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Working through "Bitter Experiences" towards Constitutionalisation.
A Critique of the Disregard for History in European Constitutional Theory

CHRISTIAN JOERGES / BREMEN – FLORENCE

Are those that forget the past doomed to repeat its mistakes?
A Comment on **Christian Joerges**

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Abstract

The defeat European constitutionalism has experienced in the French and the Dutch referendum has many reasons. The deficiency this contribution addresses is the lack sensitivity for the historical dimensions of the integration project in general and the darker legacies of law in particular. Three exploratory steps are undertaken: (1) The first deals with the diversity of European pasts. It is submitted that European constitutionalism must respect this diversity and promote toleration rather than homogeneity. (2) The second discusses the presence of European pasts in two fields. One is the controversy over "social Europe" which is traced back to divergent national histories, memories and anxieties. The other concerns the search for a European identity and citizenship. (3) The reluctance of Europeans to confront the darker side of their pasts, including the failures and fragility of law and legal institutions, has many good and bad reasons. We risk getting involved in a bitter politicisation of our memories. The contest over memories seems, however, not only unavoidable; it might become a constructive exercise. The search for a new future in post war Europe was a response to the atrocities of the Nazi period. That legacy is still alive and can be revitalized. The readiness to face Europe's past can be understood as a European vocation which may provide the integration project with an unheard of specific legitimacy.

In his comment Dario Castiglione discusses Christian Joerges's ideas of deliberative supranationalism and of the 'conflict of disciplines'; and suggests that his analysis of the relevance of the past can be extended by distinguishing between three different modes in which the past can be used: as present in the modern predicament; as a form of public discourse; and as a way of shaping and confronting one's own identity.

Keywords: constitution building – European identity – legitimacy – Nation-state – supranationalism – European citizenship – supremacy – social policy – European Convention

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A Critique of the Disregard for History in European Constitutional Theory*

CHRISTIAN JOERGES

I A Shock and two Theses

My contribution to this conference is placed between two poles or aspirations. The first was to present three years of continuous work which reflected on both Europe's accomplishment and its performance in the light of a specific theoretical perspective, namely, the deliberative strand of theories of democracy. This other pole was, in fact, complementary: it would be naïve to assume that the democratization of the emerging polity and the enlargement of the European Union could be completed like the internal market more than a decade ago. So far, every important effort to advance the integration project -- including the "completion" of the internal market -- has also revealed new dimensions of the European *problématique.* Thus, it seemed but a logical step to complement the presentation of the research undertaken with a survey of the new challenges which the integration process produces. Our list was, of course, not meant to be comprehensive. But we had hoped to identify – and still hope to have identified – three crucial issues: (1) The turn to governance, taken so emphatically in 2001, which looked like a necessary and innovative step; however, it is becoming apparent that, through the processes which this step initiated, the rule of Law, the *Rechtsstaatlichkeit* of European governance, has come under stress. (2) Similarly, with the broadening of the scope of its activities and their ever growing complexity, Europe appears to be overburdening its most successful institutional actor, namely, the ECJ. (3) Social Europe, which has been long on the European agenda, has gained a new momentum with the efforts towards a deepened constitutionalisation of the Union; but the promise of the Draft Constitutional Treaty or rather of so many of its proponents arguing that this Treaty Europe will defend its "social model" have turned out not to be sufficiently credible.

* A series of steps have led to the present form of this essay. The first was undertaken with the organisation of a workshop on "The Shadows of the Past(-s) over the Construction of Europe" in July 2004 and the publication of its proceedings in a special issue of the *German Law Journal* [(2005) 6:2 - "Confronting Memories: European 'Bitter Experiences' and the Constitutionalisation Process"]. A second step was the presentation of this project on a conference on "World War II and its Impact on the Law – 60 Years After" at the University of Haifa on 29 June-3 May 2005. The conference on "Law and Democracy in Europe's Post-National Constellation" on 22-24 September 2005 at the European University Institute in Florence was the third forum to develop the argument further. I am grateful for the stimulating comments I received at all three occasions. They made me aware of many aspects I have develop more thoroughly. This essay will hence not be published in its present form – and further cimmernts are welcome.

It will hardly be surprising to learn that I am responsible for the inclusion of a fourth challenge, namely, the thesis that Europe must confront what Bernhard Schlink has termed its "*Vergangenheitsschuld*" [1]. That notion is a typically Germanic 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 into the design of Europe and thus do remain "somehow" present in the EU, even after, or especially because of, its enlargement. To put it even more strongly: we cannot understand what happens in the EU, nor what we do and what we achieve or fail to achieve unless we bring to mind the meaning of institutional changes, legal commitments, 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 is too difficult to explain in an introduction. Suffice it to indicate here that the link between the two is a highly sensitive matter, which the term "*Gedächtnispolitik*", the politics of memory, captures quite well.

One final preliminary remark: the agenda of this conference is no longer identical with our original design. We felt that we should dedicate our concluding panel not to a further summary of the accomplishments and challenges of Europe but to the referenda on the Draft Constitutional Treaty (DCT) in France and in the Netherlands. Their outcome may have been easier to predict than their organisers were prepared to admit. Notwithstanding this, the outcome nonetheless came as a shock.

However, I will not try to anticipate our concluding discussions on the interpretation of the post-referenda situation and on the political options left for the proponents of the Constitutional Treaty. Instead, I would like to submit a thesis on the interdependence of the challenges we have identified in our conference agenda. It seems to me that reflections on Europe's *acquis historique* help us to understand important dimensions of the rejections of the DCT. The implications I will explore are twofold. They concern the type of "constitutionalisation" that the Union is able to envisage and the need to work towards a deepened *acquis historique.* To put it in positive terms: (1) Europe's constitutionalisation should be understood as a response to the structural democracy deficits which nation states cannot cure individually. (2) This type of constitution would gain a particular dignity out of the efforts of these polities to reflect upon their "bitter experiences" and to "work through their pasts".

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[1] Bernhard Schlink's *Vergangenheitsschuld und gegenwärtiges Recht*, Frankfurt a.M.: Suhrkamp 2002, [reviewed by Cornelia Vismann, in Russel A. Miller/Peer Zumbansen (eds.), *Annual of German nd European Law,* Oxford: Berghan Books 2004, 538-540]. The essays in this collection deal mainly, but not exclusively, with the assessment of wrongdoing in the past in criminal law proceedings. Cf., for the present context in particular „Die Gegenwart der Vergangenheit", at 145-156.

[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 here to cite two questions: "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?", Jürgen Habermas, "Geschichtsbewußtsein und nationale Identität: Die Westorientierung der Bundesrepublik", in *id*., *Eine Art Schadensabwicklung*, Frankfurt a.M.: Suhrkamp 1987, 162-179, at 164.

II Theoretical Framework: How do History and Law Interact?

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

> "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:

> "Today's Europe is marked by the experiences of the totalitarian regimes of the twentieth century and by the Holocaust – the persecution and extermination of the European Jews, in which the Nazi regime also involved the societies of the countries they had conquered....A belligerent past formerly involved all the European nations in bloody conflicts. It was from the experience of the military and intellectual mobilization against each other that, after the Second World War, they drew the conclusion that they had to develop new supranational forms of co-operation."

