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## History, Memory and Law

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# History, Memory and Law

Vivian Grosswald Curran\*

It has been pointed out that descendants of Roman slaves do not contemplate suing the current Italian government for damages, and that the Athenian massacre in Melos more than two millennia ago, and the Saint Bartholomew's Day massacre in France three and a quarter centuries ago, are not hot topics of debate in terms of whether they constituted genocide within the meaning of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.<sup>1</sup> However, such a debate concerning the massacre of Armenians at the hands of the Ottoman Empire does remain a matter of heated argument by both descendants of victims and modern Turkey.<sup>2</sup> This debate similarly persists as to whether the Stalinist starvation of Ukrainians constituted genocide.<sup>3</sup> It also has been suggested that there is a strong collective Irish memory of the famine of the mid-1800s, but that, even though today's population associates the famine with the country's lack of independence, it does not associate its own current problems with past political and religious oppression. This is in contrast to many African-Americans, as well as indigenous populations in Canada and

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

2. See William Schabas, *Forward* to MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s*, at xiv (2009).

3. See Andriy J. Semotiuk, *The Ukrainian Holodomor - Was It a Genocide?*, [http://www.faminegenocide.com/resources/was\\_it\\_holodomor.htm](http://www.faminegenocide.com/resources/was_it_holodomor.htm); see also Steve Gutterman, *Russia: Holodomor was not genocide*, KHARKIV HUMAN RIGHTS PROTECTION GROUP (Feb. 26, 2009) <http://www.khpg.org/en/index.php?id=1235655899>.

Australia, who do associate current problems with past slavery, persecution, and discrimination.<sup>4</sup>

What do these examples signify in the context of memory's relation to law? Among others, taken together, they suggest that memory slides into history when law stops having a role to play. Memory is a force that lies under the surface of law, generally hidden from view, although it also can be an overt subject of law. In the French language, the term, "a memorial law," or *une loi mémorielle*, in contrast to the term as used in United States law,<sup>5</sup> deals with the legal regulation of memory. More precisely, it deals with law's interface with historical memory. Memory's willed conflation with history may be observed in such exceptional laws.

In France they have included a law prohibiting racist, xenophobic, and anti-Semitic acts, defined in Article 9 to include Holocaust denial;<sup>6</sup> an official declaration of recognition that genocide was perpetrated against the Armenians in 1915;<sup>7</sup> and a law prescribing the teaching in French schools of the "positive role of France's presence abroad, particularly in North Africa,"<sup>8</sup> a

4. Schabas, *supra* note 2, at xiii-xiv. For a probing analysis of memory and history, see PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* (Kathleen Blamey & David Pellauer, trans., 2004).

5. Memorial laws in the United States are named in memory of a victim whose ordeal or death inspired a legislative measure to remedy a previously unaddressed situation; hence, *Megan's Law*, for state laws requiring authorities to disclose the whereabouts of registered sex offenders, inspired by Megan Kanka, a victim of a known sex offender, see, e.g., 42 PA. CONS. STAT. ANN. § 9799.1, and *The Brady Act*, which mandates background verifications for the purchase of firearms, and is named for President Reagan's press secretary who was shot during an attempted assassination of the president. See 18 U.S.C.A. § 922.

6. Loi 90-615 du 13 juillet 1990 loi Gayssot [Law 90-615 of July 13, 1990 concerning the Suppression of all Acts of Racism, anti-Semitism or Xenophobia], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1990, p. 8333.

7. Loi 2001-70 du 29 janvier 2001 loi relative à la reconnaissance du génocide arménien de 1915 [Law 2001-70 of January 29, 2001 concerning Recognition of the Armenian Genocide of 1915], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 30, 2001, p. 1590.

