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FOUNDATION ATROCITIES AND PUBLIC HISTORY: THE ROLE OF LAWYERS IN FINDING TRUTH

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Summary

History provides the basis for nations' existence. Yet, history is capable of telling different stories in relation to the same events. It is also open to manipulation and distortion. More so than ever, this is the case with the easy availability and cross border reach of many forms of media. In addition, the concept of public history recognises that representations of history are not made solely by professional historians. The conclusion that must be reached from this is that history is open to contesting and it is not necessarily a fair contest favouring accuracy. This paper argues that law and legal scholars can play a role in settling significant historical disputes by applying the rigour of legal dispute settlement institutions. Consideration of evidence and narrowing arguments to relevant issues are of significant worth. These possibilities are illustrated through the debates surrounding two significant atrocities of history, the Great Irish Famine and the Ukrainian Holodomor. Both events have a critical place in the nation-building of the Irish and the Ukrainians, yet the debate rages on as to whether they may or may not be genocide. We review the historical issues and the genocide issue and suggest that legal scholars rather than historians may assist in settling rather than perpetuating the disputes.

1. History and national identity

The aim of this paper is to demonstrate that historical perceptions are important to a variety of geo-political stakeholders in modern states and actively contested. It aims to argue that legal process can assist in finding the truth and settling disputes about history for the benefit of people and states. History is important to identity. In some parts of the world, it is crucial. It plays a core role in shaping national mindsets and nationalism. The very existence of a nation,

as opposed to a state, depends on history. This is of critical importance in post-imperial situations and in the face of continued or renewed imperialism. The ways how groups of people have been distinguished from one another historically, form identity.¹ Oppressive, discriminatory or simply negative treatment of a group by another, usually dominant, group can be the very action that consolidates a nation.² It can be at the heart of outcomes such as the historical Norman inhabitants of modern France now regarding themselves as French, while Bulgarians, Serbs,³ Latvians,⁴ the Irish⁵ and Slovaks⁶ strongly retained their sense of difference after hundreds of years of integration. Of course, oppression can initially be designed to eliminate a separate identity. Nonetheless, if oppression fails in achieving this elimination, it can consolidate the separation instead. The worst form of oppression is genocide.

2. History contests

The idea that a certain group of people constitute a separate nation from another group is not therefore a scientific or genetic determination as much as a perception held on the basis of a wide range of factors, some of the most decisive being historical actions. History is not, however, as transparent as many people maintain. It may be highly contestable. What people believe is a historical fact can be quite different from the events that actually occurred. In addition, what actually occurred can be presented in different ways to create different impressions or stories.⁷ People's understanding of their history is the product of school learning, sharing of community views, independent learning, as well as the presentation of history in a variety of media, exhibitions and similar phenomena. These can be in the forms of purportedly factual documentaries and the like, and, likewise, how history is presented in movies, serials, novels, and other sources.⁸ For example, in Britain, public perception of the history of Scotland is shaped by schools and academic histories, as well as shows such as the BBC's documentary series "The History of Scotland" and movies such as "Braveheart". In Ukraine, Vasyl

¹ Anderson B. *Imagined communities*. United Kingdom: Verso, 2006.

² Werth P. W. *From Resistance to Subversion: Imperial Power, Indigenous Opposition, and Their Entanglement*. *Kritika: Explorations in Russian and Eurasian History*, 2000, Vol. 1(1) p. 21.

³ Hajdarpašić E. *Out of the Ruins of the Ottoman Empire: Reflections on the Ottoman Legacy in South-eastern Europe*. *Middle Eastern Studies*, 2008, No. 44(5), p. 715.

⁴ Ābols G. *The Contribution of History to Latvian Identity*. Latvia: Nacionālais apgāds, 2003.

⁵ Kennedy L. *Unhappy the Land: The Most Oppressed People Ever, the Irish? Ireland*. Irish Academic Press, 2015.

⁶ Kirschbaum S. J. *A History of Slovakia: The Struggle for Survival*. United States: St. Martin's Publishing Group, 2016.

⁷ Jenkins K. *On 'What is History?': From Carr and Elton to Rorty and White*. United Kingdom: Routledge, 1995.

⁸ Kelley R. *Public History: Its Origins, Nature, and Prospects*. *The Public Historian* 1, No. 1, 1978, p. 16.

Barka's book "Yellow Prince" and the films "Hunger-33" (1991) and "Mr. Jones" (2019) are notable with their impact upon perception of historic events.

