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Panel Confronting History I

Working through 'Bitter Experiences' towards a New European Identity? A Critique of the Disregard for History in European Constitutional Theory UACES Conference*

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Abstract

The European integration project was designed in the early 50s (the Schuman plan of May 50 can be considered to be its birth certificate) as a response to Europe's "darker past": the heritage of nationalism and dictatorship, the cruelties of the holocaust and the war had to be overcome once and for all. Integration implied: the giving up of national power and sovereignty, the avoidance of the instrumentalization of the past; the valuing of peace, stability and welfare above national power and "glory".

This project was of lasting success. But it again and again had to overcome cdifficulties, sometimes crises Its most recent ambitions were two efforts of historical importance. First, a deepened "constitutionalization" of the European Union (as envisaged by the European Convention), the second the Union's enlargement towards Eastern Europe. The project of a constitutional treaty and the admittance of so many new states were widely perceived as "logical" steps in an ongoing process. But they also presented new challenges. To be sure, the original ideals of the post-war period are by no means outdated. But they seem to have lost their mobilizing strength and the answers to Europe's many dilemmas identified in the 50s have long since lost their relevance. The endeavour to secure contitutionalization indicates that the European polity has become more than just an economic project and is therefore in need of a new legitimation. Similarly, the admittance of "newcomers" is not simply about the financial and technical difficulties of adopting of the existing *acquis communautaire*. It affects the integration European project profoundly, simply because the new member states did not participate in its original design and subsequent development.

It is a core assumption of this essay that the novelty of the present „constitutional moment" will require new definitions of Europe's *finalité* and identity and that it will imply a new „politicization" of the integration project. In these processes, Europe's perception of its own

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„institutionalized“integration history and the histories of its national societies will have to be reconsidered. These histories involve many burdens: Europe cannot set aside the memories of the Holocaust and it will have to continue its confrontation with traditions that have sustained Euro-scepticism, anti-Europeanism and anti-liberalism traditions. The conference seeks to contribute to the constitutionalisation debate by a refelction of these burdens. Its ultimate premise is the assumption that the efforts towards constitutionalisation will gain additional legitimacy through what Theodor Adorno has called “working through the past“ (*Aufarbeitung der Vergangenheit*).

Introduction: Two Interdependent Theses

My contribution oscillates between two poles or aspirations. The first is to present reflections on the constitutionalisation process which comprise both Europe's accomplishments and its performance in the light of a specific theoretical perspective, namely, the deliberative strand of theories of democracy. However, my objective in this respect is not to enrich this theoretical debate. Instead, I will focuses on the transformation of theoretical deliberation into *legal* concepts and suggest that conflict of laws would provide the proper legal form for the constitutionalisation of Europe. The second pole is complementary. Its main message is stated in the title: European Constitutionalism and the Convention both failed to pay proper regard to the weight of history when embarking on the adventure of writing a European constitution. Neither the weight nor the differences of European historical experiences and memories have been taken into account. These experiences, especially in the 20th century, were 'bitter', if not traumatic – albeit in different ways and to different degrees. In the case of Germany, the most appropriate term to capture its specific situation may be found in Bernhard Schlink's term '*Vergangenheitsschuld*'.[1] This notion is a construction with two components, which, through their conflation, exhibit a specific tension. The importance of the first element of the term – *Vergangenheit* or the past – is simply obvious. Ideas about European unity are old. But the integration process that we are experiencing and studying was initiated after, and under the impression of, the Second World War. The remnants of this past have been engraved in the design of Europe, and thus remain 'somehow' present in the EU, even after, or especially because of, its enlargement. To put it even more strongly, we cannot understand what is happening in the EU, nor what we are doing and what we are achieving or failing to achieve

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[1] B. Schlink, *Vergangenheitsschuld und gegenwärtiges Recht*, (Frankfurt aM: Suhrkamp, 2002); the essays in B. Schlink's collection deal mainly, but not exclusively, with the assessment of wrongdoing in the past in criminal law proceedings. But see, for the present context in particular, 'Die Gegenwart der Vergangenheit', at 145-156.

unless we bring to mind the meaning of institutional changes, legal commitments, and political processes and aspirations, within historical perspectives. It seems equally obvious, for a German at least, to qualify this past with the second component of Schlink's term, *i.e.*, first and foremost, with German guilt and the 'bitter experiences' related to it.[2] The conflation of the two components in Schlink's term produces a tension which the term '*Gedächtnispolitik*', the politics of memory, captures quite well.

My thesis that important links exist between the two poles of this essay – European constitutionalism and European historical experiences – is not just a reflection upon Europe's bellicose past and the Holocaust. Historical conflicts both between European nation states and within European societies are present in all important areas affected by the integration. This essay will briefly address two of them, namely, the debate on Europe's 'social model', and European citizenship. Again, the message will be a critical one: European constitutionalism has not taken into account the weight of historical experiences in Europe's presence and the weight of memory politics in contested political issues.

All of these references to history and the insistence that European constitutionalism should regain a historical consciousness should not be read as a purely negative critique. This critique also has a positive side. It may be best submitted as a bold and daring thesis: Europe should, by working through its past(s), renew and deepen its *acquis historique*; it may, in such processes, not only obtain/acquire a better understanding of topical and contested issues of 'the integration project', but also renew the legitimacy and even the dignity of the integration project as such.

I Theoretical Framework: How do History and Law Interact?

It seems so obvious that the argument should not, and indeed does not, need any authoritative support. Nonetheless, I start with a well-known passage from Jürgen Habermas' contribution to the *Historikerstreit*:

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[2] I am neither referring to personal guilt, nor the moral 'duty to remember', but to something factual which social psychology and trauma research will be able to decipher. Suffice it to cite two questions here: 'Aber liegt nicht seit jener moralischen Katastrophe, in abgeschwächter Weise, auf unserer aller Überleben der Fluch des bloßen Davongekommenseins? Und begründet nicht die Zufälligkeit des unverdienten Entrinnens eine intersubjektive Haftung – eine Haftung für entstellte Lebenszusammenhänge, die das Glück oder auch die bloße Existenz der einen einzig um den Preis des vernichteten Glücks, des vorenthaltenen Lebens und des Leidens der anderen einräumen?', J. Habermas, 'Geschichtsbewußtsein und nationale Identität: Die Westorientierung der Bundesrepublik', in: *ibid*., *Eine Art Schadensabwicklung*, (Frankfurt aM: Suhrkamp, 1987), 162-179, at 164 [Habermas, at times, and especially in his recent interventions, is writing very personally. This dimensions gets too easily irrecognisable in translations. Suffice it therefore to indicate that he is reflecting upon how the trauma of the Holocaust affects the self-conciousness of the later generations].

> 'Our form of life is connected with that of our parents and grandparents through a web of familial, local, political, and intellectual traditions that is difficult to disentangle — that is, through a historical milieu that made us what and who we are today. None of us can escape this milieu, because our identities, both as individuals and as Germans, are indissolubly interwoven with it. This holds true from mimicry and physical gestures to language and into the capillary ramifications of one's intellectual stance…we have to stand by our traditions, then, if we do not want to disavow ourselves…'[3]

This is the personal dimension. Its political complement was written out in the Habermas/Derrida manifesto published in the *Frankfurter Allgemeine Zeitung* of 31 May 2003:

> 'Contemporary Europe has been shaped by the experiences of the totalitarian regimes of the twentieth century and through the Holocaust – the persecution and annihililation of European Jews, in which the Nazi regime made the societies of the conquered countries complicit as well...
>
> A bellicose past once entangled all European nations in bloody conflicts. They drew a conclusion from that military and spiritual mobilisation against one another: the imperative of developing new, supranational forms of co-operation after the Second World War.'[4]

These statements will not provoke much opposition. But the constellations to which they refer have not had much impact on my profession. This may seem surprising, it may be uncomfortable and difficult to explain, but it is a fact.[5] There is little explicit reflection by lawyers and legal historians on the shadows of the past in institutionalised Europe in legal history, not even in contemporary legal history.[6] This is not to say that legal historians are not

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[3] J. Habermas, 'On the Public Use of History', in: *ibid., The New Conservatism*, (Cambridge MA: MIT Press, 1990), 233.

