

LAW AND MEMORY: THE UNOBSVIOUS RELATIONSHIP

1. Introduction

It has recently been argued that the central characteristic of law is the search of the past, the search for the lost time.¹ This search is perhaps most visible in the unobvious, but exceptionally potent relationship between law and collective memory.

This relationship spans centuries. ‘Greek tragedy provides many insights into the links between memory, justice, and the law. From American and French Revolutions through decolonisation, rights and memory were always umbilically linked to state and nation, to citizenship issues and the invention of national traditions.’² Also, the link between collective memory and the creation of ethical systems has been established, as ‘collective memory that becomes a part of one’s tradition is connected to ethical issues by illuminating the precedents of human behaviour. Thus collective memory that becomes a part of one’s religious tradition is a guide for ethical behaviour.’³

But, for various reasons, this relationship has so far not been thoroughly examined in the socio-legal research. It has been observed, however, that law is ‘central to new attempts at breaking cycles of violence’⁴ and ‘at providing transitional justice during shifts from authoritarian

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¹ J. Crowe, C.Y. Lee, *Law as Memory*, *Law Critique* 2015/26, p. 251.

² A. Huyssen, *International Human Rights and the Politics of Memory: Limits and Challenges*, *Criticism* 2011/53, p. 607.

³ I. Maymid, *A comparative Case Study: Memory, Law and Morality*, *JIPR* 2013/18, p. 97, 99.

⁴ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* [in:] *Law and Collective Memory*, ed. J.J. Savelsberg, R.D. King, ARLSS 2007, p. 189, 189.

regimes to democracy',⁵ with collective memory being 'a central mediating force'.⁶

Law can be an extremely influential factor in the creation of collective memory, being 'a major discourse providing a framework for the discursive creation of collective memories of nations and groups'⁷ as it 'involves highly effective rituals'⁸ and 'its enforcement is backed by the coercive apparatus of states, churches, or other organized groups.'⁹ The 'law-tinged' memories, being shaped by 'set institutional rules, [...] differ distinctly from memories produced by historians or in the worlds of politics, art, and religion.'¹⁰ Likewise, it has been remarked that law may institutionalize collective memories.

Law can also influence collective memory indirectly, regulating what can and cannot be said about the past (e.g. Holocaust denial prohibition), what information might and might not be accessed and collected¹¹ (e.g. the archives of secret services), or through 'applied commemorations'.¹²

On the other hand, collective memory may also affect law, for example law enforcement practices, or in the process of distinction between 'law in the books and law in action'.¹³ It has been observed too that in the process of legislative and legal decision making, collective memories are 'activated', which ultimately leads to 'institutionalization of collective memory as law'.¹⁴

⁵ See N.J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, ed. N.J. Kritz, US Institute of Justice 1995; R. Teitel, *Transitional Justice*, Oxford 2000.

⁶ J. Meierhirsch, *A Question of Guilt*, cited in J.J. Savelsberg, R.D. King, [2007], p. 190.

⁷ M. Halbwachs cited in A. Reading, *Identity, memory and cosmopolitanism: The otherness of the past and a right to memory?*, EJCS 2011/4, p. 379, 385.

⁸ É. Durkheim, *The Division of Labour in Society*, New York 1984.

⁹ M. Weber, *Economy and Society*, California 1976.

¹⁰ J.C. Alexander, *Toward a theory of social trauma* [in:] *Cultural Trauma and Collective Identity*, ed. J.C. Alexander [et al.], California 2004, p. 16.

¹¹ J.J. Savelsberg, R.D. King, [2007], p. 190.

¹² J.J. Savelsberg, R.D. King, [2007], p. 207.

¹³ J.J. Savelsberg, R.D. King, [2007], p. 190.

¹⁴ J.J. Savelsberg, R.D. King, *Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States*, AJS 2005/111, p. 579–616.

Also, the question of memory, always vital during a trial, has increased in the recent years. Over 75% of the first 250 cases in the US where DNA evidence was used to the exoneration of the innocent, were the cases of those sentenced on the basis of erroneous eyewitness testimony.¹⁵ Ultimately, a broader, more scientific approach to the issue of remembering and forgetting in procedural law has been implemented as a result of the breakthrough case *State v. Henderson*¹⁶ – after it has been proved that the key witness for the prosecution has been influenced by the investigators, and thus falsely identified Mr. Henderson as the perpetrator, the New Jersey Supreme Court decided to issue new jury instructions for assessing eyewitnesses' testimony.

Drawing from cognitive psychology, the new instructions state that 'human memory is not foolproof. [It] is not at all like a video recording that a witness need only replay to remember what happened. Human memory is far more complex. [...] At each of [the] stages [of remembering], memory can be affected by a variety of factors.'¹⁷

This change provoked a discussion on the possible extent of the contribution of not only cognitive psychology, but also neuroscience to law. Cognitive psychology has long established that 'eyewitnesses sometimes report confident but inaccurate memories and that post-event suggestions or misinformation can easily taint eyewitness memory', that 'identifying members of a different race is typically more difficult than identifying members of the same race' and that 'high levels of stress can impair the accuracy of eyewitness memory.'¹⁸

On the other hand, the merits of neuroscience's intersections with law are still debated. While brain imaging techniques, such as functional magnetic resonance imaging (fMRI), or event-related potentials, might be of great help during the trial, as they can show which memories are true

¹⁵ D.L. Schacter, E.F. Loftus, *Memory and law: what can cognitive neuroscience contribute?*, *Nature Neuroscience* 2013/2, p. 118–119.

¹⁶ Judgment of the Supreme Court of New Jersey of 24 August 2011, *State v. Henderson*, N.J. 208, <https://caselaw.findlaw.com/nj-supreme-court/1578475.html>, 27.04.2018.

¹⁷ New Jersey Courts, Identification: In-Court Identification Only, judiciary.state.nj.us/attorneys/assets/criminalcharges/idinct.pdf, 25.07.2017.

¹⁸ D.L. Schacter, E.F. Loftus, [2013], p. 119.

or false, and whether or not somebody is lying, their results are still not completely unambiguous¹⁹. Thus, although neuroscientific techniques have already led to mitigating the responsibility of the defendants,²⁰ they are not always allowed into court.²¹

It has to be noted, however, that together with cognitive psychology, neuroscience could help jurors, judges, and lawyers understand memory, as both disciplines stress that the society influences memory and its accuracy in a unique, special way.²² The intersections of social, collective memories with law will be the main question of the following chapters of this paper.

2. The notions of collective memory and cultural trauma

It is often said that we are living in the days of ‘hypertrophy of memory’ or ‘memory boom.’²³ As French historian Pierre Nora observed, ‘we talk so much about memory, because so little of it is left.’²⁴ However, despite the popularity of memory-related topics in general, and collective memory in particular, the term itself is much more complex than it may appear at first glance.

The idea of collective memory was first introduced to sociology by Maurice Halbwachs,²⁵ who famously observed that ‘if we examine a little more closely how we recollect things, we will surely realize that the greatest number of memories come back to us when our parents, our friends,

¹⁹ D.L. Schacter, E.F. Loftus, [2013], p. 120.

²⁰ M.S. Gazzaniga, *Neuroscience in the Courtroom*, Scientific American 2011, scientificamerican.com/article/neuroscience-in-the-courtroom, 25.07.2017.