These non-academic forms of history belong to domain of public history. Public history can be understood as history, since it is represented and understood by the non-historian public. In this, it may be distinct from history as understood by academic historians and, indeed, historical fact.⁹ Representations of public history are more common than previously with the prevalence of new media. In many ways, it easier than ever for someone to 'publish' their representation of history. The popularity of history documentaries has also meant that commercial investment has been contributed to their production. At the same time, governments see value in supporting local history and heritage projects. Academic history, on the other hand, is largely dependent on government grants for funding research.¹⁰

Another phenomenon is that through the internet, representations of history become globalised. The public in one country does not necessarily obtain their history from the producers in their own country. This means that their outlook may be globalised and they may be more aware of the history of major countries than their own history. In addition, they can be more exposed to how major countries view their history than previously.

3. Public history and truth

All these issues raise some difficult questions about public history in the context of identity formation. The most common issue that arises regarding public history is whether it is reliable, given that producers are not necessarily trained historians or subject to any form of review. They may simply get things wrong. In terms of history as entertainment, it may be deliberately misshaped to make it more sensational and entertaining. In terms of government funding, there is the issue of independence and full representation. If the UK, government is sponsoring historians and the public to develop projects to show how England has always been an open and multicultural place, they are not likely to be delivered history that focuses on intolerance and discrimination.¹¹ Beyond this, government has long known the value of creating history to build nations and shape the public view. This also extends to political movements. Certain governments can be particularly prone to creating history that supports an outlook or sponsoring those

⁹ Grele R J. Whose Public? Whose History? What Is the Goal of a Public Historian? *The Public Historian*, 3, No. 1, 1981, p. 40.

¹⁰ Liddington J. and Ditchfield S. *Public History: A Critical Bibliography*. *Oral History*, Vol. 33(1), Oral History Society, 2005, p. 40.

¹¹ Dresser M. Politics, Populism, and Professionalism: Reflections on the Role of the Academic Historian in the Production of Public History. *The Public Historian*, Vol. 32(3), 2010, p. 39.

that do. This is always the case with imperial government.¹² This can be done more or less ethically. It can mean placing a particular angle on certain facts or departing from the facts entirely.

The manner in which facts can be used in different ways can also create a more extreme idea that truth is relative or that there are many truths. This idea is valid but open to gross misuse as a justification for the spreading of entirely false ideas as occurs with, say, holocaust denial.¹³ However, history has been swayed by post-modernism and this is problematic. The statement that it does not matter if a certain popular movie completely misrepresents history as it is only entertainment is highly debatable.¹⁴ Being produced for entertainment does not stop a movie influencing the audience's perception of history. The attitude also facilitates those with an agenda to perpetuate certain ideas for political purposes through media, entertainment, public history and even, purportedly, academic history.

Unsurprisingly, public history is riven with disputes. The past is in a very real sense up for grabs and those with significant resources can take control of public history.¹⁵ What people believe of the past can be quite different from what academic historians believe. In addition, even academic historians may not be immune to the socio-cultural (or even legal) hierarchical framework in which they work.

Finally, it must be noted that in creating history in this competitive environment, those with more resources to invest and those with a more driven agenda are at a major advantage. The global nature of the media means that the created content easily traverses borders. The contest for the public's mind between a single historian on the one hand, and state with an agenda and few scruples, on the other, is not a fair one. Nor is it easy for a person who wishes to tell the truth about the misdeeds of a particular group to that same group.

4. Manipulation of truth

Thus, in the contemporary world, history is important. At the same time, history is manipulable and the 'truth' is contestable in a competition that may favour resources devoted to creation of the narrative over accuracy and public palpability, and popularity over the unpleasant. Furthermore, it can favour stasis over change, especially when the *status quo* is popular or serves political interests. This competition is then globalised in the sense that people outside a country can

¹² Plokhy S. *Lost Kingdom: A History of Russian Nationalism from Ivan the Great to Vladimir Putin*. United Kingdom: Penguin Books Limited, 2017.

¹³ Lipstadt D. E. *Denying the Holocaust: The Growing Assault on Truth and Memory*. United Kingdom: Free Press, 2012.

¹⁴ Erickson M. J. *Truth or Consequences: The Promise & Perils of Postmodernism*. InterVarsity Press, 2009.

¹⁵ Marcellino W. *Russian Social Media Influence: Understanding Russian Propaganda in Eastern Europe*. United States: RAND Corporation, 2018.

enter the fray if they have something at stake. All these dynamics can, of course, work in different directions. Those outside the country may favour the truth over those inside it. They may also do the opposite.¹⁶

History relevant to nation-building and political positions is thus full of dispute and it appears to be on the increase.¹⁷ On the basis of a 'no authenticity' mindset and through the great array of public history vehicles, a party can put forward a counter-argument or a simple dismissal. Group A says that 150 years ago there was a large massacre of their people by Group B, and Group B denies that it happened. Group A shows an article in a journal documenting it, Group B creates a website, show or alternative article. It need not be as extreme as this; it can be a case of two honestly different beliefs. However, it can also be the case of those who simply ignore historical fact.

