krotoszyński proposes three groups of values linked with addressing the past: 1) just retribution for previous wrongs; 2) truth, memory and acknowledgement of the past; and 3) social inclusion, mercy and forgiveness. See: M. Krotoszyński, *Transitional Justice Models and Analytic...* Truth revelation, from the perspective of the present article, belongs in the second group but is relevant to all three groups.

⁶³ Susanne Karstedt notes that “the art of lying... seamlessly transforms into the ‘art of forgetting’, as Andrzej Zybertowicz argues in his analysis of how the practices of the Secret Police were denied in Poland after the transition”. S. Karstedt, *Introduction: The Legacy of Maurice Halbwachs*, in: S. Karstedt (ed.), *Legal Institutions...*, p. 21.

⁶⁴ According to the protagonists of this term, social “non-memory” is “determined not only by the forgetting of unobjectified individual experiences but also by the tendentious blocking of certain elements at odds with ideology or political strategy. This blocking alters consciousness of certain events both for currently living individuals whose lived experience does not include the blocked elements and for future generations”. M. Hirszowicz, E. Neyman, *The Social Framing of Non-Memory*, “International Journal of Sociology” 2007/1, p. 76.

⁶⁵ A. Czarnota, *Barbarians ante Portas or the Post-Communist Rule of Law*, in: W. Sadurski, A. Czarnota, M. Krygier (eds.), *Spreading Democracy and the Rule of Law*, Dordrecht 2006, pp. 288–290.

⁶⁶ Principle 3 (The Duty to Preserve Memory) of the *UN Impunity Principles*: “A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments”.

of candidates' lustration declarations – to determine previous collaboration with the state security apparatus and to judge eligibility for public office or state privileges. Lustration has been implemented in a variety of ways in Central and Eastern Europe as a mechanism for protecting the rule of law and democratic values after the political transformations of 1989. While Germany, Czech Republic and the Baltic states implemented early lustration, granted access to files and facilitated trials, equivalent measures in Poland and Hungary were delayed and relatively mild. Romanian and Bulgarian measures were weak or partial⁶⁷, whereas Slovakia, Slovenia, Albania and most former Soviet Union states opted not to implement cleansing or justice measures throughout the first decade⁶⁸. Several countries attempted a new or expanded version of lustration, disclosure or vetting after 2004⁶⁹.

Much has been written about the deficiencies of particular lustration efforts⁷⁰ and their potential impact on human rights, due process, and rule of law guarantees. Numerous constitutional court judgements⁷¹, as well as case law and documents at the Council of Europe level reflect these legislative complexities and provide guidance on appropriate procedural safeguards⁷². Beyond these rule of law concerns, opposition to lustration has somewhat resembled debates over amnesty laws in other regions, where the desire for peace and reconciliation was set against the (apparently “vindicative”) pursuit of justice and accountability⁷³.

Empirical research suggests that lustration may, even if delayed, play a positive role in rebuilding political trust and consolidating democracy⁷⁴. However, with the passing of

⁶⁷ However, a late form of informal or silent lustration was taken up by Romania and Bulgaria from 2006 to 2008, when repository agencies of secret police files started to review the files of tens of thousands of public employees and publicly disclose the findings. See: C. Horne, “*Silent Lustration*”: *Public Disclosures as Informal Lustration Mechanisms in Bulgaria and Romania*, “*Problems of Post-Communism*” 2015/3, pp. 131–144.

⁶⁸ See: L. Stan (ed.), *Transitional Justice*...

⁶⁹ See: C. Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries*, Oxford 2017.

⁷⁰ See: A. Opalińska, *Lustracja w Polsce i w Niemczech* [Eng. *Lustration in Poland and Germany*], Wrocław 2012; A. Paczkowski, *Fenomen lustracji* [Eng. *The Lustration Phenomenon*], in: A. Paczkowski, B. Różycki, Ł. Jasiński, P. Machciewicz, *Rozliczanie totalitarnej przeszłości: karanie i upamiętnianie zbrodni* [Eng. *Accounting for the Totalitarian Past: Punishment and Commemoration of Crimes*], Warszawa 2018, pp. 173–253.