8. Loi 2005-158 du 23 février 2005 loi portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés [Law 2005-158 of February 23, 2005 on acknowledging the Nation and the National Contribution Towards Repatriated French Citizens], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 23, 2005, p. 3128.

clause which caused such upheaval that it later was repealed.<sup>9</sup> The latter law followed one a few years earlier that had defined slavery and the slave trade as crimes against humanity and had mandated that the significant historical place in education which these events deserved henceforth be accorded to them.<sup>10</sup>

In Belgium, a 1981 law outlawing racism and xenophobia was extended in 1995 to prohibit and make Holocaust denial criminally punishable.<sup>11</sup> In 2007, Spain passed legislation known as the "Law of Historical Memory,"<sup>12</sup> in condemnation of the Franco dictatorship and mandating compensation to its victims. On a supranational level, the Council of Europe adopted a provision, ratified by numerous countries, prohibiting the denial of genocide or of crimes against humanity on the Internet.<sup>13</sup>

#### MEMORY AND SOCIAL MEDIATION

Memory's role in law can be observed on an individual or a group level. Maurice Halbwachs, the French sociologist who is known for having coined the phrase "collective memory," demonstrated that no matter how individual a memory appears to

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9. See Décret no. 2006-160 of Feb. 15, 2006, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 16, 2006. While all of the *lois mémorielles* have been highly controversial in France, with intellectuals and historians signing petitions to oppose them, none other has been subject to an intensity of criticism comparable to the 2005 law concerning France's colonial past. See PIERRE NORA & FRANÇOISE CHANDERNAGOR, LIBERTÉ POUR L'HISTOIRE (2008).

10. Loi 2001-434 du 23 mai 2001 loi Taubira [Law 2001-434 of May 21, 2001 concerning the Acknowledgement of Slave Trading and Slavery as a Crime Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 23, 2001, p. 8175.

11. See Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie [Law to Repress Certain Acts Inspired by Racism or Xenophobia] of July 30, 1981, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 8, 1981; Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale [Law Punishing the Denial, Justification or Approval of the Genocide Perpetrated by the German National Socialist Regime during the Second World War] of Mar. 23, 1995, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 30, 1995.

12. Ley de la Memoria Histórica (B.O.E. 2007, 310) (Spain).

13. See Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, Jan. 28, 2003, CETS No. 189 (*entered into force* Mar. 1, 2006).

be, or is, memory by its nature is a socially mediated phenomenon.<sup>14</sup> Even at its most individual level, memory is an inevitable interplay between the individual and what is remembered or, more exactly, re-constructed.<sup>15</sup> It is situated in the context of the individual's surrounding, which, in turn, means society: "[N]o memory is possible outside of the frameworks which people living in society use as a means of locating their memories."<sup>16</sup>

In law, individual memory has expanded beyond the eyewitness recollection of events of use in traditional trials. Individual memories have been critical in harnessing forces that are alternatives to formal legal proceedings in the context of Truth and Reconciliation Hearings, such as those that followed apartheid in South Africa and more recently that followed the crimes against humanity that occurred in Sierra Leone's civil war.<sup>17</sup>

Truth and Reconciliation proceedings are advocated as a way, through individual memories, of offering personal and collective catharsis by giving a voice to the previously voiceless, and of constructing collective memory for a regenerated society to take forward as its narrative for the future.<sup>18</sup> The account of individuals who are survivors of genocide and other catastrophic events can contribute something unique for historical purposes:

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14. MAURICE HALBWACHS, *LES CADRES SOCIAUX DE LA MÉMOIRE* 11 (Albin Michel, 1994) (1925).

15. *Id.* at 83-113.

16. *Id.* at 79.

17. Although the assessment of whether the South African Commission fulfilled expectations is not unanimous, calls for Truth and Reconciliation Commissions after South Africa's experience concern, inter alia, Rwanda, the Congo, Kenya and Zimbabwe. See, e.g., Ntandoyenkosi Ncube, *Zimbabwe: Women Call for Truth, Justice and Reconciliation*, SISTERS OF NOTRE DAME DE NAMUR (Dec. 26, 2009), available at <http://sdden.wordpress.com/2009/12/26/zimbabwe-women-call-for-truth-justice-and-reconciliation/>; *Call for Kenyan truth commission*, BBC NEWS (Feb. 4, 2008, 6:06 PM), available at <http://news.bbc.co.uk/2/hi/africa/7227112.stm>; Paul Rusesabagina, *Truth and Reconciliation for the Congo, Rwanda and the Great Lakes Region of Africa*, ONE (Sept. 1, 2009, 9:37 AM), available at <http://www.one.org/blog/2009/09/01/truth-and-reconciliation-for-the-congo-rwanda-and-the-great-lakes-region-of-africa/>.