These statements will not provoke much opposition. But the constellations to which they refer have not had much impact on my profession. It may seem surprising, it may be uncomfortable and difficult to explain, but it is a fact.[4] There is little explicit reflection by lawyers and legal historians on the shadows of the past in institutionalised Europe by legal history, not even in contemporary legal history.[5] This is not to say that legal historians are not

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[3] Jürgen Habermas, "On the Public Use of History", in *id., The New Conservatism*, Cambridge, MA: MIT Press 1990, 233.

[4] Cf., for an instructive recent overview Thorsten Keiser, "Europeanization as a Challenge to Legal History", (2005) 6:2 *German Law Journal (GLJ)*, available at http://www.germanlawjournal.com/.

[5] 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: Cambridge University Press 1999]; Marcel Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden: Nomos 1997; Armin v. Bogdandy, "A Bird's Eye View on the Science of European Law", (2000) 6 *European Law Journal* 208-238;. Alexander Somek, "Constitutional *Erinnerungsarbeit:* Ambivalence and Translation", (2005) 6:2 *GLJ*, with references to his much more comprehensive work; Ulrich Haltern, *Der europarechtliche Begriff des Politischen*, Habilitationsschrift Humboldt Universität Berlin 2003; see also his "Europäische Verfassung und europäische Identität", in: Ralf 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 (II). 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

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, 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".[6] 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 a *ius commune europaeum* and which can now be revitalized in the search for legal unity. The equivalent in public law has been revealed by Felix Hanschmann.[7] Leading exponents of German constitutional thought such as Josef Isensee[8] and Paul Kirchhof[9]invoke a cultural communality of historical experience which is now to become the bearer of a common polity on whose basis 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.[10] Not surprisingly, it is also much richer and differentiated. Historians started early[11] 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 available and meet with considerable interest.[12] And yet, concerns that are indeed very similar to my own personal uneasiness with contemporary legal history are being articulated.[13] Historians have not taken sufficient note of the diversity in

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the element of "political will" (at 27) in institutionalised Europe (see section III.1) but rather concerned with its unwillingness to face its pasts (see also section V). – But then there is the wonderful booklet by Heinrich Schneider, *Rückblick für die Zukunft. Konzeptionelle Weichenstellungen für die Europäische Integration,* Bonn: Europa Union 1986 summarizing 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 available!

6 Keiser (note 4).

7 Felix Hanschmann, "'A Community of History': A Problematic Concept and its Usage", (2005) 6:3 *GLJ*. The argument is elaborated in Chapter 4 of his PhD thesis on "Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft. Zur These der Notwendigkeit homogener Kollektive", Berlin-Heidelberg: Springer (forthcoming).

8 Josef Isensee, "Abschied der Demokratie vom Demos", in: Dieter Schwab *et al.* (eds.), *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft (Festschrift für Paul Mikat)*, Berlin: 1989, 705-740.

9 Paul Kirchhof, „Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland", in: Josef Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, Berlin 1993, 63-101.

10 Cf., the references in Hanschmann (note 7), esp. notes 47 ff.; see, also, Bo Stråth, "Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community", (2005) 6:2 *GLJ*.

11 See, *e.g.,* Walter Lipgens, *A history of European integration*, Oxford : Clarendon Press 1982

12 See, for example, Mark Mazower, *Dark Continent. Europe's Twentieth Century*, London: Penguin 1998.

13 Konrad H. Jarausch, „Zeitgeschichte zwischen Nation und Europa. Eine transnationale Herausforderung", Typescript, Potsdam 2004 (on file with author).

Europe's historical memories, complains Konrad H. Jarausch.[14] 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, 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…
>
> 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 popularizing cultural influences from America or ideological subversion from the Soviet Union. But in spite of similar social patterns …, the nation-states were not so damaged that they did not make a come-back and culture remained organized on a national level…
>
> Powerful factors have continued to limit the emergence of a European cultural identity".[15]

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 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*".[16]

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, it is impossible to anticipate such developments. But it is all the more important to reflect at least on the methodological difficulties of an integration of Europe's pasts into our understanding of institutionalized Europe and European law. None other than Reinhard Koselleck dealt with this the relationship between "History, Law and Justice" some 20 years ago when addressing

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[14] „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 Bo Stråth, note 10 *supra.*

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

[16] Cf., on this latter point, Fabrice Larat, "Present-ing the Past: Political Narratives on European History and the Justification of EU Integration", (2005) 6:2 *GLJ.*

the German Legal Historians, albeit at a very general level.[17] 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 about, explicitly or implicitly, the justice or injustice of situations, changes or catastrophes.[18] 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 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.*[19]

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 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.[20] 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. In Germany alone, we can identify at least three schools of thought, each of which promotes its own distinct vision in democratic positivism, functionalism and ordo-liberalism.[21] This

[17] R. Koselleck, „Geschichte, Recht und Gerechtigkeit", in: Dieter Simon (ed.), *Akten des 26. Deutschen Rechtshistorikertages*, Frankfurt a.M.: Klostermann 1987, 139-149, cited from the reprint in *id., Zeitgeschichten. Studien zur Historik*, Frankfurt a.M.: Suhrkamp 2000, 336-358.

[18] At 349.

[19] At 352.

[20] "*Fin-de-siècle* Europe", in: *The Constitution of Europe* (note 5), subtly commented by Zenon Bankowsi, "The Journey of the European Ideal", in Andrew Mortan/Jim Francis (eds.), *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe,* Edinburgh: Centre for Theology and Public Issues 1999, 149-172.

[21] See Christian Joerges, "What is left of the European economic constitution?. A melancholic eulogy", 30 (2005) *European Law Review* 461-489 also at http://www.iue.it/PUB/law04-13.pdf. I should add, however, that 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 hardly mentioned by the European law community with a public law background. The term "ordoliberalism" cannot be found on the many pages of "The New German Scholarship" (Armin von Bogdandy; Peter Uerpmann; Franz Mayer; Stefan Kadelbach; Jürgen Bast; Werner Schroeder; Ramses. Wessel) recently presented by Armin v. Bogdandy/J.H.H. Weiler (eds.), *European Integration – The New German Scholarship*,

diversity would certainly become much richer through the inclusion of more legal traditions. And such an exercise could inform us about the law's and the Union's capacity to live with pluralism and diversity.

III Unitas in Diversitas

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.[22] Just one text element refers explicitly to the past, namely, the Preamble. 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".[23]

III.1 Constitutionalisation

One could have imagined a more substantiated and more comprehensive reference.[24] 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? There is neither an official interpretation available nor can one detect traces of discussions, let alone controversies, of Europe's "bitter experiences". Does this indicate that my concern with the past is about a phantom in the convention opera? The intergovernmental silence seems to be pondering in a specifically political way. We must not infer from the absence of the past in the official constitutional agenda that we have escaped from its shadows.

The real challenge, we have concluded in our introductory observations, is the challenge of European diversity. How to accomplish "unity in diversity" (*unitas in diversitas*), the motto of the Union according to Art 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

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Jean Monnet Working Paper 9/03, available at www.mpil.de and www.jeanmonnetprogram.org. The contributors have delivered 148.875 words. The term "economy" is mentioned once.