[4] Cited from the translation in J. Habermas, 'February 15, or What binds Europeans Together: a Plea for a Common Foreign Policy, beginning in the Core of Europe', (2003) 10 *Constellations*, 291-97, at 296.

[5] See for an instructive recent overview, T. Keiser, 'Europeanization as a Challenge to Legal History', (2005) 6:2 *German Law Journal (GLJ)*, available at: http://www.germanlawjournal.com/.

[6] Such a statement requires qualifications. There are of course important contributions to a historical interpretation of Europe in the legal literature on European integration. Suffice it here to mention J.H.H. Weiler [from 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law* 1 (1981), 267-306 to *The Constitution of Europe*, (Cambridge: CUP, 1999)]; M. Kaufmann, *Europäische Integration und Demokratieprinzip*, (Baden-Baden: Nomos, 1997); A. von Bogdandy, 'A Bird's Eye View on the Science of European Law', (2000) 6 *European Law Journal*, 208-238; A. Somek, 'Constitutional

ready to confront the law's 'darker legacy'. They may be accused of having avoided this topic for too long. But this avoidance has been over for some decades now, especially in Germany. It would, of course, be absurd to accuse them of ignoring European history altogether. Quite to the contrary, Thorsten Keiser recently observed that Europe has attracted much attention since Maastricht, and has, with the Convention process, become 'one of the most important reference points of legal historical research'.[7] The primary effort of pertinent studies in the fields of private law is, however, to reveal a common cultural heritage which, in the past, is said to have formed the basis of an *ius commune europaeum,* and which can now be revitalised in the search for legal unity. The equivalent in public law has been revealed by Felix Hanschmann.[8] Leading exponents of German constitutional thought such as Josef Isensee[9] and Paul Kirchhof[10] invoke a cultural communality of historical experience, which is now to become the bearer of a common polity on the basis of which a united Europe can be, and indeed should be, constituted.

These latter positions contrast drastically with the theoretical assumptions which prevail in general historical research.[11] Not surprisingly, it is also much richer and differentiated.

Erinnerungsarbeit: Ambivalence and Translation', (2005) 6:2 *GLJ*, with references to his much more comprehensive work; U. Haltern, *Europarecht und das Politische*, (Tübingen: Mohr/Siebeck, 2005)]; see, also, his 'Europäische Verfassung und europäische Identität', in: R. Elm (ed), *Europäische Identität: Paradigmen und Methodenfragen*, (Baden-Baden: Nomos, 2002), 239-290, at 252-261). Haltern's contribution is the most systematic and comprehensive. It also reflects most explicitly on the linkages between theorising Europe, reconstructing it historiographically and determining the potential role of law as '*Sinnsprecher*' (instantiation). My reservations against his effort to understand law and integration in the light of the essence of the political will become apparent from the subsequent section. My main difficulty is of course that the matrix of will, reason and interest which Haltern employs [see, also, his 'Pathos and Patina – The Failure and Promise of Constitutionalism in the European Imagination', (2003) 9 *European Law Journal*, 14-44] would not enable me to address the law's darker legacy. In a nutshell: I am not troubled at all by a lack of the element of 'political will' in institutionalised Europe but am instead concerned with its unwillingness to face its pasts. – But then there is the great booklet by H. Schneider, *Rückblick für die Zukunft. Konzeptionelle Weichenstellungen für die Europäische Integration*, (Bonn: Europa Union, 1986) which summarises the models (*Leitbilder*) which have transformed perceptions of the European situation into political and institutional concepts. Many elements for a legal history of European integration are hence available!

7 Keiser (note 5).

8 F. Hanschmann, '"A Community of History": A Problematic Concept and its Usage', (2005) 6:3 *GLJ*. Felix Hanschmann, "'A Community of History': A Problematic Concept and its Usage', (2005) 6:3 *German Law Journal;* "'Geschichtsgemeinschaft': Ein problematischer Begriff und seine Verwendung im staats- und Europarecht", (2004) 5 *Rechtsgeschichte*, 150-162.

9 J. Isensee, 'Abschied der Demokratie vom Demos', in: D. Schwab *et al.* (eds), *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft (Festschrift für Paul Mikat)*, (Berlin: Duncker & Humblot, 1989), 705-740.

10 P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in: J. Isensee (ed), *Europa als politische Idee und als rechtliche Form*, (Berlin: Duncker & Humblot, 1993), 63-101.

11 See the references in Hanschmann (note 8), especially notes 47 *et seq.*; see, also, B. Stråth, 'Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community',

Historians began early[12] and continue to explore the integration process including its institutionalisation in all its details. The intensity of the historical research into World War II, the Third Reich and the Holocaust is simply breathtaking. In addition, historical investigations which interpret the history of the integration process in the light or shadow of European crises and failures are both available and meet with considerable interest.[13] And yet, concerns that are, indeed, very similar to my own personal uneasiness with contemporary legal history are being articulated.[14] Historians have not taken sufficient note of the diversity in Europe's historical memories, complains Konrad H. Jarausch.[15] Not being a historian, I cite once more:

> '…Europe did possess a vague sense of cultural commonality before 1914, but that did almost disappear during the two world wars. The dominant languages such as Latin, French, and later English, and, in a regional sense also German, provided a communication medium for the educated élites. The social origin and intermarriage of the aristocracy or commercial bourgeoisie was another bond. The intensity of economic exchanges created a sense of togetherness. During imperialism, the issue of race also played a role by defining European simply as white. … The rise of nationalism, the fierce hostility of World War I, the destruction of the Central and East European Empires in the suburban Paris treaties of 1919, the breakdown of trade, the repetition of the War in 1939, *etc*., practically destroyed this sense of cohesion…
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> After World War II, some residual feeling of cultural affinity grew from below and was promoted by specific sectors of the European population. The common suffering of war and oppression by the Nazis animated members of the resistance movements; the shared project of restoring cultural monuments and reviving high culture called for a degree of co-operation; moreover, the eclipse of European power led to a joint defensiveness against popularising cultural influences from America or ideological subversion from the Soviet Union. But, in spite of similar social patterns …, the

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(2005) 6:2 *GLJ*.

[12] See, for example, W. Lipgens, *A History of European Integration***,** **(**Oxford: Clarendon Press, 1982).

[13] See, for example, M. Mazower, *Dark Continent. Europe's Twentieth Century*, (London: Penguin, 1998).

[14] K.H. Jarausch, 'Zeitgeschichte zwischen Nation und Europa. Eine transnationale Herausforderung', Typescript, Potsdam 2004 (on file with author).