⁷¹ Antoni Dudek explains that in Poland, the first official lustration initiative, a Senate resolution of 19 of July 1991 was not enacted for fear of destabilizing the state. The next was a Sejm resolution of 28 May 1992 that was declared unconstitutional for exposing collaborators' names without providing for appellate procedures. The next effort in 1997 failed due to judicial boycott of the Lustration Court/Public Interest Ombudsman model. The next wave of lustration lasted from 1999 to 2004, when the staff of the Public Interest Ombudsman verified over 18,000 lustration declarations: after years, fewer than one hundred “lustration liars” were identified. Following the victory of the Democratic Left Alliance in 2001, President Aleksander Kwaśniewski attempted by amendment to exclude from the lustration process those who had worked in the Ministry of the Interior and the Military Special Service as intelligence or counter-intelligence agents. The Constitutional Tribunal lifted this ban in June 2002. A similar attempt to restrict the scope of the law in October 2002 was also struck down by the Tribunal in May 2003 on the basis of the constitutional rule of civic equality under the law. A new law adopted in October 2006 signified an extension on the categories of civic posts subject to lustration. A new, Presidential, version of the law was passed in January 2007, but its flaws and provisions sparked controversy. A May 2007 Constitutional Tribunal judgment struck down many provisions, exempting the IPN from the task of publishing a catalogue of secret police informants and narrowing down the broad list of public positions for which position holders or applicants would have to submit lustration declarations. A. Dudek, *The Consequences of the System Transformation of 1989 in Poland*, “*Remembrance & Solidarity*” 2014/3, pp. 18–21.

⁷² Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, Council of Europe Parliamentary Assembly (PACE), 27 June 1996, together with *Measures to dismantle the heritage of former communist totalitarian systems*, Doc. 7568, 3 June 1996, Report of the Committee on Legal Affairs and Human Rights by Mr Adrian Severin, including *Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law*.

⁷³ J.E. Mendez, *Victims Silenced. The Inter-American Human Rights System and Transitional Justice in Latin America*, Washington 2007, pp. 197, 202.

⁷⁴ C. Horne, *Building Trust*... However, Aleks Szczerbiak (*Politicising*..., p. 187) notes that one cannot always separate out instrumental-strategic and ideological-pragmatic motives for lustration for analytical purposes, given the “interplay of ideational and interest-based impulses and concerns” driving various actors.

time, lustration may have more of a symbolic than practical impact: in Poland the sheer backlog of compulsory lustration declarations remaining to be verified suggests that the practice is more formal and symbolic than substantive. Overall, the impact of lustration on memory construction has been marginal due to its targeted and largely private nature. In Poland, the content of lustration declarations is not made public; cases in which candidates for public election have admitted collaboration form an exception, but even in such cases, specific details regarding the nature of collaboration are withheld.

Experts have observed that in the years immediately following political transformation, CEE societies experienced a deficit of public debate about the past. In place of serious societal discussion, lustration and decommunization efforts served to limit the discourse by offering a formal response to public demand for screening⁷⁵ while in fact focusing attention on a limited number of scapegoats⁷⁶. With time, recurring debates around lustration legislation have contributed more to the development of a rule of law culture in post-communist societies⁷⁷ than to the development of collective memory.

4.2. Truth Commissions

The term *truth commissions* refers to “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years”⁷⁸. Such bodies “contribute to the construction and preservation of the historical memory, the clarification of the facts, and the determination of institutional, social and political responsibilities during certain historical periods of a society”⁷⁹.

With the exception of the 1992–1994 *Enquete-Kommission* of the German Bundestag⁸⁰ established to examine human rights violations under communist rule in East Germany from 1949 to 1989, Central and Eastern European states did not establish temporary truth commissions with the explicit aim of facilitating public discussion and truth telling after 1989. The 1992–1994 Enquete Commission held seventy-six sessions, facilitated forty-four public hearings throughout the eastern states and at the seat of the parliament in Bonn⁸¹, heard a variety of testimonies, commissioned expert analyses, initiated two plenary debates in the Bundestag and produced 18 volumes (15,187 pages) of witness statements, documents and evaluations detailing *inter alia* the power structures of the old regime and the role of the state apparatus. However, attention to these published findings was short-lived⁸².

⁷⁵ Public demand for lustration of high ranking officials reached almost 90 percent of Poles surveyed in January 1996. A. Paczkowski, *Fenomen...*, p. 218, fn. 65.

⁷⁶ A. Czarnota, *Between Nemesis...*, p. 188; A. Czarnota, *Decommunisation and Democracy: Transitional Justice in Post-communist Central-Eastern Europe*, in: S. Eliaeson, L. Harutyunyan, L. Titarenko, *After the Soviet Empire: Legacies and Pathways*, Leiden–Boston 2015, pp. 165–183.