²¹ M. Laris, *Debate on brain scans as lie detectors highlighted in Maryland murder trial*, Washington Post, 26 August 2012, washingtonpost.com/local/crime/debate-on-brain-scans-as-lie-detectors-highlighted-in-maryland-murder-trial/2012/08/26/aba3d7d8-ed84-11e1-9ddc-340d5efb1e9c_story.html?utm_term=.23313e73f300, 25.07.2017.

²² D.L. Schacter, E.F. Loftus, [2013], p. 121.

²³ S. Bednarek, *Menemotoposy. Słowo wstępne*, PK 2012/1, p. 5.

²⁴ P. Nora, *Między pamięcią a historią: “Les lieux de memoire”*, <http://www.staff.amu.edu.pl/~ewa/Nora,%20Miedzy%20pamieciami%20i%20historia.%20Lies%20lieux%20de%20memoire.pdf>, 14.04.2018.

²⁵ M.M. Sadowski, *Psychological, Social, Cultural, Literary and Legal Dimensions of Memory*, WRLEA 2015/1, p. 141, 144.

or other persons recall them to us. [...] it is in society that people normally acquire their memories. It is also in society that they recall, recognise, and localise their memories. [...] Most of the time, when I remember, it is others who spur me on; their memory comes to aid of mine and mine relies on theirs.²⁶

Halbwachs thus remarked that people acquire memories not only by psychological or physiological (individual) means, but also through social processes, which results in remembering more than one had experienced personally.²⁷

While the general concept of collective memory may seem simple, it has numerous definitions. One of the most basic ones has been created by French philosopher Paul Ricœur, who divided memories into two groups: personal memories, the ones which can be attributed to one person (when we may say ‘*my* memory of a given event’) and collective memories, the ones attributed to more than one person (when we may say ‘*our* memory of a given event’).²⁸

Other definitions of collective memory are more elaborate, with some of them emphasising the *past* aspect as crucial to the formation of collective memory, describing it as ‘knowledge about the past that is shared, mutually acknowledged, and reinforced by collectivity – from small informal groups to formal organizations to nation states and global communities’,²⁹ or stating that ‘collective memory reflects reality by interpreting the past in terms of images appropriate and relevant to the present; it shapes reality by providing people with a program in terms of which their present lines of conduct can be formulated and enacted.’³⁰

The *past* aspect of collective memory is extremely important, as collective memories are the basis for the creation of collective identity of any social group, from class to a nation, with all human beings sharing

²⁶ M. Halbwachs, *On Collective Memory*, Chicago 1991, p. 38.

²⁷ M. Hirsch, *Invitation to the Sociology of International Law*, Oxford 2015, p. 48–49.

²⁸ P. Ricœur, *La mémoire, l'histoire*, Seuil 2000, p. 152–163.

²⁹ J.K. Olick, J. Robbins, *Social Memory Studies: From Collective Memory to the Historical Sociology of Mnemonic Practices*, ASR 1998/64, p. 381–482.

³⁰ B. Schwarz, *Abraham Lincoln and the Forge of National Memory*, Chicago 2000, p. 18.

‘cultural memories that are integral to their identities.’³¹ Because ‘a group’s memory preserves the store of knowledge from which the group derives awareness of unity and peculiarity. Consequently, the socialisation process includes teaching the group’s collective memory to new members; it constitutes an important part of a community’s efforts to incorporate new members.’³²

On the other hand, some definitions stress the *social* aspect of collective memory, portraying it as ‘a pool of shared cultural resources from which a common symbolic canon or the national imagery can be consciously selected or newly constructed’,³³ or as an ‘elaborate network of social mores, values and ideals that marks out the dimension of our imaginations according to the attitudes of the social group to which we relate.’³⁴

The *social* aspect of collective memories is equally important to the *past* one in creating a group’s identity, as ‘the collective memory of a community is more than, and qualitatively different from, the aggregation of individual memories. A group’s memory involves the integration of various personal memories into a single common past of collective stories, myths, and more. Collective memory is substantiated and transmitted through a wide array of practices of commemoration, including various rituals, monument building, national holidays, museums, school textbooks, mass media, naming streets, or court’s proceedings. Agents of memory include diverse state and non-state actors, as well as individuals who organise various practices which construct and preserve the particular collective memory.’³⁵

Evidently, there are also definitions that find the *past* and the *social* aspects of collective memory equally important in its creation in general,

³¹ A. Reading, *Identity, memory and cosmopolitanism: The otherness of the past and a right to memory?*, EJCS 2011/14, p. 388.

³² M. Hirsch, [2015], p. 51.

³³ M. Wulf, *Theory Building: Dynamics of Collective Memory in Estonia*, academia.edu/968407/Theory_Building_Dynamics_of_Collective_Memory_in_Estonia, 5.03.2016.

³⁴ P.M. Hutton, *History as an Art of Memory*, cited in: B.S. Osborne, *Constructing Landscapes of Power: The George Etienne Cartier Monument, Montreal*, JHG 1998/(4), p. 58.

³⁵ M. Hirsch, [2015], p. 49–51.

not only when a group's identity is involved, noting that while 'collective memory represents both the cultural deposits of the past and emergent understandings that direct the flow of institutional life in the present, it is also about individuals using social frameworks of meaning to reconfigure the world as everyday life unfolds.'³⁶

It is worth noting, however, that despite the fact that while various collective memory theories differ, they are all derived from the Halbwachs' observation that 'if we enumerate the number of recollections during one day that we have evoked upon the occasion of our direct and indirect relations with other people, we will see that, most frequently, we appeal to our memory only in order to answer questions which others have asked us, or that we suppose they could have asked us. We note, moreover, that in order to answer them, we place ourselves in their perspective and we consider ourselves as being part of the same group or groups as they.'³⁷

Also it has to be remembered that the existence of collective memory was confirmed not only by sociology, but also by psychology. Frederic Bartlett remarked as early as in 1932, seven years after Halbwachs' 'On collective memory' was published, that 'the data [...] have repeatedly shown that both the manner and the matter of recall are often predominantly determined by social influences.'³⁸

An interesting trend that has, on the other hand, recently appeared in the social memory research is worth remarking. Though I do not quite agree with such a perspective, various scholars have begun to distinguish halbwachsian and pre-halbwachsian collective memory concepts. The pre-halbwachsian ones would include the tradition of remembering heroes and artists in the Western tradition,³⁹ granting them 'immortality', derived 'from its inherent ethical or aesthetic value, which naturally draws posterity to it and thus sustains it.'⁴⁰

³⁶ M.J. Gallant, H.M. Rhea, *Collective Memory, International Law, and Restorative Social Processes After Conflagration: The Holocaust*, ICJR 2010/20, p. 265–266.

³⁷ M. Halbwachs, [1991], p. 38.

³⁸ F.C. Bartlett, *Remembering: A study in experimental and social psychology*, Cambridge 1995, p. 23.

³⁹ N. Russel, *Collective Memory Before and After Halbwachs*, TFR 2006/4, p. 792–793.

⁴⁰ N. Russel, [2006], p. 794.

Interestingly, yet not entirely convincingly, this viewpoint tries to translate the three basic types of human memory – procedural (the ability to reproduce certain behaviour, e.g. cycling); semantic (the ability to store and evoke certain abstract information and facts, e.g. remembering geometrical formulas); and episodic (the ability to remember what one has experienced, e.g. the events of one's yesterday)⁴¹ – to the idea of halbwachstian/pre-halbwachstian collective memory concepts. Here, the pre-halbwachstian concept is linked to semantic collective memory: anybody can remember, for example, the story of Henry VIII, which 'stands on its own and is not connected by nature to any particular individual's or group's memory identity.'⁴² The halbwachstian concept, on the other hand, is linked to episodic memory, and 'it belongs to particular groups, takes lived experience as its object, is part of that group's identity, and cannot be transferred from one group to another.'⁴³

While the length of this paper does not allow for a just critical analysis of this theory, it is worth noting that it seems to be faulty in its core: for example, despite the fact that no social group today may have episodic, personal memories of Henry VIII, the collective memory of him is certainly part of collective memories of the British as a particular group, which only demonstrates that the idea of dividing the collective memory concepts' to halbwachstian/pre-halbwachstian ones and translating them to the general types of human memory does not work on some levels.

