What to do with the Buried Giant? Collective Historical Memory and Identity in the Freedom of Expression Case Law of the European Court of Human Rights

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Introduction – The 'Buried Giant'

Despite the sterling and voluminous efforts of academics, it is sometimes – perhaps often –the case that it is the artist who most eloquently captures the essence of a social issue, problem or tension. This is arguably the case when we consider the issues of identity, collective memory and human rights law with which this chapter is concerned. In his 2015 fantasy novel, *The Buried Giant*, Nobel Laureate Kazuo Ishiguro imagines a 6th century Britain, after the death of King Arthur, in which the previously warring native Britons and immigrant Saxons live together in peace and harmony.[1] The novel follows the harrowing journey of a married couple, Axl and Beatrice, as they search for their lost son, of whom they have only the faintest~~feintest~~ recollection. In the course of their odyssey, we become aware that this 'mist' of amnesia affects the entire population. It transpires that before his death, Arthur asked the powerful sorcerer Merlin to bury a sleeping she-dragon, Querig, beneath a hill. The enchanted breath of the beast induced forgetfulness across the entire population. However, a Saxon warrior, Wistan, on the orders of his king, tracks down Querig and slays her; and, as the mist of her breath dissipates, people's memories come flooding back. Axl and Beatrice finally, mercifully, remember their lost son, who died many years before the plague. But the Britons and the Saxons also remember their deep hatred of one another, and violent conflict is once more unleashed across the land.

Ishiguro's metaphor neatly encapsulates a tension that has beset societies for centuries. On the one hand, it may be better to forget past conflicts and injustices, in order to achieve peace and harmony in the present.[2] On the other hand, such forgetting risks injury to the very core of our identity, both individually and collectively, since memory is at the heart of conceptions of

[1] K Ishiguro, *The Buried Giant* (London: Faber and Faber 2015).

[2] The noun *amnesty* is derived from the Greek ἀμνησία (amnesia), forgetfulness, illustrating the link between the concept. The phrase 'to forgive and forget' is commonly used in English parlance, though as Avishai Margalit points out, simple forgetfulness is 'not real forgiveness' which is a 'conscious decision to change one's attitude and to overcome anger and vengefulness', A Margalit, *The Ethics of Memory* (Cambridge, Mass: Harvard University Press 2002) at p 193.

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human identity, an essential element in what makes us human: what makes me *me*, you *you*, us *us*.[3]

There are many fields in which this tension between remembering and forgetting comes to the fore, not least, for example, in areas such as transitional justice,[4] the writing and teaching of history,[5] and public memorialisation~~memorialisation~~.[6] This chapter seeks to examine the issue through the prism of the free speech jurisprudence of the European Convention on Human Rights (the 'Convention' or 'ECHR') in which the European Court of Human Rights (the 'Court' or 'ECtHR') has grappled with instances where words spoken have sought to impact upon the collective historical memory, and thus the identity and dignity of certain groups. With that in mind, this chapter begins with a brief introduction of the concept of collective memory, followed by a summary of some the arguments commonly advanced, both for and against, remembering and forgetting. It then proceeds to trace the emergence of collective historic memory connected to identity and dignity, as a justiciable concept in the jurisprudence of the Court~~Court of Human Rights~~ within the scope of the right to respect for a private life under Article 8, before advancing several critiques of the Court's~~Court's~~ approach. It then draws a comparison between the use of Article 8 as a juridical vehicle for collective memory as a human right, with that of Article 9~~ and~~, the right to freedom of thought, conscience and religion. We conclude that having held out the promise of collective memory as a human right under Article 8 the Court~~Court~~, perhaps for good reasons, seems ill-at-ease with following through on this development.

Collective Memory, Identity and Dignity: Understanding the Buried Giant

[3] JR Gillis, 'Memory and Identity: The History of a Relationship' in *Commemorations: The Politics of National Identity* (Princeton: Princeton University Press 1994); A Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press 1999) at p 208. See also e.g., J Waldron. 'Superseding Historical Injustice' (1992)(1) *Ethics* 4-28 at p 6; M Freeman, 'Historical Injustice and Liberal Political Theory' in M Gibney, R E Howard-Hassman, JM Coicaud and N Steiner (eds), *The Age of Apology: Facing Up to the Past* (Philadelphia: University of Philadelphia Press 2008) at p 48; S Löytömäki, *Law and the Politics of Memory* (Abingdon: Routledge 2014) at p 3; S McDonald, *Memorylands: Heritage and Identity in Europe Today* (Abingdon: Routledge 2013) at p 12.

[4] H Hagtvedt Vik, 'History, memory and memorialization processes – Reports 2013-2014 (A/68/269, 2013 and A/HRC/25/49, 2014)' in L Belder and H Porsdam (eds) *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Cheltenham: Edward Elgar 2017) at p 151.

[5] General Assembly, UNGA A/68/269, 9 August 2013, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, 'Writing and Teaching of History'.

[6] General Assembly, UNGA A/HRC/25/49, 23 January 2014, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, 'Memorialization Processes'. See e.g., the recent controversies over statues of, amongst many others, Edward Colston the Bristol slave trader and philanthropist: <https://www.bbc.co.uk/news/av/uk-england-bristol-53004755>; the colonialist Cecil Rhodes at Oriel College, Oxford <https://www.bbc.co.uk/news/education-53487991>; and Confederate General Robert E Lee in Charlottesville, Virginia <https://www.bbc.co.uk/news/world-us-canada-52920610>.

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On an individual level it seems clear that memory is intimately connected with personal identity.[7] Poignant personal accounts of friends and loved ones suffering dementia make the point that, in a very real sense, memory is inextricably linked to identity.[8] However the focus of this chapter will be, rather, on the concept of 'collective memory' linked to identity and dignity, and the way that has been adopted in the recent case law of the ECtHR.

Collective Memory

There is a huge literature in this area and the very concept of 'collective memory' itself is highly contested.[9] Indeed there is even dispute as to the correct terminology, with some using terms such as shared memory, historical memory, cultural memory and public memory,[10] and others arguing that ~~to~~ the term 'memory' itself is misleading, since it necessarily relates to *personal* recollection.[11] It is (thankfully) not the purpose of this chapter to engage with these controversies, and we rather confine ourselves to offering a brief outline of the concept of collective memory.

Collective memory is a term coined, in the first half of the twentieth century, by the French sociologist, Maurice Halbwachs.[12] Drawing on the theories of Durkheim and Bergson, Halbwach's insight was that memory cannot be a purely individual attribute – in the Lockean sense of a continuous awareness of the self through time – but can *only exist within a social context.* The historian Patrick Hutton explains Halbwachs' position in the following terms:

> [m]emory is only able to endure within sustaining social contexts. Individual images of the past are provisional. They are 'remembered' only when they are located within conceptual structures that are defined by communities at large. Without the life-support system of group confirmation, individual memories wither away … In recollection we

[7] The classic account is given by Locke whereby an individual self – identity – depends not on the sameness of substance but on the sameness of consciousness – primarily in the memory over time, J Locke, *An Essay Concerning Human Understanding* (first published 1689, London: Prometheus Books 1995) at p 188.

[8] See John Bayley's moving account of his relationship with his wife the novelist Iris Murdoch~~k~~ as she was affected increasingly by Alzheimer's: J Bayley, *Iris and Her Friends: A Memoir of Memory and Desire* (New York: WW Norton 2000); and T DeBaggio, *Losing My Mind: An Intimate Look at Life with Alzheimer's* (New York: Free Press 2002).

[9] For an excellent survey of the range of scholarship see J Olick, V Vinitzky-Seroussi and D Levy (eds), *The Collective Memory Reader* (Oxford: Oxford University Press 2011).

[10] G Cubitt, *History and Memory* (Manchester: Manchester University Press 2007) at pp 9-10; P Aguillar, *Memory and Amnesia* (M Oakley tr, New York: Berghahan Books 2002) at p 6.