⁷⁷ A. Czarnota, *Decommunisation...*, p. 181. Cf. C. Horne, *Building Trust...*

⁷⁸ *UN Impunity Principles*, p. 5

⁷⁹ See: Judgment of the IACtHR of 14 November 2014, *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 88, in which the Court also reiterated the principle according to which “historical truths obtained by these mechanisms should not be understood as a substitute for the State’s obligation to ensure the judicial establishment of individual or State responsibilities”.

⁸⁰ Study Commission for Working Through the History and the Consequences of the Socialist Unity Party (SED) Dictatorship in Germany. See further: *Interview with Rainer Eppelmann (MdB/CDU), Chairman of the Enquete Commission for the “Reappraisal of the History and Consequences of the SED Dictatorship”*, “Deutschland Archiv” 1992/8, pp. 668–671, http://germanhistorydocs.ghi-dc.org/pdf/eng/Chapter5_doc3-English.pdf, accessed on: 20 April 2020.

⁸¹ A. Beattie, *Playing Politics with History: The Bundestag Inquiries into East Germany*, Brooklyn 2008, pp. 68–69.

⁸² See: C. Offe, U. Poppe, *Transitional Justice...*; A. Beattie, *Playing Politics...*

Elsewhere in the region, historical commissions and commissions of remembrance were established in pursuit of a similar range of transitional justice goals. In Poland, an extraordinary parliamentary commission⁸³ was established in August 1989 to investigate politically motivated crimes of the 1980s – including 93 fatalities that had been identified by the Helsinki Committee as raising suspicion of security apparatus involvement. However, as a result of various constraints, the commission's final report⁸⁴ failed to make significant legal, political or social impact; impunity for perpetrators persisted, and findings on secret operations targeting *inter alia* the Catholic Church were classified by the Minister of Internal Affairs in 1991.

Poland's IPN was established by a legislative act of 1998, extending the work of its predecessor investigative commission dealing with Nazi German crimes committed against Polish citizens during World War II, and integrating its mandate into a memory institute with a wide range of functions. Controversies over the IPN's statutory mandate, activities and personnel illustrate the challenge of shielding truth revelation procedures from short-term political instrumentalization. In addition to preserving security service archives and (since 2007) facilitating lustration (vetting), the IPN is tasked with researching, investigating, prosecuting, commemorating and educating about past wrongs. Conflicts over the IPN⁸⁵ have illustrated the battles over *les cadres sociaux de la mémoire* and the role of law and legally mandated institutions in rehabilitating victims through event commemoration and preservation or dissemination of authoritative accounts of the past.

4.3. Laws regulating the opening of secret files

The question about the appropriate role for law in guaranteeing the preservation of a memory repository in the form of files and archives was an important one for the Central and Eastern European political transitions⁸⁶. State archives contained details of many crimes committed with impunity against citizens during the Nazi German and Stalinist occupations. Moreover, the extensive nature of archives of the security apparatus of the communist party-states posed particular challenges. In contrast to regimes elsewhere in the world where there was a clearer division between oppressors and oppressed, instruments of political terror in these states were often more psychological than physical⁸⁷, and the mechanism deployed to recruit collaborators and invigilate dissenters resulted in the erosion of social trust within communities at all levels⁸⁸. While the perceived lack of political alternatives constituted the most important sustaining feature of the regime in countries under the Soviet tutelage⁸⁹, the targeted recruitment and active collaboration of informers as well as passive complicity amongst the general

⁸³ See: *Biuletyn IPN* [Eng. *Bulletin of the IPN*] 2003/1, pp. 18–20, 27–29, discussing the work of the Extraordinary Sejm Commission for the Investigation of the Activities of the Ministry of the Interior, 1989–1991.

⁸⁴ The report was published almost 15 years later. See: J.M. Rokita, A. Dudek, *Raport Rokity. Sprawozdanie Sejmowej Komisji Nadzwyczajnej do Zbadania Działalności MSW* [Eng. *The Rokita Report: The Report of the Extraordinary Sejm Commission for the Investigation of the Activities of the Ministry of the Interior*], Kraków 2005.

⁸⁵ See: A. Dudek, *Instytut. Osobista historia IPN*, Warszawa 2011; A. Szczerbiak, *Politicising...*

⁸⁶ For an early discussion of practices adopted in different countries of the region, see: M. Albon, *Truth...*

⁸⁷ L. Huyse, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, "Law and Social Inquiry" 2005/20, pp. 72–73.