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

[23] For the text cf. OJ C 310/2004, 1 of 16 December 2004, available also at http:// http://european-convention.eu.int/. For a very detailed and instructive analysis cf. Armin v. Bogdandy, „Europäische Verfassung und europäische Identität", (2004) 59 *Juristen Zeitung* 53-61, esp. at 55 ff.; for a brief synopsis of the preambles to the different versions of the European Treaties cf. Fabrice Larat (note 21). – The "bitter experiences" are simply copied from the Preamble of the Polish constitution, which reads: "Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland…"

[24] For instance the one submitted by Bruno Latour in *Le Monde* of 22 October 2005: "Nous, vieilles nations européennes, fières d'un immense héritage …, nous avons… défini pour le reste du monde l'universel, mais nous avons également déclenché les plus effroyables guerres territoriales, coloniales et mondiales".

submitted, is not only an appropriate response to the diversity of European pasts, it is also, as the following section (IV) will argue, best compatible 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:[25] "[The constitution] constitutes the public power of a society …"[26] "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 social cohesion".[27] But here the law ends: "Integration as a collective mental process cannot even be ordered by law".[28] What cannot be guaranteed through constitutions within the nation state is unlikely to occur within the Union.[29] Here, an empirical observations comes is. 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 compensate for these failures and foster social integration. This, however, is not likely 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,[30] pointed to "Occam's razor" prescribing "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 later 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 to confront the

[25] D. Grimm, „Integration by constitution", (2005) International Journal of Constitutional Law 3:2, 193-208 ["Integration durch Verfassung", (2004) *Leviathan* 32, 448-463].

[26] Ibid., 194

[27] Ibid., 194

[28] Ibid., 196.

[29] Ibid. 197.

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

transnational deficiencies of that law. Europeanization and globalisation may require exactly that.

III.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 Europeanization and globalisation, it seems appropriate to consider how the closest neighbouring disciplines, especially integration research and international relations theory, conceptualize 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. It is easy to see, however, 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.[31] His diagnoses deal with the contextual conditions of political action:[32] 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 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 (in most part) at national level, the formulation of politics has been internationalised and recognition transnationalized".[33]

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. 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,[34] the point at which lawyers tend to cease to rely on reason and where they instead content themselves with authoritatively deciphering certified texts like the Treaty and/or its interpretation by an

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

[32] *Ibid.*, 188-191.

[33] My translation; *ibid*., 188.

[34] Immanuel Kant, "The Contest of Faculties", in Kant: *Political Writings* (Hans Reiss, ed., 2nd ed. 1991).

institutionalised authority such as the ECJ. This may, to turn Kant's famous common saying[35] 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 whether these claims might "deserve recognition".[36] 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.[37] However, we do not need to subscribe to this framework. The law must discover for itself, with categories of its own, of 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,[38] we did not suggest that deliberation in transparent or opaque transnational 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.[39] Provocatively put, perhaps, but brought to its logical conclusion, this means, in effect, 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

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[35] "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, 125 et seq.

[36] See J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", *Political Theory* 29, 766-781.

[37] See Gunther Teubner, *Netzwerk als Vertragsverbund*, Baden-Baden: Nomos 2004, 17 ff.; *id*., „Coincidentia oppositorum: Networks and the Law Beyond Contract and Organization" (Typescript 2005, on file with author).

[38] For a recent re-statement on which the following remarks draw cf. Christian. Joerges *et al.*, "Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws" European University Institute WP LAW 05-12, available at forthcoming in: Beate Kohler-Koch/Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Lenham, MD: Rowman and Littlefield.

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

regulatory concerns that they may follow, and they must design their national regulatory provisions in the most Community-friendly way.

III.3 Europeanization *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.[40] Deliberative supranationalism pleads for a proceduralised understanding of European law, for a "law of law production" (Frank Michelman).[41] In order to illuminate its specific status, I have qualified European law as a new species of conflict of laws.[42] Conflict of laws seeks to identify the appropriate legal responses in multi-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.[43] 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.[44] 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 diversitas*". This process can be characterized as a constitutional conflict of laws paradigm.

It cannot be the objective of this essay to elaborate this version of supranationalism much further. Let it be sufficient 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 fundamental achievements of the *acquis communautaire*:[45] the Member States have, in principle, to recognize their laws mutually; however, they remain autonomous where domains and orientations which they

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[40] Cf. as a brief summary Jürgen Habermas, "Paradigms of Law", in: Michael Rosenfeld/Andrew Arato (eds.) *On Law and Democracy: Critical Exchanges*, Berkeley-Los Angeles, CA: Berkeley UP 1998, 13-25.

[41] Frank I. Michelman, *Brennan and Democracy*, Princeton, NJ: Princeton UP 1999, 34.

[42] Note 38 *supra*; see previously Christian Joerges, „Transnationale ‚deliberative Demokratie' oder ‚deliberativer Suprantionalismus'? Anmerkungen zur Konzeptualisierung legitimen Regierens jenseits des Nationalstaats bei Rainer Schmalz-Bruns", (2000) 7 *Zeitschrift für Internationale Beziehungen* 145-161and *id,* "The 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

[43] See similarly Christopher Schmidt, "Vertical and Diagonal Conflicts in the Europeanization Process", in Christian Joerges/Oliver Gerstenberg (eds.), *Private Governance, Democratic Constitutionalism and Supranationalism*, Luxembourg: European Commission COST A 7 EUR 18340, 1998, 185-191.

[44] Cf., Ch.ristian Joerges, "Rethinking Suprnationalism" (note 38), at 9 ff.

[45] Cf. Armin von Bogdandy, "Doctrine of Principles", in: Armin v. Bogdandy/J.H.H. Weiler (eds.), *European Integration -- The New German Scholarship* (note 21). The similarities with v. Bogdandy's argument seem striking, even though Bogdandy underlines the unity of the European legal order in his *federal* vision.

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.[46] All this is not to say that the arguments, critiques and scepticism[47] towards this vision of supranationalism do not deserve to be considered. What I understand to be the strength of the argument, namely, its perception of democracy failure of constitutional states, is also its inherent difficulty.

First Interim Observation

Conflict-of-laws responses to these failures as designed by deliberative supranationalism do not leave national law as it is. They impose constraints, they require adaptation and change: their legitimation loses its links to a specific space and polity.[48] Let me rest this *problématique*. It mirrors, rather than affects, my concern with the diversity of European histories, and confirms that even though the Europeanized conflict-of-laws paradigm cannot be "deduced" from some historical reconstruction, it is the so-to-speak natural candidate for a transposition of diversity into a common legal framework.

IV 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".

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[46] Cf. Rainer Forst, "Toleration, justice and reason", in: Catriona McKinnon/Dario Castiglione (eds.), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, Manchester: Manchester UP 2003; Jürgen Habermas, "Religion in der Öffentlichkeit. Kognitive Voraussetzungen für den 'öffentlichen Vernunftgebrauch' religiöser und säkularer Bürger", in *id.*, *Zwischen Naturalismus und Religion*, Frankfurt a.M.: Suhrkamp 2005, 119-154.

