History and the law

by René Rémond

The relationship between history and politics has for some time been tempestuous and troubled. This is not a new development: in politics we choose the long view when referencing past events, whether it be to disassociate ourselves from them or to seek arguments and reinforcement from them. Our willingness to be shaped by history is inevitably somewhat ambivalent, as history is both the mortar cementing the people's unity and the seed of discord engendering its divergences and dissent. This is why the authorities cannot distance themselves from the recording of history or its transmission, and why they must consider themselves somewhat responsible for it. We are therefore not surprised that politicans are sometimes tempted to intervene in the fabrication and the instrumentalisation of history. Totalitarian regimes often openly rewrite history to their advantage, maintaining strict control over those who are tasked with the verification of historical truths. In fact nothing is more banal than the instrumentalisation and the agencing of the past. Qualifying it is sometimes controversial, and the historical significance of various events has ignited bitter ideological debates and political face-offs.

For some time now in France there has been a major debate about the role of the legislator in defining history, which normally would neither interest nor be within the purview of the normal civilian, except that new information with multiple implications has recently been brought to our attention. It involves the philosophically significant problem of searching for the truth in history, as well as the role of the State, the responsibilities of the legislators and the historians. It is about the role of the Law and the availability of access to an objective cognizance of the past, the very idea and application of democracy.

In listing all these challenges, are we not exaggerating slightly the scope of the affair? It will be up to the reader to decide, but in any case the question has not only been omnipresent in recent newspaper headlines, it has stirred the entire country and in particular elicited statements of position from both the President of France and his Prime Minister. The larger political parties have been obliged to examine its questions, a lawsuit was filed at the Conseil Constitutionnel (the Constitutional Council, the highest constitutional authority in France) and a judgment delivered in that case. Most importantly, the incident reveals the existence of a mechanism which could threaten the objectivity of the historical process and allow history to be manipulated for political reasons.

The Pétré-Grenouilleau Case

Let us examine the elements of this case. On Saturday, June 10, 2005, the jury awarding the French Senate's History Prize, which is given to distinguish a book which both satisfies strictly scientific criteria and also contributes significantly to the education of the French people - announced its choice after extensive deliberations: a book dealing with the African slave trade, published in the prestigious Gallimard series "Bibliothèque des histoires" ("Library of History"), by Olivier Pétré- Grenouilleau. At the time the Prize was awarded, the *Journal du Dimanche* published an interview with the author in which he underlined the

global nature of his research, expressing his interest in the phenomenon in its totality, i.e. not just in the "Atlantic" portion of the slave trade linked to the triangle of commerce originating in Western Europe. When asked about the qualification he would give to this historical fact, he said he considered the slave trade a crime against humanity but would not go so far as to call it *genocide*, since for him that would imply a systematic will to exterminate those of a different ethnicity. Moreover, the traders, whose motivations were mostly mercantile, certainly did not want their "merchandise," their slaves, to die out and cease to provide revenue on their "investments." This response, which seemed entirely reasonable, did not go down well with everyone, in particular those who are still haunted by memories of the slave trade tragedy.

A collective of people from the Antilles, Guyana and La Réunion, citing legislation which authorised groups to bring class action suits against those denying these specific crimes, sued the author of the book. A ranking, historian whose work was recognised and supported by his peers, and who had done nothing to contravene the historian's responsibility or that of a simple civilian of France – was thus dragged into court by plaintiffs who had no particular competence in his area of expertise, exposing him to possible criminal sanctions. Other historians suddenly realised the danger threatening research involving so-called "controversial" subjects, and the genesis of the mechanism of public opinion being allowed to compromise the independence and the dissemination of their results. The complexity of this situation triggered a series of legislative initiatives, and an awareness of the consequences of this new mindset.

International Jurisdiction and the responsibility of memory

One of the causes of this entirely unexpected problem was the fact that the world will no longer let those who commit collective crimes go unpunished. The obvious precedent would be the Nuremberg trials, which we had hoped would be a one-time event, linked solely to the second World War and to the exceptionally heinous crimes perpetrated by the Third Reich. Nuremberg left us a strong historical heritage, including concepts and definitions which have unfortunately again become current. International jurisdictions have been established to try war crimes committed in the enforced destruction of the Yugoslavian Federation and during the bloody massacres in Rwanda. The resulting initiative, whose far-reaching consequences constituted a *caesura* (a pause or break) in the history of the world, was the decision reached by the signatories of the Rome Treaty of 1999, which has been ratified by more than one hundred sovereign states, establishing a permanent International Criminal Court (ICC) with the authority over war crimes committed in both international and internal armed conflicts, reflecting the reality of contemporary armed conflict and crimes against humanity.