[15] 'Die Überwölbung eines Ensembles von disparaten Nationalgeschichten bleibt ebenso unbefriedigend wie die teleologischen Anstrengung, das aufklärerische und liberal-demokratische Erbe Europas herauszustellen, oder das Bemühen, die gegenwärtigen Integrationsversuche in die Vergangenheit vor 1945 zurückzuprojizieren. Gerade weil Erkenntnissinteressen, Wertbezüge und nationale Perspektiven drastisch variieren, ist die Pluralität der interpretatorischen Ansätze zur europäischen Geschichte gänzlich unvermeidlich'. See, also, B. Stråth, note 11 *supra.*

> nation-states were not so damaged that they did not make a come-back and culture remained organised on a national level…
>
> Powerful factors have continued to limit the emergence of a European cultural identity'.[16]

How to cope with cultural diversity and divergent historical memories: this seems to be the challenge that Europe is facing. Is it necessary to underline the importance of this point after enlargement? Not only did the accession countries from Central and Eastern Europe have their own national pasts, they also had other reasons for wishing to join the founding nations; last but not least, they were not involved in the writing of institutionalised Europe's '*acquis historique*'.[17]

Historians will respond to these challenges. We can even assume that, sooner or later, legal historians will listen and talk to their neighbouring discipline. At present, however, it is impossible to anticipate such developments. But it is all the more important to reflect, at the very least, on the methodological difficulties of an integration of Europe's pasts into our understanding of institutionalised Europe and European law. None other than Reinhard Koselleck dealt with this relationship between 'History, Law and Justice' some 20 years ago when addressing the German Legal Historians, albeit at a very general level.[18] Historians, Koselleck argues, have traditionally acted quite openly like judges in their accounts of history. Although they have become conscious of this role and sought to define their accounts more cautiously and subtly, they cannot avoid talking, explicitly or implicitly, about the justice or injustice of situations, changes or catastrophes.[19] There is a link between history, legal history, and law. However, there is also a fundamental difference in the approaches of historians and legal historians. Inherent in the category of law is the *telos* of repeated application, which requires respect for formalism (Koselleck: 'the maximum of formalism') because the law has to ensure that its principles, procedures and rules transcend the individual case. In their

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[16] K.H. Jarausch, 'A European Cultural Identity: Reality or Hope?' (Typescript Potsdam 2004, on file with author).

[17] See, on this latter point, F. Larat, 'Present-ing the Past: Political Narratives on European History and the Justification of EU Integration', (2005) 6:2 *GLJ*.

[18] R. Koselleck, 'Geschichte, Recht und Gerechtigkeit', in: D. Simon (ed), *Akten des 26. Deutschen Rechtshistorikertages*, (Frankfurt aM: Klostermann, 1987), 139-149, cited from the reprint in: *ibid., Zeitgeschichten. Studien zur Historik*, (Frankfurt aM: Suhrkamp, 2000), 336-358.

[19] *Ibid*. at 349.

analyses of the preparation and adoption of legislative acts, the approaches of lawyers and historians will be very similar. However, when it comes to the study of the development of the enactment, the legal historian has to respect the law's *proprium*.[20]

> This is all quite abstract, but it is nevertheless helpful, because it makes us aware of what is bound to happen once political processes end with a juridical act. It is not just that lawyers, as they did with the DCT in so many books, start to apply their methods of interpretation to the text that they have received. They will also project their understanding of the meaning of the political sphere/world/0 into their interpretations, and will bring their visions of the social functions of law and of its normative aspirations to bear. The case of the European Economic Community is particularly illustrative here. What, 'legal speaking', was new and promising in this Treaty? What kind of commitments had the signatories accepted? What kind of post-national legitimacy could the new entity claim? How could the rule of law in the European Community be strengthened? In his account of the European Community's *raison d'être*, Joseph H.H. Weiler has famously and convincingly underlined three rationales: Europe was about ensuring peace, promoting prosperity and overcoming discrimination on grounds of nationality.[21] These are all lessons that Europeans had learned from their pasts. The importance of both their 'juridification' in the Treaty and their subsequent implementation cannot be overestimated. And yet, they are by no means sufficiently substantiated to document some comprehensive 'unity' or to exclude fundamental disagreements about the ends of the Community, about its legitimacy and its *finalité*. A comprehensive legal history informing us about the different national ways to write European law is still to be written. It is in Germany alone that we can identify at least three schools of thought, each of which promotes its own distinct vision in democratic positivism, functionalism and ordo-liberalism.[22] This diversity would certainly become much richer through the inclusion of more legal

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[20] *Ibid*. at 352.

[21] '*Fin-de-siècle* Europe', in: *The Constitution of Europe* (note 6), subtly commented by Z. Bankowsi, 'The Journey of the European Ideal', in: A. Mortan & J. Francis (eds), *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe*, (Edinburgh: Centre for Theology and Public Issues, 1999), at 149-172.

[22] See Ch. Joerges, 'What is left of the European Economic Constitution?' (2005) 30 *European Law Review*, 461-489. Even within national communities the perceptions of what is noteworthy differ considerably. Ordo-liberalism, in my view the intellectually most interesting and practically most influential German contribution German to European law, is not part of the mindset of the general German European law scholarship.

traditions. And such an exercise could inform us about both the law's and the Union's capacity to live with pluralism and diversity.

II. Unitas in Pluralitate

If legal scholarship has invested so little, what can we expect from Intergovernmental Conferences and even from the Convention? I am not aware of any analysis of the use of history and of memory politics in the Convention process.[23] Just one text element refers explicitly to the past, namely, the Preamble.[24] This was in the original version of the Convention, a quite euphemistic document. But, at the very end of the whole process, in June 2004, the Intergovernmental Conference, following a Polish initiative, changed the Preamble quite considerably. The first two, somewhat ostentatious, passages were dropped, and the reference to 're-united Europe' was replaced by a 'Europe, re-united after bitter experiences'.

II.1. CONSTITUTIONALISATION

One could have imagined a more substantiated reference. The 'bitter experiences' are simply copied from the Preamble of the Polish constitution.[25] Poland, indeed, had particularly bitter experiences, and this notion will have very clear connotations. But what is their meaning in the community of 25 Member States? More important, perhaps, and certainly painful: The formula can be read to comprise the suffering of European nations. It may even comprise German suffering? But why is there no mention of 'the persecution and extermination of the European Jews, in which the Nazi regime also involved the societies of the countries they had conquered'?[26] There is neither an official interpretation available, nor can one detect traces of discussions, let alone controversies, of Europe's 'bitter experiences'. This seems to be shaming enough. The intergovernmental silence may even be telling in a specifically political way. The revised Preamble seems to present what Germans call a *Verschlimmbesserung*: an improvement, in that it does no longer just document European pride; a worsening, in that it

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[23] So much has been done – the review essay by Martin Große Hüttman, 'Das Experiment einer europäischen Verfassung', (2005) 28:3 *Integration*, at 262-267, presents 6 German language volumes - that I may easily have overlooked pertinent efforts.

[24] For the text, see OJ C 310/2004, 1 of 16 December 2004, available also at: http://european-convention.eu.int/. For a very detailed and instructive analysis, see A von Bogdandy, 'Europäische Verfassung und europäische Identität', (2004) 59 *Juristen Zeitung*, 53-61, especially. at 55 *et seq.*; for a brief synopsis of the preambles to the different versions of the European Treaties, see F. Larat (note 17).

[25] Which reads: 'Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland…'

[26] Thus, J. Habermas & J. Derrida, note 4 *supra.*

documents self-pity, instead of shame and guilt. It continues to do what Tony Judt analyses so intriguingly and movingly in the *Epilogue* of his recent *Postwar* as a pan-European style of *Vergangenheitsbewältigung*.[27] It does what the Germans have done for decades after the war, namely, to forget about their former citizens. It does what the Western Europeans have done, namely, to remember their liberation from the occupier but to forget about their own involvement; and it does not liberate Eastern Europeans from the perverse interpretation of exterminative racism as a machination of capitalism. What a self-deception! We must not infer from the absence of the darkest side of our past in the official constitutional agenda that we have escaped from its shadows.