[47] See the comments by Damian Chalmers, Rainer Nickel, Florian Rödl, Robert Wai in the Working Paper cited above (note 38)

[48] Cf. Klaus Günther, „Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem, in: P. Wingert/K. Günther (eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit: Festschrift für Jürgen Habermas*, Frankfurt a.M.: Suhrkamp 2001, 539-567. See also Oliver Eberl/Peter Niesen, „Demokratischer Positivismus: Habermas und Maus", in Andreas Fischer-Lescano (ed.) *Neue Theorien des Rechts* (forthcoming).

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 deformalisation of public governance. This may be too subtle. Another topic of high importance would be enlargement. But this seems too huge, however, to be dealt with *en passent.*[49]

IV.1 Social Europe and the Disregard for History in the Convention Process

"Social Europe" is one of the of the core topics of this conference. I can refer to its discussion by Waltraud Schelkle,[50] Florian Rödl, Alexander Graser[51] and Alexander Somek in the second section, and Agustín José Menéndez' report in the first. What I seek to add concerns the ambivalent legacy of "the social" as a constitutional issue – and the need to address this dimension.

IV.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.[52] Or should we understand "social justice" as an inherent promise of true democracies? Hermann Heller was probably the first to deliver a systematic constitutional theory in which the social and the rule of law were synthesized and the *soziale Rechtsstaat* presented as the best or only conceivable democratic response to the tensions between the classes in capitalist societies.[53] Heller's defence of social

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[49] For a, to my mind, particularly thought provoking starting-point cf. Tony Judt, "The past is another country: myth and memory in post-war Europe", in: Jan-Werner Müller (ed.), *Memory and Power in Post-war Europe. Studies in the Presence of the Past*, Cambridge: Cambridge UP 2002, 157-183: in legal literature see Jiří Přibáň, „European Union Constitution-Making, Political Identity and Central European Reflections", (2005) 11 *European Law Journal* 135-153; András Sajó, "Legal Consequences of Past Collective Wrongdoing after Communism", (2005) 6:2 *GLJ* all of them with rich references.

[50] /"Can there be a European Social Model?", available at http://www.iue.it/LAW/ResearchTeaching/Cidel/Index.shtml. Schelkle does not focus on the DCT but refers in her analysis to the Lisbon agenda. This is not so important. Much more interesting are aor convergences and apparent differences. We agree: "The evidence that we do not find convergence between the families or worlds of welfare capitalism, in whatever classification, is now so overwhelming that we can consider it a stylized fact" (such the text accompanying note 4). We need to find out what it means that the Lisbon consensus on a "productivist" concept could become the common core of a European social model. That consensus, Schelkle adds, "is prioritizing productivity and employment over income maintenance and basic security has economic costs" and is hence "not a free lunch" (at p. 13). The challenge, then, is the capacity of the European system to manage the implementation of a politically contested social agenda.

[51] "Approaching the 'Social Union'?", available at http://www.iue.it/LAW/ResearchTeaching/Cidel/Index.shtml and previously in particular "Sozialrecht ohne Staat? Politik und Recht unter Bedingungen der Globalisierung und Dezentralisierung", in Adrienne Héritier/Michael Stolleis/Fritz W. Scharpf (eds.), *European and International Regulation after the Nation State,* Baden-Baden: Nomos 2004, 163-184.

[52] Max Weber, *Economy and Society*; Berkeley: University of California Press, 1978, 873-874;on socialism see his „Socialism", in Max Weber, *Political Writings,* Cambridge, Cambridge UP, 1994, 272-303.

[53] See Wolfgang Schluchter, *Entscheidung für den sozialen Rechtsstaat: Herrmann Heller und die staatstheoretische Diskussion in der Weimarer Republik,* 2nd ed., Baden-Baden: Nomos 1983; David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herrmann Heller in Weimar*, Oxford: Oxford UP 1997. Important texts by Heller have been made accessible by Arthur J. Jacobsen/Bernhard Schlink (eds.), *Weimar: A Jurisprudence of Crisis*, Berkeley, CA: California UP 2000.

democracy resonates famously in the commitments of Germany's Basic Law[54] 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".[55] The authoritarian and populist right never cared about the law's rationality. Deformalisation 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 just resurfaced in the, at present, most intensively discussed book on the Third Reich in Germany, Götz Aly's *Hitler's Volksstaat*.[56] Aly not only underlines how the Nazis cared about the welfare of their *Volksgenossen*, he 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*.[57]

IV.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 "the social" and the rule of law, did not choose some *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".[58]

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

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[54] Article 20 para .1: „*Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat*".

[55] Friedrich A. von Hayek, *The Road to Serfdom,* Chicago: University of Chicago 1944.

[56] Götz Aly, *Hitler's Volksstaat. Raub, Rassemkrieg und nationaler Sozialismst,* Frankfurt a.M.: S. Fischer 2005. For a critical review, cf., for example, Mark Spoerer, "Demontage eines Mythos? Zu der Kontroverse über das nationalsozialistische »Wirtschaftswunder",; J. Adam Tooze, "No Room for Miracles. German Industrial Output in World War II Reassessed", both in (2005) 31:3 *Geschichte und Gesellschaft*; for Mark Spoerer's review see also http://hsozkult.geschichtee.hu-berlin.de/rezensionen/2005-2-143. -- To mention Aly is not to defend him, but to underline that arguments about the past ("National Socialism had a socialist dimension") get turned into arguments about the present ("The defence of the *Sozialstaat* is a defence also of expropriation and robbery").

[57] Götz Aly gets attention for his continuity theses. www.haaretz.com reproduced on 11 August 2005 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 Götz Aly's comments ("In Lafontaine's propaganda of the past weeks, elements of the national socialist concept can very clearly be recognized.").

[58] Stephan Leibfried/Michael Zürn, "Reconfiguring the national constellation", in Stephan Leibfried / Michael Zürn (eds.), Transformations of the State", Cambridge: Cambridge UP 2005, 1-36, at 8.

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.[59] It mainly rests on three pillars: the commitment to a "competitive social market economy",[60] the recognition of "social rights"[61] to be implemented by the European Court of Justice, and the introduction of "soft law" techniques for the co-ordination of social policies.[62] 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.[63] 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.[64] 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 – and that this remained a political and economic programmatic not prescribed by the constitution.

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[59] Note 23.

[60] Article 3 Section 3. --"Les tenants d'une Europe sociale se félicitent de quelques avancées - la référence à "l'économie sociale de marché", au plein-emploi, aux services publics" noted *Le Monde* on November 10, 2003.

[61] See Title IV of the Draft Constitutional Treaty (note 23).

[62] See esp. 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.

[63] Christian Joerges/Florian Rödl, „The 'Social Market Economy' as Europe's Social Model?", EUI Working Paper Law No. 2004/8, in : Lars Magnusson and Bo Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, Brussels: Lang 2005, 125-158.

