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**“Darker Legacies of Law in Europe”:  
The Florence Project Revisited.  
Accomplishments, Failings, Lessons**

Christian Joerges



European University Institute  
**Department of Law**

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## Abstract

This paper is in essential respects a restatement. It summarises research activities initiated at the EUI more than two decades ago. The best known outcome of this initiative was a collective publication edited by the author in cooperation with Navraj S. Ghaleigh, at the time an EUI researcher;\* further workshops and publications started to address issue which have now been taken up systematically and in much more depth by the Czech-German-Polish-Hungarian project "Towards Illiberal Constitutionalism in East Central Europe". This project investigates the rise of illiberal concepts and practices in Central and Eastern Europe.\*\* The present paper is the keynote to the conference in Jena on 2-3 December 2022 on "Revisiting the Dark Legacies of Illiberalism. Varieties of Constitutionalism and Legal-Political Practices in Post-Authoritarian Europe". There are, the considerable time span notwithstanding, many affinities between the agenda of these projects and communalities between issues they explore. Among these are the ongoing impact of authoritarian traditions after political transformations as well as the difficulties and temptations of memory politics both within and between national societies. Taking into account the diversity of national histories and ideational traditions, the paper outlines in its concluding sections constitutional perspectives which seek to realise the "united in diversity" motto of the Draft Constitutional Treaty of 2004.

## Keywords

Continuities and discontinuities; ideational traditions; memory politics; united in diversity; conflicts-law constitutionalism

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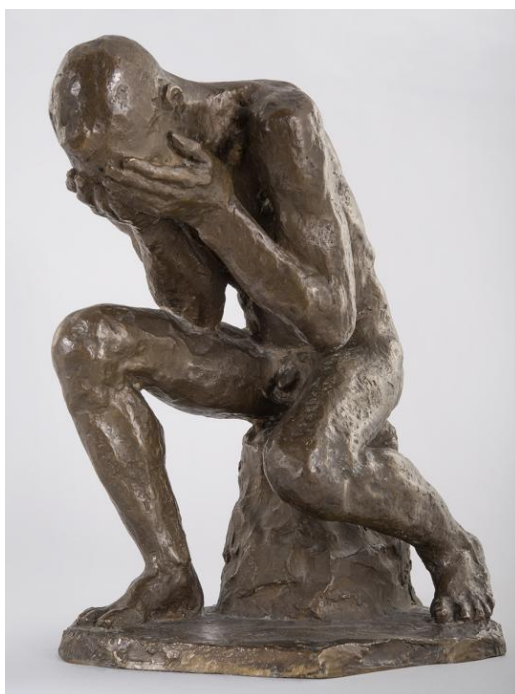
\* Christian Joerges and Navraj S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (with a Prologue by Michael Stolleis and an Epilogue by JHH Weiler), Oxford, Hart Publishing 2003 (cited DL in all further references). A precursor to my contribution is available as EUI Working Paper 2002/02: "Europe a *Großraum*? Rupture, Continuity and Re-Configuration in the Legal Conceptualisation of the Integration Project", with a comment by Neil Walker entitled "Putting the European House in Order: From *Großraum* to Condominium" Working Paper, EUI LAW, 2002/02, 3-33 and 66-80 respectively (Cadmus permanent link: <http://hdl.handle.net/1814/180>).

\*\* The Volkswagen Foundation is supporting this project within the framework of its funding programme "Challenges for Europe" over the next four years; see for some details <https://portal.volkswagenstiftung.de/search/projectDetails.do?siteLanguage=en&ref=9B052>



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Georg Kolbe, *The Liberated*, 1946 (photo by Markus Hilbich)

## I. Introduction: The Conceptual Background

Here is how I will proceed. I will first outline the conceptual background of my re-construction. This I will do through four citations, the first from a philosopher, the second from constitutional theorist, the third from a historian, and the fourth from a master thinker with a somewhat elusive academic profile. This re-construction is by no means an explanation of our premises when we started to explore “The Shadow of National Socialism and Fascism over Europe and its Legal Traditions”. It is instead a reflection on what I have learned. I will take up these four conceptual corner-stones when I outline the perspectives for an escape from the burdens of our past. Here are my four attestors:

- (1) The philosopher is, unsurprisingly so, Jürgen Habermas. In the course of the famous *Historikerstreit* of the mid-1980s on the singularity of the Holocaust with Ernst Nolte as his main opponent, Habermas has reminded us: “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”.<sup>1</sup> This was not meant to excuse the perpetrators. From what Habermas submitted there follows, instead, a “duty to remember”<sup>2</sup> and to face what Bernhard Schlink has called later Germany’s “*Vergangenheitsschuld*”.<sup>3</sup>
- (2) My second attestor is the constitutional theorist Ernst-Wolfgang Böckenförde, a professing Schmittian, who, from 1983 to 1996, was a judge at the German Constitutional Court. His oeuvre is enormous, but one sentence has become a trademark: “*Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann*” (Secularised democracies live on normative resources, which they cannot generate themselves).<sup>4</sup> As with the cite from Habermas, one has to be aware that Böckenförde’s dictum was not meant to release us from our responsibilities.<sup>5</sup> We could replace or complement it by an earlier dictum of the philosopher Ernst Cassirer: all-important is the “constitution that is written in the citizens’ minds”.<sup>6</sup>

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<sup>1</sup> Jürgen Habermas, “On the Public Use of History”, in *id.*, *The New Conservatism*, Cambridge, MA: MIT Press, 1990, 229-240, at 233.

<sup>2</sup> Pablo de Greiff, “The Duty to Remember: The Dead Weight of the Past, or the Weight of the Dead of the Past?”, typescript, Princeton, NJ, 2002, on file with the author.

<sup>3</sup> Bernhard Schlink, *Vergangenheitsschuld und gegenwärtiges Recht*, Frankfurt a.M.: Suhrkamp, 2002.

<sup>4</sup> Ernst-Wolfgang Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation”, in *id.*, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt a.M.: Suhrkamp, 1975, 42-64.

<sup>5</sup> At the time – 1964 – the Catholic Böckenförde was concerned with the readiness or hesitancy of so many of his fellow believers to identify with Germany’s young democracy; see Jan-Werner Müller: Was hält Demokratien zusammen?, *Neue Züricher Zeitung*, 26 August 2017.

<sup>6</sup> Ernst Cassirer, *The Myth of the State*, New Haven: Yale University Press, 1946, 91; cited after Vivian Grosswald-Curran, “Law’s Past and Europe’s Future”, *German Law Journal* 06 No. 02 (2005), 483-512 at 485.



- (3) Thirdly, I will consider the importance of Europe’s darker legacies for the project of European integration. Hence, a warning from the Historian Tony Judt, which he published in the wake of the Treaty of Maastricht with its establishment of the Economic and Monetary Union: “Melding the economies of countries as different as Austria and Britain, France and Portugal, Sweden and Greece (not to mention Poland or Hungary) is both impossible and unwise: Contrasting social and economic practices are born of longstanding political and cultural differences that cannot be obliterated with the wave of a magic monetary wand.”<sup>7</sup>
- (4) My fourth attestor has an elusive disciplinary identity: Anthropology? Economic History? Political Economy? Economic sociology? The last label fits best<sup>8</sup> for a characterisation of the *opus magnum* of the Hungarian/Austrian emigrant Karl Polanyi. Polanyi considered, in the concluding chapter of his *Great Transformation* of 1944,<sup>9</sup> that, in post-war Europe, “governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious ... dogma of the necessary uniformity of domestic regimes”. He continued: “Out of the ruins of the Old-World economic collaboration” should emerge as the cornerstones of a new transnational order.<sup>10</sup>

All four citations are meant to provide signposts for an evaluation of the Florence activities. They provide lasting orientations. In particular, the third and the fourth statements should be taken into account in deliberations about the future of the European project.<sup>11</sup>

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<sup>7</sup> “Continental Rift”, Op-Ed in the New York Times, 5 June 1997. Historians can err; at times, however, they are more insightful than even such renowned lawyers as Joseph H.H. Weiler, who opined: “Maastricht, in the 1990s, introduced the most important material development, EMU. Architecturally, the combination of a ‘confederal’ institutional arrangement and a ‘federal’ legal arrangement seemed for a time to mark Europe’s *Sonderweg* – its special way and identity. It appeared to *enable* Europe to square a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time—and in contrast with the experience of all such federations—powerful, some would argue strengthened (footnote omitted), Member States.” J.H.H. Weiler, “Federalism and Constitutionalism: Europe’s *Sonderweg*”, *Jean Monnet Program Working Paper* 10/2000, 4, available at: <https://jeanmonnetprogram.org/archive/papers/00/001001.html>.