[11] Cubitt ibid. Margalit (n1) refers to the term as a 'deceptive metaphor', at p 49-50.

[12] M Halbwachs, *On Collective Memory* (first published in 1925 as *Les cadres sociaux de la mémoire*, L Coser tr and ed, Chicago: University of Chicago Press 1992); J Assmann, 'Collective Memory and Cultural Identity' (1995) 65 *New German Critique* 125-133.

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do not retrieve images of the past as they were originally perceived but rather as they fit into our present conceptions, which are shaped by the social forces that act on us.[13]

Since as individuals we live our lives as members of social groups, our memories and communication of those memories to others contributes to the processes by which groups develop a sense of *collective identity extending over time*.[14] As the sociologist Barbara Misztal explains, collective memory is the 'representation of the past, both that shared by a group and that which is collectively commemorated, that enacts and gives substance to the group's identity, its present conditions and its vision of the future'.[15]

The philosopher Avishai Margalit draws the useful analytic distinction between what he calls 'common memory' and 'shared memory'. The former is an 'aggregate notion' – it aggregates the memories of all those people who remember a certain episode which each of them experienced individually and, if the number of people in a given society who have that memory is over a certain proportion, then we call memory of the episode a 'common memory'.[16] 'Shared memory', on the other hand, is not a simple aggregation, but requires communication whereby the different perspectives of those who remember an episode are integrated and calibrated so as to form a single version. Crucially, then, other people in the community who were not witnesses at the time may be 'plugged into the experience … through channels of description rather than by direct experience'. Thus, shared memory is built on a 'division of mnemonic labour'.[17] Hitherto Margalit's description relates to memory of a given point in time: a 'synchronic division of mnemonic labour', but the division of mnemonic labour can also take place diachronically, over time, through generations. As he explains it:

> As a member of a certain community of memory, I am related to the memory of people from a previous generation. They in turn are related to the memory of people from the generation that preceded them, and so on, until we reach that generation which remembers the event in question first-hand.[18]

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[13] P Hutton, *History as an Art of Memory* (Hanover: University of New England Press 1993) at pp 6-7. Similarly, Michael Schudson holds that in an important sense there can be no such thing as *individual* memory, which in reality merely 'piggybacks' on the social and cultural practices of memory that a person's society has developed, M Schudson 'Dynamics of distortion in collective memory' in D Schacter (ed), *Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past* (Cambridge, Mass: Harvard University Press 1995) 346.

[14] Cubitt (n 10) at p 155.

[15] B A Misztal, *Theories of Social Remembering* (Maidenhead: Open University Press 2003) at p 7; Aguillar (n 10) at p 7.

[16] Margalit (n1) at p 50-51.

[17] Ibid at p 51-55.

[18] Ibid at p 59.

Thus, collective memory becomes *a memory of memory* of what others have told future generations about their past.[19] So, whilst the personal use of the term *remember* is akin to *know*, collective memory is closer to *believe.*

> A shared memory of a historical event that goes beyond the experience of anyone alive is a memory of memory, and not necessarily a memory that, through the division of diachronic labo[u]r, ends up at an actual event. This kind of memory reaches alleged memories of the past but not necessarily past events.[20]

A case in point is the example of the Jews' shared memory of their Exodus from Egypt, under the leadership of Moses.[21] This has been described as 'a foundational event' and 'a focal point of ancient Israelite religion'.[22] Yet, as Margalit comments, '[e]ven if it is true that we have such a memory, it does not follow that that dramatic event ever occurred'.[23]

There exist, of course, many 'carriers' of collective memory. These include language, and law itself which, as sociologist Michael Schudson explains, 'can be understood as the encoding into binding norms of the lessons of past experience'.[24] Another, and vitally important, carrier of collective memory can be seen in the beliefs and practices of religious groups, in dogma, rituals, holy texts, liturgy, sacred sites and objects of veneration.[25]

Émile Durkheim argued, in *Elementary Forms of Religious Life*, that common beliefs, rituals and traditions transmit social memory and provide essential conditions for the continued existence of group identity. Moreover, it confers a sense of 'strength and confidence', for believers are 'surer of their faith' when they see 'how distant a past it has' and the 'great things it has inspired'.[26] As Misztal expresses it, religion is able to provide an

[19] M Osiel, *Mass Atrocity, Collective Memory and the Law* (Abingdon: Routledge 1999) at p 18.
[20] Margalit (n1) at p 58-59.
[21] See e.g., Y Zakovitch, *'And you Shall Tell your Son…' The Concept of the Exodus in the Bible* (Jerusalem: Magnes, 1991).
[22] R Hendel, 'The Exodus in Biblical Memory' (2001) 120(4) *Journal of Biblical Literature*, 601-622, at 601.
[23] Ibid. A similar approach is taken by Bosman who says that 'the exodus in the Old Testament is an excellent example of cultural memory … [that] functioned as a founding myth in the evolving of Israelite and early Jewish identity': H. L. Bosman, Hendrik L.. (2014). The Exodus as negotiation of identity and human dignity between memory and myth' (2014) 70(1) *HTS Theological Studies*, 1-6.
[24] M Schudson, 'Lives, laws and language: Commemorative versus non-commemorative forms of effective public memory' (1997) 2(1) *Communication Review* 3–17, at p 8.
[25] See Y H Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle: University of Washington Press 1996); E Zerubavel, *Hidden Rhythms: Schedules and Calendars in Social Life* (Chicago: University of Chicago Press 1981).
[26] É Durkheim, *Elementary Forms of Religious Life* (1912) (JW Swain tr. New York: Dover Publications 2008) at p 375.

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> all embracing structure of beliefs, impresses on individuals the sense of the sacredness of something outside them, and institutes a common destiny and identity not only with contemporaries but also with past and future generations.[27]

Undoubtedly, memory is an essential, perhaps *the* essential element in any kind of human *identity* - collective and individual. And when it comes to collective cultural identities, current generations 'carry shared memories of what they consider to be "their" past, of the experiences of earlier generations of the same collectivity, and so of a distinctive ethno-history'.[28] As the historian Geoffrey Cubitt says:

> For there to be a past worth worrying about, there must always be the imaginative supposition of a continuity in social existence, and such continuity is generally envisaged from the standpoint of *identification*: the past in question is *our* past, the past that gives meaning and value to our continuing existence as a collectivity, the past that belongs to us as a constitutive element in *our common identity*.[29]

So, says Cubitt, representations of a group's collective past depend on backward projections of current identities and the 'past taking mental shape by being viewed as the breeding- and testing-ground of today's social collectivities'; but these are themselves the possessors of an 'organic durability rooted in deep continuities of an earlier history' conferring on them a kind of dignity.[30] In similar vein, the sociologist Jeffrey Alexander says that '[i]dentities are continuously constructed and secured not only by facing the present and the future but by reconstructing the collectivity's earlier life'. This is especially so where groups experience trauma which often leads to such 'identity revision' – 'a searching re-remembering of the collective past, for memory is not only social and fluid but deeply connected to the contemporary sense of self'.[31]

A Memory Boom

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[27] B A Misztal, 'Durkheim on Collective Memory', (2003) 3(2) *Journal of Classical Sociology* 123-143 at p 125.
[28] Smith (n 3) at p 208.
[29] Cubitt, (n 10) at p 199-200 (our emphasis).
[30] Ibid. See also M Matsuda, *The Memory of the Modern* (Oxford: Oxford University Press 1996) at p 15.
[31] J Alexander, 'Toward A Theory Of Collective Trauma' in J Alexander, R Eyerman, B Giesen, N Smelsen and P Sztompka (eds), *Cultural Trauma and Collective Identity* (Berkeley: University of California Pres 2004) at p 22; See also Cubitt, ibid.