[64] *Bundesverfassungsgericht* in 5 *BVerfGE* 7 (1954). The much cited pertinent passage reads: „Das Grundgesetz garantiert weder die wirtschaftspolitische Neutralität der Regierungs- und Gesetzgebungsgewalt noch eine nur mit marktkonformen Mitteln zu steuernde 'soziale Marktwirtschaft'.
Die 'wirtschaftspolitische Neutralität' des Grundgesetzes besteht lediglich darin, daß sich der Verfassungsgeber nicht ausdrücklich für ein bestimmtes Wirtschaftssystem entschieden hat. Dies ermöglicht dem Gesetzgeber die ihm jeweils sachgemäß erscheinende Wirtschaftspolitik zu verfolgen, sofern er dabei das Grundgesetz beachtet.

Die gegenwärtige Wirtschafts- und Sozialordnung ist zwar eine nach dem Grundgesetz mögliche Ordnung, keineswegs aber die allein mögliche. Sie beruht auf einer vom Willen des Gesetzgebers getragenen wirtschafts- und sozialpolitischen Entscheidung, die durch eine andere Entscheidung ersetzt oder durchbrochen werden kann. Daher ist es verfassungsrechtlich ohne Bedeutung, ob das Investitionshilfegesetz im Einklang mit der bisherigen Wirtschafts- und Sozialordnung steht und ob das zur Wirtschaftslenkung verwandte Mittel 'marktkonform' ist".
Cf. on the contemporary discussion in Germany Gert Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*. Band 2, Frankfurt a.M.: Syndikat, 1979, 269 ff.

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

IV.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 got off the ground. It seemed that Pandora's box had been opened.[65]

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 deregulation machinery, and the anxieties such portrayals of Europeanization and globalization provoked amongst the French had a substantial impact on their "*non*". Political commentators[66] and academic observers hold this view; solid opinion polls confirm their point.[67] 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".[68] 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.[69] 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.

Second Interim Observation

The disregard for history by the proponents of the Draft Constitutional Treaty came at a price. The "social question" has been the core conflict of most of Europe's societies since the 19th century. Most of them went through antagonizing "bitter experiences" before they eventually

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[65] Many pertinent analyses are already available and many more will be produced. I found two analyses particularly helpful: Donatella della Porta/Manuela Caiani, "Quale Europa? Europeizzazione, identità e conflitti" (typescript EUI Florence 2005, on file with the author); Joachim Schild, „Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum", (2006) 28:3 *Integration* 187-200.

[66] Even those who had previously written: "Les tenants d'une Europe sociale se félicitent de quelques avancées - la référence à "l'économie sociale de marché", au plein-emploi, aux services publics", thus *Le Monde* on November 10, 2003.

[67] For a detailed discussion cf. Donatella della Porta/Manuela Caiani (note 64).

[68] "Demokratie ernst genommen. Europa nach dem Scheitern der Verfassung", available at http://www.iue.it/LAW/ResearchTeaching/Cidel/Index.shtml.

[69] Joachim Schild, „Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum", (2006) 28:3 *Integration* 187-200 (at 199).

found a *modus vivendi* in which democracy, welfarism, and the rule of law were somehow synthesized. Their collective memories, however, are not uniform. This is true in the old Member States, and it is particularly true with regard to post-1989 Europe. But I should not overstate my case: The "social question" which was kept latent[70] quite successfully in the formative years of the European Economic Community and for such a long time thereafter does not disappear from the European agenda with the French "*non*". – We have learned that "the social" continues to be a highly controversial, still antagonizing issue. What are the options? Are we caught in an integration *trappola*, a dilemmatic constellation in which we become aware of the complexity and sensitivity of the social question in European arenas while we are, at the same time, beginning to realize that the means to respond to it constructively are simply not available? All I have to offer is, once again, a very tentative suggestion, which builds upon the first: Europeans should become aware of their divergent experiences and their impact on their normative aspirations. They should not expect to be able to build a uniform social model, but would be better advised to confront and organise diversity. But, as Dieter Grimm has again reminded us recently, "people expect the constitution to unify their society as a polity"![71] This, I could answer, is a legacy of "methodological nationalism" in constitutionalism. In contrast, a conflict of laws paradigm does not presuppose such homogeneity.

IV.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 explained in his contribution to this conference,[72] it was not Jürgen Habermas but Dolf Sternberger[73] 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,[74] 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? Nobody who has read Jan-Werner Müller's paper can defend such a critique of *Verfassungspatriotsmus.* But what about European citizenship? This is a sensitive issue, indeed. It is the great

[70] But see Joachim Schild's remarks on the positions of Guy Mollet (at 195).

[71] Grimm 194.

[72] Jan-Werner Müller, A 'Thick' Constitutional Patriotism for Europe? On Morality, Memory and Militancy, available at http://www.iue.it/LAW/ResearchTeaching/Cidel/Index.shtml.

[73] "Verfassungspatriotismus". Rede bei der 25-Jahr-Feier der "Akademie für Politische Bildung" in Tutzing am 29.6. 1982, in: Marie-Luise Recker (ed.), *Politische Reden 1945-1990*, Frankfurt a.M.: Deutscher Klassiker Verlag 1999, 702 ff.

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

achievement of Habermas' constitutional patriotism that this is not a substantive concept of identity.[75] 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.[76] Is it too "thick" to become a European concept, or, if deprived of its German connotation, too "thin" to represent Europe's *unitas*?[77]

Habermas has only recently given a restatement. 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.[78] 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[79] – and culture is perpetuated only through the acceptance of its addresses and their convictions that it be worthwhile to maintain this tradition.[80]

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 1991, 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."[81] 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.[82] A conflict-of-laws approach would be much simpler: Let the differences persist, but subject these national

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[75] *Ibid*. See also Jürgen Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt a.M.: Suhrkamp 2004, 124.

[76] On the "militancy" and its credentials in this process cf. Günter Frankenberg, "Der lernende Souverän", in *id.*, *Autorität und Integration. Zur Grammatik von Recht und Verfassung*, Frankfurt a.M.: Suhrkamp 2003, 46-72; this example illustrates perfectly how problematic it would be to try to transmit social learning into another society – and how useful inter-societal observation and critique can be; see V.2 *infra*.

[77] Cf., Mattias Kumm. "Thick Constitutional Patriotism and Political Liberalism: On the Role and Structure of European Legal History"; Matthias Mahlmann, "Constitutional Identity and the Politics of Homogeneity", both in (2005) 6:2 *GLJ*. See also Franz C. Mayer/Jan 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 and more cautious view than their title suggests.

[78] Jürgen Habermas, „Vorpolitische Grundlagen des demokratischen Rechtsstaates?", in: *id., Zwischen Naturalismus und Religion*, Frankfuert a.M.: 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".

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

[80] *Ibid.*, at 313.

[81] "Citizenship and national Identity", *op. cit*. (note), at 507.

