

LAW, MEMORY AND HISTORY : ON THE POLITICS OF MEMORY

Memory as well as forgetting are components of collective and individual identity¹. I chose two illustrations. I shall first comment amnesty laws, as an example of the direction of public memory by governments. I shall then discuss why the recovery of memory has become a priority in the second half of the XXth century.

I. Law as an instrument of forgetting: Amnesty laws, ancient and modern

I shall discuss three examples: The amnesty enacted in Athens in 403 BC; the French Edict of Nantes of 1598 following the wars of religion and the practice of amnesty in France since the XIXth century.

I.1. The Athenian amnesty of 403 BC

After the war of the Peloponnesus and the victory of Sparta over Athens followed by the dictatorship of the Thirty, democracy was restored in Athens. A new Constitution was promulgated², accompanied by three measures³: a general amnesty and a prescription: the prohibition to recall the misfortunes of the past against anyone (there were some exceptions)⁴. The third measure was a personal oath accompanying such a prohibition. The aim was a full restoration of civil peace after the crisis.

Such a policy was thus turned both towards the past and towards the future. Moreover it related to private and public life. Such a will to erase the past could go even further. Plutarch, quoted by N.Loraux, mentions that when Athena won over Poseidon, the latter bore no

¹ See E.Traverso, *Le passé, modes d'emploi. Histoire, mémoire, politique*, La Fabrique, Paris, 2005.

² Aristotle, « The Athenian Constitution », in *The Athenian Constitution, the Endemian Ethics. On Virtues and Vices*”, trans. H.Rackham, Harvard University Press, Cambridge (Mass.) and London, 1935, 2004 ed.9.

³ I follow here N.Loraux, « L'oubli dans la cité », *Le Temps de la réflexion (Recherches)*, 1, 1980,213-242 ; « De l'amnistie et de son contraire », in *Usages de l'oubli*, Yosef Yerusalmi, Nicole Loraux, Hans Mommsen, Jean-Claude Milner and Gianni Vattimo Eds., Ed. du Seuil, Paris, 1988,23-47, expanded in *La cité divisée. L'oubli dans la mémoire d'Athènes*, Payot, Paris, 1997 ;2005 ed., ch. VI,147-171 ;English transl. : *The Divided City : On Memory and Forgetting in Ancient Greece*, Zone Books, New York,2002; B. Cassin, “Politiques de la mémoire. Des traitements en chaîne”, *Multitudes*, 6.2001.

⁴ Athenian Constitution,39.6.

resentment. Consequently the Athenians suppressed from their calendar the anniversary of this conflict, which was the second of Boedromion, and built on the Erechtheion, of all places, an altar to Lethe (forgetting).⁵ “a negative operation - the subtraction - and the installation of forgetting on the Acropolis...erasure of the conflict, promotion of L  th   as the basis of life in society”.⁶ N. Loraux comments:

“Each Athenian having sworn for himself, the city expects that the sum of these individual promises shall reconstruct the community; and, by the same act, it shelters itself from against the consequences of perjury, inevitably individual. Having thus secured the help of the gods, the political authority may appoint itself as the censor of memory, exclusively habilitated to decide what it is and it should not be, and its uses”⁷.

I.2. *France, 1598: A royal edict to forget*

The French Edict of Nantes (1598) took place in an entirely different political and religious context, that of France at the end of the XVIth century, after decades of violent and bloody wars of religion and intense civil strife. The issue was, as elsewhere in Europe, that of “the coexistence of several religious denominations inside a single political entity or the same territory...The States had to invent almost from scratch a way out from wars of religion that threatened to destroy them.”⁸ The aim was to arrive at a politico-legal settlement avoiding dogmatic controversies or the total victory of one side over the other one. The existence of religious pluralism had to be somehow publicly acknowledged, together with the recognition or affirmation of privileges or guarantees relating to religious practice, property, security, participation to public bodies such as courts and an amnesty.⁹

The Edict of Nantes is the culmination of a number of royal edicts and proclamations which, from 1563 on, tried to put an end to the civil and religious strife¹⁰. These instruments contain, in addition to the points mentioned above, two important provisions. The first one is a general

⁵ *La cit   divis  e*, op. cit., French ed., 156. The reference to Plutarch is at n.33 of ch. VI, 300.