Recent decades have witnessed what some commentators have termed a 'memory boom',[32] an 'obsession with memory'[33] often manifested in ~~an~~ a fascination with what the French historian Pierre Nora has termed *lieux de mèmoire'* – sites of memory – where memory crystalises~~crystalizes~~ in, amongst other things, artefacts, memorials, museums, archives, days of commemoration, street names, flags, and texts.[34] Many commentators link this 'efflorescence of memory'[35] with the late 20th century disillusionment in utopian ideologies, which have both led to nation states 'shoring up their legitimacy' by 'turning to the past' and also to a concomitant increase in awareness of identity and growth in the politics of identity.[36] As Jeffrey Olick *et al* say, we have:

> redirected our gaze to collective pasts, which served as a repository of inspiration for repressed identities and unfulfilled claims. Without unifying collective aspiration, identity politics proliferated. And most often these identities nursed a wound and harboured a grudge.[37]

One aspect of this memory boom has been the growth in 'memory laws' which 'enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past'.[38] Such laws may, for example, create days of remembrance, or they may ban the propagation of totalitarian ideologies or criminalise~~criminalise~~ the denial or gross minimalisation~~minimalization~~ of acts of genocide or crimes against humanity.[39] A series of such laws can be seen in France, starting with the Gayssot law of 1990 –which criminalised~~criminalised~~ Holocaust negationism, followed by a series of declaratory laws: the

[32] J Winter, 'The Generation of Memory: Reflections on the "Memory Boom" in a Contemporary Historical Studies' (2007) 1 Archives & Social Studies: A Journal of Interdisciplinary Research 363-397.
[33] A Huyssen, *Twilight Memories* (London: Routledge 1995).
[34] P Nora, 'Between Memory and History: *Les Lieux de Mèmoire'* (1989) 26 *Representations* 7-24. Nora draws a strong contrast between memory and history: the former, he says is living, permanently evolving, affective, magical, 'open to manipulation and appropriation, susceptible to being long dormant and periodically revived, perpetually actual' 'a bond tying us to the eternal present', and only accommodating 'those facts that suit it'; the latter is prosaic, 'a representation of the past', 'reconstruction, always problematic and incomplete, of what is no longer', 'intellectual and secular', and calling for 'analysis and criticism', at p 8. On this distinction see also e.g., C Maier, 'A Surfeit of Memory? Reflections on History, Melancholy and Denial' (1993) 5(2) *History and Memory* 136-152.
[35] J Winter, 'Historical Remembrance in the Twenty First Century' (2008) (617) *The Annals of the American Academy of Political and Social Science* 1-13 at p 9.
[36] Olick et al (n 9) at p 3; N Koposov, *Memory Laws, Memory Wars: the Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press 2018) 37-40. For an influential perspective see Nora (n 34). On generally identity politics see e.g. A Sen, *Identity and Violence: the Illusion of Destiny* (London: Penguin 2006); F Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (London: Profile Books 2018).
[37] ibid, Olick *et al.*
[38] Council of Europe, Thematic Fact Sheet 'Memory Laws' and Freedom of Expression July 2018 at p 1.
[39] See the memory law database created by the *MELA Memory Laws in European and Comparative Perspective Project* led by Eric Heinze, <http://melaproject.org/legal-database>. See also U Belavusau and A Gliszczyńska-Grabias (eds) *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press 2017).

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'Armenian law' of 2001 recognising~~recognising~~ the 1915 massacres of Armenians in the Ottomae~~n~~n Empire as genocide; the 'Taubira Act' of 2001 recognising~~recognising~~ slavery and the slave trade as a crime against humanity; and the 'Mekachera Act' of 2005 recognising~~recognising~~ the suffering and sacrifices of the civil and military victims of the Algeria war on the French side.[40] Such laws are always controversial and in France have been robustly opposed by historians under the banner *Liberté pour l'Histoire*.[41] More recently, and even more problematically in terms of historical free speech, a succession of tit-for-tat memory laws in former Eastern Bloc states, in particular Russia, Ukraine and Poland, -have promoted competing and conflicting state-versions of the history of World War II and the role of the Soviet Union and Red Army; an example of so called 'Memory Wars'.[42]

To slay or not to slay the Buried Giant?

The conundrum that lurks at the centre of Ishiguro's *Buried Giant* – whether it is better for a society or a group to remember or to forget has of course been debated by historians and philosophers for centuries.[43] Aware of this tension, and the potential for festering bitterness that it might engender, it is said that ancient Greek city states' battlefield memorials were deliberately constructed of wood so that they would degrade over time, thus enabling possible reconciliations between former adversaries.[44]

Historically, it is possible to discern approaches that stress both the importance of remembrance and of amnesia. Peace treaties have alternately invoked both memory and forgetting as possible engines to ensure future peace. For example the Treaty of Westphalia (1648), which was a major milestone in the development of international law as well as bringing to an end the Thirty Years' War that had ravaged Europe on religious grounds, provided:

[40] Koposov (n 36) at p 112-114; P Weil, 'The Politics of Memory: the Bans and Commemorations' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2010) 562.

[41] *Liberté Pour L'Histoire* https://www.lph-asso.fr/index.html currently led by Pierre Nora and Françoise Chandernagor and founded by René Rémond. See R Kahn, 'Does It Matter How One Opposes Memory Bans? A Commentary on Liberté Pour L'Histoire' (2016) 15(1) *Washington University Global Studies Law Review* 55-92.

[42] Koposov (n 36). See further, A Gliszczyńska, 'Law and Memory' (Verfassensblog, 4 January 2018) <https://verfassungsblog.de/law-and-memory/>; A Wójik, 'Memory Laws in Russia and Other Restrictions on Freedom of Expression' (Legal Dialogue, 9 October 2020) <https://legal-dialogue.org/memory-laws-in-russia-and-other-restrictions-on-freedom-of-expression >; M Mälksoo, 'Decommunization in Times of War: Ukraine's Militant Democracy Problem' (Verfassensblog, 9 January 2018) <https://verfassungsblog.de/decommunization-in-times-of-war-ukraines-militant-democracy-problem/>.

[43] Belavusau and Gliszczyńska-Grabias refer to these approaches as the 'oblivion model' and the 'zealous remembrance model' (n 39) at pp 3-4.

[44] F Shaheed (n 6) at paragraph 8.

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> there shall be on the one side and the other a perpetual Oblivion, Amnesty or Pardon of all that has been committed since the beginning of these Troubles … all that has pass'd on the one side, and the other … shall be bury'd in eternal Oblivion.[45]

A modern version of this approach can be seen in Spain in the wake of the Civil War, and the Francoist dictatorship,[46] at least until the enactment of the Law on Historical Memory in 2007.[47]

It is possible to see the opposite approach – that of emphasising the importance of remembrance – in the American Declaration of Independence which famously invokes and recites the history of George III's 'repeated injuries and usurpations' as justification for the rebellion/war of independence against the British, moulding collective memory for generations to come.[48] Equally famously the Treaty of Versailles, which brought to an end World War I, contained a 'War Guilt Clause' which held Germany and her allies entirely responsible for the loss and damage sustained by the victors.[49] As Belavusau and Gliszczyńska-Grabias say, '[f]ar from Westphalian oblivion, Versailles constructed transnational law through a discourse of foundational guilt'.[50]

George SantayanaSantayna famously asserted that 'those who cannot remember the past are condemned to repeat it'.[51] Less famously, De Toqueville, asserted, 'when the past has ceased to throw its light upon the future, the mind of man wanders in obscurity'.[52] Since World War II, it is without doubt the case that the 'better-to-remember' school of thought has been in the ascendency, with the revelations of the Nazi atrocities giving rise to the consensus –not only that remembrance was the best way to stop such horrors happening again – *per* Santayana and

[45] Title II Peace treaty between the Holy Roman Emperor and the King of France and their respective Allies [Treaty of Westphalia]. Avalon Project: Documents in Law, History and Diplomacy, available at https://avalon.law.yale.edu/17th_century/westphal.asp. See also e.g. the Edict of Nantes 1598 which also advocated 'oblivion' as a means to peace.
[46] P Aguilar (n10); A Aragoneses, 'Legal Silences and the Memory of Francoism in Spain' in Belavusau and Gliszczyńska-Grabias (n 39) at p 175-194.
[47] Historical Memory Law no. 52 of 26 December 2007. See V Druliolle, 'Recovering Historical Memory: A Struggle against Silence and Forgetting? The Politics of Victimhood in Spain' (2015) 9(2) *International Journals of Transitional Justice* 316-335.
[48] Declaration of Independence 1776 available at https://www.archives.gov/founding-docs/declaration-transcript.
[49] Article 231, Treaty of Versailles 1919 available at https://avalon.law.yale.edu/subject_menus/versailles_menu.asp.
[50] Belavusau and Gliszczyńska-Grabias (n 39) at p 6.
[51] G Santayana, *The Life of Reason: Or the Phases of Human Progress, vol 1: Reason in Common Sense* (New York: Charles Scribner's Sons 1920) at p 284. Michael Herr responded with the 'little history joke' that 'those who remember the past are condemned to repeat it too' cited in D Rieff, *In Praise of Forgetting: Historical Memory and its Ironies* (New Haven: Yale University Press 2016) at p 58.
[52] A De Tocqueville, *Democracy in America* (first published 1840, New York: Penguin 1956) at p 314.