<sup>8</sup> See Jens J Beckert, “The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology”, *MPfG Discussion Paper* 2007/1; Sabine Frerichs, “Karl Polanyi and the Law of Market Society”, 44 *Österreichische Zeitschrift für Soziologie* (2019), 197-208, available at: <https://doi.org/10.1007/s11614-019-00328-5>; id. “The law of market society: a sociology of international economic law and beyond”, 23 *Finnish Yearbook of International Law* (2012-2013) 173-237.

<sup>9</sup> First published with Farrar & Rinehart, 1944 (originally titled *The Origins of Our Time*), then as a paperback with Beacon Press, Boston, 1957; references in the text go to the 2nd ed. 1961 with a Foreword by Joseph Stiglitz and an Introduction by Fred Block; this 2nd edition is online available at: [https://inctpped.ie.ufrj.br/spiderweb/pdf\\_4/Great\\_Transformation.pdf](https://inctpped.ie.ufrj.br/spiderweb/pdf_4/Great_Transformation.pdf).

<sup>10</sup> The full citation reads: “... with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy, and the liberty to organize national life at will.” *The Great Transformation*, n. 9, 253-254.

<sup>11</sup> See Section IV below.

## II. The Florence Project of 1998 ff.

The Florence project experienced a very remarkable degree of attention and feedback. It seems worthwhile, however, to evaluate these responses against the background of a difficult beginning – and their underlying reasons - because these have not vanished into thin air.

### *A Difficult Beginning*

I will address and speculate about these reasons only after some story-telling and personal remembrances. From 1987 onwards, I had been - for a good number of years - a part-time professor at the EUI. I thought I knew the place well, when, in 1998, I became a full-time professor; I had eight years ahead of me with splendid research conditions and excellent students – a great opportunity to embark upon a project that had since long been on my mind. It so happened that one of my new colleagues, Massimo La Torre from Bologna, had - a decade earlier - defended his Ph.D. thesis on “*Diritto e ideologia: Karl Larenz e la dottrina giuridica nazional socialista*”.<sup>12</sup> The two of us realised that we shared similar concerns. A descendant of Nazi Germany and a descendant of Fascist Italy joining forces in a project on “The National Socialist and Fascist Heritage of Legal Thought in Europe” – this theme suggested itself as an attractive denominator for a common endeavour. We were very confident about the prospects of being funded when we submitted an outline of our project to the Research Council of the European University Institute at its 1998 meeting. The Council reacted with strong indignation. This reaction was noted not only within the walls of the beautiful *Badia Fiesolana* but even far away in the *Berlaymont* in Brussels. After my unfortunate defence of the project before the Council, I was given the chance to re-consider and clarify our objectives. I modified the heading of our application to the title you know. We were then granted 1.500.000 Lira (some € 800).<sup>13</sup> for our further activities. This was irritating. Our German-Italian initiative was meant to address the *Vergangenheitschuld* of our countries. We realised that the EUI Research Council felt – quite understandably so – that, implicit in our submission, was the insinuation that elements of the dark traditions of our countries had, in some way, infected the European project, and that we were about to explore the presence of this past in post-war Europe. “You are damaging the dignity of the integration project. Do this kind of research in Germany where it belongs”, I was told by Jean-Claude Piris, at the time a high-ranking EU official, and, in that capacity, Member of the EUI Research Council.<sup>14</sup> This was indeed the crux of the matter. Michael Stolleis, the most renowned among Germany’s legal historians studying the Nazi past,<sup>15</sup> later reminded us: you have transformed the German

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<sup>12</sup> Available at: <http://hdl.handle.net/1814/4683> published in various languages: *Der Kampf gegen das subjektive Recht, La lucha contra el derecho subjetivo* [The Fight against Subjective Rights]. Madrid: Dykinson, 2009); “Karl Larenz and the national socialist theory of contract”, 30 *Rechtstheorie* 1999, 179-226; “Der Kampf wider das subjektive Recht — Karl Larenz und die nationalsozialistische Rechtslehre”, 23 *Rechtstheorie* 1992, 355-395.

<sup>13</sup> It may have been twice as much, hence some €1.500. This did not matter. I had funds to subsidise the Darker Legacies conference of September 2000 out of the budget of a private law project and we profited from the readiness of many invitees to participate without compensation for their expenses.

<sup>14</sup> “Christian Joerges and his Nazis”, this comment from a colleague from the EUI Law Department on one of our workshops, said precisely the same.

<sup>15</sup> See his *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 3: Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945, Munich: C.H. Beck, 1999.

guilt into a pan-European problem.<sup>16</sup> The so often repeated narrative of European integration as a triumph over Nazism, Fascism, and Europe's bellicose past is certainly understandable. The harsh reactions which we provoked<sup>17</sup> were, nevertheless, not well informed – to put it mildly. Not only Germany's Weimar Republic and Italy but likewise Austria, Greece, Hungary Poland, Portugal, and Spain had experienced the rise of rightist movements and the establishment of anti-liberal, totalitarian, and undemocratic systems of governance; Mark Mazower had re-constructed Europe's pre-war and its more recent history;<sup>18</sup> Alan Milward's classic had turned the story of the European transformation of the nation state system upside down,<sup>19</sup> Anti-Semitism was on its way back,<sup>20</sup> and the legitimacy of the EU system was questioned widely.<sup>21</sup>

## **A Second Shock**

In the year 2000, the Volkswagen foundation had launched a funding initiative "*Einheit in der Vielfalt? Grundlagen und Voraussetzungen eines erweiterten Europas*", inviting interdisciplinary research on "die Vielfalt und Heterogenität dieses Kulturraums mit seinen Bezügen und Verbindungen zum übrigen Europa (thereby exploring ) die Grundlagen und Voraussetzungen für ein nach Osten erweitertes Europa" (the first words of the lengthy title in new Latin: "United in Diversity? Foundations and pre-requisites of an enlarged Europe." Our "Darker Legacies" conference of the same year and the subsequent publication of our proceedings in 2003<sup>22</sup> had been widely noticed.<sup>23</sup> Most of the EUI researchers who had participated in the project since 1999 continued with the seminar series after the conference. The CEE countries were not yet well represented, but among the participating EUI researchers was a certain Paul Blokker, among the colleagues from the Law Departments Wojciech

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<sup>16</sup> See Dieter Gosewinkel, "Antiliberales Europa – eine andere Integrationsgeschichte", *Zeithistorische Forschungen* 9 (2012), 351-364.

<sup>17</sup> See Section I.1 above and the report of Luca di Preso, "The Darker Legacies of Law in Europe: Remembering the dark past to write a brighter future", *EUI Review* 2005/06, 12-13, available at: <https://www.eui.eu/Documents/ServicesAdmin/CommunicationsService/CorporatePublications/EUIPublications/EUIReview/EUIRevWinter0506Web.pdf>.