The real challenge, we concluded in our introductory observations, is the challenge of European diversity. How to accomplish 'unity in diversity' (*unitas in pluralitate*), the motto of the Union according to Article IV-1 of the DCT? Nicolaus Cusanus operated with his *coincidentia oppositorum* in a framework that too few Europeans understand. And in the context of the Convention Process, we have certainly to ask how the Union's motto might be transformed into law? The answer submitted in the next section is this: through an understanding of European law as a new species of conflict of laws. This suggestion, it is submitted, is not only an appropriate response to the diversity of European pasts, it is also, as the following Section (IV) will argue, the most compatible one with the state of the European Union.

In the presentation of my version of European constitutionalism, I have to refrain from any systematic appraisal of the plethora of suggestions that have been submitted during the last two decades (or previously). To prepare my own argument, it is sufficient to focus on just one learned sceptic, namely, Dieter Grimm, who has continuously and consistently defended the notion of constitutionalism against its transposition into Europe's post-national constellation. Pertinent suggestions, Grimm warns, are all at odds with the important functions which we are expecting the constitutions of democratic polities to serve. To cite from Grimm's lucid recent summary of his argument:[28] '[The constitution] constitutes the public power of a society…'[29] 'People expect the constitution to unify their society as a polity… The constitution is regarded as a guarantee of the fundamental consensus that is necessary for

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[27] T. Judt, *Postwar. A History of Europe since 1945*, (New York: Penguin, 2005), at 803-831.

[28] D. Grimm, 'Integration by constitution', 3 (2005) *International Journal of Constitutional Law*, 193-208.

[29] *Ibid*., 194.

social cohesion.'[30] But here the law ends: 'Integration as a collective mental process cannot even be ordered by law.'[31] What cannot be guaranteed through constitutions within the nation state is unlikely to occur within the Union.[32] Here, an empirical observations comes in. The legitimacy of the EU, in the traditional Weberian sense, is eroding. What the proponents of the European constitution assume is that it will help to compensate for these failures and will? foster social integration. This, however, is unlikely to happen, or, as we could say by now, this assumption has already proved to be erroneous.

Grimm's argument insists both fairly and coherently on the specifics of constitutional law in democratic societies. He could have, following Majone's example,[33] pointed to 'Occam's razor' which prescribes 'not to introduce new terms unless they actually improve our understanding of the processes and phenomena under investigation' -- and *vice versa*: the Constitutional Treaty is, legally-speaking, a treaty. It could not mutate through some *fiat* of the Convention. It did not transform into anything other than an intergovernmental act. There is no good reason, Grimm concludes, for any conceptual camouflage.

The argument is correct – and yet, it remains somehow unconvincing. It is certainly important to remember that the 'juridification' of democracy was achieved in nation states, and that we must not equate transnational entities, including the EU, with states or fully-fledged federations. But this *caveat* does not tell us how to respond to post-national constellations. The quest for the constitutionalisation of the EU and for a cure to its 'democracy deficit' reflects the erosion of nation state governance, the emergence of transnational governance – and the quest for its legitimation. To rephrase this concern, Grimm asks us to adhere to our inherited dichotomy of national constitutional law and international treaty law, assuming that the entrance into the post-national constellation is legally insignificant. Grimm, of course, does much to turn this assumption into a normatively and sociologically substantiated argument. What he fails to do, however, is to explore alternatives to the type of legitimacy that statal constitutional law provides, and/or? to confront the transnational deficiencies of that law. Europeanisation and globalisation may require precisely this.

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[30] *Ibid*., 194.

[31] *Ibid*., 196.

[32] *Ibid*., 197.

[33] In his new book on the *Dilemmas of European Integration*, (Oxford: OUP, 2005), at v.

II.2. 'DELIBERATIVE' SUPRANATIONALISM

How do we find out? Since we seek to find out how constitutional law interacts with its societal environment, and, in particular, with Europeanisation and globalisation, it seems appropriate to consider how the closest neighbouring disciplines, especially integration research and international relations theory, conceptualise these developments. Clearly, this is still too general a question which does nothing but expose us to a rhapsody of approaches which pursue questions that the law does not pose, and which it is ultimately unable to answer. However, it is easy to see that we have a methodological problem in common, namely, the tensions between our categories and the changes of the context to which these categories refer explicitly or implicitly. Our core categories, in national constitutional and in international law, just as in international relations theory, all refer to the nation state as their basic unit. This dependence has been called the 'misery of methodological nationalism' by Michael Zürn.[34] His diagnoses deal with the contextual conditions of political action:[35] the nation state, he argues, is no longer in a position to define its political priorities autonomously (as sovereign), but is, instead, forced to co-ordinate them transnationally. It is not only the members of nation states (national citizens) who must recognise their political action; states, too, have also become accountable to the transnational bodies in which their politics are subjected to evaluation. To be sure, national governments vehemently continue to defend their fiscal powers. 'Whilst resources remain at national level, the formulation of politics has been internationalised and recognition transnationalised.'[36]

Parallels with what we observe in the legal system are readily apparent. Like Zürn, we can argue that that the entry of law into the post-national constellation is not at our – or the law's - disposition. We can observe how the law responds to this multi-dimensional disaggregation of statehood, and, in addition, become aware of the demands articulated at the transnational (European) level of politics on the one hand, and at national and regional levels on the other.

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[34] 'Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus', in: C. Landfried (ed), *Politik in einer entgrenzten Welt. 21. wissenschaftlicher Kongreß der Deutschen Vereinigung für Politischen Wissenschaft*, (Cologne: Verlag Wissenschaft und Politik, 2001), at 181-203. ['The State in the Post-National Constellation – Societal Denationalization and Multi-Level Governance', ARENA Working Paper, 35/1999, Oslo]. – Similarly, U. Beck, 'Beyond Methodological Nationalism. Towards a New Critical Theory with a Cosmopolitan Intent', (2003) 10 *Constellations*, at 453-468 (their differences in the use of the term need not concern us here).

[35] *Ibid.*, at 188-191.

[36] My translation; *ibid*., at 188.

We will then understand the pressure and requests for an adaptation of national law, and the honest and not so honest references to an institutionalised integration *telos*, *etc*.

This is, as Immanuel Kant famously and sarcastically observed,[37] the point at which lawyers tend to cease to rely on reason, and where they instead content themselves with authoritatively deciphering certified texts such as the Treaty and/or its interpretation by an institutionalised authority such as the ECJ. This may, to turn Kant's famous common saying[38] upside-down, be the way it operates in practice, but does not suffice in theory. We cannot content ourselves with such self-perceptions or officious self-descriptions of the validity claims raised by institutionalised Europe. In addition, or even instead, we must ask ourselves? whether these claims might 'deserve recognition'.[39] This type of critical reflection is inevitable simply because we know about the 'indeterminacy' of law and its inability to determine its own application.

What is true for legal decision-making holds equally true for the conceptual exercises that lawyers, especially German lawyers, call 'theories'. It is essential to understand that these exercises can neither rely exclusively on the authority of our given texts nor on the authority of social science. The insights, debates and approaches of political science cannot be translated literally into the language of the law and of legal discourses. Systems theory can provide us with the most elegant framework to substantiate this insight.[40] However, we do not need to subscribe to this framework. The law must discover for itself, with categories of its own, whether and how it can overcome 'the misery of methodological nationalism'.

Jürgen Neyer and I have submitted a response which we coined 'deliberative' (as opposed to traditional or doctrinal) supranationalism – and continue to defend and elaborate this concept. In a nutshell,[41] we did not suggest that deliberation in transparent or opaque transnational

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[37] I. Kant, 'The Contest of Faculties', in: Kant: *Political Writings*, (H. Reiss, ed., 2nd ed. 1991).