The establishment of these new jurisdictions implied that political acts would now have to be justified by our sense of morality, our collective conscience, positing the development of human responsibility on a planetary scale. And there was another "break" which affected our relationship to the past: the introduction of the *Convention on the imprescriptibility of war crimes and crimes against humanity,* the dissolving of the statute of limitations on certain crimes, and directly contradicting the universal practice of not allowing the prosecution or even the mentioning of specific crimes. Our century decided to abolish this linking of time and

memory for a specific category of crimes. To forget would be forbidden, a sin, and to remember would be both an ethical and legal duty. We created this duty.

Remembering is not only desirable in the search for knowledge, it is now more than ever a moral imperative, and it is not being able to remember which becomes unacceptable. The responsibility is selective and it applies only to these crimes. It is justified by the respect we owe to the victims, and it is right that they survive in our memories. It is also in another sense a reparation, in that memory asks for forgiveness for that which could neither be prevented nor stopped. By recognising its faults, a people attains a certain stature. This attitude in our civil and political society is spiritually echoed by recent developments in the Catholic Church dealing with repentance. The final consideration affecting the responsibility of memory would be the enormity of the crimes, and the scope and nature of the actions committed. In reminding us of them we are solemnly warned that these crimes could happen again and equally, that they must never happen again,

The introduction of laws on memory

These dignified and laudable considerations have profoundly altered our relationship to the past, reflecting history's changing position in society. They justify the intervention of politics into the equation. Now that remembering has become a civic responsibility, how can the legislator accept anything publically contradicting opinions that Justice or our collective conscience has previously adjudicated? This would evince a lack of respect for the victims and for their suffering, in effect condemning them a second time. This would allow doubt to enter the minds of those who did not or could not decide for themselves, contradicting the principles of civil education. Doesn't political responsibility mean to take measures, to legislate?

These, then, are the origins of the "memorial" laws dealing with the establishment of truth in history. They were strongest against the so-called revisionists, those who flatly deny the criminal activities of the Third Reich, using the defense of historical method to constitute their case. Of course, the Holocaust, the *Shoah*, is a historical fact, and there are seemingly only two explanations for the negationist position and the minds that have invented it: deliberate, contrarian bad faith (why?), or that idiosyncrasy beloved of the epistemologists, the total disruption of the critical functions of the mind, called Zoilism or hypercriticism. In 1990 the former Communist Minister Jean-Claude Gayssot submitted a bill making the denial of crimes against humanity a crime, punishable with sanctions, and it was generally well-received, the perception being that a crime of this magnitude demanded an exceptional response. Who would oppose this bill, wouldn't that mean joining the negationists or supporting Jean-Marie Le Pen, who famously called the Holocaust a mere "detail of history"? A few historians whose vision extended beyond the sentiment showed concerns about the consequences of this bill: the late Pierre Vidal-Naquet[1], and Madeleine Rebérioux[2]. Neither of them showed any sympathy for the negationists, and they asked judicious questions about the *loi Gayssot*. Unfortunately they were proved correct – the Law was meant to apply to one particular period of time, but instead has engendered a further series of memorial laws which are neither justified nor legitimate.

Raising the stakes

[1] The eminent French historian who documented the systematic use of torture by the French during the Algerian war for independence in the 1950's and early 60's.
[2] The French Marxist historian and former president of the Human Rights League.

After being lobbied by several Armenian associations, supported by senators and deputies representing large Armenian constituencies, in 2001 the Parliament adopted a law, which is unequalled and unique. It consists of one sentence: "France publicly recognizes the Armenian genocide of 1915." Period. Added was, "as of today, this is in effect as a law of the Republic." And what did it mean? It meant that anyone who professed to have doubts about an *ethnocide*[3] or massacre whose existence is unquestioned – would be in violation of the law and open to prosecution.