<sup>18</sup> Mark Mazower, *Dark Continent. Europe's Twentieth Century*, New York: Vintage Books, 1998.

<sup>19</sup> *The European Rescue of the Nation State*, London: Taylor & Francis 1992, 2nd ed., London: Routledge 1999.

<sup>20</sup> See, e.g., the reports collected by Rias-Berlin at: [https://de.wikipedia.org/wiki/Recherche\\_und\\_Informationstelle\\_Antisemitismus](https://de.wikipedia.org/wiki/Recherche_und_Informationstelle_Antisemitismus), and, in much more detail, the yearbooks of the Institute for *Antisemitismusforschung* from 1992 onwards, all available at: [https://de.wikipedia.org/wiki/Recherche\\_und\\_Informationstelle\\_Antisemitismus](https://de.wikipedia.org/wiki/Recherche_und_Informationstelle_Antisemitismus).

<sup>21</sup> See nn. 18.21 and the not so much noted example of Sonja Puntscher-Riekmann, *Die kommissarische Neuordnung Europas. Das Dispositiv der Integration*, Wien/Vienna-New York: Springer Verlag, 1998.

<sup>22</sup> Christian Joerges and Navraj S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Oxford: Hart Publishing, 2003, cited DL in all further references.

<sup>23</sup> See the Special Issue of the *German Law Journal*, "European Integration in the Shadow of its Pasts. The 'Darker Legacies of Law in Europe' Revisited", *German Law Journal* 7 No.2 (2006), 71-154 (Guest Editor Daniel Augenstein) with a collection of 25 reviews; for references to these reviews see section II below).

Sadurski, and sympathising guests such as Andras Sajó, Andrea Pető, Martti Koskenniemi, John P. McCormick, Bernhard Schlink, and Jan T. Gross. In hindsight, this list still looks simply stunning. When we became aware of the Volkswagen initiative, we thought we should embrace this opportunity. It was not difficult to ensure support among participants of the EUI conference or to recruit new collaborators. The draft application for a study of “Europe in the Shadow of its Past” with which we contacted the Volkswagen Foundation was well received there/. We continued our work and, in 2004, submitted our 50 page long application with no less than 25 participants from all over Europe.<sup>24</sup> One year later during a visit to the Hauser Law School at NYU, New York, I was informed by the Foundation that the application could not be approved. I should add that the critique of our submission as overly broad in its scope and a lack of coherence of the many envisaged topics was understandable. I felt dispirited and decided not to take up the invitation by the Foundation to try again.

Even after our ill-fated application, the Darker Legacies project remained quite prolific. A panel at the 13th Biannual Conference of the Council for European Studies in Chicago in 2002 continued with a discussion of “Anti-liberal Traditions in European Social Theory and Legal Thought”.<sup>25</sup> A significant follow-up was an EUI workshop in 2004 entitled “Confronting Memories: European ‘Bitter Experiences’ and the Constitutionalisation Process: Constructing Europe in the Shadow of its Pasts”.<sup>26</sup> This workshop had a strong CEE imprint. The contributors from Eastern Europe were *Andrea Pető* and Andras Sajó. Paul Blokker contributed an essay on “Populist Nationalism, Anti-Europeanism, Post-nationalism, and the East-West Distinction”.<sup>27</sup>

It seemed to make sense to conclude the project with a conference in Germany, with Berlin as its new capital. This took place in October 2008 with the support of the European Commission, the Heinrich-Böll-Foundation and the EUI. The venue of the opening session was spectacular; among the participants there were very prominent figures; the conference proceedings were published in 2008.<sup>28</sup> The resonance to this book remained marginal. With our use of German

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<sup>24</sup> “Europa im Schatten seiner Vergangenheit(en)/The Shadows of the Past(s) over the Construction of Europe” was our final title. Co-applicants were the lawyer Dieter Grimm (Berlin) and the political scientist Beate Kohler-Koch (Mannheim). Participants included Paul Blokker, Patricia Chiantera-Stutte, Ulrich Haltern, Thorsten Keiser, Fabrice Larat, Matthias Mahlmann, Stefan Seidendorf.

<sup>25</sup> Papers given in Chicago and further pertinent contributions by project participants (Matthias Mahlmann, David Fraser, Thomas Mertens, Christian Joerges, Vivian Grosswald-Curran, Patricia Chiantera-Stutte) were published with Christian Joerges as guest editor in a Special Issue of *Law and Critique* 14 (2003) 225-353.

<sup>26</sup> The proceedings were published in a Special Issue of the *German Law Journal* 7 02 (2005), 245-512 with Paul Blokker and Christian Joerges as guest editors.

<sup>27</sup> *Ibid.*, 37, available at: <https://www.unibo.it/sitoweb/paulus.blokker/publications2-289>; he has not left this *suje*t ever since; see <https://www.unibo.it/sitoweb/paulus.blokker/publications>.

<sup>28</sup> Christian Joerges, Matthias Mahlmann and Ulrich K. Preuß, “Schmerzliche Erfahrungen” der Vergangenheit und der Prozess der Konstitutionalisierung Europas – Rechts-, Geschichts- und Politikwissenschaftliche Beiträge – , Wiesbaden: Verlag für Sozialwissenschaften, 2008.

in the conference and the publication of its proceedings, we had apparently taken the advice and admonition to "do this kind of research in Germany, where it belongs"<sup>29</sup> too seriously.<sup>30</sup>

### III. The Florence Project Revisited

I will spare you further anecdotes and continue, instead, with a substantive review. What we undertook was an explorative exercise. Both the organisers and the participants shared an uneasiness with the unconditional praise of the integration project and process, and likewise with the "political culture of total optimism"<sup>31</sup> about its past and future. There was no way to engage with outside participants in the elaboration of a conceptual framework for our proceedings. It is at least with some benefit of hindsight possible to identify the main concerns shared by the organisers conference participants. This basis and background has been alluded to above in the references to the four master thinkers: (1) the historical memory of Europe's legal scholarship is under-developed and all too euphemistic; (2) we have to care about the normative resources upon which the integration project depends; (3) we have to take into account the cultural and political diversity of Europe's polities, refrain from the imposition of uniformity, and consider what kind of unity might nevertheless be envisaged; and (4) we have to be aware of the social and political embeddedness of "the economic".

The presence of these four explicit and/or implicit concerns should become apparent in the following re-construction of the three core issues addressed during the Florence conference and in the publication of its later publication of its proceedings, namely, the continuity/discontinuity dichotomy (II.1), the unfortunate impact of memory politics (II.2), the fortunate "United in Diversity" motto of the Constitutional Treaty (II.3), which will be read as a gate-opener to a revised understanding of the constitutional framing of the integration process and project (III.)<sup>32</sup> This latter exercise will - necessarily - be biased towards personal conceptual preferences and perspectives.<sup>33</sup>

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<sup>29</sup> See n. 14 above.

<sup>30</sup> For a very brief review see Tamara Ehs at [https://www.pw-portal.de/themen/schmerzliche-erfahrungen-der-vergangenheit-und-der-prozess-der-konstitutionalisierung-europas\\_32491](https://www.pw-portal.de/themen/schmerzliche-erfahrungen-der-vergangenheit-und-der-prozess-der-konstitutionalisierung-europas_32491). I was grateful for the invitation to publish my contribution in English: "Working through 'Bitter Experiences' towards a Purified European Identity? A Critique of the Disregard for History in European Constitutional Theory and Practice", in Ruth Buchanan and Peer Zumbansen (eds.), *Law in Transition: Human Rights, Development and Transitional Justice*, Oxford: Hart Publishing, 2014, pp. 269-287 & 269-287.