[38] 'That may be all right in theory, but does not do in practice', (I. Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis' (Vol. 9 of the *Werkausgabe der Wissenschaftlichen Buchgesellschaft Darmstadt*, edited by W. Weischedel), 1971, at 125 *et seq*.

[39] See J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', (2001) 29:6 *Political Theory*, at 766-781.

[40] See G. Teubner, *Netzwerk als Vertragsverbund*, (Baden-Baden: Nomos, 2004), at 17 *et seq*.; *ibid*., 'Coincidentia oppositorum: Networks and the Law Beyond Contract and Organization' (Typescript 2005, on file with author).

[41] For a recent re-statement on which the following remarks draw, see Ch. Joerges, 'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making, 44 (2006) *Journal of Common Market Studies*, 779-802; *id.*, 'Rethinking European Law's Supremacy: A Plea for

bodies would constitute democratic transnational or European governance. Instead, we started 'from below', with the simple observation that no Member State of the EU can take decisions without causing 'extra-territorial' effects on its neighbours.[42] Provocatively put, perhaps, but brought to its logical conclusion, this, in effect, means that nationally organised constitutional states are becoming increasingly incapable of acting democratically. They cannot include all those who will be affected by their decisions in the electoral processes, and, *vice versa*, citizens cannot influence the behaviour of the political actors who are taking decisions on their behalf. It is, hence, only through a supranationally valid law that democratic governance can be accomplished. 'Deliberative' supranationalism seeks to identify principles and rules that serve precisely this end. It is a concept well-anchored in real existing European law in doctrines such as the following: the Member States of the Union may not enforce their interests and/or their laws unboundedly; they are bound to respect European freedoms; they may not discriminate; they may only pursue 'legitimate' regulatory policies approved by the Community; they must co-ordinate in relation to the regulatory concerns that they may follow, and they must design their national regulatory provisions in the most Community-friendly way.

II.3. EUROPEANISATION VIA *CONFLICT OF LAWS METHODOLOGY*

The primary function of these types of norms is co-ordinative. It represents a 'proceduralisation' of the category of law in the sense that Jürgen Habermas and others have defined this legal paradigm.[43] Deliberative supranationalism pleads for a proceduralised understanding of European law, for a 'law of law production' (Frank Michelman).[44] In order to illuminate its specific status, I have qualified European law as a new species of conflict of laws.[45] Conflict of laws seeks to identify the appropriate legal responses in multi-

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a Supranational Conflict of Laws', in B. Kohler-Koch & B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union*, (Lenham, MD: Rowman and Littlefield, forthcoming 2007).

[42] This argument was first submitted in: Ch. Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', (1996) 2 *European Law Journal*, at 105-135, and then restated in 'The Impact of European Integration on Private Law: Reductionist Perceptions', True Conflicts and a New Constitutionalist Perspective', (1997) 3 *European Law Journal*, 378-406.

[43] See, as a brief summary, J. Habermas, 'Paradigms of Law', in: M. Rosenfeld & A. Arato (eds) *On Law and Democracy: Critical Exchanges*, (Berkeley-Los Angeles CA: Berkeley UP, 1998), 13-25.

[44] F.I. Michelman, *Brennan and Democracy*, (Princeton NJ: Princeton UP, 1999), at 34.

[45] Note 41 *supra*; see, previously, Ch. Joerges, 'Transnationale "deliberative Demokratie" oder "deliberativer Suprantionalismus"? Anmerkungen zur Konzeptualisierung legitimen Regierens jenseits des Nationalstaats bei R. Schmalz-Bruns', (2000) 7 *Zeitschrift für Internationale Beziehungen*, at 145-161 and *ibid.,* 'The

jurisdictional constellations. It is an old discipline which, in its 'modern' (post-1848) development, shares all the weaknesses of methodological nationalism. Its methodology, however, is rich and adaptable to 'vertical' conflicts between different levels of governance, as well as to the 'diagonal' conflicts which result from the assignment of different competences to different levels of governments in constellations which require the co-ordination or subordination of such partial competences.[46] It is, furthermore, an approach to the resolution of complex conflict constellations which is by no means appropriate only within international settings, but is likewise appropriate within national legal systems. It is an approach which reflects the continuous need for law production, and seeks to ensure the law's legitimacy through proceduralisation. It is precisely this need which is constitutive for the European Union. To rephrase our initial thesis, the constitutionalisation of Europe should not seek to replace national constitutional law. Instead, it should be prepared to work continuously on Europe's '*unitas in pluralitate*'. This process can be characterised as a constitutional conflict of laws paradigm.

It cannot be the objective of this essay to elaborate this version of supranationalism much further. Suffice it to restate that deliberative supranationalism continues to do what conflict of laws has done during its long history, namely, to identify the rules and principles which frame multi-jurisdictional constellations. In the European Union, it does this with much more strength and with orientations which form the fundamental achievements of the *acquis communautaire*: the Member States have, in principle, to recognise their laws mutually; however, they remain autonomous where domains and orientations which they regard as essential are concerned. The guarantee of this type of autonomy can be understood as an institutionalisation of tolerance in the trans-legal sense of this notion.[47] All this is not to say that the arguments, *critiques* and scepticism towards this vision of supranationalism do not deserve to be considered. What I understand to be the strength of the argument, namely, its

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Europeanization of Private Law as a Rationalisation Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 *European Review of Private Law*, 175-191.

[46] See, similarly, Ch. Schmid , 'Selective harmonisation: Vertical, horizontal, and diagonal conflicts: Diagonal competence conflicts between European competition law and national regulation: A conflict of laws reconstruction of the dispute on book price fixing. *European Review of Private Law*. 8 (2000), 155-172.

[47] See R. Forst, 'Toleration, justice and reason', in: C. McKinnon & D. Castiglione (eds), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, (Manchester: Manchester UP, 2003); J. Habermas, 'Religion in der Öffentlichkeit. Kognitive Voraussetzungen für den "öffentlichen Vernunftgebrauch" religiöser und säkularer Bürger', in: *ibid.*, *Zwischen Naturalismus und Religion*, (Frankfurt aM: Suhrkamp, 2005), at 119-154.

perception of democracy failure of constitutional states, also points to a practical weakness of the EU which the theory of deliberative supranationalism cannot cure.

III. Exemplary Illustrations

Does all this have anything to do with Europe's *praxis*? Are all these matters merely for a Preamble, and not for the actual contents of a Constitutional Treaty? How compatible or dysfunctional are they when brought to bear in the mundane world of European affairs? My thesis is, of course, that Europe's pasts are present *in our daily business* and not just in debates about memorials for the European Jewry and/or the Roma and the Sinti, about surrender and/or liberation days, about resistance and/or collaboration, about genocide trials and the remuneration of forced labour, or about the true nationality of Albert Einstein. In order to substantiate my assertion, I could now go into a huge spectrum of topics – only to get lost there. It would, on the other hand, be carrying coals to Newcastle, and, at the same time, too abstract simply to insist that there are varieties of capitalism in Europe, that Scandinavian welfarism has always been distinct, that the history of antitrust in post-war Germany differs from that of Italy, that the French *planification* and *services publiques* are not identical with Germany's *Ordoliberalismus* and its *Daseinsvorsorge*. My argument is much stronger and more specific: it concerns the 'bitter experiences' to which European societies have responded individually, in concert, or collectively, and my assertion is that it would be beneficial for Europe to reflect upon its working through its pasts. Two of the topics addressed explicitly and implicitly in our agenda seem particularly appropriate for exemplary discussions, namely, 'Social Europe' and 'European Identity and European Citizenship'. The advantage of this presence is that I can be very brief. Other topics would be equally important. One is the rule of law and of experiences with the de-formalisation of public governance. This may be too subtle. Another topic of high importance would be enlargement. But this seems too huge to be dealt with *en passent*.[48]

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[48] For a, to my mind, particularly thought-provoking starting-point, see T. Judt, 'The past is another country: myth and memory in post-war Europe', in: J.-W. Müller (ed), *Memory and Power in Post-war Europe. Studies in the Presence of the Past*, (Cambridge: CUP, 2002), at 157-183: in legal literature, see J. Přibáň, 'European Union Constitution-Making, Political Identity and Central European Reflections', (2005) 11 *European Law Journal*, 135-153; A. Sajó, 'Legal Consequences of Past Collective Wrongdoing after Communism', (2005) 6:2 *GLJ* all of them with rich references.