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de Tocqueville – but also that the identity, dignity and rights of the victims of such acts require that they be remembered, and remembered appropriately. This belief is illustrated by the post-war~~post war~~ boom in memory laws, but also in the transitional justice movement with the rise of truth and reconciliation commissions[53] and memorialisations,[54] not only to prevent repetition but out of respect for identity and the dignity of people who fell victim to past atrocities. In this regard, Jeremy Waldron argues that remembrance is crucial to the identity, not only of individuals but also of communities:

> To neglect the historical record is to do violence to this identity and thus to the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting the individuals as well.[55]

Furthermore, as Waldron also points out, when people are told to 'forgive and forget', to 'let bygones be bygones', it is in reality the case that the 'forgetfulness urged upon [them] is rarely the blank slate of historical oblivion. In practice '[t]hinking quickly fills ~~the~~ up the vacuum with plausible tales of self-satisfaction, on the one side, and self-deprecation on the other.'[56]

The consensus on the normative and practical benefits of remembering was, however, not always taken for granted. In his classic 1882 essay, 'What is a Nation?' the French historian Ernest Renan argued strongly that the very idea of nationhood required a certain collective amnesia, even at the expense of the pursuit of historical truth:

> Forgetting, I would even say historical error, is an essential factor in the creation of a nation and it is for this reason that the progress of historical studies often poses a threat to nationality … the essence of a nation is that all of its individual members have a great deal in common and also that they have forgotten many things.[57]

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[53] M Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press 1998); T Toderov, *Memory as a Remedy for Evil* (G Walker trans., London: Seagull Books, 2010).
[54] Shaheed (n 6).
[55] Waldron (n 3) at p 6. See also J Thompson, 'Apology, Justice and Respect: A Critical Defense of Political Apology' in M Gibney *et al* (n 3) at p 31-44.
[56] Waldron, ibid.
[57] E Renan, 'What is a Nation?' in HK Bhaba (ed), *Nation and Narration* (Abingdon: Routledge 1990) at p 11.

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Whilst today it is undoubtedly the case that the better-to-remember school of thought represents the 'conventional wisdom' and, as David Rieff suggests, it 'now stands as one of the more unassailable pieties of our age',[58] there are nevertheless several notable opposing voices. Rieff himself, for example, *contra* Santayana, accepts that whilst 'n~~N~~ever again' is a 'noble sentiment', 'there is no reason to suppose that an increase in the amount of remembrance will so transform the world that genocide will be consigned to humanity's barbarous past'.[59] Further, he argues that:

> [a]t numerous times and in numerous places, remembrance has provided the toxic adhesive that was needed to cement old grudges and conflicting martyrologies, as it did in Northern Ireland and in the Balkans for generations, if not centuries …
>
> Despite the overwhelming consensus to the contrary, does not the historical record … justify asking whether in some places and at some moments in history what has ensured the health of societies is not their capacity for remembering but their ability to forget?[60]

Thus, for example, the historian Tony Judt argued that the post-war European recovery and peace were only made possible by the tacit yet universal decision to *leave the past in the past* and to concentrate on building a better future.[61] Indeed Judt went further, suggesting, contrary to popular belief that '[m]aybe all our museums and memorials and obligatory school trips today are not a sign that we are ready to *remember* but an indication that we feel we have done our penance and can now begin to let go and *forget*, leaving the stones to remember for us …'.[62] Furthermore, the current preoccupation with memory and identity with its 'particularising~~particularizing~~ character' has been criticised~~criticised~~ for diverting attention from current concerns, jeopardising~~jeopardizing~~ the aspirations to universality that modernity generally, and the human rights movement in particular, tend to embody; coupled with the fact that it is inevitable that some memories are recognised~~recognised~~ at the expense of others.[63] Gibney *et al* recount the Mohawk proverb: 'it is hard to see the future with tears in your eyes' noting that the politics of memory can easily lead to a 'politics of bitterness', easily

[58] Rieff, (n 51) at pp 58-9.
[59] Ibid at p 83.
[60] Ibid at p 87.
[61] T Judt, 'The Past is Another Country: Myth and memory in Post War Europe' (1992) 21(4) *Daedalus* 83-118.
[62] T Judt, 'The "Problem of Evil" in Post War Europe', *New York Review of Books* (New York, 14 February 2008) <https://www.nybooks.com/articles/2008/02/14/the-problem-of-evil-in-postwar-europe/>.
[63] Löytömäki (n 3) pp 123-125.

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manipulated, wherein 'those whose ancestors were wronged demand apologies from the descendants of those they believe to have committed those wrongs'.[64] As Bikhu Parekh writes:

> Intercommunal conflicts thrive on memories of real or imagined past acts of injustice. The more bitter the memories, the more intractable the conflicts and the more difficult it becomes to restore normal relations between the communities involved.[65]

The historian Charles Maier has gone so far as to talk of a 'surfeit of memory' in which memory is not ~~as~~ a sign of historical confidence, but of a 'retreat from transformative politics'.[66]

Striking the balance?

Despite the undoubted power and clarity of the Buried Giant metaphor, the practical reality is that the choice between remembering and forgetting is almost never a 'zero-sum game'.[67] Very often what is at stake is the *way* that remembering takes place: what emphases are placed on what aspects of past events? In other words, *who* are remembered as the *heroes*, the *victims* and the *villains* in present day portrayals? It is frequently the narration of the past in forms of expression that seeks to shape collective memory in a certain way, perhaps sometimes at the expense of the dignity and identity of certain groups.[68] It is, therefore, necessary to strike some sort of balance. As Linda Smiddy says:

> A country willing to confront its past to save its future must consider how best to marshal its resources to pursue justice and preserve truth, to strike the balance between remembering and forgetting, and to shape and preserve a culture's collective memory as one way to forestall the recurrence of heinous events.[69]

One possible approach that may be of help in negotiating such delicate balances, or at least provide an analytical frame of reference is suggested by Avishai Margalit in his masterful study

[64] Gibney et al (n 3) at p 6; Minow (n 51) at p 10.
[65] B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke: Macmillan 2000) at pp 212-213.
[66] Maier (n 34) at p 150.
[67] Waldron (n 3) at p 6.
[68] The most obvious example is Holocaust Denial, see e.g., D Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin 1995); R Kahn, *Holocaust Denial and the Law* (London: Palgrave Macmillan 2004). Hare and Weinsten (n 40) Part VI. Prominent recent examples include disputes over public memorialisations of controversial figures, such as Edward Colston and Cecil Rhodes (n 6).
[69] LO Smiddy, 'An Essay on Professor Fronza's Paper: Should Holocaust Denial Be Criminalized' (2006) 30 *Vermont Law Review*, 645 at p 646.