Before that law went into effect, the eminent scholar Bernard Lewis[4] was sanctioned by a French court after an Armenian association sued him using the *loi Gayssot* (the "Gayssot" law) about denying crimes against humanity. Suddenly that law was being used to refer to the Armenian genocide. But there was a difference: the *loi Gayssot* technically referred to French men or women who were World War II victims or collaborators; it was not unusual that the representatives of France pass a law about them. However, in the Armenian massacre, the victims were subjects of the Ottoman Empire, not of France. And contextually, could we not in theory also prosecute the Spanish conquerors for the massacre of the American Indians? In addition, the period of time referenced by the *loi Gayssot* was 1945; the Armenian massacre took place in 1915. And the legislature was also being asked to decide something the specialists could not agree on: no one denies that the Turks left hundreds of thousands of Armenian men and women to die, in appalling conditions, but was it the execution of a decision which expressly ordered the extermination of each and every Armenian?

This is the dilemma facing historical researchers. If we qualify an event, a crime, as *genocide*, we effectively banalise that concept as it applies to the Holocaust, diluting it, rendering it less specific and unique. In fact, the existence of the second "memorial" law set up a sort of competition between victims, as what the laws had in common was their citing of the persecutions suffered by the victims, risking that the memories of specific groups or "communities," be used as substitutions for collective memory.

The third of this family of "memorial" laws is known as the "*Madame Taubira*" law, bearing the name of the Senator from Guyana. It was adopted on May 21, 2001, and fortunately does not cite historical facts not involving France, since it condemns the slavery treaties and the slave trade in the colonies. But it does go back farther, the slave trade having been excoriated for over two hundred years and slavery itself having been abolished in 1848. Those who suffered have been dead for years and their surviving descendants are separated five or six generations from them. The law nonetheless gives them the right to defend the slaves' memory, to honor their descendants, and to prosecute anyone who dares to deny or minimize the fact of their existence. This was the reason for the Pétré-Grenouilleau case. So how far are we willing to go back in time? Back as far as the Crusades, or the Albigensian Crusade[5]? Perhaps the Reformists (the Protestants) should ask for reparations for the persecutions they suffered because of the revocation of the Edict of Nantes in 1685. Juxtaposing these particular memories would no doubt undermine the national memory and set the various traditions of thought against each other. Why legislate only on crimes? The *loi Taubira* implicitly targeted the whole colonial system, depicting it in negative terms. It is true that under the Ancien

[3] As opposed to genocide, which has international implications, *ethnocide* or ethnic genocide, is the province of ethnologists, who have not yet determined an exact meaning for the word.
[4] The Cleveland E. Dodge Professor Emeritus of Near Eastern Studies at Princeton University.
[5] Albigensian or Cathar Crusade of 1181.

Régime and over several centuries it was accompanied by slavery and the slave trade, but it was that same system which, beginning in the 19th century, ordered the French colonies to cut off the slave trade and to abolish slavery. Crossing the line judiciously drawn by the Constitution of the Fifth Republic between the legislative and executive branches of the government, which limits the former in defining the general principles of education, the *loi Taubira* decreed that "school curricula and programmes dealing with history or the humanities must situate the slave trade and slavery in their rightful places in history." Beyond the fact that we don't know exactly what *is* their rightful place – how many class hours, how many pages in the books should be devoted to them? – we need to ask how we can presume to legislate something which requires specific professional and scientific knowledge – is to open the door leading to confusion about roles and responsibilities.

Confiscating history

The *loi Taubira* shot colonialism down, the following *loi* rehabilitated it. The first law gave teachers quantitative instructions and obligations; the second told them how to "appreciate" them: "School curricula should recognise in particular the positive effects of the French presence overseas, notably in North Africa, and should also honor the courage and sacrifice of soldiers from these countries in the French Army." That step, once taken, cannot be untaken if a legislator dictates his interpretation of history to the teacher, substituting himself for the real historian. If this law goes further than the one preceding it, the two laws are interdependent: the second law would not have been proposed if the first had not expressly targeted colonialism. It is perfect dualism: the two laws evoke, if disassociated, the two faces of this historical fact. They also call for consistent, concerted judgment. Asking for the repeal of the first *loi Taubira* would mean a political choice dictated by ideology; exonerating colonisation of its crimes, while asking for the repeal of the second law would give the impression that colonisation had had only negative effects on the countries involved. And to lobby for both laws to be repealed simultaneously would mean conclusions would be drawn and decisions would be made from a purely scientific position on the independence of history, which is technically supposed to illustrate the complexity of social reality and its innate ambivalence.