[82] Cf. Bernhard Peters, "Public discourse, identity, and the problem of democratic legitimacy", in: Erik O. Eriksen (ed.), *Making the European Polity.Reflexive integration in the EU,* London: Routledge 2005, 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 observe and criticise each other.[83]

The concept of European citizenship, its inclusion in the Maastricht Treaty notwithstanding, has remained a playing field mainly of political scientists and legal theorists. Lawyers trying to come to terms with Europeanization 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-Europeanized political citizen who exercises his political autonomy under the umbrella of a constitutional state, can be gradually overcome. This potential has materialized 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.[84]

Third Interim Remark

There are many more examples. They all could serve to illustrate in much detail how legal systems are re-constituting legal systems in Europeanization processes. This is by no means a linear and necessarily beneficial process. What seems so important to underline, however, is to understand that it is false to conceptualize European law as a ready made or steadily growing *corpus* which would gradually replace national legal systems. To put it provocatively: there is no such thing as a uniform European law. What we have are texts which are understood in the light of divergent legal traditions. What we have to develop is an analytical understanding of these processes.[85] What we have to learn is how to organise and stabilize the balance of private and public autonomy in such a way that the European law of law production (*Recht-Fertigungs-Recht*) deserves recognition. I refrain from substantiating

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[83] Cf. Klaus Eder's intensive work on the Europeanization of public spheres, in particular Klaus Eder, "Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issuespezifischen Kommunikationsgemeinschaft", (2000) *Berliner Journal für Soziologie* 167-184; Klaus Eder/Cathleen Kantner, "Transnationale Resonanzstrukturen in Europa. Ein Kritik der Rede vom Öffentlichkeitsdefizit in Europa", in Maurizio Bach (ed.), *Die Europäisierung nationaler Gesellschaften;* Die Europäisierung nationaler Gesellschaften, Wiesbaden: Westdeutscher Verlag 2000, 306-331 See also Hans-Jörg Trenz, „Einführung: Auf der Suche nach einer europäischen Öffentlichkeit", in: Ansgar Klein *et al*. (eds.) *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, Opladen: Leske und Budrich 2003, 161-168. – It is hardly necessary to underline that the conflict-of-law methodology is not pretending to offer ready-made recipes. "Diversity" is precious; but so are the advantages of living together and communication. Cf. on the particlaurly sensditive language problem Bruno de Witte, "Language law of the European Union: Protecting or Eroding Linguistic Diversity?", in Rachael Crauford Smith (ed.), *Culture and Ezropean Union* Law, Oxford: Oxford UP 2004, 205-241.

[84] But see Christian 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* 149-196, at 173 ff.; also at http://www.iue.it/PUB/law04-12.pdf. Fields like anti-discrimination and labour law may appear more exiting. [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].

[85] For related efforts inspired by systems theory cf. Marc Amstutz, "Zwischenwelten. Zur Emergenzeiner interleglen Rechtsmethodik im europäischen Privatrecht", in: Christian Joerges/Gunther Teubner (eds.), *Rechtsverfassungsrecht, Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie,* Baden-Baden: Nomos 2003, 213-238 (English version forthcoming in *European Law Journal*; Poul Kjaer, "Governance as Structural Coupling", Typescript European University Institute 2005 (on file with author).

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

V "Reluctance to Glance in the Mirror" [86]

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".[87] These answers seem so evident, even emotionally appealing. The appearance deceives. The glance in the mirror tends to have unsettling effects both in one's lifeworld and beyond.

V.1 "Do this Type of Research in Germany"

"Europe in Fascist and National Socialist Perspectives – Their Legacy in European Integration" – this was the title of an application for a modest sum of money by my former colleague Massimo la Torre and myself to the Research Council of the EUI back in 1999. The responses were quite unfriendly: "Do that type of research in Germany!" "This Institute must not become a forum for this kind of topic!" But, at the end of the day, and after a redrafting of its title, the project was accepted. The seminars and lectures which we then started to organise, however, did not meet with much interest, neither among students nor among our colleagues. Attention grew only slowly over the years. The whole enterprise retained its somewhat odd *gusto*, a matter of "Joerges and his Nazis".[88] "This topic is too remote to be of interest for our applicants; it has so little to do with law; to include it in our programme would be incompatible with our mandate", I was told by the Academy of European Law.

It took time to understand and to accept these reactions. The consternation of our Research Council was, it seems to me now, clearly a defence of the dignity of the European project. After all, the integration of Europe was an act of reconciliation. How can you insinuate that this great and noble response to German atrocities was somehow contaminated! Closely related to this anger is a second sensitive issue. It was not by accident that the organisers of the project came from Germany and Italy. But, by bringing it to the EUI and by its design, we had, albeit more implicitly than consciously, read European dimensions into Germany's past and German guilt. This unsettling aspect coincided with new signals from the outside world, *e.g.*, a considerable number of books and films about German suffering. Were we accomplices of a new brand of memory politics through which the Germans seek some relief from their burden and try to re-distribute their historical guilt? No. It is impossible to insulate our magic academic hill from the outside world to which I therefore turn.

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[86] Michael Stolleis, "Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945", in: Christian Joerges/Navraj S. Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Oxford, Hart Publishing 2003, 1-18.

[87] Pablo 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).

[88] See Navraj S. Ghaleigh, "Looking into the Brightly Lit Room: Braving Carl Schmitt in Europe", in Christian Joerges/Navraj S. Ghaleigh (note 85)., 44-54, at 44..

V.2 "What Is Wrong with Inflicting Shame Sanctions?"[89]

The outside world is simply there and within it the past is present. This, however, is not a comforting insight. We were informed by Hayden White decades ago about the biases that insert themselves into narrative structures.[90] We are experiencing that this infiltration gets consciously politicised, that it is simply impossible not to instrumentalize the past in general and "bitter experiences" in particular.

And it is all under way, Jan-Werner Müller observes in his essay.[91] The "politics of regret", exchanges over the recognition of guilt, excuses by political leaders, debates about memorials in schoolbooks, painful self-interrogations in so many quarters about collaboration and involvement in the Holocaust. It usually starts within national societies. Observation from the outside, evaluations and interferences follow. Is there a chance that these often painful processes and contestations create a new sensitivity, that Europeans learn something about themselves, from and for their neighbours, which will be beneficial for their Union? Could one even hope that the European project derives a new legitimacy out of these confrontations with "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.[92] Furthermore, Armin von Bogdandy observes in his evaluation of the Preamble,[93] negative connotations are unlikely to further identity building; he concludes that "identity politics" should be dropped altogether and Europe appeal to more mundane long-term interests of its citizens. This, however, has never been the full story of the European idea. "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".[94]

There are no guarantees against short-sighted political instrumentalisation. There is no rule of law, no code of good practice, which can regulate societal learning. What is our choice? We must try to find answers: "*Was bedeutet: Aufarbeitung der Vergangenheit*", was the question of an essay by Theodor W. Adorno, written in 1959, in which he took issue with what the Germans have coined "*Vergangenheitsbewältigung*".[95] The kind of debate he helped to initiate turned Germany into a better place. Outside observation, critique from outside, proved to be helpful.

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[89] James Q. Whitman, "What Is Wrong with Inflicting Shame Sanctions?", (1998) 107 *Yale Law Journal*, 1055-92.

[90] Hayden White*, Metahistory. The Historical Imagination in Nineteenth-century Europe,* Baltimore ; London : Johns Hopkins UP 1973.

[91] Jan-Werner Müller, A 'Thick' Constitutional Patriotism for Europe? On Morality, Memory and Militancy, available at http://www.iue.it/LAW/ResearchTeaching/Cidel/Index.shtml.

[92] Cf., James Q. Whitmann (note 87), 1088-1091.

[93] „Europäische Verfassung und europäische Identität" (note 23 *supra*), at 57.

