

# ЗАГАЛЬНА ТЕОРІЯ ДЕРЖАВИ І ПРАВА

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## PUBLIC MEMORY SPHERE AND ITS LEGAL PETRIFICATION. FEW REMARKS ON THE LEGAL FRAMEWORK OF THE INSTITUTES FOR THE NATIONAL REMEMBRANCE FUNCTIONING IN POLAND AND UKRAINE

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The main goal of the following article is an answer to the question on the role of the legal institutions in the processes of the societal collective memories petrification. Through the comparison of the normative basis for the functioning of the institutes for the national remembrance, in Poland and Ukraine, my crucial intention is a presentation of the regional specificity of the state impact on the processes of collective co-remembering in the particular postcommunist societies in Central and Eastern Europe, with the references to the characteristic elements of the regional constitutionalism. Necessary to identify and to explain is the inevitable fundamental difference between states' memory policies in the presented countries and their approach to the institutions. The text starts from the comparison of the institutes for the national remembrance, but my intention is to explain the differences through the analyses of the legal and socio-legal background of their functioning.

*Keywords:* collective memory, Central and Eastern European constitutionalism, public memory, legal petrification of the past, state institutional legal policies.

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**Introduction.** The presented text focusses on the very special and the very regional institutions – institutes for the national remembrance in Poland and Ukraine. Such institutions are created in (almost) all Central and Eastern European states. Especially in Baltic States (except Latvia) and all-around former so-called satellite states of the Soviet Union. Nevertheless, the existence of Ukrainian institute seems to be some exception in the group of countries which after the collapse of the Soviet Union did not decide about immediate integration with the political structures of the Western World (EU/NATO), but tried to reformulate their relations with Russia inside the new organization – Commonwealth of Independent States. Such a historical and political background creates an excellent opportunity for the comparison of the legal methods and solutions adopted in the statutes and the other acts establishing Polish and Ukrainian institutions of the national remembrance.

The presence of both institutes in the public discourse inside their home countries and at the international level is visible. The employees and the officials of Polish and Ukrainian institute are active actors of the memory disputes between Poles and Ukrainians. In consequence, the observers are dealing with the mixture of the political (state memory policies) and the legal spheres (individual state's memory legislation). It is also a consequence of the political factor choices accomplished at the moment of political community final creation.

Such complexed topic creates a possibility of socio-legal research which could provide answers on different spheres. Firstly, sociological, which analyses the problem of the collective societal memory and the collective forms of co-remembering as a theoretical concept. Secondly, the presentation of the other legal issues like CEE constitutionalism or the instrumentalisation of law should be interesting too. Finally, identification of the links between such phenomena like law, society, and legal petrification of societal co-remembering could also be useful, especially for the Ukrainian reader. As far former satellites have accomplished their strategic goal – already mentioned integration with the political structures the Western World – Ukraine is at the road beginning. In result, comparison and presentation of the main similarities and the differences create an opportunity for the reflection about the style and quality of some legislators' decisions. Such sum up could be useful at the institutional level too. Especially that such an analyse is provided for the reader from the state which strategic plan is to join the 'European club'.

My main intention is to enlighten for the Ukrainian reader already mentioned main similarities and the differences on different levels. First comparative legal analysis – in that part, my main plan is a comparison of the legal background of the institutes for the national remembrance functioning in Poland and Ukraine. The main comparative variables are: 1) the institutes' legal character; 2) legal tasks presented in the establishing statutes; 3) the forms of political supervision; 4) (eventually) motives for the institutes creation.

Second is a presentation of the sociological experience of the studies on collective memory, especially its construction and the paths of creation. The special attention will be concerned with the forms of the state impact on this sociological phenomenon. The third part is preserved for the socio-legal reflection on the CEE constitutionalism with the particular reference to the role of the collective memories in the processes constitutionalisation new political communities in the region after the fall of communism. Finally, by husking main differences between Polish and Ukrainian legal policies on the past, I would like to identify conditions (both legal and societal) which stimulates and breaks up processes of the state legal impact on the collective memory sphere.