However, nowadays not only collective memory, but also another social aspect of memory, known as collective forgetting, or collective amnesia, is frequently analysed.⁴⁴ As 'collective memory often affects individuals' emotions, and recollecting a particular event may generate a sense of pride [but also] embarrassment within the community's members',⁴⁵ this intriguing term encompasses the memories, which, while not being

⁴¹ N. Russel, [2006], p. 797–798.

⁴² N. Russel, [2006], p. 798.

⁴³ N. Russel, [2006], p. 799.

⁴⁴ M. Hirsch, [2015], p. 49.

⁴⁵ E. Zerubavel, *Social Memories: Steps to a Sociology of the Past*, *Qualitative Sociology* 1996/6, p. 283, 290.

erased, are ‘inaccessible at the time remembering takes place’, usually due to institutional and cultural practices⁴⁶ (for example slender memories of the Armenian genocide in Turkey, or of the treatment of indigenous people during the colonial period among Spaniards or Portuguese).

A similar term, linked to Giorgio Agamben’s idea of the *bare life* during the *state of exception*, is non-memory. As it has been observed, ‘when armies invade, dictators rule and genocidal forces are unleashed, the possibility for symbolic representation of the past embedded within a set of social and cultural practices, legal guarantees and political interventions may be entirely absent.’⁴⁷ The result of a legal and ethical void during the state of exception may be ‘the absence of a public and mediated record of atrocity and abuse’, i.e. non-memory.⁴⁸

On the other hand, the new media have also allowed for a reverse mechanism to take place, i.e. collective evoking. Collective evoking is a process of bringing some forgotten facts and events back into collective memory of a social group. It may have recently been observed in Poland on the example of the history of post-WWII anti-communist resistant movements, which thanks to numerous books, articles, movies, but mostly thanks to the internet, rose from oblivion in the 1990s, to huge national celebrations taking place every March the 1st since 2011.⁴⁹

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Another term closely related to the relationship between law and memory is cultural trauma. Inflicted on collective bodies, e.g. a nation,⁵⁰ cultural trauma is ‘a memory accepted and publicly given credence by a relevant membership group and evoking an event or a situation that

⁴⁶ C.B. Stone, W. Hirst, (*Induced*) *Forgetting to form a collective memory*, *Memory Studies* 2014/7, p. 314–316.

⁴⁷ A. Reading, [2011], p. 383.

⁴⁸ A. Reading, [2011], p. 383.

⁴⁹ M.M. Sadowski, *Collective Memory and Historical Determinacy: The Shaping of the Polish Transition* [in:] *Central and Eastern European Socio-Political and Legal Transition Revisited*, ed. B. Fekete, F. Gárdos-Orosz, Peter Lang 2017, p. 175, 179.

⁵⁰ B. Törnquist-Plewa, E. Narvselius, *Cultural Trauma Theory and the Memory of Forced Migrations: An Example From Lviv*, academia.edu/7144299/Culture_Trauma_Theory, 1.11.2016.

is: laden with negative effect; represented as indelible; and regarded as threatening a society's existence or violating one or more of its cultural presuppositions.⁵¹

As 'the ontologically unbearable nature of the event',⁵² defying comprehension and representation, 'short-circuits symbolic mechanisms of coping with sudden changes, [...] the traumatic effects tend to be lasting and intractable',⁵³ for example the effects of Holocaust, war in former Yugoslavia, or of the genocide in Rwanda.

Cultural trauma has also been defined as 'less the existence of a repressed memory than the habitual acting out of the life world of the past in the present, mirroring a past experience of humiliation and destruction.'⁵⁴

It has also been noted that experiencing cultural trauma 'can be understood as a social process that defines a painful injury to the collectivity, establishes the victim, attributes responsibility, and distributes the ideal and material consequences. [...] as traumas are experienced, [...] the collective identity will become significantly revised.'⁵⁵ What is also important, while both individuals and groups may be traumatised not only by the events that took place in reality, but also by the ones that will take place, or are believed to have taken place,⁵⁶ the reasons behind cultural (collective) and psychological (individual) trauma differ significantly.

The mechanisms of psychological trauma include 'intra-psychic dynamics of defence, adaptation, coping and working through.'⁵⁷ The process of creating cultural trauma, however, involves 'claims-making

⁵¹ N.J. Smelser, *Psychological Trauma and Cultural Trauma* [in:] *Psychological Trauma and Cultural Trauma*, ed. J.C. Alexander [et al.], p. 31, 44.

⁵² S. Radstone, *Screening Trauma: Forrest Gump, Film and Memory* [in:] *Memory and Methodology*, ed. S. Radstone, Berg 2000, p. 89.

⁵³ C. Carruth, *Trauma: Explorations in Memory*, Baltimore 1995.

⁵⁴ K.M. Fierke, *Bewitched by the Past: Social Memory, Trauma and International Relations* [in:] *Memory, Trauma and World Politics: Reflections on the Relationship Between Past and Present*, ed. D. Bell, Basingstoke 2006, p. 116, 132.

⁵⁵ J.C. Alexander, *Toward a Theory of a Cultural Trauma* [in:] *Psychological...*, ed. J.C. Alexander [et al.], p. 1, 22.

⁵⁶ J.C. Alexander, *Toward a Theory of a Cultural Trauma* [in:] *Psychological...*, ed. J.C. Alexander [et al.], p. 9.

⁵⁷ N.J. Smelser, [2004], p. 38–39.

by agents; carrier groups of the trauma process (with material and ideal interests); speech acts by carrier groups, who address an audience in a specific situation, seeking to project the trauma claim to the audience; and cultural classifications regarding the nature of the pain, the nature of the victim to the wider audience, and the attribution of responsibility.⁵⁸

The implications of cultural trauma are severe – ‘the experience of traumatic events strikes a blow to the psyche that limits constructive intervention by community.’⁵⁹ As it has been observed, ‘where the mnemonic processes writing the past are for various reasons contended, as it is after conflagration, the integrity of its link with the present may compromise the flow of interactional life. Institutional structure may no longer be intact, and collective trauma from cataclysmic natural or political events that render individual bonds unworkable, may contribute to a community’s incapacity to construct coherent, consistent narratives to help organize life into a meaningful interactional flow.’⁶⁰

However, it is worth noting that ‘establishing a historical event or situation as traumatic must speak in a language that will reach individual people. [...] experiencing a language of negative effect is a necessary condition for believing that a cultural trauma exists or is threatening.’⁶¹ This linguistic action, ‘through which the master narrative of social suffering is created, is mediated by the nature of institutional arenas that contribute to it.’⁶² Institutional features of law play a key role here, affecting the construction of both collective memory and cultural trauma.

3. Law as memory

The idea of seeing law as memory has emerged in the socio-legal thought deeply rooted in the philosophical concepts of Gilles Deleuze, Emmanuel Levinas and Henri Bergson and it stems from the latter’s views

⁵⁸ J.C. Alexander, [2004], p. 38–39.