[94] Fabrice Larat (note 16 *supra*).

[95] "The Meaning of Working Through the Past", in Theodor W. Adorno, *Critical Models. Interventions and Catchwords*, New York: Columbia UP 1998, 89-103.

Concluding Observation

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. It may, however, even be Europe's vocation to reconstruct a purged identity through such processes, a more modest, even a humble self-portrayal, but one which could be quite attractive.[96]

The "jurist as such" cannot, and need not, know. But he can learn a lot about law from history and bring that learning to bear in the ongoing debates about a constitution for Europe. There is knowledge available[97] about the fragility of constitutions; the indeterminacy of rules; the strength and weaknesses of human rights; the potential and failure of social rights; the values and limits of legal formalism; the context dependency of legal methods and the attraction of power for the legal profession; about the non-legal conditions of legal ordering. To keep all these insights alive in the constitutionalisation of Europe would be a constructive, even indispensable, contribution.

[96] To cite again (see note 24 *supra*) Bruno Latour: "Parce que nous sommes persuadées à la fois de la grandeur de notre tradition, des crimes commis en son nom et de notre affaiblissement relatif, nous avons juré solennellement d'unir nos destins, à la fois si divers et si communs, dans une aventure politique sans équivalent dans l'histoire pour redécouvrir ensemble quelle sera dorénavant notre part dans cette mondialisation que nous appelons de nos vœux".

[97] This final remark is the core argument of the whole effort . I cannot develop it here but refer simply to two further contributions in (2005) 6:2 *GLJ*, namely that of Vivian Grosswald Curran ("Law's Past and Europe's Future") and David Fraser ("National Constitutions, Liberal State, Fascist State and the Holocaust in Belgium and Bulgaria") as well as the latter's more recent *Law after Auschwitz*, Durham, NC: Carolina Academic Press 2005.

Are those that forget the past doomed to repeat its mistakes?

DARIO CASTIGLIONE

I start with the usual caveat for working papers. These are scattered thoughts, in response to Christian Jorges's wide-ranging and thought-provoking paper, which I have read with interest, but whose arguments I have not yet had the time to 'work through' fully. CJ's paper aims, amongst many other things, to summarize the work he has done on European constitutionalisation in the past years. I shall offer here in brief synthesis my own take on the issues raised by CJ, and advance some reflections of my own.

It may not be entirely inappropriate – given CJ's paper's focus – to premise my discussion with a brief reminiscence of my own. If I am not mistaken, Christian and I met for the first time ten years ago over an espresso machine, which I think he had brought back from Italy to Bremen in order to revolutionise conviviality at ZERP. Since then we have met many times at academic conferences and other events, and more recently as members of the CIDEL project. Throughout these years we have discussed with and listen to each other with respect, but also, I would suggest, with a touch of reciprocal amused scepticism – and some reciprocal intellectual suspicion. Nothing personal; but the result perhaps of our different approaches and disciplines. On the one hand, there was the lawyer, pretending not to understand some of the abstract reasoning of the political theorist; and on the other, the political theorist, trying to wish away as theoretically indifferent the intricate circumlocutions of the private (notice, not 'public') lawyer. I think that over the years, however, we have started to understand each other better. This may have been the effect (as our friends from Arena may be pleased to hear) of the transforming power of deliberation – or more trivially of the effect of some kind of osmotic intellectual process going on in the European studies circles. Be as it may, the bottom line is that we (or more generally our disciplines) are now taking each other more seriously. CJ's paper – full of theory as it is, and dealing with the interplay between law and history and the conflict between different pasts and the perception of them – is the perfect test to see how far we can now sing, if not the same, at least a very similar tune.

I have already said that CJ's paper is wide-ranging (and, I would now add, ambitious). As I understand it, it aims to do three main interlocking things. One is to outline his view of constitutionalization in Europe, and how this deals with the unity/diversity conundrum. The second, and most comprehensive, is to discuss the place of the past (and memory) in law and the European constitutionalisation process in particular. The third, and perhaps implicit one, is to find the appropriate place that law (as a practice and a discipline) has in the legitimation process of European integration. As I shall try to argue in the limited space at my disposal, I am broadly sympathetic with what CJ has to say on the first two aims, but more ambivalent on how he conceives the third; though, in truth, CJ's own message regarding the place of law is itself rather ambivalent, at least in this paper. But to proceed with order, I shall first, telegraphically, express my qualified agreement with what he describes as deliberative supranationalism; I shall then, a bit more at length, argue that there are various senses in which we can take the question of dealing with the past and with one's own memories; and, finally, I shall, again briefly, raise some doubts on the centrality of law, though agreeing on CJ's emphasis on the conflict of disciplines as a legitimating model. To be sure, there is one thing on which I entirely agree with CJ, and that is that the place of the past in working out

Europe's future is a central question for making progress with the kind of analytical and normative tasks we set ourselves as part of our CIDEL research; namely, to understand where and how the European project can find its legitimacy.

I. What kind of constitutionalisation?

I agree with CJ that those who consider the EU as an exclusively intergovernmental or international organisation, or even as a form of regulatory state, even though they may have some valid empirical points to make regarding the nature and dynamics of the European integration process, fail to seen the full implications of what has been happening over the last few decades; providing no answer to the question of what kind of legitimacy is required in a postnational constellation. The recognition of this new state of affairs implies, on the one hand, the analytical task of observing how law, society and politics are transformed by the tension that postnational developments produce in the organisation of constitutional nation states; and, on the other, the normative question of how democratic legitimacy needs to be reconfigured (assuming, that is, that democratic legitimacy remains a necessary combination in present day politics). CJ's own answer (which is linked to his discussion of the importance of the past) is that, analytically, we can observe how, at all levels, national decisions increasingly produce externalities, which require new levels of co-ordination between nation states. The European integration process has been a way of addressing this problem. In the process, economic, social, and legal integration has transformed the operations and inner logic of law and politics. Normatively, this implies the recognition of the need for a procedural type of law aimed to regulate conflicts between different normative systems, rather than a normatively superior European law. This idea is similar to MacCormick's view of law beyond sovereignty, and to Weiler's idea of constitutional toleration (though I tend to disagree with the use of the latter category, for I find it misleading in relation to constitutional discourse and constitutional arrangements). In CJ's case, the mutual recognition between legal systems is named 'deliberative', I assume, because the processes of procedural regulation is conceived as having developed piecemeal and evolutionary through discoursive processes at legal and administrative levels, thus involving different agents and different levels of the legal system (though more through the development of private, rather than public law). My impression is that, in this sense, the use of 'deliberative' is overstretched, since in a proper sense it would imply more definite normative processes and the development of new spaces for public discussion and intercommunication between specialised publics; whereas instead power politics and system-led mechanisms seems to me still largely dominant in this process of supranational co-ordination. Indeed, 'supranational co-ordination', mainly operating through the interaction of legal and administrative systems, may better characterise what CJ is describing. However, I think I agree with two important aspects of his analysis. First, the constitutionalisation process in Europe has proceeded through a variety of avenues; second, the underlying imperative of European constitutionalism is to find a way of recognising diversity and of regulating normative conflicts without suppressing them. This recognition of diversity is an important systemic property in the development of the EU legal system, the more so than it was throughout the development of the national constitutional systems). Given the paramount importance of the relationship of mutual recognition between the different national legal and constitutional systems (and I would add: socio-political systems), the importance of their different pasts, and of how they have contributed to the formation and self-perception of their own systems is of fundamental relevance in order to establish a proper (and critical) relationship between them.