5. Law and dispute resolution

The courts of law have long functioned as the institution of ultimate dispute settlement. This is the case both in civil disputes and criminal procedures. Law contains a raft of rules and procedures to settle disputes practically and as fairly as possible. Facts are determined in accordance with rules of evidence to ensure that those that are relied upon are relevant and reliable.¹⁸ Arguments are narrowed to ensure that the dispute is focussed and resolved rather than allowed to evolve and change to perpetuate uncertainty and dispute. Each party makes their case and is subject to procedural rules.¹⁹ While legal procedures and the courts are far from free of criticism in terms of favouring those with more resources, they are significantly more contained and constrained than the court of public opinion, where parties can declare anything that they can afford to present in a history debate.²⁰

In addition, many of the factual matters that are disputed in history will have a connection to some criminal area. A massacre, for example, can be considered as the crime of murder. In this, it is distinguished naturally from involuntary manslaughter. Some issues are actually the product of law to start with. Despite some of the debate about genocide that is seen in the public concerning a genocide

¹⁶ Consider the dynamics in this book: Birtles B. *The Truth About China: Propaganda, Patriotism and the Search for Answers*. Australia, Allen & Unwin, 2021.

¹⁷ Plokhy S. *Ukraine and Russia: Representations of the Past*. University of Toronto Press, 2008.

¹⁸ Hemming A. and Layton R A. *Evidence Law in QLD, SA and WA*. Australia, Thomson Reuters Australia Limited, 2016.

¹⁹ King A. S. *Global Civil Procedure*. *Harvard International Law Journal*, Vol. 62(1), 2021, p. 223.

²⁰ De Saulles D. *Reforming Civil Procedure: The Hardest Path*. United Kingdom: Bloomsbury Publishing, 2019.

as a concept is largely the creation of law.²¹ It was explicitly considered in view of the holocaust and, as a result, defined in international law. Thus, while genocide has had a long-standing deplorable history, it was only named as such as part of creating the international law concerning the crime of genocide.²²

6. Legal process compared to public historical debate

The issue of naming in law is important to the focus of the dispute. If a court considers whether a genocide has occurred, it considers the legal definition of genocide and the facts established in the court. It then determines whether the established facts meet the definition of genocide. If they do, genocide is considered to have occurred. It is worth considering what the procedure excludes in comparison to a public history debate. It excludes discussion about whether it is good or bad to find that something amounts to genocide. It excludes discussion of what various parties have to say on whether it is genocide – for example, particular governments, experts and historians. Finally, it excludes discussion of whether the definition of genocide employed in the law is an appropriate definition of genocide, or whether it meets some other definition of genocide that differs from the legal one. All these exclusions, as well as the rules around evidence and procedure mean that an outcome can be delivered, and it is one that can be much more impartial – freer of influence and distortions – than a public debate.

Clearly, it is not possible for every significant historical dispute to go to a court. There are issues of standing and courts do not have the resources to deal with all these matters. However, as with all issues in law, this does not exclude the application of legal methods by those who are trained and qualified to apply them. That is, lawyers. Consequently, the current essay suggests that lawyers, in particular, legal academics, engage in a new form of research and publishing that involves the application of their legal skills to the determination of public history disputes of great consequence. This may or may not be done in cross-disciplinary collaboration with academic historians. Such research and publications will be highly valuable to the debate in that they will provide objective evidence in relation to whether a genocide has occurred. While some may call their results into question, the status of established academic lawyers and journals is such that their outcomes should be considered reliable. It is worth noting that there is nothing new about academic lawyers and practising lawyers giving their learned opinions on a dispute that is yet to go before a Court. This is the nature of legal practice. Thus, the law and legal scholars can and should assume a more significant position in settling the disputes around public history. In this, they can play a practical

²¹ Kebranian N. Genocide, History, and the Law: Legal Performativity and Recognition of the Armenian Genocide in France and Germany. *Holocaust and Genocide Studies*, Vol. 34(2), 2020, p. 253.

²² Art. 2, Convention on the Prevention and Punishment of the Crime of Genocide.

role in the service of the truth, countering imperialism and misinformation and enhancing nation-building and the improvement of lives.