<sup>31</sup> Giandomenico Majone coined this epigram after decades of constructive promotion of the integration process in his *Rethinking the Union of Europe Post-Crisis. Has Integration Gone too Far?*, Cambridge: Cambridge University Press 2014, Chapter 2, pp. 58-87, see, also, his EUI Working Paper Law 10/2014 on "The Deeper Euro-Crisis or: The Collapse of the EU Political Culture of Total Optimism EU Political Culture of Total Optimism".

<sup>32</sup> References to contributions to the Darker Legacies volume (DL) go to the author and the page number of his or Vivian Curran Grosswald's contribution – the gender bias in the DL volume is scandalous. References to the reviews collected by Daniel Augenstein (n. 22 above) name the author, the addressed essay and the page number of his or her review in the German Law Journal (GLJ).

<sup>33</sup> See Section IV below. The preceding remarks are not meant to rebut the critique of the DL for its lack of thematic unity and overly broad scope (see the summarizing account of the pertinent observations by Daniel Augenstein, "Introduction: The reluctance to 'glance in the mirror': 'Darker Legacies of Law in Europe' revisited", GLJ 7 No. 2 at 79).

## **Continuities and/or Discontinuities**

“Why set out to unravel the possible continuities between (one of) Europe’s darker legacies and its ‘brighter’ future, given that the European project was initiated as a reaction to and remedy against Nazi Germany and constituted, post-war, a pre-condition for its sovereignty and a symbol of its moral renewal?” Daniel Augenstein’s opening of his Introduction to the collection of book reviews in the Special Issue of the *German Law Journal*<sup>34</sup> captures well the queries with which we had to deal. As just underlined,<sup>35</sup> we did not even try to impose a specific conceptual framework on the contributors. My own contribution built on earlier work on the legitimacy *problématique* of European governance,<sup>36</sup> There I had quite extensively discussed two competing schools of thought, which defended the legitimacy of European governance beyond and above the democratic constitutionalism of the Member States. One was Hans Peter Ipsen’s conceptualisation of the European Communities as “purposive associations for functional integration”;<sup>37</sup> the other was the ordoliberal concept of economic constitutionalism (*Wirtschaftsverfassung*).<sup>38</sup> Both of them have left a strong long-term impact on European law and legal scholarship.<sup>39</sup>

Ordoliberalism had its origins in the Weimar Republic and the founding fathers of ordoliberalism had used tainted language, in particular in their 1936 manifesto.<sup>40</sup> Not just this text but the entire tradition has in recent years come under *siège*.<sup>41</sup> It is perceived and criticised

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<sup>34</sup> Introduction, n. 21 above.

<sup>35</sup> Section III, text before sub-section 1.

<sup>36</sup> See, e.g., Christian Joerges, “Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik”, in: Rudolf Wildenmann (ed.), *Staatswerdung Europas? Optionen einer Europäischen Union*, Baden-Baden: Nomos, 1991, pp. 225-268 (= EUI Working Paper No. 90/02, San Domenico di Fiesole, 1991), Translation: “The Market Without the State? States Without a Market? Two Essays on the Law of the European Economy”, available at: <http://eiop.or.at/eiop/pdf/1997-019.pdf>; thereafter id., “Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration”, *European Law Journal*, 2 (1996) 105-135.

<sup>37</sup> Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen: J.C.B. Mohr, 176 ff.

<sup>38</sup> See the references in “The Market without the State” (n. 35) at 33 ff.

<sup>39</sup> Ipsen’s functionalism has been most prominently defended by Giandomenico Majone, e.g., in his ‘The European Community. An “Independent Fourth Branch of Government”?’, in Gert Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, Baden-Baden: Nomos, 1994, pp. 23-42 [also available at: <https://cadmus.eui.eu/handle/1814/239>] and more recently evaluated by Turkuler Iskisel in her seminal study of *Europe’s Functional Constitution* (Oxford: OUP 2016, in particular Chapter 2, 57 ff.: the interest in the ordoliberal theory of economic constitutionalism is more recent but intense (see, recently, Guillaume Grégoire and Xavier Miny (eds.), *The Idea of Economic Constitution in Europe*, Leiden: Brill, 2022 (open access), available at: <https://brill.com/view/title/63005?language=en>).

<sup>40</sup> Walter Eucken, Franz Böhm and Hans Grossmann-Doerth, “Unsere Aufgabe. Begleitwort der Herausgeber zur Schriftenreihe ‘Ordnung der Wirtschaft’”, in Franz Böhm (ed.), *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Stuttgart/Berlin: Kohlhammer, 1937, VII-XXI; Translated in F. Böhm, “Rules of Law in a Market Economy”, in Alan Peacock and Hans Willgerodt (eds.) *Germany’s Social Market Economy: Origins and Evolution*, London: Macmillan, 1989, 46-67.

<sup>41</sup> See Josef Hien and Christian Joerges, “Ordoliberalism as an irritating German idea”, available at: <https://www.researchgate.net/publication/313657667>. An early voice in European legal scholarship to diagnose a

as openly or inherently being committed to Schmittian theorems, in particular his notions of the "strong state"<sup>42</sup> and the "comprehensive decision" (*Gesamtentscheidung*).<sup>43</sup> Does the use of these terms by Franz Böhm indicate an ideational consensus with Schmitt? Are there even pre-war and post-war ideational communalities and continuities? The short defence is that the ordoliberal project sought to tame politics through law and the commitment to market liberalism against discretionary political interventions, whereas Schmitt defended unregulated sovereign decision-making and the primacy of political leadership over the economic order.<sup>44</sup>

Hans Peter Ipsen's functionalism is a more complex case. The acceptance and support of *völkisch* legal thought in his habilitation thesis, *Politik und Justiz. Das Problem der justizlosen Hoheitsakte*,<sup>45</sup> are unmistakably - and painful.<sup>46</sup> His post-war commitment to the constitutional democracy of the Federal Republic, however, seems unmistakable.<sup>47</sup> Again, "Schmitt's work and career, like a spectre, haunts the study of European integration".<sup>48</sup> The challenge is Schmitt's duality of the "machine-specific realm of technology (*Technik*), which is 'dead', and

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"strong Schmittian flavour" in the foundational manifesto was Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Oxford: Hart Publishing, 2002, p. 26.

<sup>42</sup> Carl Schmitt, "Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern", *Volk und Reich* (1933), pp. 81-94; English translation in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism*, University of Wales Press, 1998, pp. 213-232.

<sup>43</sup> Franz Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, 120; he refers explicitly in his explanation of this term to Carl Schmitt, *Verfassungslehre*, München/Munich-Leipzig: Duncker & Humblot, 1928, 20 ff.

<sup>44</sup> Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*, New York: Columbia UP, 82; Guillaume Grégoire concludes in his thorough reconstruction of the early years of the ordoliberal tradition: "Franz Böhm carried out a real theoretical coup de force: he endorsed the conservative critique of the 'economic state', but subverted Schmitt's analysis to propose a truly liberal meaning of the concept of *Wirtschaftsverfassung*, where Böhm's reference to the Schmittian meaning of (political) 'constitution' and the concept of *Wirtschaftsverfassung* set the two notions against each other. This proves ultimately to be particularly subtle and astute. Böhm operated with Schmitt's concept, albeit against him" (Grégoire, "The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles", in id. and Xavier Miny, *The Idea of Economic Constitution in Europe: Genealogy and Overview*, Leiden: Brill Nijhoff, pp. 53-93, at 83 f.

<sup>45</sup> Hamburg: Hanseatische Verlagsanstalt, 1937.

