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Book Review

LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES, edited by Susanne Karstedt¹

PENELOPE (PENNY) ANDREWS²

CERTAIN FUNDAMENTAL QUESTIONS have recently surfaced in the wake of systemic brutality and extreme atrocities that constitute war crimes, crimes against humanity, and gross violations of human rights. What is the most appropriate method for a society to punish the perpetrators? How does a society pay tribute to and provide reparations for individual victims? How does a society heal the collective trauma and devastation caused by brutality and atrocities? What are the most effective steps to be taken to ensure that the past is not repeated? The role of legal institutions and legal processes and their engagement with and entanglement of individual and collective memories raise further difficult and complex questions.

These questions have become staples for advocates and scholars in the human rights community, both at the local and international level, and several impressive texts dedicated to these issues have been produced.³ *Legal Institutions and Collective Memories*, a welcome addition to the literature, contributes comprehensive historical, sociological, and legal perspectives to this important dialogue. Dedicated as a tribute to Maurice Halbwachs (1877-1945) and his coining of the concept of “collective memory,”⁴ *Legal Institutions* serves to explore this notion in the wake of several experiments to address and redress war crimes,

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1. (Oxford: Hart, 2009) 409 pages [Karstedt, *Legal Institutions*]. Professor Susanne Karstedt is a noted European criminologist who is based at Leeds University in the United Kingdom. Her areas of research include genocide and the prosecution of Nazi war criminals.
 2. Associate Dean for Academic Affairs, City University of New York School of Law.
 3. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997); Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); and Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).
 4. Susanne Karstedt, “Introduction: The Legacy of Maurice Halbwachs” [Karstedt, “Maurice Halbwachs”] in Karstedt, *Legal Institutions*, *supra* note 1, i at 2.

crimes against humanity, and gross violations of human rights. These experiments include prosecutions (for example, at Nuremberg and the international criminal tribunals relating to the former Yugoslavia and Rwanda), truth commissions (as in Chile, Guatemala, and South Africa), lustration (as in the former East Germany), and other hybrid mechanisms (such as the Gacaca courts in Rwanda).⁵

The contributors represent a most impressive array of scholars, who have either shaped many of the debates surrounding these issues or made notable contributions to the discourse. They continue that tradition in *Legal Institutions*, and this biographical aspect of the contributors renders the book especially significant. The South African Truth and Reconciliation Commission (TRC) looms large in the text: at least three chapters are dedicated entirely to it, while others reference it throughout.

The historical, international, and comparative focus provides a comprehensive conceptual framework where the issues raised in the book are richly analyzed. The historical period begins with the end of World War II and spans the decades since. The geographical sweep includes Australia, the former Czechoslovakia, Germany, Poland, Latin America, South Africa, and South Korea.

The book consists of six thematic parts that explore the concept of collective and collected memories in their many configurations. Part one explores the relationship between truth and justice, while providing contrasting ways and analyses of dealing with the past. Part two explores divisions, contestations, and silences about memory, and part three examines the politics of culture and identity that shape both memory and law's responses. The issue of rescuing and restoring rights in the wake of past abuse and horror and transitional periods is investigated in part four, while part five explores bureaucratic details, including biographies. Finally, part six delves into Germany's Nazi past and attempts to locate collective memories in the context of an evolving political culture. The thematic choice is interesting because the editor does not proceed chronologically—as texts of this kind tend to—but instead utilizes a conceptual framework that allows for an organic synthesis between concept and chronology.

Neither the editor nor the individual authors are too concerned with chronicling when events happened, although they certainly do so. Rather, their aim throughout the text is to explore the methodology and epistemology of how

5. See e.g. Shale Horowitz & Albrecht Schnabel, eds., *Human Rights and Societies in Transition: Causes, Consequences, Responses* (Tokyo: United Nations University Press, 2004); Bernhard Schlink, *Guilt about the Past* (Toronto: House of Anansi Press, 2009).

collective memories “shape and permeate law,”⁶ and the cultural and identity questions that influence this uneasy yet vital relationship.

Part one, entitled “‘The Truth and Nothing but the Truth’: Truth and Justice between the Past and the Present,” opens with chapters by Stanley Cohen and Juan Mendez, where they explore the issue of “truth” and its relation to the excavation of facts.⁷ These eminent scholars take contrasting approaches to the criminal justice model as a means of unearthing truth. Cohen sees this model as wanting, and instead explores several types of truths, including factual or forensic truth, personal and narrative truth, social truth, and healing and restorative truth. He concludes that because only factual or forensic truth has any legitimacy in the criminal justice system, recovering the truth is only a tentative endeavour. Mendez, on the other hand, interprets the criminal justice model as superior in unpeeling the layers of truth, thereby contributing to a shared collective memory in countries that have chosen this route. He sees a fundamental right to the truth, and its vital role in ending impunity.