⁸⁸ C. Horne, M. Levi, *Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe*, Budapest 2003, p. 6.

⁸⁹ I owe this thought to Antoni Z. Kamiński.

population⁹⁰ facilitated the penetration of the secret police in certain societies and within targeted groups.

The new governments of Central and Eastern Europe after 1989 faced the challenge of designing file access procedures to address this legacy. Taking into account sources of error – including incentives for secret informers to embellish or fabricate reports, but also methods used by the security services to check the reliability of agents and informers – secret police files needed to be understood not as a crude depository of objective truth from which individual accountability should be deduced, but rather for the light they shed on the mechanisms of the prior regime⁹¹. While some experts advocated for a principle of transparency and individual response to the content of secret police files, according to which victims and collaborators would be allowed to add a personal statement to their own files, others suggested that more attention should be focused not on individual collaborators but on the dossiers of high-level party officials and party files in order better to understand how and why a given society developed into “society of systematic denunciation”⁹².

Finally, archives containing secret files are also relevant cross-nationally in processes aimed at infusing and upholding new norms within the new legal and security order. As John Ciorciari and Jesse Franzblau note, “law seldom requires third countries to share their secret files, and voluntary disclosure remains relatively rare. This constitutes an important weak link in the international human rights regime”⁹³. The European Court of Human Rights proceedings initiated by Polish families of Katyń massacre victims provides a poignant illustration of this point⁹⁴. Furthermore, the cross-border security relevance of secret files was highlighted during accession processes to the North Atlantic Treaty Organization – as Western NATO members were concerned over former secret police gaining access to sensitive data, and to the European Union – whose members were concerned over the prospect of communist officials taking up office in Brussels⁹⁵.

Comparing the truth revelation procedures presented above in reference to the chosen case-study, it seems that those oriented toward the preservation and opening of the secret archives had the greatest untapped potential to deepen societal understanding and memory not only of the circumstances of the most egregious crimes, but also of the networks that made up the former social system – with its socially embedded lines of intimidation, collaboration, dependency, control and command.

Moreover, expert discussions on the content of secret files illustrate that the memory-shaping role of secret archives can be understood with reference to both subjective and objective conceptions of truth⁹⁶; those who have worked with such records acknowledge

⁹⁰ See: C. Gonzalez-Enriquez, *Decommunization and Political Justice in Central and Eastern Europe*, in: A. Barah (ed.), *The Politics of Memory: Transitional Justice in Democratizing Societies*, Oxford 2001, pp. 218, 220.

⁹¹ See: K. Verdery, *Postsocialist Cleansing in Eastern Europe: Purity and Danger in Transitional Justice*, 2009, pp. 18–19, <https://tinyurl.com/y8ojqx2h>, accessed on: 20 April 2020.

⁹² M. Albon, *Truth...*, p. 11.

⁹³ J.D. Ciorciari, J. Franzblau, *Hidden Files: Archival Sharing, Accountability, and the Right to the Truth*, “Columbia Human Rights Law” 2014/46, p. 153.

⁹⁴ J. Kowalewski, *The WWII ‘Katyń’ crime before the ECHR: is the Convention a transitional justice tool?*, Warsaw 2012, <https://tinyurl.com/ybtxa59w>, accessed on: 20 April 2020; G. Baranowska, *The Right to the Truth for the Families of Victims of the Katyń Massacre*, *Verfassungsblog*, 6.01.2018, <https://tinyurl.com/y74zhqny>, accessed on: 20 April 2020.

⁹⁵ L. Stan, *Introduction: Post-communist transition, justice, and transitional justice*, in: L. Stan (ed.), *Transitional Justice...*, p. 8.

⁹⁶ See: M. Łoś, *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*, “Law and Social Inquiry” 1995/1, pp. 155–156. Maria Łoś suggests that debates over lustration reveal competing notions of the very nature of truth. Proponents aimed at uncovering “the truth” and insisted on the public dimension of truth that needed to be “objectified” to reflect the nature of prevailing power relations. Opponents claimed that lustration represents attempts to recentralize and renationalize “truth”, which is by its very nature local, situational, private and subjective.

the need to verify records, corroborate them with other sources, interpret them and only then attempt on their basis to reconstruct past events⁹⁷. Special procedures should be in place at the national and international level to govern archive maintenance and access in accordance with international human rights standards as well as rule of law and security considerations. In addition to political, privacy and security considerations resulting from the declassification of sensitive documents, appropriate maintenance and access may be undermined by deficit in resources, expertise, legal enforcement, physical access or professional archive management. Archive procedures designed to reflect their role as truth revelation procedures enable these archives to perform memory-related functions⁹⁸ that reflect both the post-transitional context and international standards⁹⁹. In Poland, such procedures were deficient: many security archive files were destroyed in the 1980s and 1990s, and access to files was severely limited thereafter – initially even for historians working within the IPN¹⁰⁰.