<sup>46</sup> Pertinent references in Christian Joerges, "Europe a *Großraum*? Rupture, Continuity and Re-configuration in the Legal Conceptualisation of the Integration Project", *DL*, 167-192, n. 92 (pp. 182-184).

<sup>47</sup> See, e.g., Hans Peter Ipsen, "Über das Grundgesetz" (1950), reprinted in Ernst Forsthoff (ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968, 16-41.

<sup>48</sup> John. P. McCormick, "Carl Schmitt's Europe. Cultural, Imperial and Spatial Proposals for European Integration, 1923-1955", *DL*, pp. 133-141, at 141. Some reviewers have suggested that the book should have given more space to the discussion of Schmitt (see, e.g., Martin Loughlin, "The Constitution of Europe: the new *Kulturkampf*?", *GLJ*, 182-190) and missed thereby a chance to strengthen the coherence of the entire collection (see Julian Rivers, "Provocation and Springboard", *GLJ*, 221-226). These are valuable suggestions in view both of the Weimar sources of Schmitt's later allegiance with the Nazis and in view of the enormous attention he attracts *post mortem* until today, not least in the US (see Andrew Norris' "Review Essay: A Mine that Explodes Silently: Carl Schmitt in Weimar and After", *Political Theory* 33, 2005, 887-898). Schmitt is tellingly nearly omnipresent in the book – to such an extent, that the reconstruction of these comments would have required another book. The contribution by McCormick (see n. 48 above), which focuses exclusively on Schmitt met with wide acclaim).

the intellectual-spiritual (*geistige*) realm of technicity (*Technizität*), which is very much 'alive'.<sup>49</sup> In a fascinating comparative analysis,<sup>50</sup> which was rarely noticed until it was re-discovered by Peter M. Lindseth,<sup>51</sup> Schmitt argued that the division of legislative and executive powers increasingly gave way, especially in Germany, to a delegation of extensive normative powers to the executive, a change dictated by changes in the political, economic, and financial situation. The exercise of this type of authority could not be understood as purely technical. It represented the rise of "technicity".<sup>52</sup> Already in his plea for a "strong state",<sup>53</sup> Schmitt had delivered a strong polemic against all technocratic efforts that assume that they can decide "all issues according to technical and economic expert knowledge following supposedly purely substantive, purely technical and purely economic considerations".<sup>54</sup> Ipsen's functionalism does exactly this, Schmitt has argued in a post-war review of Ipsen's *Gemeinschaftsrecht*: reading this "1,000-page tome", Schmitt was "stricken with deep sorrow": the approach of European law, which "legalizes" a technocratic-functional administration of European associations, has no concept of a "legitimate political" project.<sup>55</sup>

Our findings may appear somewhat paradoxical. But the ordoliberal tradition as Ipsen's functionalism seeks to endorse the legitimacy of the integration project by concepts which are distinct from the widely shared notions of democratic constitutionalism. Both of them have been criticised for their assumed vicinity to Schmittian theorems. The paradox remains: the critique of the two German traditions that have impacted upon the integration project is mistaken; but this fortunate result does - by no means - resolve the legitimacy *problématique* of European governance.<sup>56</sup>

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<sup>49</sup> John P. McCormick, *Carl Schmitt's Critique of Liberalism. Against Politics as Technology*, Cambridge: CUP 1997, 44.

<sup>50</sup> Carl Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1936), 252-268.

<sup>51</sup> Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s", *Yale Law Journal*, 113 (2004), 1342-1415 at 1348 n. 50. See, thereafter id. *Power, War a Legitimacy. Reconciling Europe and the Nation-State*, Oxford: OUP, 2010, p. 63 ff., p. 74 ff.

<sup>52</sup> On this term, see John McCormick, *Carl Schmitt's Critique* (n. 49), 22 ff.; Gian-Giacomo Fusco and Michalis Zivanaris, "The Neutralisation of the Political. Carl Schmitt and the Depoliticisation of Europe", *Journal of Contemporary European Studies* 29 (2021), 1-16 at 4.

<sup>53</sup> N. 42 above.

<sup>54</sup> Carl Schmitt, "Die Wendung zum totalen Staat" (The Turn to the Total State) (1931), and reprinted in id., *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles, 1923-1939* (1940), quoted after the reprint with Dunker und Humblot, 1914, 146-153.

<sup>55</sup> Schmitt, "Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität", *Der Staat* 17 (1978), 321-339, at 335. A revealing case of "technicity" is/can be found in Ipsen's notion of "Reichsaußenverwaltung" discussed in Christian Joerges, "Europe a Großraum?", n. 46 above, at 181 f.

<sup>56</sup> See the insightful irony in the concluding observations of W. Tom Eijsbouts, "Historical-Legal Knowledge – and What to do With it", *GLJ*, 105-108, at 108 and Pietro Costa's discussion "of the relationship between continuity and discontinuity [as] a relationship that only the ideologues can suppose to describe by determining clear-cut and definite gaps, while the historians, and the jurists as historians of themselves, are aware that continuity and discontinuity, dramatic cleavages, and disguised legacies usually co-exist" (Pietro Costa, "Lawyers and the Vital



The continuity/discontinuity dichotomy is present throughout the entire volume. Joseph H.H. Weiler, in his Epilogue,<sup>57</sup> rightly points out that the dichotomy, as such, is under-specified. The meaning of legal theories, doctrines and methodologies is context specific. The jurisdictions and their political contexts should be considered just like disciplinary specifics, human genealogies and, last but not least, political and legal cultures.

Ordoliberalism as well as Carl Schmitt's and Hans Peter Ipsen's "Technicity" are topical examples. It is possible and instructive in both cases to identify what Joseph Weiler calls, in his Epilogue, "human genealogies".<sup>58</sup> In both cases and everywhere else, one must dig deeper. Particularly sensitive, in this respect, is Pietro Costas' review:<sup>59</sup> "[T]he hypothesis that the relationship between the twentieth century totalitarian regimes and the liberal and democratic traditions may be different from a mere antithesis, as our common sense tends to suppose."<sup>60</sup> He adds that "a further difficulty stems from the fact that the object of the analysis is not strictly homogeneous: fascist Italy, national socialistic Germany, Franco's Spain, and Dollfuss' Austria are different regimes"<sup>61</sup> – to which we will return in Section II.3.

### ***Memory Politics in the Integration Process***

During the "Confronting Memories" conference mentioned above,<sup>62</sup> András Sajó surprised the participants with unexpected news. Following a Polish initiative, the Preamble of the Constitutional Treaty had been amended by a passage which seemed very much on the same wavelength as our agenda. Integration, it now read, occurred "after bitter experiences".<sup>63</sup> This brief amendment contrasted with the usually utterly euphemistic Sunday-talks. In his contribution, Sajó focused on Hungarian failings, which, in his view, should "not be explained

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Relationship Between the Past and the Present", GLJ, 87-104, at 88). The lively dispute between James Q. Whitman, "On Nazi 'Honor' and the New European 'Dignity'", GL, 243-266, and Gerald L. Neuman, "On Fascist Honor and Human Dignity: A Skeptical Response", GL, 267-274, is concerned with exactly this issue and the dispute is to be re-considered in the light of James Q. Whitman's more recent, *Hitler's American Model: The United States and the Making of Nazi Race Law*, Princeton: Princeton University Press, 2017.

<sup>57</sup> DL, 369-402.

<sup>58</sup> Ibid. 397.

<sup>59</sup> N. 56.

<sup>60</sup> Ibid., 87; and, of course, "No one wants the taint of an association with the crimes of Nazism': (Sometimes) in search of the meaning of Nazi Law", Simon Lavis, *Holocaust Studies: A Journal of Culture and History*, 26 (2020), 108–122.