Part two, entitled “Divided Memories, Contested Truths, Silenced Voices,” contains four chapters, three of which focus on the TRC. These chapters explore attempts to forge a national narrative from a legacy of divided memories, strategic renderings of truth, and individual and collective silences. South Africa, as a historically and currently divided society, illustrates the problem of utilizing legal processes to shape collective memories in the wake of trauma and abuse. Emilios Christodoulidis and Scott Veitch examine the way that the TRC has explored South Africa’s past, with the TRC always mindful of how the uncovering of this past shapes the future and the reconciled nation’s narrative about truth and reconciliation.⁸ The TRC provided only a limited window through which South Africans could examine their past.

Heribert Adam also examines the work of the TRC by locating his analysis within two kinds of memory: progressive memory and retrogressive memory.⁹

6. Karstedt, “Maurice Halbwachs,” *supra* note 4 at 3.

7. Stanley Cohen, “Unspeakable Memories and Commensurable Laws” in Karstedt, *Legal Institutions*, *supra* note 1, 27 at 27; Juan E. Mendez, “An Emerging ‘Right to Truth’: Latin-American Contributions” in Karstedt, *Legal Institutions*, 39.

8. Emilios Christodoulidis & Scott Veitch, “Reflections on Law and Memory” in Karstedt, *Legal Institutions*, *ibid.*, 63.

9. Heribert Adam, “Divided Memories: How Emerging Democracies Deal with the Crimes of Previous Regimes” in Karstedt, *Legal Institutions*, *ibid.*, 79.

He interprets progressive memory as fundamentally positive, an inquiry “into the causes of past suffering with a view to preventing a future recurrence”¹⁰ amounting to “political education in the best sense.”¹¹ In contrast, retrogressive memory “locks people into vicious circles of past conflicts.”¹² He laments the missed opportunities of the TRC because of its politically skewed composition, its particular theological perspectives, and its individualized focus on gross violations of human rights. A combination of these missed opportunities, and the TRC’s highly orchestrated ritual of truth telling and reconciliation, thereby permitted the exoneration of beneficiaries of apartheid.

Gunnar Theissen’s highly empirical piece examines how the TRC negotiated the divided memories that were a feature of post-apartheid South Africa, and what the TRC’s contributions may have been to narrow those divisions.¹³ He concludes that the processes of the TRC, and its attempt to tell the stories of victims, failed to heal those divisions, and may in fact have reified them. In the concluding chapter of this section, Young-Hee Shim turns her gaze to the “comfort women” of Korea, exploring the role of shame and silences on the one hand, and public acknowledgement and empowerment on the other.¹⁴

In part three, entitled “Law, Memory and the Politics of Culture and Identity,” all three authors explore the contested meanings of identity shaped by historical narratives embedded within deeply divided social memories. Heinz Steinert’s opening chapter references the “memory and heritage industry,”¹⁵ an adjunct of the “[c]ulture industry,”¹⁶ to illustrate the commodification of the past as well as individual and collective memories in popular culture. Kathy Laster argues that despite its transformative potential, the landmark Australian High

10. *Ibid.* at 80.

11. *Ibid.*

12. *Ibid.*

13. Gunnar Theissen, “Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion” in Karstedt, *Legal Institutions, ibid.*, 101.

14. Young-Hee Shim, “From Silence to Testimony: The Role of Legal Institutions in the Restoration of the Collective Memories of Korean ‘Comfort Women’” in Karstedt, *Legal Institutions, ibid.*, 135. The term “comfort women” refers to Korean women who were kidnapped and raped by Japanese soldiers during World War II.

15. Heinz Steinert, “Negotiating the Past: Culture Industry and the Law” in Karstedt, *Legal Institutions, ibid.*, 161 at 162.

16. *Ibid.*

Court decision confirming indigenous land rights had limited impact on the collective identity of Australian society, despite the Court's rejection of the historical narrative of *terra nullius* embedded in Australian legal memory.¹⁷ Turning his attention to legal liberties and his concept of "experienced authenticity,"¹⁸ Arthur Stinchcombe explores the fluid interaction of individual identity and institutional structure to argue that this engagement generates a shared vision of a collective future.