⁵⁹ K.T. Erikson, *Everything in Its Path: Destruction of Community in the Buffalo Creek Flood*, New York 1976, p. 152–153.

⁶⁰ M.J. Gallant, H.M. Rhea, [2010], p. 266.

⁶¹ N.J. Smelser, [2004], p. 40–41.

⁶² J.J. Savelsberg, R.D. King, [2007], p. 192.

on time and memory. Seeing time ‘not as a series of isolated moments’, but rather ‘a continuous duration or movement’,⁶³ Bergson thought the present to exist ‘primarily as a focused and concentrated encounter with the past’,⁶⁴ merely ‘the best illuminated point of a moving zone which comprises all that we think or feel or will.’⁶⁵

Henri Bergson also distinguished two types of memory: habit memory and pure memory. In his view, the habit memory is gained through repeating certain actions, and then accessed ‘intuitively’ in the present moment. While it is based on some past actions, it does not ‘transport the owner of the memory back into the past.’⁶⁶ Pure memory, on the other hand, is an image of a scene or an event from the past, which, while selective, ‘records, in the form of memory-images, all the events of our daily life as they occur in time.’⁶⁷

For Bergson, pure memory is always shaped by the present, as ‘it arises in response to some feature of the perceiver’s current environment’, involving an interaction between ‘the present context and the images of a reconstructed past.’⁶⁸ He illustrated this concept on a model of an inverted cone (see Figure 1),⁶⁹ representing the shape of memory. ‘S’ (the point of the cone) is the place of intersection of one’s memory with his or hers present, ‘P’; ‘AB’ (the wide end) encompasses the whole of one’s lived experience; and ‘AB’; ‘A’B’; ‘A”B”’,’ are specific events in one’s past, which can be evoked as ‘representational memories,’ when brought to mind in ‘special circumstances.’ However, they are permanently shaping our present experiences, as they always live ‘in the background.’⁷⁰ In short, it means that ‘the lived experience of the present [...] both produces and

⁶³ J. Crowe, C.Y. Lee, [2015], p. 253.

⁶⁴ J. Crowe and C.Y. Lee, [2015], p. 252.

⁶⁵ H. Bergson, *Creative Evolution*, trans. A. Mitchell, H. Holt, London 1911, p. 3.

⁶⁶ J. Crowe, C.Y. Lee, [2015], p. 253.

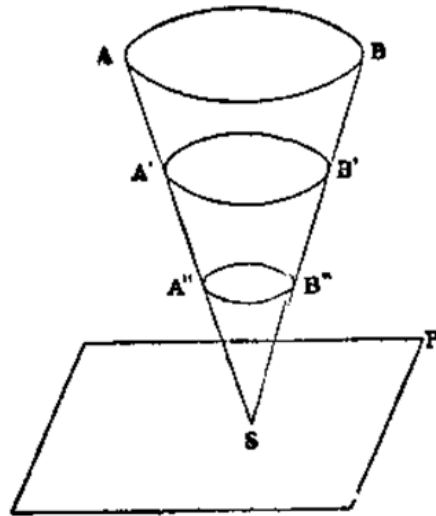
⁶⁷ H. Bergson, *Matter and Memory*, brocku.ca/MeadProject/Bergson/Bergson_1911b/Bergson_1911_02.html, 1.11.2016.

⁶⁸ J. Crowe, C.Y. Lee, [2015], p. 253.

⁶⁹ H. Bergson, *Matter and Memory*, http://www.reasoned.org/dir/lit/matter_and_memory.pdf, 1.11.2016.

⁷⁰ J. Crowe, C.Y. Lee, [2015], p. 254–255.

is itself shaped by memory',⁷¹ and that, in Deleuze's words, 'the present itself is only the most contracted level of the past.'⁷²



For Bergson, the past both shapes and is shaped by the present, and they both 'combine to yield an integrated experience of time and memory.'⁷³ In his theory the past is dynamic, being perpetually reshaped by more recent events, its content depending on the 'perceptual trigger' producing it, thus a 'pure retrieval' of the past events may never take place.⁷⁴

On the other hand, various legal interpretation theories, namely originalist (which searches for the original public meaning of the text) and intentionalist (which looks into the intentions of the legislator), perceive the past as a 'static entity'. Such a perspective is considered wrong from the 'law as memory' viewpoint because words in any legal act change meaning over time, the social circumstances also change, thus 'any public meaning or intention that may be reconstructed from the time of

⁷¹ J. Crowe, C.Y. Lee, [2015], p. 254.

⁷² G. Deleuze, *Bergsonism*, New York 1991, p. 74.

⁷³ J. Crowe, C.Y. Lee, [2015], p. 256.

⁷⁴ J. Crowe, C.Y. Lee, [2015], p. 256.

enactment is [...] a product of the present and the many other presents that precede it.⁷⁵ Ultimately, the judge, forever suspended between the past and the present, is in perpetual search for the dynamically changing meaning of law.⁷⁵

This view has been vividly illustrated by Francis A.R. Bennon, who said that ‘the on-going Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to turn; nor are its passengers. Having only what they set out with, they cope as best as they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.’⁷⁶

Another Bergson’s concept, that ‘we perceive only in the past, the pure present being the invisible progress of the past gnawing into the future’,⁷⁷ also translates into the legal discourse, explaining why the witnesses testimonies vary to such an extent. As each person’s present ‘is experienced against a backdrop of oppression or privilege, violence or relative safety, bodily disintegration or integrity’,⁷⁸ each and every testimony is different in a way. Interestingly, Bergson’s view finds support in cognitive psychology, as empirical studies show that people ‘intuitively place events into the context of their existing conceptions of the world in an effort to make memories more coherent.’⁷⁹

Interestingly, Bergson’s observations on memory sometimes echoed these of his contemporary, Maurice Halbwachs. Similarly to the above-mentioned sociologist, Bergson also noted the social elements of memory, arguing that collective memory lives on in the present – ‘what holds good for the present of individuals holds also for the present of nations: an event belongs to the past and enters into history when it is no longer of any direct interest to the politics of the day and can be neglected without the affairs of the country being affected by it.

⁷⁵ J. Crowe, C.Y. Lee, [2015], p. 257.

⁷⁶ F.A.R. Bennon, *Statutory Interpretation*, London 2002, p. 76.

⁷⁷ H. Bergson, *Matter and Memory*, http://www.reasoned.org/dir/lit/matter_and_memory.pdf, 1.11.2016.

⁷⁸ J. Crowe, C.Y. Lee, [2015], p. 258.

⁷⁹ S.K. Reed, *Cognition*, Wadsworth 2010, p. 383.

As long as its action makes itself felt, it adheres to the life of a nation and remains present to it.⁸⁰

It has also been observed that Bergson's ideas resonate with Frederik A. von Hayek's evolutionary conception of common law, which 'evolves gradually over time through application to distinctive factual scenarios. Each case incrementally and dynamically extends the legal principles', which ultimately means that 'the common law is not so much created as uncovered',⁸¹ being 'the product of human action but not of human design.'⁸²

The link between von Hayek's and Bergson's theories is clearly visible: in common law the *stare decisis* doctrine means that 'the judges begin in the present, reflect on the past, and then apply the fruit of their reflections to yield an outcome.'⁸³ While Bergson tells us that any such kind of process 'depends crucially on snap judgments that already integrate a wide spectrum of past and present experiences', von Hayek speaks about 'utilising social knowledge' in common law.⁸⁴

The further development of Bergson's ideas may be found in Emmanuel Levinas' diachronic theory of ethics. In his concept, Levinas argues that the ethical encounter between oneself and another person compels the former to 'recognise the ethical demands presented by other people'. The face-to-face encounter results in an 'epiphany', as the other presents "a 'primordial' demand for recognition as an ethical subject."⁸⁵ The memory of consecutive encounters forms the basis of an ethical attitude, which may further lead to the creation of legal and political discourse.⁸⁶

Levinas, similarly to Bergson, insists that "the flow of time [...] produces a series of events linked by 'retention, memory and history'. '[N]othing is lost' to the past; rather, 'everything is consigned',

⁸⁰ H. Bergson, *The Creative Mind*, New York 1946, p. 179.