⁶ Id, *ibid*.

⁷ Id, 171.

⁸ O.Christin, *La paix de religion.L'autonomisation de la raison politique au XVI  me si  cle*, Ed. du Seuil, Paris 1997, 9 and 12.

⁹ Christin's book contains a comparative study of the settlements arrived at in the Holy Empire, France and the Swiss cantons.

¹⁰ See B.Cottret, *1598.L'Edit de Nantes. Pour en finir avec les guerres de religion*, Perrin, Paris,1997 ; J.Garrisson, *L'Edit de Nantes*, Paris, Fayard, 1998 ;T.Wanegffellen, *L'Edit de Nantes. Une histoire europ  enne de la tol  rance (XVI  me- XX  me si  cle)*, Paris, LGF, 1998. The Edict of Nantes was meant to be “perpetual” and « irrevocable ». It was progressively weakened by the authorities .Its repeal in 1685 was a national tragedy.

amnesty. The second one relates to the memory of the past events and consists in a two-fold prescription.

The first one is the order to forget these events. The language is identical throughout 35 years and the royal scribes used the same words:

“We...order all insults and offenses that the iniquity of the time and the occasions that resulted may have provoked between our subjects, and all other things passed and caused by the present tumult shall remain extinct as dead, buried and not existent”¹¹. In 1570 the Edict of Saint-Germain-en -Laye ordered that “the memory of all things pas on both sides...be *extinct and asleep as non-existent* ”¹². In 1573, less than one year after the massacre of thousands of Protestants in Paris and elsewhere on St Barthelemy’s day (August 24)¹³ the Edict of Boulogne uses the same expression in relation to these events. The Edict of Nantes begins with the same prescription¹⁴.

The second prescription is a general prohibition to mention the past events in all public documents, administrative and judicial and of all private quarrels and actions relating to them.

I.3. *Amnesty statutes in XIX th and XX th century France*

During the XIXth and XX th centuries, a number of amnesty statutes were enacted in France¹⁵., mostly after important political events or civil strife: in 1816 after the fall of Napoleon and the restoration of monarchy, in 1879-1880, a few years after the uprising of the Paris Commune, in 1900 after the Dreyfus Affair, in 1951-1953 after the Vichy régime, in 1962, 1966 and 198 after the war in Algeria. Their two- fold aim, forgetting and civil pacification , led at times their proponents to use the same vocabulary as that of the 403 BC or 1598 measures, including the word “ forgetting”¹⁶Amnesty statutes have often provoked violent controversies on their scope and meaning, as shown by two examples mentioned by Gacon. After the Dreyfus Affair the 1900 amnesty was bitterly criticized by many “Dreyfusards”, such as Clemenceau, Reinach or Pressensé, who refused its application to both camps, the very “ raison d’être” of the Bill. Many actions were pending before the courts, including the prosecution of Zola, sentenced for libel because of his articles and who had

¹¹ Amboise, art. 9.

¹² Art.1.My emphasis

¹³ See A.Jouanna, *La Saint-Barthélémy. Les mystères d’un crime d’Etat*, Gallimard, Paris, 2007

¹⁴ Art. 1.

¹⁵ See S.Gacon, *L’amnistie. De le Commune à la guerre d’Algérie*, Ed.du Seuil, Paris, 2002.

¹⁶ See the 1814 Charter, art.11, the 1830 one, art.10. Other examples are quoted by Gacon, “ L’oubli institutionnel”, in *Oublier nos crimes. L’amnésie nationale :une spécificité française ?*,D.Nicolaïdis, Ed., Autrement,, Paris,1994, p. 98, 100, 105 and 106.

appealed the judgments. He wrote: "...One had to finish with it and to end the strangling of truth and of justice. This is what has been done...I have been deprived of my absolute right to appeal my being sentenced in absentia. One has brutally suppressed the truth I could have brought, the justice I was entitled to."¹⁷ Dreyfus also protested¹⁸.