18. See, e.g., DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDERS* (2003).

archival documents cannot explain what people underwent, while individual accounts, although, and indeed precisely because each is subjective, can provide such information.<sup>19</sup>

The channeling of memory towards alternatives to formal legal proceedings may hold special appeal in contexts where the crimes are growing remote and where memory recedes and is lost. For example, the trials of Nazi collaborators in France that occurred half a century after the events involved sometimes painfully confused testimony by extremely elderly witnesses.<sup>20</sup> The search for solutions to the problems outside of historically traditional legal frameworks inherent in traditional trials is more compelling the less successfully the formal legal proceeding is adapted to the struggle for justice.

On the other hand, one should resist the temptation of considering any solution a universal panacea. With respect to Truth and Reconciliation Commissions in particular, it has been argued that belief in:

[T]he conciliatory and therapeutic efficacy of truth telling are the product of a Western culture of memory deriving from North American and European historical processes. Nations do not have psyches that can be healed. Nor can it be assumed that truth telling is [universally] healing on a personal level: truth commissions do not constitute therapy.<sup>21</sup>

Memory also raises issues of a proprietary nature. There was widespread outrage in France when a United States court did not dismiss a class action lawsuit brought by former French citizens or residents for the conduct of French banks and insurance

19. See ALEIDA ASSMANN, *DER LANGE SCHATTEN DER VERGANGENHEIT: ERINNERUNGSKULTUR UND GESCHICHTSPOLITIK* 48 (2006).

20. E.g., Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 *HASTINGS L.J.* 1, 73-93 (1998). See generally LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE Holocaust* (2001).

21. Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, SPECIAL REPORT 130 (February 2005), at 1; see also William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 *HUM. RTS. Q.* 1035 (2003)(examining the situation of coexisting international prosecution and truth commission for Sierra Leone).

companies during World War II.<sup>22</sup> The adjudication of such issues in France was a question, of, among others, national, or what some would call, *cultural*, memory. It was also a question of more direct French legal culture inasmuch as Articles 14 and 15 of the French Civil Code grant jurisdiction to France's courts over proceedings involving French nationals. Until as recently as 2006, these provisions were interpreted also as conferring exclusive exorbitant jurisdiction to France's courts.<sup>23</sup>

In France, the reference to a "duty towards memory," "*le devoir de la mémoire*," has had currency for some time; recently, the expression was also used by a high court. This was some time ago, in February of 2009. The expression was used by the Council of State, France's Supreme Court for administrative law, but it arose in the context of declaring that the time has come to *sever* the connection between memory and law for matters relating to France's obligations for harms committed during World War II.<sup>24</sup> The court said that a solemn duty of memory existed and persisted, but that it was one for the State to conduct as a political and historical matter, rather than as a legal one.<sup>25</sup>

#### ELEPHANT IN THE ROOM

If, as the Council of State suggested, there is a duty of memory, to whom is this duty owed? This brings me to the final point I want to touch on between law and memory, and probably the closest to what our hosts had in mind when they defined the subject of our panel in terms of forces that are hidden from view but are nonetheless operative.

I became interested a few years ago in the idea of the past as a kind of elephant in the room for the European Court of Human Rights when it dealt with an assisted suicide case, *Pretty v. United*

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22. See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 78 (2003); Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 371 (2008).

23. Cour de cassation [Cass.] [highest court of ordinary jurisdiction], 1e civ., May 23, 2006, D. 2006, Chron. 1846, note Audit.