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The Ethics of Memory.[70] Margalit considers the question of the extent to which there exists an ethics of memory, and within that, the extent to which 'we [are] obligated to remember people and events from the past'. In arriving at an answer, he draws on the distinction between what he calls 'thick' relations, and 'thin' relations. Thick relations are 'anchored in a shared past or moored in shared memory', that are 'grounded in such attributes as parent, friend, lover, fellow-countryman'. Generally speaking, they are our relations to the 'near and dear'. Thin relations, on the other hand, are 'backed by the attribute of being human'; they are in general our 'relations to the stranger and to the remote'.'[71] For Margalit these distinctions map on, respectively, to the distinctions between ethical relations and moral relations. Thin, moral relations are universalist, they encompass all humanity and, as such, are 'long on geography and short on memory'.[72] Thick, ethical, relations on the other hand are typically 'short on geography and long on memory'; indeed memory is the 'cement that holds thick relations together, and communities of memory are the obvious habitat for thick relations and thus for ethics'.[73] Thin relations are related to universal respect; thick relations relate to caring, loyalty and necessarily involve partiality, for it is impossible to create a universal caring ethical community for *all* human beings.[74]

Using this as his framework Margalit 'distils' his answer: that our duty to remember is essentially an ethical one, which extends to those within the compass of our thick relations – the family, the tribe, the nation. That we 'ought' to remember is both 'a constitutive part of our typical thick relations' and 'an affirmation of the relation'.[75] As Margalit says, this is attested to by the expectation that we are remembered after our death. By contrast, the duty to remember does *not* extend to thin, moral relations – humanity *as a whole* is not and cannot be a community of memory. But there is an important exception to this general rule, namely: 'striking examples of radical evil and crimes against humanity, such as enslavement, deportations of civilian populations, and mass exterminations … acts that undermine the very foundation of morality itself'.[76] Given that, as Margalit puts it, such cases are attacks on the 'very notion of shared humanity' and constitute instances when morality should be concerned with memory as well',[77] it is perhaps unsurprising that memories of an attack on humanity as pernicious as that of the

[70] Margalit (n1).
[71] Ibid at p 7.
[72] Ibid at p 8.
[73] Ibid.
[74] Ibid at p 73-76.
[75] Ibid at p 106.
[76] Ibid at p 78.
[77] Ibid at p 9.

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Holocaust should have led to the post-war human rights movement,[78] and, in Europe, the creation of the European Convention on Human Rights (1950).[79]

The Buried Giant in Court: Collective Memory at the European Court of Human Rights

There are several provisions within international human rights instruments that bear upon collective memory, as integral parts of cultures, having their origins in the right to take part in cultural life of the community under Article 27 of the Universal Declaration of Human Rights 1948.[80] The European Convention on Human Rights does not, on the face of it, contain a right to collective memory linked to identity and dignity.[81] However, in a series of cases involving the right freedom of expression, the European Court of Human Rights has begun to explore the possibility that collective memory may indeed legitimately be protected as a human right. These cases have involved, in one way or another, expression that has sought to impact or shape contemporary perceptions of the past, in ways that are often in conflict with the collective memory, identity and dignity of others.

Article 10 of the ECHR protects, under paragraph 1, the right to freedom of expression. In common with most of the other articles within the Convention, Article 10 is not an absolute right, but may be balanced against competing interests as provided for under paragraph 2. This requires that any limitation must be 'prescribed by law' (i.e., the 'rule of law' requirement of certainty and foreseeability) and be 'necessary in a democratic society' in the pursuit of one of aims listed.[82] Amongst these, paragraph 2 'legitimate aims' is the 'protection of the reputation

[78] See e.g., A Fagan, *Human rights: Confronting Myths and Misunderstandings* (Cheltenham: Edward Elgar 2009), at p 7-8.

[79] See e.g., E. Bates, *The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press 2010) at p 33-76.

[80] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). International Covenant on Civil and Political Rights 16 Dec 1966 999 UNTS 171 Article 27, and the International Covenant on Economic Social and Cultural Rights 1966, Article 15; Shaheed (n 6); See PYS Chow, 'Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights' (2014) 14 *Human Rights Law Review* 611-646; R O'Keefe 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR (1998) 47(4) *International and Comparative Law Quarterly* 909-923; A De Baets 'The United Nations Human Rights Committee's View of the Past' in Belavusau and Gliszczyńska-Grabias (n 39) 29; and P Naftali, 'The Right to Truth in International Law: The Last Utopia' in Belavusau and Gliszczyńska-Grabias (n 39) 70.

[81] The Court has dealt with disputed portrayals of historical episodes in several high-profile cases such as: *Lehideux and Isorni v France* Application no 24662/94 (ECtHR, 23 September 1998) (the role of Marshal Petain and the Vichy regime), *Giniewski v France* Application no 64016/00 (ECtHR, 31 January 2006) (the role of the Catholic church in the rise of Nazism), *Janowiec and others v Russia* Application nos 55508/07 and 29520/09 (21 October 2013) (the Katyn massacre); *Kononov v Latvia* Application no 36376/04 (ECtHR,17 May 2010) (war crimes by Soviet troops in Latvia). On the latter see M Mälksoo, '*Kononov v Latvia* as an Ontological Security Struggle Over Remembering the Second World War' in Belavusau and Gliszczyńska-Grabias (n 39) 91.

[82] This essentially denotes the principle of proportionality, see further G Huscroft, BW Miller and D Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press 2014).

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and rights of others'; and it is via this provision that the Court~~Court~~ has hung its development of the incipient right to collective memory as a potential counter-balance to the free speech right in paragraph 1.

An important early step in the journey can be seen in the 2012 case *Aksu v Turkey* which concerned derogatory terms about the Gypsy/Roma community used in publications by the Turkish Ministry of Culture.[83] The applicant was of Roma origin and brought an application under the right to respect for a private life under Article 8. The Court~~Court~~ stated that personal autonomy was an important underpinning of Article 8, which embraced multiple aspects of a physical and social identity. The Court~~Court~~ continued:

> [A]n individual's ethnic identity must be regarded as another such element… In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and feelings of self-worth and self-confidence of members of the group.[84]

The Court~~Court~~ stated that where Articles 10 and 8 have to be balanced against each other, since there is 'no hierarchical relationship' between them, the question for the Court~~Court~~ is to ensure that a fair balance has been struck by the domestic authorities. On this question, as long as the balancing act has been carried out in accordance with criteria established by the Court~~Court~~, giving proper weight to the respective rights, the domestic authorities will be afforded a wide margin of appreciation and, accordingly, the Court~~Court~~ will 'require strong reasons to substitute its own view for those of the domestic courts'.[85] Thus, the exact balance struck between competing rights is essentially a matter for domestic authorities, who are closer to their own populations and better acquainted with their own cultures and legal systems.

Whilst Aksu did not concern collective memory in express terms, the Court~~Court~~ took a further step down this road the following year in *Putistin v Ukraine*.[86] The case concerned the infamous 'Death Match' of 1942, a football match played between players who before the war had played for Dynamo Kiev, but by this time were working in a local bread factory, and a team composed

[83] *Aksu v Turkey* Application nos 4149/04 and 41029/04 (ECtHR, 15 March 2012).
[84] *Aksu* at paragraph 58.
[85] *Aksu* at paragraphs 63-68. This is an aspect of the principle of subsidiarity. See also *Von Hannover v Germany (2)* Application nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) at paragraph 106 and *Axel Springer v Germany* Application nos 39954/08 (ECtHR, 7 February 2012) at paragraph 87. In the event Aksu lost his case.
[86] *Putistin v Ukraine* Application no 16882/03 (ECtHR, 21 November 2013).