⁸¹ J. Crowe, C.Y. Lee, [2015], p. 259.

⁸² F.A. von Hayek, *Law, Legislation and Liberty*, Chicago 1973, p. 81.

⁸³ J. Frank, *Law and the Modern Mind* cited in J. Crowe, C.Y. Lee, [2015], p. 259.

⁸⁴ J. Crowe, C.Y. Lee, [2015], p. 259.

⁸⁵ J. Crowe, C.Y. Lee, [2015], p. 262.

⁸⁶ J. Crowe, C.Y. Lee, [2015], p. 263.

‘synthesised’ or ‘assembled’ into a ‘transcending diachrony’ that resists the tendency to separate time into a series of events.⁸⁷ Said diachronic orientation of ethics, contains the secret of sociality,⁸⁸ thus paving the way for justice and law.⁸⁹

While Bergson ventures to show that ‘law’s engagement with the past is imbued with layers of meaning embedded as memory’, and Levinas ‘uncovers the ethical weight of these meanings and shows that they contain within them the basis for a communal orientation towards social life’,⁹⁰ they both prove that law’s relationship with the past is a ‘constructive engagement’ producing a ‘dynamic synthesis’ of past and present,⁹¹ forever ‘oscillating’ and ‘shaping’ one another, which, in the eyes of ‘law as memory theory’ results in law searching in vain for the past, and ultimately finding itself.⁹²

4. Law and collective memory

As I have mentioned earlier, it is nowadays clear that law influences, and is influenced by collective memory. Criminal, administrative, and civil law procedures, as well as various administrative tribunals and commissions (e.g. TRCs), visibly shape collective memory.⁹³

The trial, seen by Garfinkel as a ritual ‘degradation ceremony,’ during which the ones found guilty are destructed,⁹⁴ or by Durkheim⁹⁵ as a conventional practice ‘through which social sentiments maintain their force and vitality’, in the case of fallen dictators or former persons of authority leads to their ‘destruction’ on many levels, also on the level of collective memories of their time in power, which are bound to change, making the

⁸⁷ E. Levinas, *Otherwise Than Being or Beyond Essence* cited in J. Crowe, C.Y. Lee, [2015], p. 263.

⁸⁸ E. Levinas, *Entre Nous: Thinking of the Other*, New York 1998, p. 169.

⁸⁹ J. Crowe, C.Y. Lee, [2015], p. 263.

⁹⁰ J. Crowe, C.Y. Lee, [2015], p. 264.

⁹¹ J. Crowe, C.Y. Lee, [2015], p. 260.

⁹² J. Crowe, C.Y. Lee, [2015], p. 265.

⁹³ J.J. Savelsberg, R.D. King, [2005], p. 192.

⁹⁴ H. Garfinkel, *Conditions of Successful Degradation Ceremonies*, AJS 1956/61, p. 420.

⁹⁵ É. Durkheim, *The Division of Labour in Society*, trans. W.D. Halls, Free Press 1984.

critical view of the most recent history much stronger.⁹⁶ What happens during the proceedings is then adapted as a ‘theatre of ideas,’ where large questions of collective memory and even national identity are engaged.⁹⁷

Such a perspective of trial spurred president Roosevelt decision to hold Nuremberg trials, as ‘his interest in documenting the Nazi regime’s aggression and atrocities through court proceedings was political and strategic, exemplifying Halbwachs’ claim of presentist orientations in the construction of collective memory.’⁹⁸

The peculiar relation between trial and collective memory has also its drawbacks: it focuses on the individual, and not collective criminal guilt, resulting in ‘faulty’ collective memories. Collective guilt has a dynamic relationship with collective memory and collective violence, which the individual guilt lacks.⁹⁹ As a result, in the case of post-WWII Germany, while ‘individual perpetrators were ritually expelled, the majority of Germans were offered a chance to avoid acceptance of collective guilt.’¹⁰⁰ Similarly, in post-Vichy France, the trials touched only the main actors of the fascist regime, and ‘by attaching guilt to some individuals through legal rituals, memory could be cleansed of the collaboration of many.’¹⁰¹

On the other hand, the heavily-bureaucratized trials where the victim seems to have been forgotten at the expense of the memory of offences, may have a positive, if not entirely ‘true’ effect on collective memories. Notably, it has been observed that the South African TRC, while focusing on establishing individual facts, has helped to ‘moderate’ collective memories of the apartheid.¹⁰²

It is not only directly (through trials), however, that law shapes collective memory. It may also be created indirectly, by ‘regulating what information can be produced, accessed, disseminated (and to whom),

⁹⁶ J.J. Savelsberg, R.D. King, [2005], p. 192–193.

⁹⁷ M.J. Osiel, *Mass Atrocity, Collective Memory, and the Law*, Piscataway 1997, p. 3.

⁹⁸ J.J. Savelsberg, R.D. King, [2005], p. 193.

⁹⁹ J.J. Savelsberg, R.D. King, [2005], p. 195.

¹⁰⁰ M.J. Osiel, [1997], p. 101.

¹⁰¹ J.J. Savelsberg, R.D. King, [2005], p. 194.

¹⁰² J.L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation*, New York 2004, p. 115.

revealed, or kept secret.¹⁰³ A good example of such practices is provided by laws regulating access to the archives. It has been said that the very strict ones in place in Germany, where the court files are accessible only with a permit, and the ones related to people may be viewed only 30 years after one's death (unless they concern the legacy of German Democratic Republic, DDR), on the one hand lead to the 'silencing of the voices of ordinary people',¹⁰⁴ and on the other to the 'advancing [of] elite-serving collective memories', where the 'history as victims' stories are preferred.¹⁰⁵

Defective legal provisions and deficient institutions (perhaps most importantly in the area of education) may have been a result of the fact that the 'culture climate [which] prevailed [in post-WWII Germany] favoured disaffiliation from the past over all else.'¹⁰⁶ As it has been observed, 'Holocaust remembrance in itself was not a significant focus'. While the Nuremberg and other trials 'kept remembrance of Nazi crimes in the public eye, a scaffolding of counter ideologies in Germany fostered inurement toward facing contradictions in collective memory', prompting the researchers to remark that 'in the aftermath of war and genocide, facts rendered by historians and archival data, or the legal renderings of international and civil law, may be pitted against people's collective memory rather than in alignment with it.'¹⁰⁷ Ultimately, the present day Germans tend to 'think of themselves and their family in terms of *innocence* with blame attributed solely to the National Socialists. [They have] a positive social identity rather than one governed by remorse.'¹⁰⁸

However, laws regulating the use of available information may also play a good part in the shaping of collective memories, as is the case with the norms prohibiting the spreading of the 'Auschwitz Lie' – the public denial of the Holocaust taking place. Extremely strict in Europe, said

¹⁰³ J.J. Savelsberg, R.D. King, [2005], p. 197.