II. Past, what past?

This takes us to CJ's main subject: how to deal, in Europe and in the constitutionalisation process, with the past, with our historical memories, and with the 'bitter experiences' of Europe's past. I refrain here from dealing with the more substantive part of this question. CJ himself is posing the problem rather than offering a solution to it. He emphasises the necessity of 'coming to terms' with the European past, while noticing the reticence with which this has been done during the constitutionalisation process (and more generally, as part of the integration process). He offers some illustration of how the past affects some important decisions awaiting Europe, such as the social question. But understandably he refrains from outlining a substantive philosophy of the past or a politics of memory for the EU. This does not belittle his efforts. At this stage, showing the way is already an important contribution, something that entirely appropriate to the occasion of our discussion, since we are attempting to draw the conclusions from the work done for the CIDEL project during the last three year, while tentatively investigating new thematics for future research on the legitimacy of the European polity within the postnational constellation.

What I wish to suggest, however, is that to deal with the past as part of the constitutionalisation process means more than one thing and that, though this is evident from the many questions raised by CJ's paper, there is scope for a more analytical approach to the issue. I wish therefore to suggest that there are three specific senses that we need to take into consideration when 'dealing with' the past:

1. the past as it is embedded in our present predicament;
2. the past as it is used in the politics of public memory;
3. the past, finally, which we need to *confront* (that is, our attempt to come to terms with the 'bitter experiences' of the past).

Although it is true that these questions overlap to a considerable extent, I think that CJ's paper tends to subsume the former two under Adorno's theme of how to 'work through' the past (or, to put it in other intriguingly different ways: 'come to terms', or 'overcome', or 'learn from' the past). In fact, the theme of confronting the bitter experiences of the past is only a particular variant of the idea of the public use of memory (the second sense), and a more overt expression of the way in which we deal with the embeddedness of the past in the present (the first sense). Let me very briefly show the different kinds of problematics raised by these different ways of posing the problem of the past, and their relative relevance to the constitutionalisation process in Europe.

The question of the 'embedded past' is usefully illustrated by CJ's own discussion of Social Europe. In very simple terms the idea of an 'embedded past' means that, *to a large extent*, we – we as individuals and we as collectivities – are what the past has made us. Our institutions, our practices, our public languages can only be understood as the extension of forms of collective action and discourse from the present into the past, often projecting a long shadow over the *imagined* future of the community. They do not exist in an abstract single point in time. Thus, for instance, it is disingenuous to think that we can wish away the social question from the European agenda, as supporters of neo-liberal economic policies tend to do, in a situation in which the extension and deepening of a common market increases the likelihood of externalities from national social policies. This is true, amongst other reasons, because the formation of the social state was an important formative experience of the social and constitutional state in Europe. Moreover, as CJ notices, this formative experience came in

many guises, justified through different ideological and cultural discourses, and embodied in different institutional forms. The question of social Europe is one that is embedded in both the European past, and in European national pasts. When dealing with this sense of the 'embedded past' both kinds of embeddedness matter, taking us to the question of unity and diversity in Europe and whether this issue can be constitutionalised.

The second sense of dealing with the past is that of the 'public use of memory'. It should not be difficult to see how the problems involved by the politics of memory differ from those discussed under the embeddedness of the past. Most obviously, a politics of memory was part and parcel of the discussions over the EU Constitution – what should be included in the Preamble, and whether explicit mentions of God and the Christian religion were appropriate. More generally, the question of the European identity, of the need for and nature of constitutional patriotism (in either its thick or thin version), of the forms and practices of remembrance, self-identification and celebration, are all issues that are greatly concerned with the public use of memory. The importance of the politics of memory has indeed increased in times of identity politics, but, at the same time, as it has been suggested, there is the danger that such a politics of memory will contribute to the reification of cultural and ethnic identities and stifle both intercultural dialogue and democratic politics. So, though it is important to be fully cognisant of the important place that the public use of memory has in the political community, one should carefully consider the dangers that such a use carries with it. One may wonder, for instance, whether it was wise to engage in the kind of political operation involved by the drafting of the Preamble of the constitution, at this time and in the form in which it was attempted.

The third sense of 'dealing with the past' is clearly an extension of the public use of memory. Dealing with 'bitter experiences' is a special case of the way in which we pose ourselves in relation to the past. I cannot here dwell on the more philosophical aspects of this problem, on the kind of things that such a 'laborious' process may imply, and on how it may work individually and/or collectively. I only wish to notice the fact that in most cases, political identity tends to be based on more positive and celebratory aspects of one's past, or in the case of tragedies, what seems relevant is the resilience of the people and their struggle against adversities. This upbeat message is particularly striking if one thinks of American constitutional patriotism and of its many expressions. It is, however, understandable how confronting the 'bitter experiences' of the past may have become an important – though somehow contested – theme of German self-identification with the post-war constitutional regime (in the Italian post-war constitutional experience, the sense of guilt in relation to the Fascists past was partly avoided by identifying the new regime with the nation as an expression of the forces of Resistance, which had fought against Fascism and the German occupying army after 1943). Naturally, the German experience is not unique, and there are echoes and variants of confronting and working through 'bitter experiences' as a way of establishing a political identity in other constitutional experiences, such as those of South Africa, or some of the East European and Latin American democracies – though most of the cases resemble more the Italian, rather than the German case. Although it is particularly difficult to devise a public pedagogy for confronting 'bitter experiences' of which many individuals (or indeed, the entire community, when those experiences are far away in the past) are not responsible; I think there is something to be said about a political identity that is as much versed in self-critical as in self-celebratory exercises. Indeed, the inability of the United States to 'work through' the historical episode of slavery and the protracted, and for certain aspects still relevant phase of social segregation, may have something to do with the persistently optimistic tenure of the American politics of memory. Europe, on its part, has

ample ground to be attentive to both celebratory and self-critical uses of public memory. I am not sure whether, as CJ says, Europe can cultivate a 'vocation' for a 'humble self-portrait', but in fact, this is something that we would be wise to try to pursue strenuously, also in view of some of our colonian past and the increasing multicultural nature of our society.

III. The law and the conflict of disciplines

One final word on the place of law in all this. In discussing the importance of bringin history back in, CJ also speaks of the 'fragility' of constitutions and the 'non-legal conditions of legal ordering'. This leads me to two further reflections. One is that what he says about the relationship between history and law should be extended to other fields. So that history and memory have a part to play in all other institutional mechanisms through which society is organised. The other is that law on its own cannot be considered as the eminent site for legitimacy even within the postnational constellation. In this sense, The idea and method of the conflict of disciplines needs extending beyond the legal sphere, and need to involve a continuous discourse and reciprocal criticism between the different areas of practical knowledge that comprise modern society, so that the citizens can acquire adequate self-knowledge and exercise some control over the mechanisms of power and social control that order their lives. The conflict of discipline requires no less than this.