5. Conclusions

The right to know the truth has acquired customary law status as a norm of international humanitarian law¹⁰¹ and is considered to be a potential general principle of law¹⁰². The articulation of this and related rights within international, regional and domestic systems of law clarify the nature of state obligations to develop and preserve institutions and mechanisms that provide individuals, their next of kin, and entire societies with authoritative – publicly accessible – accounts of serious human rights violations of the past. The implementation of transitional justice mechanisms known as truth revelation procedures facilitates the fulfilment of these and related state obligations – including the duty to preserve memory against the threat of negation or revisionist narratives. In the challenging task of designing and evaluating such procedures, the right to truth provides a victim-oriented perspective that may help to orient public discourse and

⁹⁷ See: K. Persak, *Rekonstruowanie prawdy* [Eng. *Reconstructing Truth*], “Tygodnik Powszechny”, 23 January 2012, <https://www.tygodnikpowszechny.pl/rekonstruowanie-prawdy-15134>, accessed on: 20 April 2020.

⁹⁸ See: submission of Poland in response to: Office of the High Commissioner for Human Rights questionnaire on Right to the truth – National Archives on Human Rights, pursuant to Human Rights Council resolution 21/7 of 10 October 2012 on the Right to the truth (A/HRC/RES/21/7), https://www.ohchr.org/EN/Issues/Truth/Documents/Poland_english.doc, accessed on: 20 April 2020.

⁹⁹ *Rule of Law Tools For Post-Conflict States. Archives*, UN Office of the High Commissioner for Human Rights, New York–Geneva 2014; *UN Impunity Principles; Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo De Greiff* (A/HRC/30/42), UN Human Rights Council, 7 September 2015 (including *Set of General Recommendations for Truth Commissions and Archives*, pp. 27ff); *Report of the Office of the United Nations High Commissioner for Human Rights on the Seminar on Experiences of Archives as a Means to Guarantee the Right to the Truth* (A/HRC/17/21), UN Human Rights Council, 14 April 2011; *Right to the Truth. Report of the Office of the High Commissioner for Human Rights* (A/HRC/12/19), UN Human Rights Council, 21 August 2009; *UN Economic and Social Council Resolution 2005/30: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (E/RES/2005/30), 25 July 2005; *Archives of the Security Services of Former Repressive Regimes. Report prepared for UNESCO on behalf of the International Council of Archives by Antonio González-Quintana*, Paris 1997; *Question of the impunity of perpetrators of human rights violations (civil and political). Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119* (E/Cn.4/Sub.2/1997/20). UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 26 June 1997 (discussing commissions of inquiry and archive preservation under the heading of *the right to know*).

¹⁰⁰ A. Dudek, *Instytut...*, pp. 148–152.

¹⁰¹ *Study on the right to the truth...* (UN Doc. E/CN.4/2006/91).

¹⁰² Y. Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, “International Review of the Red Cross” 2006/88, p. 268.

legal reasoning in the direction of substantive protection of human rights while providing a conceptual bridge between law, state obligation, and the question of collective memory.

Empirical studies show that the democratic transitions that began in 1989 to change forever the face of Central and Eastern Europe were subject to a number of transitional justice constraints. In the context of Poland's negotiated political transformation, high-level communist officials were initially allowed to retain positions of power and, as elsewhere in the region, many archival records were destroyed¹⁰³. The circumstances of the transformation in this particular country context conditioned the role played by law as a vehicle of memory.

Judged against the human rights discourse on truth, justice and reparations, new norms and mechanisms capable of underpinning a new legal discourse, grounded in a new form of legal education¹⁰⁴, were lacking in Poland's transformation¹⁰⁵. The contrast between the extensive normative standards and the limited state practice presented above illustrates that laws, processes and procedures that attempt to erase or to institutionalize memory in the form of authoritative accounts of the past need to be evaluated with respect to the goals and values underpinning the articulation of a right to truth. It is against the demands of this individual and collective right that attempts to control or institutionalize memory should be reconsidered and reframed. Restitution, as Lavinia Stan notes, "is not limited to the return of abusively confiscated property, but can materialize as acknowledgement of past sufferings, the restoration of honour and dignity to long-silenced victims, or public knowledge of the repression mechanisms kept secret by the old regime"¹⁰⁶. The reconstruction of public memory beyond this restorative context is more inclined toward the generation of political or moral capital and thus prone to instrumentalization and manipulation.