Part four, entitled "Creating and Restituting Rights After Abusive Regimes: Bridges Between the Past and the Future," pays close attention to the possibilities and limitations of constitutional and other legal mechanisms to transform a previously divided society into one that is integrated and democratic. Kim Lane Scheppele and Grażyna Skąpska, in their thoughtful chapters, explore the role of law and legal institutions in transitional societies.¹⁹ Scheppele examines the central place of constitutions and constitutional courts in transitional political arrangements as bridges from repressive pasts and their collective memories to new societies without the abusive excesses of the past. Skąpska focuses on attempts at the restitution of property rights in Central and Eastern Europe, and the cultural and historical roots of conceptions of property rooted in collective memories.

The next part, entitled "The Stores of Memory: Files, Individual Biographies and Collective Memories," examines the bureaucratic ordering and cataloguing of individual and collective memories in files and biographies. Carol Heimer and Stinchcombe examine the metamorphosis of individual biographies and official dossiers into the evidentiary basis for court cases, and the selective elimination of individual recollection for the purpose of a more consistent official narrative.²⁰ Jiřina Šiklová interrogates her own biography to outline the excess of official monitoring and invasion, and how individuals construct their individual

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17. Kathy Laster, "Australia's Sorry Judges: Nationalism and Collective Memory" in Karstedt, *Legal Institutions, ibid.*, 187.
 18. Arthur L. Stinchcombe, "Experienced Authenticity of Culture and Legal Liberties" in Karstedt, *Legal Institutions, ibid.*, 217.
 19. Kim Lane Scheppele, "Constitutional Interpretation after Regimes of Horror" in Karstedt, *Legal Institutions, ibid.*, 233; Grażyna Skąpska, "Paying for Past Injustices and Creating New Ones: On Property Rights Restitution in Poland as an Element of the Unfinished Transformation" in Karstedt, *Legal Institutions*, 259.
 20. Carol A. Heimer & Arthur L. Stinchcombe, "Biographies: Legal Cases and Political Transitions" in Karstedt, *Legal Institutions, ibid.*, 283.

biographies to conform to the standardized and autocratic expectations of those who wield control and censorship.²¹ Roger Engelmann examines the ubiquity of the Stasi in Eastern Germany and their impact on the individual and collective.²² Finally, Andrzej Zybertowicz argues that despite this history of repression and authoritarianism, the transition period becomes one of official denial and obfuscation.²³

The concluding part, "Failing Memory: The Law and its Past," examines the "blind spot[s]"²⁴ of legal institutions in coming to terms with the past. Konstanze Plett illustrates the cumulative effect that silencing has had on the wider academic culture.²⁵ She uses the biography of a female German scholar, who migrated to the United States in the 1930s and who refused to return even after the war, to demonstrate her marginalization and complete obliteration from the collective memory of the male-dominated profession. In the concluding chapter, Ruth Herz examines the treatment of young ethnic offenders in the juvenile courts in Germany, and the failure of post-unification Germany to come to terms with its Nazi and communist past.²⁶

Minor criticisms can be made of the organization of the book, particularly the fact that certain chapters were included in one section and not another. For example, Young-Hee Shim's chapter on comfort women might have been better suited for inclusion in part six, where her analysis comports more with issues around the contested nature of memories long hidden and silenced. In addition, although the chapters are for the most part solid and concise, some of them tend to be somewhat abstract. Regardless, these minor criticisms pale in comparison to the enormous contribution this text makes to the literature on legal institutions and collective memories. Most of the texts that focus on these

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21. Jifina Šiklová, "Biographies and Résumés as Part of Life under Communist Rule in the Czech Republic" in Karstedt, *Legal Institutions, ibid.*, 317.
 22. Roger Engelmann, "The 'Stasi Records', the Public and Collective Memories: The Inspection of Personal Records" in Karstedt, *Legal Institutions, ibid.*, 329.
 23. Andrzej Zybertowicz, "The Art of Forgetting: The Communist Police-State as a Non-reality" in Karstedt, *Legal Institutions, ibid.*, 341.
 24. Karstedt, "Maurice Halbwachs," *supra* note 4 at 22.
 25. Konstanze Plett, "The Loss of Early Women Lawyers from Collective Memory in Germany: A Memoir of Magdalene Schoch" in Karstedt, *Legal Institutions, supra* note 1, 355.
 26. Ruth G. Herz, "Putting the Nazi Past Behind: Juvenile Justice and Germany's Changing Political Culture" in Karstedt, *Legal Institutions, ibid.*, 373.

matters tend to locate their analysis in divided disciplines—that is, either in law, psychology, sociology, or elsewhere. The comparative and interdisciplinary approach of *Legal Institutions* is one of its great strengths, and it will be of enormous benefit to legal and other scholars in the field. This reviewer is unaware of another text that explores the issue of legal institutions and collective memories with such depth and intellectual creativity, and as comprehensively, as *Legal Institutions*.