7. Example of the famines

The paper will now turn to two introductory cases to demonstrate its argument. It will not apply the method and resolve these disputes, as this task would be beyond the scope of this introductory paper. Rather, it will show how the disputes exist and how the history is debated. Both considered cases involve famine and deliberation as to whether it amounts to genocide. Both famines are traumatic events that have had a major destructive impact on a population. Both occurred when the people were part of a larger political entity and not directly in charge of their own government. Both have shaped and will continue to shape the population's view of their national identity and their need to be independent. The issue of whether the famines were genocide is fundamental to these people. If they were, it represents the complete delegitimization of the dominant 'imperial' government's rule of the population and this has major implications towards any continued or future involvement of that group in the affairs of the impacted population.

The two famines to be considered here are the Great Famine of Ireland in the nineteenth century and the Holodomor of Ukraine in the twentieth century. In brief, the Irish famine occurred when Ireland was part of the United Kingdom and ruled from London. The Holodomor occurred when Ukraine was part of the Soviet Union which was an extension of rule from Moscow/ St Petersburg that had long been established under the Russian empire. While Ireland is now well-established as an independent state, there remains a contest over the legacy of British rule not least in relation to Northern Ireland that remains part of the United Kingdom. Ukraine is now an independent state however, at the stage of nation building and subject to significant internal and external pressure that attempts to delegitimise the state in favour of Russian rule.²³ Russia is significantly involved in this, and public views on Russian rule and the Ukrainian experience are a major focus in both Ukraine and Russia. The issue of whether the population of the state of Ukraine would be better off under Moscow rule is the core of the issue and has major political importance. Thus, whether this population suffered genocide under rule from Moscow less than a century ago is of a paramount significance. It strikes at the heart of Moscow's legitimacy as a government, as well as undermines the legitimacy of the idea that Russians and Ukrainians are really the same people. If they were, genocide would be unthinkable.

The Irish famine occurred from 1845 to 1852, and resulted in the loss of between a fifth and a quarter of the population through death or emigration. Its

²³ Pisciotta B. Russian revisionism in the Putin era: An overview of post-communist military interventions in Georgia, Ukraine, and Syria. *Italian Political Science Review*, 50(1), 2020.

impact on the overall society and culture was immense. The Irish language, for example, suffered one of its greatest declines due to the impact of the famine in rural areas.²⁴ No one ever attempted to deny that the famine occurred. What has happened over time – the questions about British complicity in the famine and its outcomes have become increasingly distinct. In the immediate aftermath of the famine, the presentation of it as an unfortunate disaster or even further evidence attesting to inability of the Irish to rule themselves was more common. Overreliance of the Irish on potatoes can be portrayed as an indication of their stupidity rather than the result of the institutional situation they had been forced into.²⁵ Of course, at the time the British press and press in Ireland would have been dominated by English interests or Anglo-Irish interests.

Historians have been working on the issue of British complicity in the famine over the years. It is only in recent decades that public opinion in England has softened towards Ireland and opened up to considering such questions. The issue of whether the famine amounted to genocide has only recently entered the public consciousness strongly. The debate is interesting to review in light of the discussion above. Tim Pat Coogan, a well-known Irish writer who has played a role in nationalist and republican development published a book called “The Famine Plot”.²⁶ In this popular book, he asserts that the famine was genocide. He does this by reference to the legal definition. Coogan’s work of public history has been significantly criticised by academic historians.²⁷ They have expressly focussed on his journalistic as opposed to historical credentials. In addition to attacking his credentials, these historians rely on referring to other historians’ opinions on the matter, public opinion regarding this, and they question Coogan’s citation of the UN definition of genocide. Rather, they assert that genocide is something else, something not captured in this definition. Notably, these positions, unlike Coogan’s, sidestepped the UN definition of genocide, simultaneously proposing that whether the famine was genocide depended on factors like whether such a finding was what the people needed or wanted. In this, their responses are not appropriate. Hence, the issue remains open and should be settled.²⁸ It is true that Coogan’s methods in terms of evidence and application are open to criticism. However, the response has not focussed on the issue in question – it has resorted to attacks on method and questions of principle. It is suggested that the issue can be resolved by applying Coogan’s reference to the UN definition, but to do so required supplementing it with proper evidence. Such work would be valuable to

²⁴ Ó Murchadha C. *The Great Famine: Ireland’s Agony 1845–1852*. United Kingdom: Bloomsbury Academic, 2011.

²⁵ Nie, M de. *The Eternal Paddy: Irish Identity and the British Press, 1798–1882*. University of Wisconsin Press, 2004.

²⁶ Coogan T. P. *The Famine Plot: England’s Role in Ireland’s Greatest Tragedy*. United States: St. Martin’s Publishing Group, 2012.

²⁷ Kennedy, L. 2015.