**Legal framework.** Polish Institute of National Remembrance – Commission for the Prosecution Crimes against the Polish Nation has been created by the Polish parliament statute of 18 June 1998. The presented statue was deeply amended in 2016. Later on, most out of controversial amendment elements have been excluded from the act or by the legislator or by Constitutional Court. At the moment, most of the legal problems created by the politicians in 2016 and later have been more-less solved. Nevertheless, apart from the controversies, crucial legal solutions which determines chosen variables do not have changed since 1998.

The public character of Polish Institute for the National Remembrance (further: IPN) is not determined in the establishing statue. In contrast with Czech or Lithuanian institutions which possess a similar profile. In both cases establishing acts determinates its role – as a state and public law institutions. Nevertheless, the public character of the IPN comes from the general act construction and its sources of financing. According to the Art. 8 p. 2 Institute is financed from the state budget. The head of the IPN is a President appointed for the five-year term by the parliament lower chamber (Sejm), at the agreement of the Senate and at the application of the Council of the Institute of Remembrance which shall present a candidate who is not its member. The same procedure is predicted for the President's dismiss. According to the Art. 9 p. 1 President is independent of the other state authorities. However, he or she is obliged to present parliament official report from the Institute activity once a year. Lack of the report

submission or its rejection by the parliament is one of the conditions for the President's cadency termination [Art. 13, p. 1].

IPN Council plays an essential role in the President's election procedure. This body is responsible for the candidate selection and his or her application submission into the Sejm. Its function is predicted as an opinion-making and counselling body of the President of the Institute in the matters related to the scope of operations of the Institute [Art. 15]. The members of the Council are appointed for the seven-year term, and they can be reelected once. It consists of nine members: two appointed by the President of the Republic of Poland, five by Sejm and two by Senate.

This short presentation of the IPN bodies shows the complexity of its organization. Nevertheless, a formal framework of the Institute bodies does not present its fields of activity. The political factor also determines those in the same legal statute. It is also necessary to emphasize that Polish IPN has the most comprehensive functions of all similar institutions created in the region (Lithuania, Czechia, Slovakia, Hungary, Romania, Bulgaria, Estonia, German lands which belonged to DDR). Its role is: 1) collecting and granting access to the collected documents produced by Polish People's Republic, Soviet and Nazi German security services; 2) investigate the crimes against Polish Nation or committed on Polish territory against representatives of the other ethnic groups; 3) lustration (vetting); 4) public education; 5) «Looking for resting places of persons killed in the fight with the imposed totalitarian system or as a consequence of the totalitarian repressions or ethnic cleansing» [Chapter 6a]; 6) performing in commemorating initiatives. Moreover, in the last chapter of the statute are located criminal provisions. To fulfil presented legal tasks, IPN is composed of the following offices: Commission of the prosecution crimes against Polish Nation, Vetting (lustration) office, Office of the commemorating struggle and the martyrdom, Office of search and identification, Archive, National education office, a publishing house.

The last element should answer to the question of why Polish legislators decided on creating such a complex institution. Their motives are presented at the statute beginning in the preamble. They decided to set up IPN because in their minds still bears memory about the number of Polish victims, losses and damages during the second world war and after, patriotic traditions of struggles against both totalitarian regimes communist and Nazi, actions of Polish citizens to reconstitute fully state independence. They also emphasized state obligation to prosecute all the crimes against peace, humanity, war crimes, and other human rights violations.

Summing up this short presentation of the organisational and the legal framework of Polish Institute for the National Remembrance functioning, plus taking into account legislators motives presented in the preamble, I have to emphasize that the reader deals with the most complex institution. The number and the dependencies between different IPN bodies suggests a will of its liberation from the political influences. Nevertheless, it is well known wishful thinking. Both style of the supervision and the appointment of the organ, plus a source of financing, shows the public character of the Institute for the National Remembrance in Poland which is under full control of the political elements of social life. I could say that we deal with the fiction of independence, typical not only for Poland but also for the other CEE liberal democracies.

I am aware of the Ukrainian Institute for the National Remembrance historical suffers from the politicians. Nevertheless, its history clearly shows the approach of the CEE political factors to collective memory. They recognise it as a far-right concept from the early beginning. Nevertheless, the main normative base for this analysis will be the last act of Ukrainian government re-establishing the Institute of National Remembrance

after the Revolution of Dignity (ПОЛОЖЕННЯ про Український інститут національної пам'яті) from 2014 with later amendment changing its character from the research institution into governmental agenda.

