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

1. Introduction

The field of memory studies in Poland offers an appropriate space within which to take up the problem of the juridification 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 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.

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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 debate and controversy. 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”. 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 past. As Adam Czarnota 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 past. While procedural and evidentiary techniques within the law are typically tied to individual rather than collective memory, law is concerned with the past to the extent that the past helps to regulate present and future social relations. The role of law is particularly significant in relation to sustaining or changing group identity through the regulation of collective memory 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” – 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 history, the socio-legal field of transitional justice is grounded in

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10 A. Czarnota, Between Nemesis…, p. 126.
12 A. Czarnota, Prawo…, p. 205.
13 A. Czarnota, Prawo…, p. 209.
14 E. Heinze, Epilogue…, p. 415.
a discourse that assumes depoliticization to be an intrinsic value. 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 coherence. 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 justice, 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. The effectiveness of these procedures depends upon, but is not guaranteed by, the authority of law 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, 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 capital. 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

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17 A. Czarnota, Prawo…, p. 208.
20 A. Czarnota, Prawo…, p. 212.
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 texts\textsuperscript{23}, 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 years\textsuperscript{24}.

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 judiciary\textsuperscript{25}. 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 law\textsuperscript{26}. It is in this context that the research problem is investigated below.

\textsuperscript{23} See: Article 38(1) of the Statute of the International Court of Justice.

\textsuperscript{24} See further: M. Bucholc, \textit{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 \textit{memory politics}. The present article focuses instead on a subset of transitional justice procedures.


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 1980s. 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 rulers. The democratic opposition in Poland worked successfully to accommodate the outgoing leaders’ demands in order to secure the possibility of free elections, simultaneously facilitating a “soft landing” for representatives of the ancien régime in the context of the democratic transformation and preserving the conciliatory spirit of the Roundtable.

The main protagonists of democratic reforms in Poland in 1989 chose to draw a line on the past. The particular constraints imposed by a negotiated transition 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 system. 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 collaboration 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,
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 governments. 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 context. 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”. 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 Europe. 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” 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 particular, the concept of a right to truth

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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).
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 regimes\textsuperscript{44}.

The right to truth as an emerging socio-legal norm can be traced back to long-standing 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 impunity\textsuperscript{45}, 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”\textsuperscript{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 treatment\textsuperscript{47}. Politically implemented mechanisms of truth telling have also been considered a form of reparation for victims of injustice\textsuperscript{48}: 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 injustices\textsuperscript{49}.

Responding to societal demand for historical clarification\textsuperscript{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 Rights\textsuperscript{51} (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 regime\textsuperscript{52}. 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)\textsuperscript{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

\textsuperscript{45} \textit{UN Impunity Principles}.
\textsuperscript{50} M. Krotoszyński, \textit{The Transitional Justice Models and the Justifications…}
\textsuperscript{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, \textit{Bámaca Velásquez v. Guatemala} (Merits), para. 201; judgment of the IACtHR of 14 March 2001 \textit{Barrios Atos v. Peru} (Merits), para. 48. See similar language and more recent applications in: judgment of the IACtHR of 14 November 2014, \textit{Rodríguez Vera et al. v. Colombia}, para. 509.
\textsuperscript{53} J. Sweeney, \textit{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 based\(^\text{54}\).

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”\(^\text{55}\).

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 sufficiently\(^\text{56}\).

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 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 ACHR\(^\text{58}\). 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 impunity\(^\text{59}\).

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.

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4. Truth Revelation Procedures in regional perspective

In addition to criminal trials, transitional justice mechanisms denoted as truth revelation procedures (or truth-seeking mechanisms\(^{60}\)) 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 value\(^{62}\) 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-memory\(^{64}\). 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 memory\(^{66}\) 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…*


\(^{62}\) 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 Zybortowicz 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 unobjectivized 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. Hirschowitz, E. Neyman, *The Social Framing of Non-Memory*, “International Journal of Sociology” 2007/1, p. 76.


\(^{66}\) 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 partial, whereas Slovakia, Slovenia, Albania and most former Soviet Union states opted not to implement cleansing or justice measures throughout the first decade. Several countries attempted a new or expanded version of lustration, disclosure or vetting after 2004.

Much has been written about the deficiencies of particular lustration efforts and their potential impact on human rights, due process, and rule of law guarantees. Numerous constitutional court judgements, as well as case law and documents at the Council of Europe level reflect these legislative complexities and provide guidance on appropriate procedural safeguards. 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 “vindictive”) pursuit of justice and accountability.

Empirical research suggests that lustration may, even if delayed, play a positive role in rebuilding political trust and consolidating democracy. However, with the passing of...
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 screening while in fact focusing attention on a limited number of scapegoats. With time, recurring debates around lustration legislation have contributed more to the development of a rule of law culture in post-communist societies 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.” 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.”

With the exception of the 1992–1994 Enquete-Kommission of the German Bundestag 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 Bonn, 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 the power structures of the old regime and the role of the state apparatus. However, attention to these published findings was short-lived.

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.
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”.
81 A. Beattie, Playing Politics with History: The Bundestag Inquiries into East Germany, Brooklyn 2008, pp. 68–69.
82 See: C. Ofte, 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 commission 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 report 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 IPN 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 transitions. 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 physical, and the mechanism deployed to recruit collaborators and invigilate dissenters resulted in the erosion of social trust within communities at all levels. While the perceived lack of political alternatives constituted the most important sustaining feature of the regime in countries under the Soviet tutelage, the targeted recruitment and active collaboration of informers as well as passive complicity amongst the general population posed particular challenges.

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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…
89 I owe this thought to Antoni Z. Kamiński.
population 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 regime. 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.”

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.” The European Court of Human Rights proceedings initiated by Polish families of Katyn massacre victims provides a poignant illustration of this point. 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 the European Union – whose members were concerned over the prospect of communist officials taking up office in Brussels.

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 truth; those who have worked with such records acknowledge...


M. Albon, *Truth*…, p. 11.


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 events. 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 functions that reflect both the post-transitional context and international standards.

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 IPN.

5. Conclusions

The right to know the truth has acquired customary law status as a norm of international humanitarian law and is considered to be a potential general principle of law. 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

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100 A. Dudek, Instytut..., pp. 148–152.
101 Study on the right to the truth... (UN Doc. E/CN.4/2006/91).
Truth Revelation Procedures as a Rights-based Alternative to the Politics of (Non-)Memory

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 destroyed. 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 education, were lacking in Poland’s transformation. 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.” 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 trust. 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, populist.

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103 W. Sadurski, Rights, pp. 236–237.
106 L. Stan, Introduction, p. 3.
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 ritual 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” 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

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