The genealogy of these "memorial" laws, which as far as we know may continue to proliferate, has created an unexpected and worrisome situation for both research and education, and – I affirm this without hesitation – for civil rights and democratic process. Will the fear of legal action steer us away from delicate subjects? What researcher would take on a subject which potentially could expose him to a lawsuit? What research director would be willing to hire young investigators in sensitive or dangerous cases, as Olivier Pétré-Grenouilleau did? Entire pages of history will remain blank, unless someone fills those blanks with State-proclaimed "truths." The intrusion of politics into the definition of programmes and the establishment of historical truths would mean the outright confiscation of history by those in power, and a terrible loss to ordinary men and women.

A group of historians, worried by this turn of events, took the initiative of addressing the major politicians directly, intending not only to plead for the rights of the historians to do their work freely, without pressure from the State, but also in the name of each French man and woman to know and understand history. Contrary to popular opinion, the historians did

not claim to have a monopoly on the truth, merely the professional qualifications to speak about it, since by delegation they work for US. They do not "own" History, inasmuch as judges do not "own" the law, nor do doctors "own" our health. They answer to us. This is why some of them responded without question when they were asked to testify in the great trials dealing with the Occupation, with the single condition that they be asked only to verify facts, not to judge nor take part in the confusion between legal truth and historical truth. They were asked for their perspectives on the facts in evidence, sometimes also for explanations. They were not prohibited from juridically or morally qualifying these same facts, i.e. "is this genocide or not?" Does the historian overstep his bounds when he allows himself to morally disapprove of an act or a crime?

The role of the politicians

The politicians also want to have their say. They certainly have the right to publicly express their feelings in these situations, they may speak in our behalf -- but they must follow two rules: unless they have personally investigated a case as any historian might, and developed their positions or convictions based upon purely historical considerations, their positions as representatives of the nation do not give them the right to decree what is true and what is not, nor to adjudicate conflicts of interpretation.

This may seem obvious, but it is probably not a bad idea to set it down in black and white: in the debate on the "memorial" laws, we heard legislators abusing their positions, ignoring the fact that they only hold office because they are elected by the people, in fact conferring on themselves the rights to, the jurisdiction over historical truth, which confuses political legitimacy with that acquired through the scientific process. No senator, minister or deputy would dare to make pronouncements about the forces of nature, about hydraulics or the secrets of the genome. It is because of this definition of roles that there are now established institutions whose job it is to clarify the scope of the legislators' actions and those of the authorities. Why should it be any different for history?

By opposing the principle of the "memorial" laws, the historians are reminding us to respect this separation of roles, reaffirming that history, our collective memory, belongs to us all. The list of the "memorial" laws shows us what the factors were in passing them, essentially electoral and political (not in itself a bad thing). They were clearly more influenced by emotion than by reason, they were without scientific foundation, confusing memory and history. They all begin in the same way, through lobbying by religious or ethnic constituencies, in the hope that their memories will be given consideration on the national stage, using history as both hostage and intermediary. The historians are taking a stand against this instrumentalisation which chips our collective memory into fragments.

The second condition which the politicians need to accept when they are planning to speak about history concerns form: experience and the current controversy have shown us that they should not speak when their intent is to submit a law. Of course, politicians have every right to speak about history but not as part of the process that is specifically theirs: their votes. And by passing a law they are not "taking a position," not the way the intellectuals did when they signed those long petitions. The law sets the rules, the standard, the limits. When it

is amended with a clause allowing lobbyists to file lawsuits, it sets in motion an incredibly efficient and innately destructive mechanism. It was to neutralise this process that the historians advocated the abolition of the "memorial" laws, although they had certain qualms about extending the rule to the *loi Gayssot* because of its uniqueness. Of course it was also this same law which began the whole disastrous sequence of events.

In any case, something needed to be done.

The answer was a grand gesture worthy of all the hoopla. Both the French President and his Prime Minister proclaimed that the legislator does not have the power to dictate history. And the Constitutional Council downgraded the subparagraph of the last law which had intervened in the definition of school programmes while effectively disregarding constitutional law. The collective which had sued Olivier Pétré-Grenouilleau withdrew its complaint, with interesting grounds: its process neither embodied public opinion nor included petitions from intellectuals. Was this a sign of the price we must pay for independent research, the establishment of a history which will be neither weapon nor pawn in the controversies which continue to divide us? History needs to belong to all of us.*

- René Rémond

* P.S. Of course we have just learned that the Socialist minority in the Assemblée Nationale was planning to submit a law saying that those who deny the Armenian genocide may be prosecuted and sentenced to five years in prison. Which then would align it with the Holocaust and give it the same weight as the *loi Gayssot*. Politicians are apparently incorrigible; emotion has again triumphed over reason.

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