Public character of the Ukrainian Institute is out of discussion. In 2014 was recreated according to the state power act. The difference between Polish IPN and the Ukrainian equivalent is rooted in the establishing act character. As far Polish institution has been created by the parliament statute, the Ukrainian one basis on the government decision. I am aware of the character of the legal acts hierarchy in Ukraine, nevertheless the use of the two steps of the social representation instead of one – in Poland the statute was passed by the direct society representatives, in Ukraine by the group representing parliament majority and approved by the parliament – could create some controversies and affect, in a consequence, a lower societal institution legitimacy. The transformation of the Ukrainian institute into the element of the state authority makes such a controversy much more visible.

As it was underlined in the previous subchapter, the found fathers of Polish IPN tries from its early beginning present it as an independent research institution only supported by the state apparatus, and the Ukrainian ones did not do that. The first paragraph of the Governments Decision characterizes Ukrainian institution as an «institution which implements states policy in the field of restoration and preservation of Ukrainian's national memory» [§1]. Next point confirms the character of the Institute as a public legal person. The area of its activity is clearly described in the following paragraphs. The Institute should preserve the memory about crucial, for Ukrainian national identity, those are among others, events like *Holodomor*, mass famines of 1921–1923 and 1946–1947, all the actions protecting Ukrainian independence, sovereignty, and territorial integrity (including Anti-terrorist operations). The Institute role is to create most comprehensive possible pictures about the crucial moments of Ukrainian history, to inform its society about the results and to prepare the basis for the public commemoration of those who deserve that. According to the § 3 p. 2 the Institute should provide for the Ministry of Culture, the proposals of the state policy methods on the memory field in the regions with the multinational composition of residents.

The central Institutes bodies appointment is less formalized than in Poland, what comes from the character of the legal act establishing it. The primary person is Chairman appointed by governments after the previous candidate selection by the Ministry of Culture [§ 8]. The Chairman has to possess two deputies, from whom one is elected according to the same procedure as a chairperson. The candidates for the Deputies should be present Ministry of Culture by the Chairman.

In contrast with Polish legislators, the authors of the Ukrainian Institute act did not provide any motives for the Institute for the National Remembrance creation.

**Collective memory concept and the use of societal coreremembering in CEE.** In the previous section, the words «memory» and «remembrance» have been used quite often. Human possibility of remembering is treated as a natural biological process. Nevertheless, co-remembering inside society is its construct, not biological.

Following M. Halbwachs and later investigators of that research problem, collective memory is a result of the social interactions focusing on the reconstruction of the individual memories inside a particular group. Such a process of reconstruction can appear in micro-groups like family or at the macro-level (classes or the nations). Collective memory possesses also particular element – presentist character. It means that all the events from the past are evaluated from the present perspective. In other words, those who are participants of the memory discourse are aware of the short and long-time

consequences of the event from the past. In effect, this knowledge is the principal evaluation determiner.

The subjective perspective of the article is a memory of the national community. Using B. Misztal categories collective memory (including the nation's memory) can be formulated in three possible ways. First is a state (understood as an institutional entity) uses its provision and the apparatus (including legal tools) to transfer useful memory narrations to the society. This perspective is characterized as «inventor of the traditional perspective» [11, p. 56]. Two others are or reverse, like «popular approach» [see: 11, p. 61–67], or are limited into the discursive part of the collective memory creation process like «dynamics of the memory approach» [see: 11, p. 67–74].

Researchers (among others B. Anderson, P. Connerton, E. Hobsbawm, T. Renger) were examining that research problem and has selected almost three elements which are essential for the collective memories creation in the «inventors of the tradition» sense: public, secular, education; public celebrations; public memorization in the open space.

P. Connerton, in the book *How societies remember* pointed out that public celebration of commemorating has a double meaning. He used an example of Nazi Germany public celebrations. First is a creation of the identity with those who are memorized. The second one is preserved for the semi-metaphysical sphere where both, those who are alive and present, and those who are reminded during the celebration are liked in the metaphysical presence. In other words, what the literature of the subject somewhat agreed, that since 19th century and the beginning of the nation-state formation in Europe, the state (understood as an institutional entity) has decided to replace God, and became a destination of the massive feelings of the particular societies. In effect, what was pointed mainly by E. Hobsbawm, the state has become an omnipotent social actor at the memory field. The institutional machinery of the modern state is, in fact, able to affect any citizen by different codes, symbols or its representatives (like the postman or railway employees). From the 19th and 20th century, such a states' activities were even more natural, because they were not limited by the external legal orders (international and supranational).