Jaurès' took a less legalistic and more historical and political position: The amnesty "was necessary to clear the road from now useless and tedious trials. It was necessary to prevent the saturation of the public mind which would have soon refused truth itself...Zola confesses with a kind of haughty melancholy that he had dreamed not only of victory, but of the apotheosis of truth. There is never, in the history of mankind, an apotheosis for truth, but always hardly fought battles, bitter and full of darkness"¹⁹.

Another debate took place after the Liberation when the issue of presidential pardon for persons sentenced for collaboration was discussed. Many former Résistants had reservations about it, fearing that it might mark the beginning of a campaign of rehabilitation of the Vichy régime. One of them, Claude Bourdet, after mentioning the failure of epuration²⁰, recognised the inevitability of pardons but insisted on the necessity of protecting "public peace" and of preventing those pardoned to be transformed into "sowers of discord". He concluded: "In one word let us have a contract: forgetting against silence"²¹. In a different manner both public peace and forgetting had reappeared in the public discourse.

The only clause relating to memory and amnesty in French criminal law²² prohibits all those who have known the existence of an amnestied sentence in the exercise of their functions to recall it in any manner or to leave a mention of it in any document

¹⁷ *L'Aurore*, 22 December 1900, quoted in part by Gacon, op. cit. p 131, text in E. Zola, *L'Affaire Dreyfus. La vérité en marche*, edited by C. Becker, Garnier-Flammarion, Paris, 1969, p. 196 and in Zola, *J'accuse ou la vérité en marche*, edited by JP. Legal, JJ. Pauvert, Paris, 1965, p. 234.

¹⁸ For an extract of his letter to the Senate see J.D. Bredin, *L'Affaire*, Julliard, Paris, 1983, p. 405.

¹⁹ *La Petite République*, 21 December 1900, quoted by Gacon, op. cit. p 132.

²⁰ See B. Vergez-Chaignon, *Histoire de l'épuration*, Larousse, Paris, 2010.

²¹ *Combat*, 7-8 May 1949, quoted by Gacon, op. cit. p. 216.

²² Penal Code, Art. 133-11.

II. The heritage of the XXth century :Law and the other instruments of memory

Notre héritage n'est précédé d'aucun testament²³

Is it possible that the antonym of « forgetting » is not « memory but *justice* ?²⁴

I shall comment on two issues.

II.1. *Repairing historical wrongs or injustices*

During the mid-1990s a strong tendency towards repairing historical wrongs or injustices appeared and was evident both in a number of publications²⁵ and in many movements and initiatives, at the national and international level. Such initiatives related to a variety of events: the slave trade and slavery, colonisation, the Armenians' genocide in Turkey in 1915, the treatment of certain groups (e.g the Japanese-Americans and the Japanese-Canadians) in the USA and Canada during WW2), the Nazi genocide of the Jews, exploitation of slave labor and looting of property, dormant assets after 1945 in Switzerland, Germany and Austria, etc. One of the novelties has been the role of non - State actors.

From the legal point of view the outcome has been a variety of instruments: statutes, international agreements and restitutions. Non - legal tools have consisted in statements and apologies .One significant by-product has been a competition of victims and of memories.

II.2 *The heritage of the Communist and Nazi totalitarianism*

This heritage is a three- fold one. The first part is the consequences of these regimes' onslaught against national and political memory. This has been mainly the policy of Communist regimes, probably because Nazism did not last enough to think of it. The

²³ R. Char, *Feuilles d'Hypnos*, in *Œuvres poétiques*, introduction by J.Roudaut, Gallimard, Paris, 1983,190.

²⁴ Yosef.H.Yerushalmi, "Réflexions sur l'oubli", in *Usages de l'oubli*, op.cit.,19 and in *Zakhor : Jewish History and Jewish Memory*, University of Washington Press, Seattle and London, 1989.116.