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of German service personnel. The Ukrainian players won the match, despite alleged unsportsmanlike conduct by the opposition, unfair refereeing by an SS officer and threats of sanctions. After the game the players allegedly suffered serious repercussions including arrest and being sent to a concentration camp, where four were eventually executed.[87] However, newspaper reports at the time of the 60th anniversary of the game alleged that some of the Ukrainians had collaborated with the Gestapo; and the son of one of these players, Vladlen Putistin, brought an action against the newspaper and journalist alleging the dissemination of falsehoods and seeking a rectification and non-pecuniary damages. Having failed before the domestic courts, he claimed a violation of Article 8. The ECtHR stated that the:

> 'reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8.[88]

In the event, as was the case in *Aksu*, the applicant was unsuccessful, with the Court holding that the domestic courts had not failed to strike an appropriate balance between his rights and those of the press. However, the Court nevertheless had taken a further step towards recognising a mnemonic right – linked to identity and dignity – by accepting that Article 8 covered the reputation of a *deceased ancestor*.

In the subsequent judgment of *Jelševar v Slovenia*, the CourtCourt accepted that the *fictional* portrayal of a forbear in a novel might engage the descendant's Article 8 rights;[89] and in *Dzhugasvili v Russia*, the CourtCourt proceeded on the premise that newspaper articles dealing with the historical role of the applicant's grandfather, former Soviet leader Joseph Stalin, could engage his Article 8 rights.[90] In both of these cases, however, the CourtCourt upheld the domestic Court'scourt's views that the free speech interest at stake significantly outweighed the Article 8 interests in play. This was especially so in *Dzhugashvili*, in which it stressed the importance of being able to debate the role of a global figure such as Stalin, and warned against the dangers of judicial interventions in historical debate which would 'shift the … historical discussions from public forums to courtrooms'.[91]

[87] The 1981 John Huston film *Escape to Victory* featuring Bobby Moore, Pelé, Michael Caine and Sylvester Stallone was inspired, very loosely, by the story of the Death Match.
[88] *Putistin* (n 86) at paragraph 33.
[89] *Jelševar v Slovenia* Application no 47318/07 (ECtHR, 11 March 2014) at paragraph 37.
[90] *Dzhugashvili v Russia* Application no 41123/10 (ECtHR, 9 December 2014) at paragraphs 26-35.
[91] Ibid at paragraph 33.

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The culmination of this line of cases, which firmly establishes collective memory related to identity and dignity as being fully within the compass of Article 8, is the landmark Grand Chamber judgment in *Perinçek v Switzerland*.[92] Dogu Perinçek, a Turkish lawyer and politician, had made a series of speeches in Switzerland in which he had stated that:

> allegations of an 'Armenian genocide' are an international lie … invented in 1915 by the imperialists of England, France and Tsarist Russia who wanted to divide the Ottoman Empire during the First World War
>
> …
>
> Turkey was on the side of those defending their homeland and the Armenians were on the side of the Imperialist powers and their instruments.[93]

Perinçek was convicted and fined under Article 261 *bis* of the Swiss Criminal Code which makes it an offence for a person, *inter alia*, on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, to deny, grossly trivialise~~trivialize~~ or seek to justify, a genocide or other crimes against humanity.[94] Having exhausted domestic legal remedies in Switzerland, he claimed a violation of his Article 10 Convention right to freedom of expression.

The Court, following the logic of the cases discussed above, took the opportunity to fully recognise collective memory, linked to identity and dignity, as falling within the ambit of Article 8:

> The 'rights of others' [under Article 10(2)] … were the rights of Armenians to respect for their and their ancestor's dignity including their right to respect for their identity constructed around the understanding that their community had suffered genocide. In the light of the case-law in which the Court~~Court~~ has accepted that both ethnic identity and reputation of ancestors may engage Article 8 … under its 'private life' heading … the Court~~Court~~ agrees that these were rights protected under [Article 8].[95]

[92] *Perinçek v Switzerland* Application no 27510/08 (ECtHR, 15 October 2015). See L Daniele, 'Disputing the Indisputable: Genocide Denial in *Perinçek v Switzerland*' (2016) 25 *Nottingham Law Journal* 141-152.
[93] *Perinçek* ibid at paragraphs 13-16.
[94] The provision was enacted in 1993 in order, so the legislature believed, to make Swiss law compliant with Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination 1965.
[95] *Perinçek* (92) at paragraph 227.

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Thus whilst the Court did not actually use the term, what it seems to have done in this series of cases is to *create* a mnemonic human right to 'collective memory' linked to identity and dignity, out of what arguably *was* previously a relatively abstract, albeit important, human interest.

Collective Memory as a Human Right under Article 8 – a Case of Rights Inflation?

It could be argued that this expansion of the scope of Article 8 is an example of the kind of 'rights inflation' that has led to widespread criticism of the Court~~Court~~ in recent years.[96] The reputation and dignity of deceased forebears may be thought to be very *far* from the classical core protections offered by Article 8 such as, for example, defence against unwarranted searches and intercepts,[97] unwanted publication of private information,[98] or state intrusion into the intimate sphere of sex and sexuality.[99] And yet this construction by the Court~~Court~~ leads to collective memory, linked to identity and dignity, being placed in the scales as an equal combatant with freedom of expression. As the Court in *Perinçek* put it, following its previous 'balancing' case law, the outcome of the case should not vary depending on whether the application was brought under Article 8 or Article 10, because both rights 'deserve equal respect'. As a consequence, the way the balancing exercise is carried out is primarily a matter for the state concerned – it falls within the margin of appreciation and it would take 'strong reasons' [for the Court~~Court~~] to substitute its own view – *on the proviso that* the balance is 'carried out … in conformity with criteria laid down in the Court's case-law'.[100] These 'criteria' essentially embody underpinning rationales for the protection of competing rights concerned; and where the national authorities have not properly considered the 'importance or scope' of the rights in play, then the margin of appreciation – the latitude given to the state – will be narrow.[101]

In applying the criteria to the concrete facts in *Perinçek* (considered in more detail in the following section) the Court~~Court~~ held that the balance should weigh in favour of expression since it concerned matters of public interest on historical issues which were entitled to strong

[96] Naftali (n 80) 72. See e.g., J Sumption *Trials of the State: Law and the Decline of Politics* (London: Profile Books 2019); J Tasioulas 'Are human rights taking over the space once occupied by politics' *New Statesman* (London: 26 August 2019) < https://www.newstatesman.com/2019/08/are-human-rights-taking-over-space-once-occupied-politics>; D Clément, 'Human Rights or Social Justice? The Problem of Rights Inflation (2018) 22(2) *International Journal of Human Rights* 155-169.

[97] See e.g., *Malone v UK* Application no 8691/79 (ECtHR, 2 August 1984).

[98] See e.g., *Von Hannover (2)*(n 85).

[99] See e.g., *Dudgeon v UK* Application no 7525/76 (ECtHR, 22 October 1981).

[100] *Perinçek* at paragraph 198.

[101] Ibid at paragraph 199.

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protection under Article 10.[102] Furthermore, 'taking into account the overall thrust of the statements' the Court~~Court~~ did 'not perceive them as a form of hatred or incitement or intolerance'.[103] After all, Perinçek did 'not call the Armenians liars', use abusive terms with respect to them or attempt to stereotype them, but rather directed his allegations against the 'imperialist powers'.[104]

On the facts this may well be the correct decision – bearing in mind the importance of freedom of expression and historical debate. Thus, as was the case in *all* the other collective memory cases discussed above, Article 8 yielded to Article 10. In order to try and understand this resolution to the balancing act, we shall examine and critique the application of some of the Court's other stated criteria in the following section.

Critique of the Court's treatment of the Buried Giant

In *Perinçek* the Court examined an extensive list of criteria enabling a balancing of the 'concrete aspects of the two rights at stake'.[105] The two that bear most heavily on the significance of collective memory were: (a) the *context* of the interference with the expression, and (b) the extent to which the expression *affected the rights* of the Armenian community.