Symbols and the memory narrations are playing an extremely important role in the constitutionalization of the political communities in CEE since the 1990s.

**Constitutionalisation of the political communities after the transition and the role of collective memory.** A. Młynarska-Sobaczewska, in her article on the normativization of the collective identities, has pointed out a crucial issue for this text. She explains the role of the memory narrations in the CEE democratic constitutions after 1989. In her opinion such a communicates located inside the legal act possesses concrete function and the receivers – «they are the instrument of confirming the legality of the constitution-making actors and further of the powers appointed according to the passed constitution [...] By the nation's history and the creation of communitarian feeling based on the historical experience, they constitute the community» [12, p. 111]. Why preamble plays such an essential role in democratic societies? Czech-British academic J. Priban, following N. Luhmann, pointed that «it is the self-obligating will of the sovereign people [which] is ceremoniously codified [exactly] in the constitutional preambles and converted into the moral, mythical, foundations of the political society» [13, p. 5]. In other words, the processes of the constitutionalization are demanding an element where the myths and beliefs located several all-around societies will be used to legitimate already created, by the constitution, political system.

The use of the memory narrations and the references to the past is common for all CEE constitutions passed after the democratic shift in the 90s'. Moreover, even if they

were free of that element, finally after the several amendments such narrations were implemented inside (Latvia, Romania).

In Polish constitution of 1997 are located references to the best traditions of first and second Polish Republic, to the bitter periods when fundamental rights and freedoms were not respected in Poland or to the multi-century heritage of predecessors. In the Czech constitution of 1992, the references are oriented on the remembering of the Crown of Bohemia and Czechoslovak statehood. In the Slovak constitution, contrary to Czechs, the state's roots are located in the Great Moravian tradition. The memory narrations are also present since 2014 in Latvian constitution, where the history of the state and its suffers from the totalitarian regimes are explained. Apart from these examples, memory narrations and the references to the traditions from the past, eventually to some historical state formations, are present in Estonian, Lithuanian, Hungarian and Romanian constitutions. The Fundamental Law of Hungary and the role of the past in the political community creation in that state since 2011 is a bit different topic, but the fact is that acceptance of the state vision of past in crucial to be declared as a Hungarian.

Such effective use of the past and its petrification by law is clearly explained by the group of Polish scholars: J. Marszałek-Kawa, A. Ratke-Majewska and P. Wawrzyński. They connected that issue with the character of the post-authoritarian society. As they mentioned «as far the legitimization of the political shift can be fulfilled by the references or to the past or to future, the reconstruction of the community vision has to be rooted in the presentation of the common core, traditions and the experiences constituting it» [10, p. 111].

Answer for the question why post-communist CEE states which after 1989 decided to join EU/NATO did not resign from the national community reconstruction, and they tried to link individual, liberal, values with the communitarian elements needs more in-depth studies and the examination. At the moment, I am able only to present some presumptions. Nevertheless, such fact was observed by the other scholars. Already mentioned, J. Piban called such a move of the legislative power in Poland «an interesting mixture of civil and national patriotism» [13, p. 85].

Ukrainian constitution preamble is formulated in a similar manner to the other CEE acts. There are also located references to the past and «centuries-old history of Ukrainian state-building and on the right to self-determination realized by the Ukrainian nation».

**Conclusions.** At first glance, if the constitution, and especially its preamble, plays a unique role in the processes of political communities' creation and contains the self-obligating will of the society, the decisions on the national remembrance institutes creation can be understood as a fulfilment of the constitutional obligations. Nevertheless, the use of memory for such an action creates another problem related to the character of contemporary states and societies. Legitimization of the political regime by the metaphysical links with predecessors is preserved for the forms of the state-hood which in the Western culture are treated as past. West – personified by the EU – looks for the legitimacy in the institutional effectiveness, not in the beliefs in the spirits of fathers. In consequence, such hybrid constitutionalism connecting national and the individualistic elements (coming from the core of the EU) demands in-depth examination. The institutional policies of Poland and especially Ukraine are the consequence of the presented constitutionalism form.