²⁸ McGowan M. G. *The Famine Plot Revisited: A Reassessment of the Great Irish Famine as Genocide*. *Genocide Studies International*, Vol. 11(1), 2017, p. 87.

the Irish idea of history and contemporary politics. Historians are not sufficiently constrained in how they have to present their case, while journalists and members of the public are not constrained at all.

The Holodomor contrasts significantly with the Irish famine. It is a more recent historic event, which occurred in 1932 and 1933. The death toll is from 3.5 to 7 million, and therefore much higher than that of Ireland. However, despite these two acute differences, it is far less known about and less controversial in terms of international attention it has received. The reasons for this lie in the fact that it occurred in the completely closed and censored environment of the Soviet Union and the issues of Ukrainian identity and persecution are far less known in the world due to a general lack of western focus and a long-term control of public history and perception of the region by Moscow and St Petersburg. The Holodomor was completely covered up by the Soviet government and international information about it was systematically countered by propaganda. An ostensible Western academic study about it published in 1987 called it a myth created by Ukrainian nationalists.²⁹ This book has now been revealed to be a work of Soviet propaganda. The Russian public still remains under its misinformation through school history books and an official line that generally constructs a different history of Ukraine.³⁰ The idea that Ukrainian nationalists are a group of delusional people who cannot see that Ukrainians are Russians is widely held in Russia. There is a wide array of sources that have been sponsored and created to perpetuate the idea. People in Ukraine, as well as overseas are susceptible to this information.

Thus, Russia does not recognise the Holodomor as anything more than a natural disaster and historically the Soviet Union even hid that. However, the information that has arisen, particularly since Ukrainian independence is harrowing to read³¹ and paints a far worse picture of government than anything in the Irish case.³² There can be little doubt that Stalin deliberately took steps that resulted in the deaths of huge numbers of Ukrainians and that he took them with this goal in mind.³³ Hence, it is surprising how the simple facts of the Holodomor can still be contested. There are a number of historians who have documented the horrors.³⁴ The difficulty in gaining recognition and systematic assessment of the Holodomor as the atrocity was is intimately related to the difficulty that Ukrainians still face in having their identity recognised internationally, in Russia

²⁹ Tottle D. *Fraud, Famine and Fascism: The Ukrainian Genocide Myth from Hitler to Harvard*. Toronto: Progress Books, 1987, p. 3.

³⁰ Motyl A. J. *Deleting the Holodomor: Ukraine Unmakes Itself*, World Affairs, 2010, pp. 25–34.

³¹ Kul'chyts'kyy S. *Ukrayins'kyy Holodomor v konteksti polityky Kremlya pochatku 1930*. Instytut istoriyi Ukrainy, 2014, p. 208.

³² Klid B. and Motyl A. J. (eds.). *The Holodomor Reader. A Sourcebook on the Famine of 1932–1933 in Ukraine*. Canadian Institute of Ukrainian Studies, 2012.

³³ Graziosi A., Hajda L. and Hryn H. (eds.). *After the Holodomor: The Enduring Impact of the Great Famine on Ukraine*. Harvard Ukrainian Studies, Vol. 30 (1–4), 2008.

³⁴ Hrynevych L. *Khronika kolektyvizatsiyi ta Holodomoru v Ukraini 1927–1933*. HREC Press, 2016, p. 693.

and even within their own country. This is related to Russian identity and the role that Ukrainian identity plays in that concept. Consequently, it is more important than ever that the Holodomor's status as genocide be properly established from a solid legal perspective. This outcome is important in setting the national identity issues that hold up the success of the Ukrainian state.

Conclusion

This paper has concluded that legal process and academic approach can resolve historical disputes for the benefit of people and states. It has looked at the role of history in national success and how this relates to the problem of truth in history. It argues that history can be manipulated and contested in a way that favours powerful interests. It shows that this problem is even more significant now than in the past. It illustrated the issue through the great famines of Ireland and Ukraine. These two examples amply reflect the problems discussed in terms of the constant contestability and manipulability of public history, at the same time noting that it is essential for the settlement of disputes, the establishing of identity and reconciliation with the past.³⁵ They also show how scholarship on the disputes shies away from legal method in favour of various historical approaches. The argument is that a strict legal method applied by lawyers can significantly improve the situation by providing an outcome that has been subject to due process and is more objective and freer of significant manipulation. Such scholarly output would be of high value and clearly innovative. It would also contribute to international fairness and stability.

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³⁵ Noack C., Janssen L and Comerford V.(eds.). *Holodomor and Gorta Mór: Histories, Memories and Representations of Famine in Ukraine and Ireland*. London: Anthem Press, 2012, p. 278.

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