24. Notice No. 315499 of February 16, 2009, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 10, 2009, p. 4440.

25. *Id.*

*Kingdom*.<sup>26</sup> The discussion concerns the obverse of memory in the form of willed amnesia. Now a group of scholars under the direction of Christian Joerges has been working on this “elephant in the room” problem within the framework of the European Union’s integration and constitutionalization.<sup>27</sup>

Joerges and his colleagues argue that there is a deficit of legal scholarship in the European Union concerning Europe’s past. Through the first words of their book title, “*Bitter Experiences of the Past . . .*,” they take umbrage with the vague and buried allusion to that past in the Preamble to The Treaty Establishing a Constitution for Europe,<sup>28</sup> an allusion nestled unobtrusively in a rosy statement about the present: “Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity . . .” as though all of the pain, bitterness, and division themselves had been buried in a now unproblematic past.<sup>29</sup>

Even this scant reference disappeared in the document that now has been ratified, and that entered into force in December of 2009: namely, the Lisbon Treaty.<sup>30</sup> Like its predecessor, the Lisbon Treaty omits any explicit reference to the two world wars, the Holocaust, or the gulag, so that Europe cheerfully is set forth only as an unproblematic unity existing amid respected and

26. 2002-III Eur. Ct. H.R. 157, 157; see Vivian Grosswald Curran, *Remembering Law in the Internationalizing World*, 34 HOFSTRA L. REV. 93, 93 (2005).

27. See SCHMERZLICHE ERFAHRUNGEN DER VERGANGENHEIT UND DER PROZESS DER KONSTITUTIONALISIERUNG EUROPAS (Christian Joerges, Matthias Mahlmann & Ulrich K. Preuß eds., 2009).

28. The Treaty Establishing a Constitution for Europe remained unratified due to its rejection by the French and Dutch populations in the referenda of 2005. See KRISTIN ARCHIK & DEREK E. MIX, CONG. RES. SERV., RS21618, THE EUROPEAN UNION’S REFORM PROCESS: THE LISBON TREATY 2 (2009), available at [http://assets.opencrs.com/rpts/RS21618\\_20090918.pdf](http://assets.opencrs.com/rpts/RS21618_20090918.pdf).

29. Dec. 16, 2004, 2004 O.J. (C 310) 1, Preamble. This also was the subject of a panel presentation given by Joerges at the University Association for Contemporary European Studies Conference, University of Edinburgh Law Faculty, Sept. 2, 2008. See also Konrad H. Jarausch, *Konfligierende Erinnerungen, nationale Prägungen, Verständigungsversuche und europäische Geschichtsbilder* in Joerges et al., *supra* note 27, at 15-25.

30. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

valued pluralism.<sup>31</sup> But it was the trauma of two terrible, wrenching world wars, and of other wars and endless menace of looming war, that led Schumann and Adenauer to try to find a way out of future European conflicts.<sup>32</sup>

One may ask why omitting references in legal documents today is a problem. The denial of past disunity goes beyond issues of historical accuracy. The fact that contemporary Europeans have experienced the past very differently has meant that Europe's cultures of memory were and still are coded nationally, such that a great deal remains in terms of overcoming mutually traditionally hostile images of "others".<sup>33</sup> Konrad Jarausch suggests that more open debate and focus on the diversity of memories may be able to lead to discerning new sorts of commonalities – maybe a new valuing of separate experiences in which their past suffering can transform into a basis for cooperation.<sup>34</sup> This can only be constructed from an acknowledgment and incorporation of the contradictory nature of Europe.<sup>35</sup> A principal argument of several authors of this book, and in particular of Joerges and Jarausch, is that harmonization can be built only on that foundation or it never will take root.

Thus, as it now stands, the current culture of memory is not one that unites Europe, but one that separates it, with victims of opposing ideologies' past abuses, excesses, and abominations competing with each other for recognition. Mutual recognition of the suffering of others is needed as a stepping stone for European integration, just as a fearless "speaking" by European judges, especially judges of the European Court of Human Rights, in their decisions of an often "unspeakable" past would be a stepping stone towards increased lucidity of issues Europe confronts today.<sup>36</sup> Europe's past should be current in its present and not just, as Joerges puts it, in debates about monuments to Jews or gypsies or holidays to honor the Resistance, or about crimes against humanity trials or German compensation for World War II slave

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31. See Jarausch, *supra* note 29, at 15.