The collation of testimonies and preservation of the integrity of secret records enables the reconstruction of individual and collective memories that enable people to come to terms with their own history and rebuild social and political trust¹⁰⁷. In Central and Eastern Europe, citizens of the former German Democratic Republic were offered a symbolic opportunity to undertake this process as a collectivity. Elsewhere in the region, processes aimed at deepening societal understanding of networks of repression and injustices of the past were very limited. Deeper public debate on the contents of accounts and records of the past may have empowered victims of violations and reduced the scope for instrumentalizing the content of archives for scapegoating, legitimizing, polarizing, populist¹⁰⁸,

¹⁰³ W. Sadurski, *Rights...*, pp. 236–237.

¹⁰⁴ See: V. Ferrari, *Law and Society Studies and Legal Education*, "Journal of Legal Education" 2005/4, pp. 495–499.

¹⁰⁵ M. Zirk-Sadowski, *Transformation and Integration of Legal Cultures and Discourses – Poland*, in: W. Sadurski, A. Czarnota, M. Krygier (eds.), *Spreading Democracy...*, p. 310.

¹⁰⁶ L. Stan, *Introduction...*, p. 3.

¹⁰⁷ See further: R. Engelmann, *The "Stasi Records", the Public and Collective Memories: The Inspection of Personal Records*, in: S. Karstedt (ed.), *Legal Institutions...*, p. 21, who notes how the opening up of Stasi files helped those affected make sense of their experiences, allaying suspicions and preventing the construction of individual and collective myths. See also: R. Jahn, *The Better We Understand Dictatorship, the Better We Can Shape Democracy – on Dealing with the Heritage of the Ministry for State Security in Germany*, "Remembrance and Solidarity Studies in 20th Century European History" 2014/3, pp. 103–110.

¹⁰⁸ Since 2016, the current Polish government has (mis-)used collective memory of political repression to legitimate legislation that deprives broad categories of former uniformed services of acquired pension privileges on account of their alleged service to a "totalitarian state" prior to August 1990. While such provisions will continue to face legal challenges in the courts, a rights-based approach may have reduced the likelihood of adopting legislation based on a presumption of collective rather than individual guilt.

purging or ritual¹⁰⁹ purposes in the decades that followed. Acknowledging the discursive limits on legal reasoning presented by legal formalism, a truth-oriented, victim-sensitive discourse about the past has the potential to provide an alternative to “mythologies of self-pity and self-idealization”¹¹⁰ and one-sided narratives within the politics of memory and non-memory. It is within this rights-based frame of remembering that truth procedures can be implemented in fulfilment of a state’s legal obligations towards individuals and societies.

Truth Revelation Procedures as a Rights-based Alternative to the Politics of (Non-)Memory

Abstract: This article offers a socio-legal reflection on the relation between law, state obligation, and attempts to institutionalize collective memory. As the question of memory institutionalization becomes most pertinent in the context of regime change that imposes on an incumbent government certain expectations for addressing the past, the article considers this research problem from the perspective of transitional justice theory. The transitional justice paradigm allows for an interdisciplinary consideration of the topic. Special attention is paid to legal norms and mechanisms directed towards establishing authoritative knowledge about the past. The emerging principle of *the right to truth* is presented as an integrating and rights-based perspective from which to approach societal demands for acknowledging injustices of the past. Measured against the fundamental rights that lie at the heart of transitional justice theory, three types of *truth revelation procedures* are presented. The article shows that the relationship between law and memory – which is often reduced to one of political instrumentalization – should, in accordance with the values of a liberal democracy, be reframed from the perspective of individual and collective rights. The article seeks to contribute to the field of memory studies in the social sciences by exposing functions of legal norms and mechanisms that are often overlooked when discussed from the perspective of the politics of memory.

Keywords: collective memory, truth revelation procedures, transitional justice, right to truth, politics of memory, post-communist Poland

¹⁰⁹ J. Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe*, Princeton 1997, cited in: K. Verdery, *Postsocialist Cleansing...*, p. 13.

¹¹⁰ V. Tismaneanu, *Fantasies of Salvation. Democracy, Nationalism and Myth in Post-Communist Europe*, cited in: L. Stan, *Introduction...*, p. 3.

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