<sup>61</sup> Ibid., 88.

<sup>62</sup> N. 26.

<sup>63</sup> For the text, see OJ C 310/2004, 1 of 16 December 2004, also available at: <http://europeanconvention.eu.int>. For instructive analyses, see Fabrice Larat's contribution to the Confronting Memories workshop: "Presenting the Past: Political Narratives on European History and the Justification of EU Integration", GLJ 6 No.2 (2006), 273-290 and Armin von Bogdandy, "Europäische Verfassung und europäische Identität", *Juristen Zeitung* 59 ( 2004 ), 53-61, especially at 55 ff. — The Polish constitution reads: "Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland ..." The text is available at: <https://www.senat.gov.pl/en/about-the-senate/konstytucja/preamble>.

away by irresistible German pressure”.<sup>64</sup> European “*Entgiftungsarbeit*” after “*Aufarbeitung*” of past atrocities? The two German terms were coined by Theodor W. Adorno:<sup>65</sup> “*Entgiftungsarbeit*” can be translated as decontamination work. In his essay of 1959 on “Was bedeutet: *Aufarbeitung der Vergangenheit*”, Adorno took issue with what the Germans have called “*Vergangenheitsbewältigung*”.<sup>66</sup>

Could the Preamble have provided new orientation in the efforts to build bridges between the European past and Europe’s future? “Memory politics” is a viciously mined field. The legacy of the most obvious wrongdoer has to be addressed and can thereby be turned into an asset that can be exploited. And *vice versa*: such noble gestures as Sajó’s reference to Hungarian shame lend themselves to cheap rebuttals.<sup>67</sup> It is difficult to imagine that the work of the Constitutional Convention would have addressed such difficulties. It could, nevertheless, have done better. There is no mention or allusion in the Preamble, and the decision to adopt it, to the world wars, to the Holocaust and further “bitter experiences”; the “re-united” formula camouflages the burdens on the shoulders of “the peoples of Europe”. The memories of these peoples differ very significantly, whereas the text of the Preamble insinuates that “all of the pain, bitterness, and division themselves had been buried ... and even this scant reference disappeared in the Lisbon Treaty”.<sup>68</sup>

Memory politics is concerned with the recurrent *problématique* of all preceding deliberations. It would be naïve to assume that Europe’s diversities could be eliminated and political efforts; projects negating these conditions can generate destructive effects. Underlining these difficulties is anything but Eurosceptic. To cite Curran Grosswald again: “[T]he current culture of memory is not one that unites Europe, but one that separates it, with victims of opposing ideologies’ past abuses, excesses, and abominations competing with each other for recognition. Mutual recognition of the suffering of others is needed as a stepping stone for European integration”.<sup>69</sup>

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<sup>64</sup> András Sajó, “Legal Consequences of Past Collective Wrongdoing after Communism”, GLJ (2006) 6 No. 2, 425-437, at 426.

<sup>64</sup> András Sajó has elaborated on his concerns with Hungary’s perception of its own darker legacies in his contribution to the later Berlin conference of 2006: “Verhinderung der Vergangenheit: wehrhafte Demokratie in postdemokratischen Demokratien”, in Christian Joerges et al., *Schmerzliche Erfahrungen*, (n.28), 274-298, at 281-284.

<sup>65</sup> See Theodor W. Adorno, “Zum Gedächtnis Eichendorffs”, in: *Noten zur Literatur*, Vol. I 105 (1958).

<sup>66</sup> “The Meaning of Working through the Past”, in Theodor W. Adorno, *Critical Models*, New York: Columbia University Press 1998, 89-104; “*Aufarbeitung der Vergangenheit*” owes its meaning to his critique of the notion of “*Vergangenheitsbewältigung*”.

<sup>67</sup> See Claus Leggewie, “Equally Criminal? Totalitarian Experience and European Memory”, EUROZINE, 1 June 2006, available at: <https://www.eurozine.com/equally-criminal>.

<sup>68</sup> Vivian G. Curran, “History, Memory and Law”, *Roger Williams University Law Review* 16 (2011), 1000-109, at 106, available at: [http://docs.rwu.edu/rwu\\_LR/vol16/iss1/5](http://docs.rwu.edu/rwu_LR/vol16/iss1/5).

<sup>69</sup> Ibid at 107. In a similar vein, Carlos Closa, “Dealing with the Past: Memory and European Integration”, *Jean Monnet Working Paper* No. 1/11, available at SSRN: <https://ssrn.com/abstract=1972355>. Contributors to the follow-up to the “confronting Memories” workshop in the 2006 conference in Berlin (n. 28 above) have elaborated such perspectives; suffice it here to mention Konrad H. Jarausch, “Konfligierende Erinnerungen. Nationale Prägungen, Verständigungsversuche und europäische Geschichtsbilder”, in Christian Joerges et al., *Schmerzliche Erfahrungen*

## **United in Diversity**

Our initial submission to the EUI Research Council had dealt exclusively with Germany and Italy. Both countries deserve such attention.<sup>70</sup> Conference participants explained why the two are not alone. Alexander Somek added Austria,<sup>71</sup> Agustín José Menéndez dealt with Spain.<sup>72</sup> Constitutional transformations are accompanied by deep ideational transformations, institutional infrastructure, and societal changes. Vivian Grosswald Curran addressed the differences and communalities in the methodologies and substantive contents of the French and German jurisprudence,<sup>73</sup> Matthias Mahlmann, the entire body of legal theory,<sup>74</sup> private law and labour law, as discussed by Alessandro Somma, Giuseppe Monateri<sup>75</sup> and Luca Nogler.<sup>76</sup>

The inclusion of private law and labour law in the exploration of Europe's Darker Legacies is both unavoidable, in view of the attention that private law attracted post-1933, *and* worth underlining, in view of the post-war focus on public law in debates on the legitimacy of democratic governance in nation states and the "constitutionalisation" of European governance. Pier Giuseppe Monateri and Alessandro Somma, in their discussion of Nazi and Fascist theories of contract, underline that these pre-war theories were deeply anti-liberal.<sup>77</sup> They document this ideological commitment of numerous many other professors of private law scholars who continued their career in the Federal Republic.<sup>78</sup> The field of private law is of interest also because the preparatory work of the "*Akademie für Deutsches Recht*" for a new civil code ("*Volksgesetzbuch*") under Justus Wilhelm Hedemann, who was prominent in

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(n. 28 above), 15-25; Jan Werner Müller, "Thomas Manns Altraum? Potential und Paradoxien europäischer Erinnerungspolitik", *ibid.*, 231-240.

<sup>70</sup> See Massimo La Torre, "The German Impact on Fascist Public Law Doctrine – Costantino Mortati's Material Constitution", DL, 305-320; Giacinto Della Cananea, "Mortati and the Science of Public Law: A Comment on La Torre, DL, 321-336.

<sup>71</sup> Alexander Somek, "Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933-1938 and its Relevance to Constitutional Language in Europe", DL, 361-398.

<sup>72</sup> Agustín José Menéndez, "Shifting Dogma: From Republicanism to Fascist Ideology under the Early *Franquismo*", DL, 357-360.

<sup>73</sup> Vivian G. Curran, "Formalism and Anti-Formalism in French and German Judicial Methodology", DL 205-228.

<sup>74</sup> Matthias Mahlmann, "Judicial Methodology and Fascist and Nazi-Law", DL, 229-242.

<sup>75</sup> Pier Giuseppe Monateri and Alessandro Somma, "The Fascist Theory of Contract", DL, 55-70.

<sup>76</sup> Luca Nogler, "The Individual and the Collective in Labour Law: from Weimar to Maastricht", DL 275-304.

<sup>77</sup> N. 78.