III.1. SOCIAL EUROPE AND THE DISREGARD FOR HISTORY IN THE CONVENTION PROCESS

I will not try to summarise the vast topical debates on '*L'Europa sociale*' here. instead, I will address a neglected dimension of this debate, namely, the ambivalent legacy of 'the social' (the efforts to find a stable response to the social conflicts in capitalist societies) as a constitutional issue.

III.1.1. Rechtsstaat v. Sozialstaat

The patterns of debate on social justice, democracy and the rule of law are enormously stable. It all starts – in the German memory – with Max Weber's warning that the intrusion of values of social justice into the legal system (the turn to substantive rationality) will threaten the law's formal rationality and the rule of law as such.[49] Or should we understand 'social justice' as an inherent promise of true democracy? Hermann Heller was probably the first to deliver a systematic constitutional theory in which a social model and the rule of law were synthesised, and the *soziale Rechtsstaat* presented as the best, or the only, conceivable democratic response to the tensions between the classes in capitalist societies.[50] Heller's defence of social democracy resonates famously in the commitments of Germany's Basic Law,[51] but was never uncontroversial. Two types of arguments are particularly important: In the neo-liberal and monetarist view, the quest for a 'social' democracy is economically irrational and risks destroying our freedoms. This second aspect was drastically articulated by von Hayek's characterisation of welfarism as a 'road to serfdom'.[52] The authoritarian and populist right never cared about the law's rationality. De-formalisation was inevitable, but should – and this was the fascist and national-socialist conclusion in the twenties and thirties – be compensated by strong political leadership representing *il movimento* or *das Volk* directly. This is no longer the vocabulary of modern populism. What remains a common *credo* of populist movements is their anti-modernism, their instrumentalisation of anxieties, their appeal to collective cultural or national – but always exclusionary – identities. How far away is our darker past? The issue

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[49] M. Weber, *Economy and Society*, (Berkeley: University of California Press, 1978), at 873-874; on socialism, see his 'Socialism', in: M. Weber, *Political Writings*, (Cambridge, CUP, 1994), at 272-303.

[50] See W. Schluchter, *Entscheidung für den sozialen Rechtsstaat: Herrmann Heller und die staatstheoretische Diskussion in der Weimarer Republik*, (2nd ed), (Baden-Baden: Nomos, 1983); D. Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herrmann Heller in Weimar, (Oxford: OUP, 1997). Important texts by Heller have been made accessible by A.J. Jacobsen & B. Schlink (eds), *Weimar: A Jurisprudence of Crisis*, (Berkeley: University of California Press, 2000).

[51] Article 20 para .1: 'Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat'.

[52] F.A. von Hayek, *The Road to Serfdom*, (Chicago: University of Chicago, 1944).

that has just resurfaced in the, at present, most intensively discussed book on the Third Reich in Germany, Götz Aly's *Hitler's Volksstaat*.[53] Aly not only underlines how the Nazis cared about the welfare of their *Volksgenossen*, but also points to very uncomfortable continuities in social policies. This has become a subtext of the renewed debates on the compatibility of freedom and social justice, between the *Rechtsstaat* and the *Sozialstaat*.[54]

III.1.2. Social Europe in the Draft Constitutional Treaty

Hermann Heller's legacy was strong in post-war Germany. And Germany, in its search for a synthesis of a social model and the rule of law, did not choose some/a? *Sonderweg*. The responsibility for ensuring welfare, balancing social inequalities and creating infrastructure for economic development has become a common feature of the European nation state. It is in this abstract sense that we can identify 'a European social model' as one of the four dimensions of 'a multi-function state that combines the Territorial State, the state that assures the Rule of Law, the Democratic State, and the Intervention State'.[55]

Given the strength of this tradition, it was predictable that the Convention, even though this was not originally foreseen, would have addressed this precarious dimension of the integration project. The ambition of the Convention to design a document of constitutional dignity left no choice. A refusal to enlarge the agenda would have damaged the political credibility of the whole endeavour. Working Group XI on Social Europe had a belated start, but worked all the more intensively.

This had an impact. Social Europe became a visible dimension of the Draft Constitutional Treaty.[56] It mainly rests on three pillars: the commitment to a 'competitive social market

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[53] G. Aly, *Hitler's Volksstaat. Raub, Rassemkrieg und nationaler Sozialismut,* (Frankfurt aM: S. Fischer, 2005). For a critical review, see, for example, M. Sorer, at: http://hsozkult.geschichtee.hu-berlin.de/rezensionen/2005-2-143 with many references. To mention Aly is not acknowledge that statements like 'the defence of the *Sozialstaat* is a defence also of expropriation and robbery' reflect the ambivalences of the social particularly well.

[54] G. Aly gets attention for his continuity theses. On 11 August 2005, www.haaretz.com reproduced the report of the *Deutsche Nachrichtenagentur* on an infamous contribution of Oskar Lafontaine to the electoral campaign of Germany's new Left Party ('The state is obligated to prevent family fathers and women from becoming unemployed because of *Fremdarbeiter* (foreign workers) taking away their jobs by working for low wages.') together with G. Aly's comments ('In Lafontaine's propaganda of the past weeks, elements of the national socialist concept can very clearly be recognised.').

[55] S. Leibfried & M. Zürn, 'Reconfiguring the national constellation', in: S. Leibfried & M. Zürn (eds), *Transformations of the State*, (Cambridge: CUP, 2005), 1-36, at 8.

[56] Note 24.

economy',[57] the recognition of 'social rights'[58] to be implemented by the European Court of Justice, and the introduction of 'soft law' techniques for the co-ordination of social policies.[59] It is, however, once again both remarkable and deplorable that all of these elements were introduced by political fiat and without much reflection on historical experience. Joschka Fischer and Jacques Villepin, to whom we owe the assignment of constitutional dignity to the concept of the 'social market economy', knew they were giving a political signal. But apparently not much more. Nobody seems to have explained that the '*soziale Marktwirtschaft*' was Germany's post-war historical compromise, supported by the Christian Democrats, the trade unions and both Christian Churches.[60] No one seems to have recalled the ambivalent past of this project. Nobody seemed to know or to care about the reasons which the German Constitutional Court had given for its rejection of the idea of a constitutionalisation of the market economy in its seminal *Investitionshilfe* judgment, handed down in 1954.[61] The standard response in the debates on the social dimension of the Convention to the openness and indeterminacy of the formula in the Constitutional Treaty was that all modern constitutions need to resort to programmatic commitments. Germany is then cited again as an exemplary case. The future *gestalt* of the *soziale Rechtsstaat* was, indeed, by no means clear at the time of the adoption of the Basic Law. However, as indicated, it was quite clear how the '*soziale Marktwirtschaft*' would try to give a specific content to the social commitments of the Basic Law, and it was apparent that this 'Third Way' met with broad political and societal support. The *Bundesverfassungsgericht* found also broad support for the view that the concrete design of Germany's social model should be left to the legislature and was not prescribed by the Basic Law.