¹⁰⁴ I. Markovits, *Selective Memory: How the Law Affects What We Remember and Forget about the Past: The Case of East Germany*, LSR 2001/35, p. 513, 527.

¹⁰⁵ J.J. Savelsberg, R.D. King, [2005], p. 198.

¹⁰⁶ M.J. Gallant, H.M. Rhea, [2010], p. 271.

¹⁰⁷ M.J. Gallant, H.M. Rhea, [2010], p. 272.

¹⁰⁸ M.J. Gallant, H.M. Rhea, [2010], p. 272.

norms are much more lenient in the US, hence most of the present-day neo-Nazi propaganda is created there.

Inversely, for its part, collective memory may shape law and legal institutions. The trial, which, as I have remarked above, leads to the creation of collective memories, may also be treated as ‘a venue for seeking the victory of the memory of justice over the will to forget.’¹⁰⁹ It too has been noted, in more general terms, that memories of past injustice may influence one’s expectations of what exactly constitutes justice,¹¹⁰ or even that ‘laws themselves are carriers of the past into the present, as laws represent memorials dedicated to past wrongs.’¹¹¹

The link between collective memories, cultural trauma and the creation of law is clearly visible on the example of Holocaust. As Shoah became the ‘universal symbol of evil in the Western world’¹¹² holding a ‘metaphorical power’,¹¹³ it provided ‘a cognitive and moral framework that can impel legal action.’¹¹⁴ The trauma and the collective memory of the Holocaust spurred, among others, the formerly mentioned Nuremberg trial and the creation of anti-Auschwitz lie legislation; it helped to change the view on the treatment of captured Japanese soldiers during WWII by the US; and it is often argued that it propelled the intervention during the Balkan Wars, as it was used by Western politicians to ‘both motivate and justify’ their actions.¹¹⁵ Ultimately, it has been even said that ‘the Holocaust is regarded as a standard for judging the seriousness of past injustices and [serves] as a template for claiming compensation for them.’¹¹⁶

¹⁰⁹ W.J. Booth, *The Unforgotten: Memories of Justice*, APSR 2001/95, p. 777, 779.

¹¹⁰ N.L. Rosenblum, *Introduction* [in:] *Breaking the Cycles of Hatred: Memory, Law, and Repair*, ed. M. Minow, Princeton 2002, p. 5.

¹¹¹ J.J. Savelsberg, R.D. King, [2005], p. 200.

¹¹² J.C. Alexander, *On the Social Construction of Moral Universals The Holocaust from War Crime to Trauma Drama*, EJST 2002/5, p. 5–85.

¹¹³ D. Levy, N. Sznajder, *The Holocaust and Memory in the Global Age*, Philadelphia 2006, p. 5.

¹¹⁴ J.J. Savelsberg, R.D. King, [2005], p. 200.

¹¹⁵ J.J. Savelsberg, R.D. King, [2005], p. 201.

¹¹⁶ J.C. Torpey, *Making Whole What Has Been Smashed: On Reparations Politics*, Cambridge 2001, p. 337–338.

It has also been argued that ‘the institutionalisation of collective memory as law is further mediated by historical consciousness.’¹¹⁷ As societies look back onto the past ‘in light of the present’,¹¹⁸ ‘law realizes its potential to construct solidaristic collective memory. The past endures in the present in legislation.’¹¹⁹ This is clearly visible on the examples of the US and Germany. While in the US the tendency to ‘depoliticize’ its own past¹²⁰ leads to slender collective memories and meagre commemorations of the times of civil rights abuses, in Germany the decision to stand up to its own past led to ‘deep historicisation’ of Holocaust memories and commemorations.¹²¹ As a result, German hate crime law makes a reference to the Nazi past and the Holocaust, ‘explicating’ the categories of the victims. US federal hate crime law, however, does not refer to domestic history, but to foreign civil rights abuses instead.¹²²

These differences project onto various carriers of collective memory in the two countries. While in the US disparate groups act as carriers of collective memory, in Germany the state is the main carrier. Ultimately, German hate and extremism regulations focus more protection to the groups victimised by the Holocaust, giving them greater protection. In the US, on the other hand, the law emphasises the protection of all potentially vulnerable groups.¹²³

At the end of this chapter I would like to briefly remark on the fact that past years have seen a ‘proliferation of efforts to reform the past’¹²⁴ by ‘righting the old wrongs’ (i.e. discrimination, prejudices, injustices) through legal initiatives such as ‘repartitions, formal government apologies, and

¹¹⁷ J.J. Savelsberg, R.D. King, [2005], p. 202.

¹¹⁸ L. Balfour, *Unreconstructed Democracy: W.E.B. Du Bois and the Case for Reparations*, APSR 2003/97, p. 33.

¹¹⁹ B.A. Misztal, *Durkheim on Collective Memory*, JCS 2003/3, p. 132.

¹²⁰ M. Kammen, *Mystic Chords of Memory: The Transformation of Tradition in American Culture*, New York 1991.

¹²¹ R.D. King, *When Law and Society Disagree: Group Threat, Legacies of the Past, and the Organizational Context of Hate Crime Law Enforcement*, PhD Thesis, University of Minnesota 2005, p. 599.

¹²² J.J. Savelsberg, R.D. King, [2005], p. 203.

¹²³ J.J. Savelsberg, R.D. King, [2005], p. 204.

¹²⁴ M. Galanter, *Righting Old Wrongs*, PPQ 1992/12.

pardons.¹²⁵ Certain movements ('moral entrepreneurs') 'devote themselves to investigating, publicizing and campaigning about old wrongs',¹²⁶ as 'collective memories of past injustice are used to cement loyalties to a movement, provide inspiration through stories of past successes and ultimately foster activism.'¹²⁷ A clearly controversial example is often given, that of 'collective memory of the African American community [which] continued to transmit from generation to generation a sense that race was the defining interest in individuals' rights and that the well-being of blacks individually and as a group could be secured only by continued political and social agitation.'¹²⁸ Whether or not this example is true, it is quite clear that groups use collective memories as 'catalysts' for an individual's involvement in this genre of collective actions, which in the end may lead to legal change.¹²⁹

One also has to remember law's role in making it possible for a society to recuperate after mass atrocity, as 'public memory can be constructed publicly [only] if the law advances social solidarity by ventilating and addressing disagreement, rather than concealing it – by acknowledging and confronting interpretive controversy, not suppressing it.'¹³⁰ This function of law will certainly prove just as important in the future, as it was in the past.

5. International law, human rights law and memory

The ties between law and memory, visible in law in general, are even more clearly visible in international law and human rights law. As it has been noted, 'collective memory in the aftermath of war, genocide, and atrocity is affected by institutions like education and international law that can strongly influence founding narratives.'¹³¹ However, collec-

¹²⁵ J.J. Savelsberg, R.D. King, [2005], p. 205.

¹²⁶ M. Galanter, [1992].

¹²⁷ F.C. Harris, *Collective Memory and Collective Action during the Civil Rights Movement* [in:] M. Minow, [2007], p. 154, 157.

¹²⁸ M.C. Dawson, *Behind the Mule: Race and Class in African-American Politics*, Chicago 1994, p. 51.

¹²⁹ J.J. Savelsberg, R.D. King, [2005], p. 205.

¹³⁰ M. Osiel, *Mass atrocity, collective memory, and the law*, Piscataway 1997, p. 283.