32. See *id.*

33. *Id.* at 17

34. See *id.*

35. *Id.* at 20

36. See SCHMERZLICHE ERFAHRUNGEN, *supra* note 27; Curran, *supra* note 26.

laborers, or the true citizenship of Albert Einstein.<sup>37</sup> Rather, the past should be current in the present in constructing European law.

The consequences of European law's policy of denial may be heavy. Aside from the sort of European judicial struggle to identify subtextual concerns that I have noted elsewhere at greater length,<sup>38</sup> Joerges suggests that one such consequence was the French rejection of the European Union Constitution in 2005 due to widespread fear that neo-liberal European Union deregulatory machinery would sooner or later doom France's welfare state. Had legal scholarship adequately focused on memory, it should have been possible for European Union law to take the diversity of Europe's histories into account.<sup>39</sup> However, Europe's putting forth no more than a vague and, to the French, less than credible promise of a "social Europe" in the draft constitution did not satisfy the French electorate.<sup>40</sup>

If memory is to have contemporaneous value to law, practical solutions must be identified. I concur with Joerges and Jarausch in believing in the merit of a legal working through of collective memory, and in particular with Joerges' innovative idea of developing a legal procedure for interpreting law in the light of different legal traditions.<sup>41</sup> Joerges' idea is to form a European Union-wide "conflicts law" (he uses this as the English translation of "*Kollisionsrecht*," and does so in contradistinction to the common-law "conflict of laws"),<sup>42</sup> a concept one might understand as a law of confronting *in* colliding. Joerges advocates conflicts

37. Christian Joerges, *Kollisionsrecht als Form der Konstitutionalisierung Europas nach "schmerzliche Erfahrungen": Zur Kritik der Geschichtvergessenheit der Europarechtswissenschaft*, in SCHMERZLICHE ERFAHRUNGEN, *supra* note 27, at 36.

38. See, e.g., Curran, *Re-Membering Law*, *supra* note 26; see also SCHMERZLICHE ERFAHRUNGEN, *supra* note 27.

39. See Joerges, *supra* note 37.

40. *Id.* at 39.

41. *Id.* at 41.

42. See generally Christian Joerges, *The Idea of a Three-Dimensional Conflicts Law as Constitutional Form*, (RECON Online Working Paper No. 5, 2010), available at [http://www.reconproject.eu/main.php/RECON\\_wp\\_1005.pdf?fileitem=5456171](http://www.reconproject.eu/main.php/RECON_wp_1005.pdf?fileitem=5456171); Christian Joerges, *Re-Conceptualising European Law as Conflicts Law, the ECJ's Labour Law Jurisprudence and Germany's Federal Constitutional Court*, in INTERDISCIPLINARY STUDIES OF COMPARATIVE AND PRIVATE INTERNATIONAL LAW (Bea Verschraegen, ed., vol. I, 2010).

law as the procedure for mutual critiquing by member States of each others' national laws.<sup>43</sup>

#### CONCLUSION

Analyzing the work of Halbwachs on collective memory, Paul Ricoeur noted the following: "On the horizon stands out the wish for an integral memory that holds together individual memory, collective memory, and historical memory, and a wish that extracts from Halbwachs this exclamation worthy of Bergson (and Freud): '[w]e forget nothing.'"<sup>44</sup> A number of years ago, Pierre Nora published a book in several volumes called *Places of Memory*.<sup>45</sup> Europe today is a place teeming with competing, contradictory memories. Our ever-narrowing, more globalizing world only multiplies the proximity of incompatible memories. To work through the effects of peoples' difficult pasts inevitably requires working through their memories. Not just law, but *also* law, has its role to play in this process.

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43. See Joerges, *Three-Dimensional Conflicts Law*, *supra* note 44; see Joerges, *Re-Conceptualising*, *supra* note 44, see also Joerges, *Kollisionsrechts*, *supra* note 39.

44. Ricoeur, *supra* note 5, at 396.

45. PIERRE NORA, *LES LIEUX DE MÉMOIRE* (1984).