(a) Context i - Geography

With regard to the context, the Court~~Court~~ first considered the 'geographical factors'. It found that there was 'no direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years'. The 'only such link' could be, the Court~~Court~~ said, through the 'presence of an Armenian community on Swiss soil'. This was, however, 'tenuous'; and indeed there was no 'evidence that the atmosphere in Switzerland was tense ... or [that there was] friction between Turks and Armenians'.[106] This argument is certainly understandable in a public order, jurisdiction-based sense – after all, *most* of the people who would suffer offence to their collective memory by the remarks were a *long way-away* from

[102] Ibid at paragraph 229-230. See e.g., *Lehideux* (n 81). This is in fact the application of the first of the Court's listed criteria, namely 'the nature of the applicant's statement'.

[103] Ibid at paragraph 232.

[104] Ibid at paragraph 233.

[105] The *Perinçek* criteria are: i. the nature of the applicant's statements; ii. the context in which they were interfered with; iii. the extent to which they affected Armenians' rights; iv. The extent of consensus among contracting states on the need to criminally sanction such statements; v. the existence of any relevant international law rules; vi. The methods employed by the Swiss courts to justify the conviction, vii. The severity of the interference, at paragraph 228-282.

[106] Ibid at paragraph 244.

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the *locus* in which these remarks were uttered. There are, however, several criticisms that can be levied at this approach.[107]

First, in a purely practical sense, in the internet age~~internet age~~ when words and images can be transmitted around the world in an instant, for the Court~~Court~~ to adopt such a narrow geographical, jurisdiction-based focus seems anachronistic.[108] But from a more principled standpoint, if we are considering the collective memory linked to identity and dignity of a particular community – in this case a community which suffered genocidal, existential trauma – it is at least open to question whether it should matter *where they live* or that not many people from that community are resident in the particular jurisdiction where the statements were made. Given the importance, within human rights doctrine, of the universal applicability of human rights and of protecting vulnerable *minorities*, it is arguable that this right should apply to all, regardless of where they happen to live. As the President of the Court, Judge Spielmann,~~Speilmann~~ joined by six others, said in their dissent:

> Minimising~~Minimising~~ the significance of the applicant's statements by seeking to limit their geographical reach amounts to seriously watering down the universal, *omnes* scope of human rights – their quintessential defining factor today.[109]

The approach of the Court~~Court~~ in this regard – perhaps understandably – appears to confine the collective memory right to the narrow geographical region. If we recall the work of Avishai Margalit, this would seem to correspond to the 'thick', ethical mnemonic obligation that, he says, exists in those with whom we have a strong connection. But Margalit also argues that there exists a 'thin' *universal, moral* duty to remember acts of 'radical evil and crimes against humanity such as enslavement, deportation of civilian populations and mass extermination', *wherever they occur*.[110] This is clearly *not* the view of the ~~European Court of Human Rights~~ECtHR. Indeed, under this approach one wonders what, from a European perspective, would be the view taken of denial or minimalisation~~minimalization~~ of the genocides and crimes against humanity in, for example, Rwanda, Cambodia, Darfur or Myanmar? The Court's~~Court's~~ logic suggests, because of spatial/geographical distance, such denials would be

[107] See R Kahn, 'Banning Genocide Denial – Should Geography Matter?' Belavusau and Gliszczyńska-Grabias (n 39) 329.
[108] Ibid 337 ff.
[109] *Perinçek*, joint dissenting opinion of Judges Spielmann, Casadeval, Berro, De Gaetano, Sicilianos, Silvis and Kūris at paragraph 6. See also Kahn, (n 108) 340 ff.
[110] Margalit (n1) above at p 78.

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more acceptable – a conclusion that seems be at odds with the claimed universal nature of human rights.[111]

It is significant in this regard that the Grand Chamber of the Court in *Perinçek*, stated that the justification for criminalising~~criminalising~~ denial of the Holocaust was 'not so much' that it was a 'clearly established historical fact',[112] but rather that it depended upon the 'historical context of the states concerned', especially those states, such as Austria, Germany, Belgium and France, which bear a 'special moral responsibility to distance themselves from those atrocities that they have perpetrated or abetted'. Holocaust denial in these cases 'even if dressed up as impartial historical research, must *invariably be seen as connoting an antidemocratic ideology and anti-Semitism*'.[113] This line of reasoning leads to the same problem as outlined above: if the justification for criminalisation~~criminalisation~~ depends upon geographical context, what are we to say when a state that does *not* bear such responsibility criminalises~~criminalises~~ Holocaust denial? Is it really possible or advisable to draw such geographical lines of responsibility? Would a Holocaust denial law in the UK or the Republic of Ireland violate Article 10 because those states (respectively) opposed Nazi Germany or remained neutral during the Second World War? Does the collective memory, dignity and identity of Jewish people suffer less injury because of the different location in which the words were uttered?

Context ii: The Time Factor

The other 'context' element relied on by the Court in *Perinçek* was the time factor. In particular, the 'lapse of time' of nearly 90 years between the impugned statements and the events to which they referred, and the fact that, by that time, there would be 'surely very few, if any, survivors'. The Court continued:

[111] *Perinçek*, joint dissenting opinion of Judge Spielmann *et al* at paragraph 7.

[112] Until the Grand Chamber judgment this tended to be the justification advanced, see e.g., the Chamber Judgement in *Perinçek v Switzerland* Application no 27510/08 (ECtHR, Chamber, Second Section, 17 December 2013) at paragraph 117; *Lehideux* (n 81) at paragraph 47.

[113] *Perinçek* at paragraph 243 (our emphasis). In cases of convictions for denial or trivialisation of the Holocaust– of which many have come before the Court – the Court has tended to utilise Article 17 of the Convention which prevents Convention rights being used to destroy the very rights protected *by* the Convention, see e.g., *Garaudy v France* Application no 65831/01 (ECtHR Decision, Fourth Section, 24 June 2003; *M'Bala M'Bala v France* Application no 25239/13 (ECtHR Decision, Fifth Section, 20 December 2015).

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> [w]hereas events of relatively recent vintage may be so traumatic as to warrant, for a period of time, an enhanced degree of regulation of statements relating to them the need for such regulation is bound to recede with the passage of time.[114]

This, of course, seems intuitively correct. But it does raise awkward questions from the perspective of collective memory, identity and dignity. If a historic collective trauma is acknowledged to be an important component of collective memory and identity of people *today*, it should not *necessarily* matter that there are no survivors still living. If the Court is effectively saying that Article 8 as a vehicle for collective memory has a 'sell by date', this rather undermines the reasoning behind recognising it in the first place. Moreover, where does this leave the criminalisation of Holocaust denial? Should it too have a sell by date? And does the passage of time – as well as geography – exempt us from Margalit's moral duty to remember acts of radical evil?

(b) Impact on the rights of the Armenian community

In assessing the 'impact on the rights of the Armenian community', the Court could not accept the statements were so wounding to the dignity of Armenians who suffered/perished, and the dignity and identity of their descendants, as to require criminal measures in Switzerland.

This was not to say that there:

> might exist circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage for the dignity of groups affected by such events: for instance if they are particularly virulent and disseminated in a form that is impossible to ignore
>
> …
>
> But it cannot be said that there were such circumstances in the present case.[115]

Thus it seems as though, having laid the groundwork to recognise~~recognise~~ collective memory as coming within the scope of Article 8, and thereby able to go head-to-head with Article 10 on an equal footing, when it comes to actually assessing its weight in the juridical balance, there are many factors that lighten it significantly. This may partly be due to the novelty and

[114] *Perinçek* at paragraph 250. See also *Lehideux* (n 81) at paragraph 55.
[115] *Perinçek* at paragraph 253.

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thus fragility of the concept of collective memory as an aspect of Article 8 in the eyes of Court~~Court~~. As we shall see in the following section, where collective memory is claimed under the ambit of the right to freedom of thought, conscience or religion under Article 9 ECHR, the Court~~Court~~ seems to have been much more willing to allocate it meaningful weight.