¹³¹ M.J. Gallant, H.M. Rhea, [2010], p. 274.

tive memory and international law may interact in both directions, with some international legal mechanisms simultaneously affecting and being affected by collective memory.¹³²

International law influences the societies' collective memories (from regional groups, to nations, to global institutions) in a variety of ways. Some international legal doctrines and decisions of international institutions (e.g. Security Council), tribunals (e.g. International Court of Justice), or trials (e.g. the Nuremberg, Tokyo, Eichmann and Klaus Barbie's trials)¹³³ at times function as carriers of collective memory. Similarly, many treaties or international organisations' resolutions are 'incorporated' into societies' collective memories (e.g. Molotov–Ribbentrop Pact in Poland).¹³⁴

Interestingly, it may be observed that some aspects of international law aim at affecting collective memory. One of the best examples is the Nuremberg tribunal, whose founders intended that the 'trial would also serve as a lesson in history for future generations.'¹³⁵ International law also influences collective memory in protecting 'sites of memory' relating to, *inter alia*, 'history of peoples' (1972 World Heritage Convention), or being 'a source of European collective memory' (1992 European Convention on the Protection of the Archaeological Heritage), and in establishing international annual memorial days (e.g. EU's Europe Day or the International Holocaust Remembrance Day).¹³⁶

As I have mentioned earlier, international law may also be influenced by collective memories. The memories may affect the interpretation of international treaties (Article 32 of the 1969 Vienna Convention on the Law of Treaties explicitly names 'the preparatory work of the treaty and the circumstances of its conclusion' a secondary source of its interpretation).¹³⁷ The collective memories can also become institution-

¹³² M. Hirsch, [2015], p. 52–53.

¹³³ M.J. Gallant, H.M. Rhea, [2010], p. 277.

¹³⁴ M. Hirsch, [2015], p. 52–53.

¹³⁵ A. Cassese, *International Criminal Law*, Oxford 2013, p. 256.

¹³⁶ M. Hirsch, [2015], p. 55.

¹³⁷ Article 32 of the 1969 Vienna Convention on the Law of Treaties, oas.org/legal/english/docs/vienna_convention_treaties.htm, 20.07.2017.

alized in diverse legal mechanisms, or semi-institutionalized in various international soft laws. Ultimately, they may even influence ‘states positions and conduct regarding implementation of international legal rules’ (e.g. Japan’s position on 1968 Non-Proliferation Treaty).¹³⁸

In the recent years we may have observed two situations where collective memory was a significant, albeit not determinative factor in the shaping of international law. The first example is Germany’s stance on the European Debt Crisis during its first two stages, which was largely influenced by the collective memories of the hyperinflation during the Weimar Republic (1922–23). As the German public opinion is constantly reminded about this horrible time and its sombre repercussions (the ‘agents of collective memory’ include politics, the German central bank, the mass media, and museums), it is not surprising that in a 2012 survey the biggest anxiety (of 63%) of Germans was inflation.¹³⁹ Thus, the policy of German government towards the crisis was firstly extremely pro-austerity. Germany agreed to the proposed expansionary measures only during the third stage of crisis (December 2011–September 2012).¹⁴⁰

Similarly, the Argentinian’s government policy towards the tribunals of the International Centre for Settlement of Investment Disputes (hereinafter: ICSID) and the United Nations Commission on International Trade Law (hereinafter: UNCITRAL) was largely affected by collective memories. As the cases against Argentina were filed to ICSID and UNCITRAL following various state’s decisions undertaken to tackle the economic crises of 2001 and 2002, the country’s government turned to the Calvo doctrine, which is hugely popular in Latin America. Articulated by Argentine jurist and diplomat, Carlos Calvo, following the threat of European intervention in Argentina and other South American Countries in between the years 1834–1850, the doctrine emphasises the ‘opposition to international legal rules concerning the external protection of foreign investors [...], and particularly the right of the investor’s home state to

¹³⁸ M. Hirsch, [2015], p. 56–57.

¹³⁹ C. Siedenbiedel, *Die Angst vor der Inflation* cited in M. Hirsch, [2015], p. 68.

¹⁴⁰ M. Hirsch, [2015], p. 58–72.

intervene in disputes between the host state and the investor.¹⁴¹ As the collective memories of foreign interventions are reinforced by politicians, public bodies and mass media, a large part of the public opinion's associated ICSID proceedings 'with loss of sovereignty', which, along with the Calvo doctrine, was shrewdly used by the government to postpone the reaching of a settlement agreement until 2013.¹⁴²

It is worth noting that the two examples above do not only show how the collective memories may influence international law, but also how they may be used in political context, and what limits does the collective memory have in the legal context. While both the German and Argentinian policies were initially influenced by memories of the time past, additional socio-cultural and economic factors ultimately led to 'deviations from legal policies derived from these collective memories'¹⁴³ – perhaps contrary to the public opinion in the two countries.

Correspondingly, the intersections between law and memory may be uncovered in the human rights law. While 'law alone cannot appease a community or those within it who experienced a terrifying past', it may be noticed that the 'problems that include the criminal prosecution of human rights offenders are especially important in reconstructing collective memory and facilitating recovery.'¹⁴⁴

It has also been observed that 'only memory of right violations can nurture the future human rights in the world, thus providing a substantive link between past and future.'¹⁴⁵ The present-day human rights law has been shaped by collective memory, that of genocide and forced population movements in the 20th century, and of the natural law tradition. It is clearly visible on the example of the Universal Declaration of Human Rights (UDHR) and the United Nations Genocide Convention¹⁴⁶ – as 'the dignity of the victims, their struggles, and their fate must

¹⁴¹ M. Hirsch, [2015], p. 78.

¹⁴² M. Hirsch, [2015], p. 72–88.

¹⁴³ M. Hirsch, [2015], p. 90.

¹⁴⁴ M.J. Gallant, H.M. Rhea, [2010], p. 272.

¹⁴⁵ A. Huyssen, [2011], p. 60.

¹⁴⁶ A. Huyssen, [2011], p. 608.

be preserved in memory, all the more since it was the express aim of the masters of genocide to obliterate all memory of their victims', it gives the ground for said United Nations treaties.¹⁴⁷

It has been even argued that it is the strength of the collective memories of past atrocities that keeps human rights from 'slipping too quickly into historical abstraction.'¹⁴⁸ It has been also noted that 'it is a mark of human rights discourse today that it feeds on memory discourse while often disparaging it.'¹⁴⁹

In reality, however, human rights can 'survive' only if they are supported by real, individual cases of their violations, as only then one's imagination will recognise what Susan Sontag called 'the pain of the others', and only then it will be possible to construct 'legal, political, and moral remedies against the unchecked proliferation of such pain'¹⁵⁰ – 'the continuing strength of memory politics remains essential for securing human rights in the future.'¹⁵¹

Hopefully, a new trend in the relationship between collective memory, international law and human rights law has been observed. A comparative study of Latin American countries over 26 years has proven that 'democratizing states after atrocity, moving them away from amnesties for human rights abusers and toward criminal trials of perpetrators rather than relying solely on truth commissions, amnesties, reparations museums, and memory sites' results in a 'decrease [of] the likelihood of future atrocities when compared with processes of reconciliation and growth.'¹⁵² As the turn of the century has seen the cultural policies become 'part of international efforts within transitional justice' with frameworks involving truth commissions, financial compensation, establishing monuments, creating archives and public acts of commemoration,¹⁵³ in places where

¹⁴⁷ A. Huyssen, [2011], p. 611.

¹⁴⁸ A. Huyssen, [2011], p. 616–617.

¹⁴⁹ A. Huyssen, [2011], p. 621.

¹⁵⁰ A. Huyssen, [2011], p. 617.