Compared legal framework of the institutes functioning in Poland and Ukraine clearly shows similarities and the fundamental differences. First of all, the different is scale of the several institutes social legitimacy. The formal framework is a consequence of the kind of the establishing act. Also, the element of the CEE constitutionalism affects

both institutes in the different scale. As far Poland, since 2004 is a subject of not only national but also supranational legal order of the EU law, which demands proper legislation, fulfilling the membership criteria, Ukraine as an associated country, is at the moment less limited. Such a legal situation creates opportunities for the direct impact on the public, collective, memory sphere by the state institutions. The analysis of the Ukrainian Institute for the National Remembrance legal framework clearly shows that the political factor uses this possibility. In the case of Poland, it is more complicated at the moment. Such a situation is connected with the fact that some controlling mechanisms of the rule of law or the fundamental rights protection have been ceded at the supranational level.

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**СФЕРА ПУБЛІЧНОЇ ПАМ'ЯТІ  
ТА ЇЇ ЮРИДИЧНЕ ЗАКРІПЛЕННЯ.  
ДЕКІЛЬКА ЗАУВАЖЕНЬ ЩОДО ЮРИДИЧНОЇ  
РЕГЛАМЕНТАЦІЇ ІНСТИТУТІВ НАЦІОНАЛЬНОЇ ПАМ'ЯТІ,  
ЩО ФУНКЦІОНУЮТЬ У ПОЛЬЩІ ТА В УКРАЇНІ**

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Висвітлено роль та значення правових інститутів у процесах збереження колективної суспільної пам'яті. Охарактеризовано інститути національної пам'яті у Польщі та в Україні. Виявлено основні подібні та відмінні риси у їх функціонуванні. Обґрунтовано важливість аналізу цих інститутів у більш широкому, регіональному, контексті. Звернуто увагу не лише на порівняльну характеристику передбачених приписами законодавства повноважень цих інститутів, але також їх розглядають як конкретні, регіональні, конституційні та соціально-правові феномени. Їх регіональна особливість пов'язується зі загально-суспільними та соціально-правовими інститутами, насамперед із правами людини та ліберальною демократією.

За допомогою порівняльного аналізу нормативної бази функціонування інститутів національної пам'яті у Польщі та в Україні, зокрема її виокремленню в ієрархії нормативних актів (беручи до уваги аспект соціальної легітимності), продемонстровано регіональні особливості впливу держав на процес збереження колективної пам'яті. Охарактеризовано форми, способи та міру впливу конкретних правових інструментів на колективну суспільну пам'ять. Висвітлено особливості обрання відповідних органів, механізмів їх державного контролю, джерел фінансування тощо.

Важливою є і соціологічна концепція у висвітленні інститутів колективної суспільної пам'яті, зокрема мотиви законодавців та методи їх створення, роль індивідуальних сподівань у формуванні колективної пам'яті, форми суспільного впливу на ці інститути тощо.

Також представлено характерні елементи регіонального конституціоналізму, зокрема як місцеві особливості вплинули на процеси конституціоналізації в Центральній та Східній Європі. Це має вагомe значення для ідентифікації та пояснення неминучої принципової відмінності між політикою пам'яті держав у представлених країнах, їх підходом до інститутів національної пам'яті та, як наслідок, баченням політики публічної пам'яті.

Аналіз інститутів національної пам'яті не обмежується лише матеріалом Польщі та України, а відбувається у більш широкому контексті функціонування цих інститутів у постсоціалістичних суспільствах Центральної та Східної Європи (наприклад, Литви, Чехії, Словаччини, Румунії та Угорщини).

Відтак зроблено висновки про правові передумови функціонування інститутів національної пам'яті, звернуто увагу на необхідність не лише текстуального аналізу законодавства, але й всебічного їх розгляду в соціально-правовій перспективі. Це важливо для вивчення інших складних феноменів, зокрема державної політики колективної пам'яті.

*Ключові слова:* колективна пам'ять, національна пам'ять, Центрально- та Східно-європейський конституціоналізм, юридичне забезпечення збереження минулого, державна політика пам'яті.

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