<sup>78</sup> Of outstanding importance is Karl Larenz. —Massimo La Torre's PhD thesis on Larenz (see n. 11 above) had inspired the whole project. Larenz became despite his allegiance with the Nazi ideology a renowned legal theorist and highly influential private law scholar in the Federal Republic (see for the example of Larenz's work on standardized contract terms Christian Joerges, "History as Non- History: Divergencies and Time Lags between Friedrich Kessler and German Jurisprudence", *American Journal of Comparative Law* 42 (1994), 163-193; *id.*, "Demos vs. Ethnos in Private Law: Friedrich Kessler and His German Heritage", *Yale LJ* 104 (1995), 2137-2143.

German economic law long before 1933,<sup>79</sup> had a progressive touch.<sup>80</sup> The most irritating case is that of Franz Wieacker. How can an ardent protagonist of Germany's "legal renewal" (*Rechtserneuerung*)<sup>81</sup> transform into a transnationally-acclaimed legal historian?<sup>82</sup>

Franz Wieacker was not alone. The "*völkische Rechtserneuerung*" had its protagonists in all legal disciplines. Equally troubling, a good proportion of them excelled in their careers in the Federal Republic. Politically even more troubling, the Nazi regime and ideology had taken over the entire fields of public services, infiltrated the judiciary and likewise the economy. "Do this kind of research in Germany!"<sup>83</sup> To be sure, Germany provided the worst-case scenario. Karl Polanyi, however, knew more: The *Great Transformation* of formerly liberal orders was a pan-European phenomenon. European states and societies have reasons to explore their respective pasts. However, to become academically sound and politically meaningful, such explorations have to take the different shades of grey in the memories of European societies and their memory politics into account. What are the implications and lessons to be learned from the omnipresence of the diversity *problématique*? Is the integration project destined to promote the uniformity of economy and society in the European space? "United in Diversity", the motto of the ill-fated Constitutional Treaty is a more prudent announcement.<sup>84</sup> It can, however, not be understood as a recipe. How, then, can we make sense out of it? The following section seeks to respond to this query. This response operates in my own discipline and the perspectives it outlines are my own

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<sup>79</sup> See Heinz Mohnhaupt, "Justus Wilhelm Hedemann als Rechtsdenker und Zivilrechtler vor und während der Epoche des Nationalsozialismus", in Michael Stolleis and Dieter Simon (eds.), *Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin*, Tübingen: Mohr, 1989, 107-159, 156, 259; Mathias Schmoeckel, *Die Großraumtheorie. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit*, Berlin: Duncker & Humblot, 1994, 225.

<sup>80</sup> As noted with some surprise by Gert Brüggemeier, Brüggemeier, "Oberstes Gesetz ist das Wohl des deutschen Volkes. Das Projekt des 'Volksgesetzbuches'", 45 *Juristenzeitung* (1990), 24-28.

<sup>81</sup> See Tomasz Giaro, "A Matter of Pure Conscience? Franz Wieacker and his Conceptual Change", *Studia Iuridica* 82 (2019), 9-28; Thorsten Keiser, *Eigentumsrecht in Nationalsozialismus und Fascismo*, Tübingen: Mohr Siebeck 2005, both with many references. See, recently, Katharina I. Schmidt, "'The Law that we Feel Living within Us': German Jurists and the Search for 'Life' in Modern Legal Science, 1900-1946", Ph.D. Thesis Princeton, NJ 2021, Chapter V.

<sup>82</sup> A History of Private Law in Europe with Particular Reference to Germany, Oxford: Clarendon Press, 1995; equally irritating, however, this *Privatrechtsgeschichte der Neuzeit* glosses over the Nazi period as if it were en quelque façon nul.

<sup>83</sup> N. 14 above.

<sup>84</sup> Article I-8 Draft Constitutional Treaty, OJ C 310 of 16.12.2004.

## **IV. Perspectives and Synthesis**

### **Conceptual Framework**

The conceptual basis and framing of my suggestions was outlined in the introduction. I rephrase my reading of the four master thinkers cited there, the first a philosopher, the second a constitutional theorist, the third a historian, and the fourth an economic sociologist.

- (1) The philosopher Habermas: we have to examine critically our political and ideational pasts; we will thereby encounter much diversity with lasting impact.
- (2) The constitutional theorist Böckenförde: secularised democracies live on normative resources which they cannot generate themselves). Can the integration project develop the normative resources on which it functions as a democratic polity?
- (3) The historian Tony Judt: socio-economic diversity is here to stay. The common currency will not operate as a magic wand through which these varieties become meaningless.
- (4) The economic sociologist Karl Polanyi: in post-war Europe, "governments will be prepared to tolerate willingly how other nations shape their domestic institutions"; "economic collaboration" should emerge as the cornerstone of a new transnational order.

The four master thinkers are by no means Eurosceptics. Their views comprise "facts and norms". Factual diversity is not a bad thing in itself. Imposing uniformity is undemocratic. To put it slightly differently: "Short of meaningful democratic legitimacy, [integration] is not self-sustainable."<sup>85</sup>

### **Democracy Enhancing Conflicts Law**

How can European law and policy comply with these requests? My suggestions will comprise three rapid steps. The first invokes the legacy of Karl Polanyi, who has recently experienced an amazing renaissance in various disciplines.<sup>86</sup> The second summarises the foundational ideas of "deliberative supranationalism" which I started to develop 25 years ago in co-operation with political scientist Jürgen Neyer.<sup>87</sup> The third proceeds from "deliberative supranationalism" to the promotion of transnational democratic governance.<sup>88</sup>

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<sup>85</sup> Pedro Gustavo Teixeira: "The Legal History of the European Banking Union: How European Law Led to the Supranational Integration of the Single Financial Market, Oxford: Hart Publishing, 2020, at 295.

<sup>86</sup> Noted, e.g., by Jens Beckert, "The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology", (2007) *MPIfG Discussion Paper 07/1*, at 7 and many more since then.

<sup>87</sup> The concept has been first submitted by Christian Joerges and Joerges Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", *European Law Journal* 3 (1997), 273-299.

<sup>88</sup> A follow-up to Christian Joerges, "Responding to Socioeconomic Diversity in the European Union (and to Steven Klein's Essay) with Democracy-Enhancing Conflicts Law", *Global Perspectives* (2021) 2 (1): 18788 available at:

Polanyi first:

Three insights of his economic sociology deserve to be underlined here. The first: the capitalist market economy requires an institutional backing and continuous political management. The second: since economies are man-made polities, they will exhibit varieties which mirror a variety of political preferences, historical experiences, and socio-economic configurations. This is what we must expect - and should respect! - once our societies have gained the "liberty to organise national life at will". The third point: Polanyi predicts and advocates "collaboration" as the institutional backbone and framework of post-national constellations.

"Deliberative Supranationalism" as an Institutional Form of Co-operative Transnational Governance in the EU:

The idea of "deliberative supranationalism", as opposed to the orthodox understanding of supremacy of European law, has come of age. Its conceptual core, however, is not outdated. The argument in a nutshell: the Member States of the EU must no longer act autonomously as assumed in the traditional understanding of sovereignty. They operate, instead, under conditions of ever more interdependencies. They must hence take into account that their own policies exert "external effects" on their neighbours and become aware of their own exposure to such effects.<sup>89</sup> Due to this constellation, the Member States of the EU cannot comply autonomously with their commitments to democratic governance. In Habermasian terms: European citizens cannot understand the laws and policies which they are expected to observe as the result of democratic processes in which they were involved. In view of these structural deficits of nation-state democracies, the quest for the establishment of a transnational authority tasked with a control of these effects seems normatively irrefutable. The constitutional implication of all this has been articulated most stringently by Ulrich K. Preuß: only through transnational co-operation, "can - under conditions of interdependency - the domination of others be transformed into legitimated rule. In that understanding, the integration project, if properly institutionalized, is not democratically deficient, but a necessary pre-condition of democratic rule within constitutional democracies."<sup>90</sup>

From Controlling External Effects of Control of National Policies to an Enhancement of Democratic Governance in the EU through Conflicts Law:

This third step builds on arguments submitted by Dani Rodrik, a political economist from the Kennedy School of Government at Harvard University, with Polanyian commitments, in which

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<https://doi.org/10.1525/gp.2021.18788> and id. "Transnational Constitutionalism – Conflicts-Law Constitutionalism – Economic Constitutionalism – The Exemplary Case of the European Union" (forthcoming in *Journal of Social & Legal Studies*).