Would such awareness have made a difference? It might, at least, have led some of the actors to proceed with more caution and to be more careful with their promises. The same holds true

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[57] Article 3 (3).

[58] See Title IV of the Draft Constitutional Treaty (note 24).

[59] See, especially, Article I-14 (4) of the DCT; the assignment of a *competence* 'to promote and co-ordinate the economic and employment policies of the Member States' has been repealed. Article I-11(3) as amended on 22 June 2004.

[60] Ch. Joerges & F. Rödl, 'The 'Social Market Economy' as Europe's Social Model?', EUI Working Paper Law No. 2004/8, in: L. Magnusson & B. Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, (Brussels: Lang, 2005), at 125-158.

[61] *Bundesverfassungsgericht* in: 5 *BVerfGE* 7 (1954). See, on the contemporary discussion in Germany, Gert Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, Vol. 2, (Frankfurt aM: Syndikat, 1979), 269 *et seq*.

for two other pillars of 'social Europe'. What should make us trust in the capability of the ECJ to accomplish social progress through the powers that it has in the interpretation of the new social rights? Based on what kind of evidence could the Convention's Working Group XI 'consider that the open method of co-ordination has proved to be a useful instrument in policy areas where no stronger co-ordination instrument exists' without taking note of the experience which we have had with the de-formalisation of social commitments?

III.1.3. Social Europe and the French Referendum

It was no longer possible to be more cautious in the presentations of 'social Europe' after the campaigns in France had got off the ground. It seemed that Pandora's box had been opened.[62]

There is hardly any doubt that the perceived dismantling of the French welfare state through the integration process, the portrayal of Europe as a neo-liberal de-regulation machinery, and the anxieties that such portrayals of Europeanisation and globalisation provoked amongst the French had a substantial impact on their '*non*'. Political commentators and academic observers hold this view; solid opinion polls confirm their point.[63] Hauke Brunkhorst is probably right in pointing out that the heated French debate failed to acknowledge the bright side of granting spheres of autonomy to European citizens and equated the freedoms all too superficially with 'Anglo-Saxon neo-liberalism'.[64] Among the mixed motivations which guided the French, the disappointing insight that Europe could no longer be understood as just a *grande France* may have been as important as Joachim Schild assumes.[65] What I seek to underline – and what the comments cited confirm, at least implicitly – is the presence of France's past which manifests itself in the patterns of the debate. It seems to me unsurprising that the kind of European future that the Draft Constitutional Treaty had so vaguely outlined, and its proponents had so confidently proclaimed, could not cope with this past.

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[62] See D. della Porta & M. Caiani, 'Quale Europa? Europeizzazione, identità e conflitti' (typescript EUI Florence 2005, on file with the author); J. Schild, 'Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum', (2006) 28:3 *Integration*, at 187-200; enlightening esp. for non French observers also Jean-Louis Andreani, "France solidaire et France libérale**",** LE MONDE | 15.06.06 .

[63] For a detailed discussion, see D. della Porta & M. Caiani (previous note).

[64] 'Taking Democracy Seriously: Europe after the Failure of its Constitution', this volume.

[65] J. Schild, 'Ein Sieg der Angst' (note 62), at 199.

III.2. IDENTITY AND CITIZENSHIP

What does it mean to be a citizen in the EU? There are so many contributors to this conference better qualified than I am to respond to this issue that it would be wise to remain silent. On the other hand, no other issue brings law and history in general, and law and 'bitter memories' specifically, so intimately together. I will be very brief, but I cannot resist the temptation to rephrase my suggestion: a constitutional conflict of laws paradigm may help us to avoid the pitfalls which the concept of a European citizenship entails.

It is difficult, even impossible, to avoid Habermas and the notion of constitutional patriotism when one enters this arena. As Jan-Werner Müller has explained,[66] it was not Jürgen Habermas but Dolf Sternberger,[67] who constructed this category. Habermas adopted *Verrfassungspatriotismus*, transforming it into a cornerstone of his political theory in such a way that he could later, in 1991,[68] introduce the idea of constitutional patriotism into the European constitutional discourse. Does Habermas' constitutional patriotism abstract too rigidly from the social, political and cultural embeddedness of 'really existing' human beings, as has been argued so often? This *critique* is not valid. It is the great achievement of Sternberger and Habermas' constitutional patriotism that this is not a substantive concept of identity.[69] But it is, nevertheless, a concept which is embedded in a specific culture and *Lebenswelt*, designed to mirror Germany's transformation into a constitutional democracy.[70] Is it too 'thick' to become a European concept, or, if deprived of its German connotation, too 'thin' to represent Europe's *unitas*?[71]

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[66] J.-W. Müller, *Constitutional Patriotism,* (Princeton: Princeton University Press 2007)**.**

[67] 'Verfassungspatriotismus'. Rede bei der 25-Jahr-Feier der 'Akademie für Politische Bildung' in Tutzing am 29.6. 1982, in: M.-L. Recker (ed), *Politische Reden 1945-1990*, (Frankfurt aM: Deutscher Klassiker Verlag, 1999), at 702 *et seq*.

[68] *Staatsbürgerschaft und nationale Identität*, (St. Gallen: Erkner, 1991). The short monograph was reprinted in: *Faktizität und Geltung*, (Frankfurt aM: Suhrkamp, 1992), at 632-660, *Between Facts and Norms*, (Cambridge MA: MIT Press, 1998), at 491-515.

[69] Ibid. See, also, J. Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*, (Frankfurt aM: Suhrkamp 2004), at 124.

[70] On the 'militancy' and its credentials in this process, see G. Frankenberg, 'Der lernende Souverän', in: *ibid.*, *Autorität und Integration. Zur Grammatik von Recht und Verfassung*, (Frankfurt aM: Suhrkamp, 2003), at 46-72; this example illustrates perfectly how problematical it would be to try to transmit social learning into another society – and how useful inter-societal observation and *critique* can be.

[71] See M. Kumm. 'Thick Constitutional Patriotism and Political Liberalism: On the Role and Structure of European Legal History'; M. Mahlmann, 'Constitutional Identity and the Politics of Homogeneity', both in (2005) 6:2 *GLJ*. See, also, F.C. Mayer & J. Palmowski, 'European Identities and the EU – The Ties that Bind the Peoples of Europe', (2004) 42 *Journal of Common Market Studies*, 573-598 with historical dimensions

Habermas has only recently given a re-statement. Constitutional patriotism, he insists, does not assume that citizens will identify with abstract constitutional principles. *Verfassungspatriotismus* is a conscious affirmation of political principles as citizens experience them in the context of their national histories.[72] He deepens this point in his discussion on the meaning of culture and of the, in his view, misconceived, idea of guaranteeing cultures through collective rights: culture is of an intrinsic importance for our lifestyle; the human mind (*Geist*) is culturally constituted[73] – and culture is perpetuated only through the acceptance of its addresses and their convictions that it be worthwhile maintaining this tradition.[74]

A European concept of citizenship which seeks to achieve a deepened integration through some form of intentional 'identity politics' would then be fundamentally misconceived. European citizens are not expected – by Habermas – to forget their histories and cultural traditions. They cannot escape from them, anyway, they should develop them further, and they should learn to live with this variety. Back in 1988, Habermas opined:

> 'By and large, national public spheres are still culturally isolated from one another….In the future, however, a common *political* culture could differentiate itself from the various *national* cultures.[75]

This differentiation between a 'European-wide political culture' and many other cultural spheres which remain national resembles an exercise in conflict of laws methodology, inspired by systems theory and its notion of functional differentiation. It is a conceptually all-too-artificial and, sociologically-speaking, unrealistic suggestion.[76] A conflict–of laws approach would be much simpler: Let the differences persist, but subject these national

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and more cautious view than their title suggests.