¹⁵¹ A. Huyssen, [2011], p. 620.

¹⁵² M.J. Gallant, H.M. Rhea, [2010], p. 273–274.

¹⁵³ A. Reading, [2011], p. 382.

human right trials have taken place ‘there was a rapid shift toward norms and practices providing more accountability for human rights violations’, ‘a spike in state efforts to address past human rights abuses’, and ‘a diminishing tendency toward terrorism after conflict and abuse of human rights.’¹⁵⁴

6. Instead of a conclusion: a right to memory?

The fascinating relationship between law and memory is yet to be further explored, and a complex study of the unique bond is clearly needed. Nevertheless, it should already be clear today that ‘there can be no justice without memory’,¹⁵⁵ and lawyers should be aware of ‘the intimacy of memory’s bond with justice, not as obsessional or as a syndrome, but as a face of justice itself.’¹⁵⁶ However, one question remains: can there be a legally enforceable ‘right to memory’?

While the answer remains open, I would argue that such a right does exist, at least on the collective level. So far the right to memory has been defined as ‘an acknowledgement of the otherness of the past made present and future through various symbolic and cultural acts, gestures, utterances and expressions’,¹⁵⁷ which has arisen ‘out of a concern with the ways in which communication and culture play a part in establishing identities and citizenship within transitions to democracy after conflict, dictatorship and genocide.’¹⁵⁸ It has also been noted that the right to memory ‘is a complex but necessary right with a number of tensions, which future explicit formulations at the international level will need to address, connect and reconcile.’¹⁵⁹

The difficulty in finding a way to “recognize and provide for the international management of the tension between autochthonic memories within a ‘global’ memory field that mobilizes memories across and

¹⁵⁴ M.J. Gallant, H.M. Rhea, [2010], p. 273–274.

¹⁵⁵ A. Huyssen, [2011], p. 612.

¹⁵⁶ W.J. Booth, [2001], p. 777.

¹⁵⁷ A. Reading, [2011], p. 380.

¹⁵⁸ A. Reading, [2011], p. 380.

¹⁵⁹ A. Reading, [2011], p. 392.

between national borders”¹⁶⁰ results in the lack of any explicit mentions of the right to memory in international conventions. Its existence in many treaties, however, is clearly visible. Numerous examples include the efforts towards the protection of indigenous people cultures (e.g. Articles 11, 13, and 31 of the 2007 Declaration of the Rights of Indigenous Peoples),¹⁶¹ which may disappear in the course of globalisation, the aforementioned United Nations Genocide Convention, or the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. ‘A right to be remembered’ may also be treated as one of the main rationales behind the Convention for the Safeguarding of the Intangible Cultural Heritage – memory obviously forms part of intangible cultural heritage.

Interestingly, while the very existence of the right to memory is still debated, it has already been argued that should it be an actual right, it would ‘traverse’ the traditional division for economic, social and cultural rights, resulting ‘in a particular set of discursive tensions between framing the absolute and the particular.’¹⁶² Also, it has been remarked that a right to memory must ‘acknowledge the range of modalities invoked by different media of cultural memory. While reasoned testimony and ordered documents within public archives may have their place, it also should be understood that memory practices may involve the performative and embodied dimensions of memory.’¹⁶³

Will the ‘right to memory’ transform itself from collective to an individual one? The technological advances make it theoretically possible, as ‘digitization enables new connectivities and assemblages of memories in unevenly globalized and localized contexts’,¹⁶⁴ what the future actually holds in store for the right to memory remains to be seen.

¹⁶⁰ A. Reading, [2011], p. 387.

¹⁶¹ *Declaration of the Rights of Indigenous Peoples*, un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html, 5.07.2017.

¹⁶² A. Reading, [2011], p. 388.

¹⁶³ A. Reading, [2011], p. 391.

¹⁶⁴ A. Reading, [2011], p. 380.

Summary

Despite the fact that we are living in the times of ‘hypertrophy of memory’ or ‘memory boom’, many legal scholars have so far tried to ignore the numerous ties between law and memory. These ties, however, do exist, and some researchers even suggest that law is perpetually in search of the past, while others say that memory is one of the cornerstones of law. The purpose of this article is to investigate the unobvious, but extremely potent relationship between law and memory. In the first part of this paper, the author briefly introduces the notions of collective memory and cultural trauma, which connect law and memory. The second part of the article is devoted to the concept of ‘law as memory’, which is mainly based on Henri Bergson’s and Emmanuel Levinas’ concepts. In the third part of the article, the author shows the intersections between collective memory and law, exemplifying how collective memories may be shaped by law, and *vice versa*, how law may be shaped by collective memories. The fourth part of the paper is dedicated to the close bonds between collective memory and international law, and between human rights law and memory. The author first analyses the workings of the relationship of memory with the international law, showing how they both influence each other, and giving some recent examples of the intersections of international law and collective memory, e.g. Germany’s response to the Eurozone crisis and Argentina’s reaction towards the ICSID’s awards. Then he focuses on the liaison between memory and human rights law, explaining how memory ‘stands behind’ human rights in the modern era. In the last part of the article, the author ventures to sum up his deliberations, and tries to answer one of the questions of the 21st century – whether there is a right to memory.

Keywords: law, memory, collective memory, cultural trauma, international law, human rights law, halbwachs, bergson, levinas

Prawo i pamięć: nieoczywiste związki

Streszczenie

Chociaż żyjemy w czasach „hipertrofii pamięci” i *memory boom’u*, związki pomiędzy prawem a pamięcią od wielu lat pozostają ignorowane przez badaczy nauk prawnych. Mimo to, nie sposób zaprzeczyć, że te związki istnieją, gdyż, jak zauważają niektórzy autorzy, prawo wciąż poszukuje przeszłości, podczas gdy pamięć jest jednym z kamieni węgielnych prawa. Celem tego artykułu jest zbadanie tych nieoczywistych, ale niezwykle silnych związków między pamięcią i prawem. W pierwszej części artykułu autor krótko przedstawia koncepcje pamięci zbiorowej oraz traumy kulturowej, które łączą pamięć z prawem. Druga część artykułu jest poświęcona analizie idei „prawa jako pamięci”, której podstawy stworzyli Henri Bergson i Emmanuel Levinas. W trzeciej części artykułu autor pokazuje punkty styeczne między pamięcią zbiorową i prawem, badając w jaki sposób pamięć zbiorowa jest kształtowana przez prawo, i *vice versa*, w jaki sposób prawo jest kształtowane przez pamięć zbiorową. Czwarta część artykułu jest poświęcona biskim związkom pomiędzy pamięcią zbiorową a prawem międzynarodowym oraz pomiędzy prawem praw człowieka i pamięcią. Autor najpierw analizuje w jaki sposób prawo międzynarodowe i pamięć zbiorowa współdziałają za sobą i wzajemnie na siebie wpływają, m.in. na przykładzie reakcji Niemiec na kryzys w strefie euro i stosunku Argentyny do wyroków ICSID. Następnie autor skupia się na relacji między pamięcią i prawem praw człowieka, wyjaśniając w jaki sposób w dzisiejszych czasach pamięć „stoi za” prawami człowieka. W ostatniej części artykułu autor podsumowuje swoje rozważania, stawiając następujące pytanie – czy w dwudziestym pierwszym wieku istnieje prawo do pamięci?

Słowa kluczowe: pamięć, pamięć zbiorowa, trauma kulturowa, prawo międzynarodowe, prawo praw człowieka, Halbwachs, Bergson, Levinas

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