²⁵ Here are a few titles: E. Barkan, *The Guilt of Nations Restitutions and Negotiating Historical Injustices*, Norton , New York,2000 ;J.Elster, *Closing the Books. Transitional Justice in Historical Perspective* ,Cambridge University Press, Cambridge, 2004; Ch. Maier," A Surfeit of Memory ? Reflexions on History, Melancholy and Denial", *History and Memory*, 1993.136; M.Marrus, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, University of Wisconsin Press, Madison (Wisc),2009; M.Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction, New-Brunswick (NJ),1997; N.Tavuchis, *Mea Culpa. A Sociology of Apology and Reconciliation*, Stanford University Press, Stanford, 1992; R. Teitel, *Transitional Justice*, OUP, New York and London,2000; J.Torpey, *Making Whole What has been Smashed. On Reparation Politics*, Harvard University Press, Cambridge (Mass.), 2006; *Politics and the Past: On Repairing Historical Injustice*, Rowman, New York and Oxford, 2003.

Communist regimes did not rest only on fear and terror. One of their instruments has been the political confiscation of memory, its invalidation, directed against the whole society and aiming at the reconstruction of a “new past”. The mortal danger for society was immediately understood by the dissidents. One of their main goals was to maintain and to restore memory and combat official falsifications and deformations, to prevent amnesia to spread and to allow their compatriots to remember not only the past but also their very identity, of which the past was a component. An illustration of this central preoccupation can be found in a document the title of which is “The right to history”, published in Prague in 1977 by the Charter 77 movement: “Our engagement for the respect of human rights includes, without restriction, the reviving of historical memory. For them the fight against the falsification of memory was an act of resistance against a mutilation of the public mind.²⁶ As Adam Michnik aptly wrote: “Communism did not want only to take over the people’s work and freedom. It also wanted to own their memory”²⁷.

In his preface to a collection of essays in memory in Central and Eastern European countries²⁸ the French historian Jacques Le Goff speaks of “erased memory, manipulated memory, disputed memory. There is no people, no nation, no identity without memory, and no democracy without free memory”²⁹. He concludes: “The worst is forgetting”.³⁰

The second part of this heritage relates to the victims. Both regimes had in common, among other characters, the deliberate planning of mass and anonymous death³¹. There is therefore a pressing social need, a moral imperative to name them, to identify them, to prevent them to suffer forever the anonymous fate planned by their executioners. In an article published in New York in 1942 commenting on the killing by the Nazis of Jews and other victims in Europe Hannah Arendt wrote: “Not one mass will now be sung, not one Kaddish will be said”³². These dead leave no written wills behind, hardly so much as a name; we cannot pay

²⁶ See V.Havel’s « Letter to Dr Husak, General Secretary of the Czechoslovak Communist Party », in *Vaclav Havel or Living in Truth*, J.Vladislav, Ed., Faber and Faber, London, 1987, 3.

²⁷ In *L’ Europe retrouvée ?* La Baconnière, Neuchâtel, 1992, 253.

²⁸ *A l’Est, la mémoire retrouvée*, A.Brossat,S.Combe, J.Y. Potel and J Ch. Szurek, Eds , La Découverte, Paris, 1990.

²⁹ Id, preface, 8

³⁰ Id, p. 10.- On the dimensions of memory in multicultural cities of that part of Europe see *Les villes multiculturelles en Europe centrale*, D.Bechtel and X.Galmiche, Eds., Belin, Paris, 2008. On memory, history and language in the Balkans see P.Garde, *Le discours balkanique. Des mots et des hommes*, Fayard, Paris, 2004.

³¹ See T.Snyder, *Bloodlands. Europe between Hitler and Stalin*, Basic Books, New York, 2010 For a study of the mass killings in Soviet Russia in the late thirties see N. Werth, *L’ivrogne et la marchande de fleurs. Autopsie d’un meurtre de masse*, Tallandier, Paris, 2009

³² Heine, *Romanzero*, « Gedächtnisfeier » : “ Keine Messe/wird man singen,/keinen Kadosch/wird man sagen ”.

them our final respects, we cannot comfort their widows and orphans. They are victims in a way that there have been no victims since Carthage and its Moloch were destroyed”³³.

Indeed the only tomb of these victims is our memory, and this is the ultimate justification of laws against the denial of the genocide of the Jews.