[72] J. Habermas, 'Vorpolitische Grundlagen des demokratischen Rechtsstaates?', in: *id.*, *Zwischen Naturalismus und Religion*, (Frankfurt aM: Suhrkamp 2005), 106-118, at 111: 'Entgegen einem verbreiteten Missverständnis heißt 'Verfassungspatriotismus', dass sich Bürger die Prinzipien ihrer Verfassung nicht allein in ihrem abstrakten Gehalt, sondern konkret aus dem Kontext ihrer jeweils eigenen nationalen Geschichte zu Eigen machen'.

[73] 'Kulturelle Gleichbehandlung – und die Grenzen des postmodernen Liberalismus', *ibid.*, 279-323, at 306.

[74] *Ibid.*, at 313.

[75] J. Habermas, 'Citizenship and National Identity ', Appendix II to *Between Facts and Norms*, (Cambridge, MA: MIT Press, 1999), at 507.

[76] See B. Peters, 'Public discourse, identity, and the problem of democratic legitimacy', in: E.O. Eriksen (ed), *Making the European Polity. Reflexive integration in the EU*, (London: Routledge, 2005), at 84-124.

communities to rules and principles which ensure mutual respect and co-existence. Do not create some élitist public space, but ensure that the national political cultures can observe and criticise each other.[77]

Notwithstanding its inclusion in the Maastricht Treaty, the concept of European citizenship has remained a playing field mainly of political scientists and legal theorists. Lawyers trying to come to terms with Europeanisation processes in the fields they examine have difficulties in transforming it into legal concepts with a potential of structuring their inquiries. But it is at this level of concreteness where 'European citizenship' can deploy a great potential. It is a concept through which the inherited schism between the European 'market citizen' (Hans Peter Ipsen) who enjoys private autonomy in the great European economic space and the un-Europeanised political citizen who exercises his political autonomy under the umbrella of a constitutional state, can be gradually overcome. This potential has materialised in many fields. The most interesting example that I know of is from the not so mundane world of European company law, which I will not explore here.[78]

There are many more examples. They all could serve to illustrate in much detail how legal systems are re-constituting legal systems in Europeanisation processes. This is by no means a linear and necessarily beneficial process. However, what is so important to underline, in my opinion, is that it is false to conceptualise European law as a ready-made or steadily growing *corpus juridicus* which will gradually replace national legal systems. What we have to develop is an analytical understanding of these processes. What we have to learn is how to organise and stabilise the balance of private and public autonomy in such a way that the European law of law production (*Recht-Fertigungs-Recht*) deserves recognition. But let me

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[77] See K. Eder's intensive work on the Europeanisation of public spheres, in particular, K. Eder, 'Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issuespezifischen Kommunikationsgemeinschaft', (2000) *Berliner Journal für Soziologie*, 167-184; K. Eder & C. Kantner, 'Transnationale Resonanzstrukturen in Europa. Ein Kritik der Rede vom Öffentlichkeitsdefizit in Europa', in: M. Bach (ed), *Die Europäisierung nationaler Gesellschaften; Die Europäisierung nationaler Gesellschaften*, (Wiesbaden: Westdeutscher Verlag, 2000), 306-331 See, also, H.-J. Trenz, 'Einführung: Auf der Suche nach einer europäischen Öffentlichkeit', in: A. Klein *et al*. (eds) *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, (Opladen: Leske + Budrich, 2003), at 161-168.

[78] But see Ch. Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', (2005) 24 *Duke Journal of Comparative and International Law*, pp. 149-196, at 173 *et seq*.; also at http://www.iue.it/PUB/law04-12.pdf. Fields like anti-discrimination and labour law may appear more exciting. [Mechanisms of 'Europeanization from below are instructively documented in the latter field by Silvana Sciarra (ed), *Labour Law in the Courts. National Judges and the European Court of Justice*, (Oxford: Hart Publishing, 2001)].

refrain from substantiating these visions here any further. What should have become plausible, however, is their potential to link law to history.

Concluding Remarks

The past - good or bad - is with us. Does it matter whether we make ourselves aware of it? We should try, especially in the cases of an unpleasant past, to learn! We may then even have a 'duty to remember'.[79] These answers seem so evident, even emotionally appealing. But appearances deceive. Until now, and, indeed, for the foreseeable future, Europeans will have to live with different, in many respects, conflicting, historical memories – and there is no authority entrusted with deciding about such conflicts. It is all the more important to be aware that 'the glance in the mirror' [80] tends to have unsettling effects both in one's own lifeworld and in the political sphere.

There is hardly much room to choose. It may well be, as Armin von Bogdandy observes in his evaluation of the Preamble,[81] that negative connotations are unlikely to further identity-building. We can therefore argue against 'identity politics' altogether. We should not assume, however, that we can control the biases that insert themselves into narrative structures.[82] We can observe that this infiltration becomes consciously politicised, that it is simply impossible not to instrumentalise the past in general, and 'bitter experiences' in particular.

And it is all under way, Jan-Werner Müller observes in his essay.[83] The 'politics of regret', the? exchanges over/of the recognition of guilt, the apologies by political leaders, the debates about memorials in schoolbooks, the painful self-interrogations in so many quarters about collaboration and involvement in the Holocaust. Is there a chance that these often painful processes and contestations will create a new sensitivity, that Europeans will learn something about themselves, from and for their neighbours, which will be beneficial for their

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[79] P. de Greiff, 'The Duty to Remember: the dead weight of the past, or the weight of the dead of the past?', Typescript Princeton 2001 (on file with author).

[80] M. Stolleis, 'Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945', in: Ch. Joerges & N.S. Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, (Oxford, Hart Publishing, 2003), at 1-18.

[81] 'Europäische Verfassung und europäische Identität' (note 24 *supra*), at 57.

[82] H. White, *Metahistory. The Historical Imagination in Nineteenth-Century Europe*, (Baltimore; London: Johns Hopkins UP, 1973).

[83] J.-W. Müller, replace with new title.#

Union? Could one even hope that the European project derives a new legitimacy out of these confrontations with the 'bitter experiences' in Europe's pasts? Jan-Werner Müller is sceptical and cautious. Mutual observation tends to provoke cross-border blame and to promote shame as governmental politics.[84]

Back to the Constitutional Treaty: Can Europeans really hope to 'forge a common destiny' while remaining 'proud of their own national identities and history' - as the Preamble suggests - if they fail to confront their pasts? 'Working through the pasts' is a European burden and 'from the very beginning, the integration of Europe represents the remedy to centuries of imperialism, war and other kinds of inter-state conflict, and is shown as the only possible alternative to Europe's self-destruction and decay'.[85] This insight we may share. However, it will not suffice as an orientation when trying to come to terms with our pasts. Somewhat paradoxically, it is the Holocaust which Europeans seem to recognize as a point of negative communality. To cite *Postwar* again:

> 'The new Europe, bound together by the signs and symbols of its terrible past, is a remarkable accomplishment; but it remains forever mortgaged to that past. If Europeans are to maintain this vital link – if Europe's past is to continue to furnish Europe's present with admonitory meaning and moral purpose – then it will have to be *taught* afresh with each passing generation. The 'European Union' may be a response to history, but it can never be a substitute.'[86]

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[84] See also J.Q. Whitmann, 'What Is Wrong with Inflicting Shame Sanctions?', (1998) 107 *Yale Law Journal*, 1055-92, , at 1088-1091.

[85] F. Larat (note 17 *supra*).

[86] T. Judt, note 27 *supra*, at 831.