Article 9 as a carrier for Collective Memory

Collective memory as linked to identity and dignity, as we have seen above, has been determined by the ECtHR to fall within the scope of Article 8 ECHR. However, another important vehicle for, and repository of, collective memory can be found within the religious beliefs, doctrines, texts, rituals, practices and objects of veneration that represent the (oft long-established) collective memories of many faith communities.[116] These aspects of collective religious memory have, on occasion, been subject to attack by way of different forms of expression. Actions taken by states to curb freedom of expression, so as to protect the religious sensibilities of believers, have resulted in a number of Article 10 applications to the ~~European~~ Court~~Court~~.[117] Examples include the banning of a film depicting the Christian holy family in a derogatory manner,[118] the refusal to grant a video licence for an erotic film about the sixteenth century Saint Teresa of Ávila,[119] the conviction of the publisher of a novel containing insulting comments about the Prophet Mohammad,[120] and the banning of billboards advertising clothing using models with the names Jesus and Mary.[121] In these cases however, the collective memory is given legal embodiment not via the right to respect for a private life under Article 8, but rather under the auspices of the right to freedom of thought, conscience or religion under Article 9 ECHR.

A recent example can be seen in the case of *E.S v Austria* which involved comments in a public seminar entitled 'Basic Information on Islam' organised~~organised~~ by a member of the right-wing Austrian Freedom Party.[122] The comments in question referred to the 7th century Prophet Mohammad's marriage to the 6 year-old Aisha saying: '[w]hat do we call it, if it is not paedophilia?'. The speaker was convicted under Article 188 of the Austrian Criminal Code,

[116] See text accompanying n 23-25 above.
[117] See T Lewis, 'At the deep end of the pool: religious offence, rebates speech and the margin of appreciation before the ECtHR' in J Temperman and A Koltay (eds), *Blasphemy and freedom of expression: comparative, theoretical and historical reflections after the Charlie Hebdo massacre* (Cambridge: Cambridge University Press 2017) 259.
[118] *Otto-Preminger-Institut v Austria* Application no 13470/87, (ECtHR, 20 September 1994).
[119] *Wingrove v United Kingdom* Application no 17419/90, (ECtHR, 25 November 1996).
[120] *I.A. v Turkey* Application no 42571/98 (ECtHR, 13 September 2005).
[121] *Sekmandienis Ltd v Lithuania* Application no 69317/14, (ECtHR 20 January 2018).
[122] *E.S. v Austria* Application no 38450/12 (ECtHR, 25 October 2018) at paragraphs 44 and 46.

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which makes it an offence for anyone who, in circumstances where their behaviour is 'likely to arouse justified indignation':

> [p]ublicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community … or a dogma, a lawful custom or a lawful institution of such a church or community …

Whilst not using the terminology, this provision clearly protects something very close to religious collective memory linked to group identity and dignity in a similar manner to the provisions considered in the previous section. In this case, however, when the speaker applied to the ECtHR under Article 10 ECHR, the right that was placed in the balance on the other side of the scales was not the Article 8 right to privacy, but rather the right to freedom of thought conscience or religion under Article 9 ECHR.

The outcome in *E.S.* stands in stark contrast to that in *Perinçek* where, it will be recalled, the Court~~Court~~ had found a violation of the applicant's Article 10 rights. Finding there to be no breach of Article 10, the Court~~Court~~ agreed with the domestic courts that the comments had 'not been made in an objective manner aimed at contributing to a debate of public interest' but rather had been 'aimed at demonstrating that Mohammad was not a worthy subject of worship' and were liable to arouse justified indignation in others, jeopardise~~jeopardize~~ the peaceful co-existence of religious and non-religious groups, and provoke and hurt the feelings of the followers of Islam.[123]

In its conclusion, the Court in *E.S* followed the strong, albeit highly controversial, lead provided in earlier cases on the disparagement of objects of religious veneration. And we see that the treatment of *religious* collective memory, as legally embodied in Article 9 ECHR, seems to be at odds with the way collective memory is dealt with under Article 8. In short, those applicants complaining about assaults on what is in effect *religious collective memory* of figures from the distant past have, on the whole, been successful when Articles 9 and 10 have been placed on either side of the balance.[124] In contrast, Article 8 when used as the conduit for the right to collective memory linked to identity and dignity right has allocated little comparative weight in the scales. It is possible that this difference in approach between

[123] *E.S.* at paragraphs 52-55.
[124] The exception, of the cases cited herein, is *Sekmandienis* (n 116).

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Articles 8 and 9 reflects, on the part of the Court~~Court~~, an implied acknowledgement of the fact that few areas of case law~~case law~~ are typically more controversial or heated than those involving complaints about attacks on religious sensibilities related to objects of veneration.[125]

Concluding Remarks – so what *does* the European Court of Human Rights think of the Buried Giant?

The answer to the question of what the ECtHR thinks of the Buried Giant of collective memory is a resounding: 'Don't Know!'. On the one hand, in a series of cases, culminating in *Perinçek*, the European Court of Human Rights has essentially *weaponised* historical collective memory linked to identity and dignity, by constructing it into a mnemonic human right under Article 8 of the Convention. This is a major step.

But having forged this potentially powerful sword the Court has not, apparently, felt able to *wield* it. When it has been invoked to do battle with Article 10, the Court has hedged it about with caveats as to geographical and temporal nexus. Moreover, this ambivalence in relation to Article 8 collective memory is all the more striking when compared to the Court's willingness to give something very close to collective memory – often of figures of veneration from the deep, even mythic, past – full weight when martialled under Article 9.

There are several overlapping possible explanations for this state of affairs. It may be that there exists some anxiety at the possible ramifications of this development. Obviously, there are risks to the freedom of historical debate, and of judges being dragged into the role of deciding between competing versions of history of which the Court~~Court~~ is acutely aware. Indeed, this may help explain the apparent 'ring-fencing' of Holocaust Denial as a form of speech that 'invariably' connotes anti-democratic and anti-Semitic ideology, and can thus be disposed of using Article 17 ECHR.[126] It may also indicate a nervousness about the undeniably rather opaque theoretical foundations of a 'human right to collective memory' as alluded to above, in

[125] See e.g., J Temperman and A Koltay, *Blasphemy and freedom of expression: comparative, theoretical and historical reflections after the Charlie Hebdo massacre* (Cambridge: Cambridge University Press 2017) and R E Hassner, 'Blasphemy and violence' (2011) 55(1) *International Studies Quarterly*, 23-45.

[126] On Article 17 see note 113.

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contrast to the arguably better understood and certainly more well-trodden justifications for Article 9.[127]

It is worth bearing in mind that, in recent years, a number of Council of Europe states have engaged in 'memory wars', using competing memory laws not to protect the memory of the victims of past atrocities, but rather to exonerate past (contentious) actions by the state and its agents.[128] Thus, it is perhaps unsurprising that the Court~~Court~~ has been reluctant to operationalise~~operationalise~~, fully, the right in a strong form, because doing so could place it in an awkward position in respect of possible future applications. With the resurgence of popularism and strongly nationalistic governments in parts of Europe, the warning of a character in *The Buried Giant* seems especially pertinent: 'Who knows what will come when quick-tongued men make ancient grievances rhyme with fresh desire for land and conquest?'[129]

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In view of the insoluble tensions associated with memory and forgetting, it seems hardly surprising that the Court has, figuratively speaking, rather shrugged its shoulders. Nevertheless, in its balancing methodology, the Court retains sufficient flexibility to deal with the 'Buried Giant' in an appropriate way, and to strike an acceptable balance between remembering and forgetting.

[127] As long ago as 1993 the Court pronounced, in what has become a stock phrase, that Article 9 'is one of the foundations of a "democratic society" and 'in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life …' see *Kokkinakis v Greece* Application no 14307/88 (ECtHR 25 May 1993) at paragraph 31.

[128] See Koposov (n 36) and I Nuzov, 'Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe' (2019) 19(2) *Human Rights Law Review*, 231-253.

[129] ~~With the resurgence of popularism and strongly nationalistic governments in parts of Europe, the warning of a character in *The Buried Giant* seems especially pertinent: 'Who knows what will come when quick-tongued men make ancient grievances rhyme with fresh desire for land and conquest?'~~

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