In such a context law can provide legal instruments of memory. One of them is the trial of individuals accused of crimes against humanity, including genocide, or war crimes. Such trials have been taken place both at the national level³⁴ and at the international one. The novelty here has been the invention of the notion of crimes against humanity and of international criminal courts, as shown by the Nuremberg International Military Tribunal (1945), the International Tribunals for former Yugoslavia (ICTY) and for Rwanda (ICTR) and the creation of the permanent International Criminal Court. Irrespective of the fundamental procedural and substantive differences between the task of a court trying an individual and that of the historian, the fact is that such trials have contributed both to our knowledge of history and to its memory.

The third part of this heritage has been, for Central and Eastern European countries which have suffered both oppressions, a memory that, in many ways, and especially in relation with the Nazi genocide of the Jews, is definitely not that of Western Europe³⁵.

The historian’s task remains paramount and Yosef H. Yerushalmi’s warning is a timely one: “Historiography - that is, history as a narrative, discipline or ‘genre’ with its rules, institutions and procedures - cannot, I insist, be a substitute for collective memory, nor create an alternate tradition that could be shared. But the essential dignity of the historian’s calling remains and its moral imperative seems even more urgent than ever. In this world of ours, the issue is no more, now, that of the decadence of collective memory and of the decline of the awareness of the past, but that of the brutal rape of what memory that can still keep, of the deliberate lie engineered by the deformation of sources and of archives, of the invention of mythical and remade pats in service of the powers of darkness”. And he concludes: “Against the militants of forgetting, the forgers of documents, the murderers of memory, against the revisers of encyclopaedia and the conspirators of silence...the historian, only the

³³ H. Arendt, *Jewish Writings*, J. Kohn and R. Feldman, Eds., Schocken Books, New York, 2007, 162.

³⁴ E.g. the Eichmann trial in Israel in 1961, the Auschwitz trial in Germany in 1963 and the three trials (Touvier, Barbie and Papon) that took place in France in the 80s and 90s).

³⁵ See T. Judt’s perceptive remarks in “From the House of the Dead: On Modern European Memory”, *The New York Review of Books*, Oct. 6, 2005.12, and I. Bibo, *Misère des petits Etats d Europe de l’Est*, L’Harmattan, Paris, 1986.

historian, with the austere passion for facts, proof, evidence, which are central to his vocation, can effectively stand guard”³⁶ .

This is why it is more important than ever, in such a context, to distinguish memory from history: their aims, values and methods are simply not the same and should not be confused.³⁷

Before historians begin or able to finish their work, other writers are up to the task of maintaining the memory of what happened. The names of Primo Levi, Vassili Grossman, Varlam Chalamov, Alexander Soljenytsine and Imre Kertez come to the mind, among many others, together with those of the poets, such as Paul Celan, Anna Akhmatova and Czeslaw Milosz. The latter, powerless spectator of the crushing of the Warsaw ghetto’s uprising in 1943, mentions the “loneliness of the dying” and adds:

“Those dying here, the lonely
Forgotten by the world,
Our tongue becomes for them
The language of an ancient planet”.

Seven years later, an exile in Washington he affirmed the power of the pen:

“Do not feel safe the poet remembers.
You can kill one, but another is born.
The words are written down, the deed, the date.
And you’d have done better with a winter dawn,
A rope, and a branch bowed beneath your weight”.

The last word here is Anna Akhmatova’s in “Requiem”:

“In the terrible years of the Yezhov terror, I spent
Seventeen months in the prison line of Leningrad.
Once, someone recognised me. Then a woman with
Bluish lips standing behind me, who, of course, had
Never heard me called by my name before, woke up from
The stupor to which everyone had succumbed and
whispered in my ear (everyone spoke in whispers there):
“Can you describe this?”
And I answered: “Yes, I can”.

³⁶ See n. 25 supra.

³⁷ See O.Pétre-Grenouilleau, “ Passé/Présent. Quelques réflexions sur une incrustation », *Matériaux pour l’histoire de notre temps*, 85, January - March 2007.

Then something that looked like a smile passed over
What had once been her face”³⁸

³⁸ *The Complete Poems of Anna Akhmatova*, translated by J. Hemschemeyer, Edited and with an Introduction by R. Reeder, Zephyr Press, Somerville, (Mass.),1990, 2 vols.- For an anthology see *Against Forgetting: Twentieth Century Poetry of Witness*, edited and with an introduction by C. Forché, Norton, New York, 1994.