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# Just fatherlands? From Kristallnacht to Katyn.

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Debating Europe's Justice Deficit:  
The EU, Swabian Housewives, Rawls, and Ryanair

Edited by Gráinne de Búrca, Dimitry Kochenov and Andrew Williams  
with the assistance of Suryapatim Roy

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**Carole Lyons: *Just Fatherlands? From Kristallnacht to Katyn***

Though drafted in the shadow of the Shoah, there is really no formal recognition of institutionalized killing embedded in the European Convention of Human Rights. I classify this as the ‘original sin’ of the Convention, a sin which permeates through the decades. My concern today is with the European Court in Strasbourg, but indeed similar questions may be asked of the EU Court in Luxembourg. My question is: how do these courts work through their specific, extreme past? How does a day to day EU lawyer move from dealing with prosaic free movement of goods to confronting the legacy of the Shoah? I think we must remember that EU justice issues considered today did not all begin with the market, with coal and steel, with Schuman - they did not begin there but prior. Three themes will be focused on: (1) historical justice and the role of the courts, (2) memory mediated through the judicial route, and (3) the specific legacy of Auschwitz in Europe and the human rights response. Firstly, courts and historical justice; there are fascinating layers of adjudication observable in Europe in the 1960’s, when, for example direct effect was being conceived in the *Van Gend* case<sup>35</sup>, while at the very same time German judges were dealing with the mass killings in Treblinka. How did the emergent Europe embrace those very distinct strata of justice and was there any integration or link between them? The second theme is courts as sites of memory. The ECtHR is an enthralling arena for European legal historians, although a relatively unexplored one. When you ask the question about a court as site of memory, the work of Pierre Nora has influenced me here, and effectively if you adopt his approach, courts can’t deal with memory, they can deal with history but not actually with genuine memory because of its intimate organic nature.<sup>36</sup> And finally, the issue of the legacy of the Holocaust in Europe. In the 1961 *X v Germany* case,<sup>37</sup> the nameless X was in Auschwitz and several other camps and epitomizes the whole gamut of the Jewish experience of World War II and the Holocaust, from *Kristallnacht* onwards. His case was guillotined and rendered inadmissible; the paper examines how that compares to how cases involving National Socialists were dealt with in the same era in Strasbourg. To add by way of quick conclusion and connections with other contributions, I liked Neil’s comment about how one conception of justice is the capacity to deal with arbitrary domination and see links with themes of this paper and also Damian’s view of justice as mutual dependency, in relation to which I argue from context of my paper that if you haven’t got mutual confrontation of the past, then that ability to have mutual dependency is depleted.

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<sup>35</sup> Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>36</sup> P. Nora, ‘Beyond Memory and History : *Les lieux de mémoire*’ 26 *Representations* 6 (1989).

<sup>37</sup> *X v The Federal Republic of West Germany*, App. No 627/59, Decision of 14.12.1961.