<sup>89</sup> No other than Jürgen Habermas has defended this insight in his analysis of the "postnational constellation": "Nation states (...) encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level" ("Does the Constitutionalization of International Law Still Have a Chance?" in id, *The Divided West*, Cambridge: Polity Press, 2007, 113-193, at 176).

<sup>90</sup> Ulrich K. Preuß, 'Gibt es eine völkerrechtliche Demokratietheorie?' in: H Heinig and J Terhechte (eds), *Postnationale Demokratie, Postdemokratie, Neoetatismus*, Tübinge: Mohr Siebeck, 2013, 169-178 (my translation); in a similar vein, Mattias Kumm 'Kosmopolitischer Staat und konstitutionelle Autorität. Eine integrative Konzeption Öffentlichen Rechts', *Der Staat* 52 (2013) 245-266.

Rodrik builds upon the recent work of political scientists Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik.<sup>91</sup> Rodrik's commitment to Polanyi is apparent in his insistence on the dependence of capitalist market economies on the institutional backing by state institutions and continuous political management.<sup>92</sup> The implication has just been underlined: we have to expect, and should respect, democratically-endorsed varieties. On that background Polanyi predicts and advocates "collaboration". Whereas the three political scientists just named are concerned with international relations, Rodrik has spelled out the implications of their insights for the EU, where a transnational authority can derive a legitimate mandate to ensure co-operative problem-solving from the democracy deficits of the Member States.<sup>93</sup> Rodrik submits that "the policy failures that exist arise not from weaknesses of global governance, but from distortions of domestic governance". He adds: "Governance failures must be corrected where they occur. In view of their manifold causes and forms, they cannot simply be expunged by transnational fiat." What the supranational level should instead do is to encourage self-corrections at national level with supranational "oversight restricted to procedural safeguards — such as transparency, accountability, use of scientific/economic evidence — intended to reinforce democratic deliberation".

All this, we conclude, opens perspectives for the realisation of the "United in Diversity" vision of the Draft Constitutional Treaty, which can be realised without state- or federation-building or the empowerment of a democratic all unaccountable technocracy.

## **V. A Provisional Outlook**

What should now, finally, follow is a resume which explains what I expect from your work. I will not shy away from writing such an outlook, but I feel that I should postpone this exercise until after the end of this conference and after having read more than I could read so far.

It is beyond doubt, however, that your focus on Illiberalism is a fortunate decision. The well-prepared opportunity of a multi-disciplinary cooperation over four years among research teams from East and West is more than promising. It is also demanding for the reasons addressed in the preceding sections.

- (1) Illiberalism is anything but a uniform phenomenon. There is a diversity of darker legacies in the East and a similar variety of populist movements in the West. The discrepancy with our explorative work on authoritarian traditions is obvious but not fundamental. On closer inspection, the queries that have plagued us in the Florence project, become visible again, at least if you do not avoid the discussion of normative concerns: "How do you know, it's democracy when you see it?"

In his contribution to the *Darker legacies* volume, Oliver Lepsius has argued that German National Socialism had no constitutional theory of its own, but instead, systematically de-

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<sup>91</sup> "Democracy-Enhancing Multilateralism", *International Organization*, 63 (2009), 1-31.

<sup>92</sup> See, explicitly, his Opening address on 'Karl Polanyi and Globalization's Wrong Turn' on the Vienna part of the International Karl Polanyi Conference 2019, hosted at Radiokulturhaus Vienna, on 3 May 2019, available at: [https://www.karlpolanyisociety.com/wp-content/uploads/2019/12/Dani-Rodrik\\_Transcript.pdf](https://www.karlpolanyisociety.com/wp-content/uploads/2019/12/Dani-Rodrik_Transcript.pdf).

<sup>93</sup> Dani Rodrik, "The Future of European Democracy", in: L. van Middelaar and Ph. van Parijs (eds.), *After the Storm: How to Save Democracy in Europe*, Tiel: Lannoo Publishers, 2015, 53-66.

legalized its own structures of authority in a de-formalizing manner.<sup>94</sup> The quest for a theoretical justification is not a typical German quirk. My search for some theoretical endorsement of the legitimacy of illiberal and/or authoritarian systems has, however, not been successful. To concede, that “Illiberal democracies” can be understood as electorally endorsed regimes produced by populism,<sup>95</sup> may confirm their “social” legitimacy. It does not imply that these systems respect the commitment of Article 2 TEU to democracy and the rule of law.<sup>96</sup> A further intricate issue: We not only need to define the notion of democracy, but have also consider the proper means for its protection. Resort to “conditionality” is a widespread technique, but no justification of one-sided decisions about the use of this instrument.

- (2) The failure to conceptualise the political implications and social functions of economic ordering is an original sin of European legal scholarship committed. This was a camouflage of the implicit political economy of the foundational period of the integration project which contributed to the takeover of a stark neoliberal market utopia. The economy has to be understood “as a polity”, is the counter-vision which I have submitted, relying mainly on Polanyi’s economic sociology.<sup>97</sup> One implication is the liberty to organise economy and society “at will”, has to be respected as a democratic asset which must not be subordinated to economic rationality or technocratic rule. It further implies that the CEE countries have to liberate themselves from the legacies of authoritarian economic governance but also be prepared to cope with varieties of economic ordering which are emerging also in the CEE countries.<sup>98</sup> My underlining of the democratic credentials of this new diversity is not meant as a defense of economic autarky and political sovereignty. It is instead a plea for a deliberate structuring of cooperative problem-solving among interdependent polities which the EU is entitled to supervise and promote.<sup>99</sup>
- (3) The most demanding prerequisite of all these submissions is the Böckenförde *dictum*: democracy cannot be imposed by command and control has to be ensured in the last instance by the democratic quality of societal processes.

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<sup>94</sup> See, DL, 22 f. and the discussion of the notion of the *Großraum* by Loughlin, DL, 176 f. and Joerges, DL, 171. ff.

<sup>95</sup> See. András Sajó, “The Constitution of Illiberal Democracy as a Theory About Society”, *Polish Sociological Review* 208 (2019), 395-412; similarly Paul Blokker, “Varieties of populist constitutionalism: The transnational dimension”, *German Law Journal* 20 (2019), 332-350. It all depends on the ambit of your inquiries. Bojan Bogaric, “The Two Faces of Populism: Between Authoritarian and Democratic Populism”, has good reasons not to equate Roosevelt’s New Deal with the present East European populism (his paper is available at SSRN-id3598937.pdf). See also Dani Rodrik, “Populism and the economics of globalization”, *Journal of International Business Policy* 1 (2018), 12-38, available at [https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism\\_and\\_the\\_economics\\_of\\_globalization.pdf](https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf). See with refreshing clarity Claus Offe, “On the Will of the People: Notes on the Political ‘Theory’ of Populism”, *Global Perspectives* 1 (1) (2020). <https://doi.org/10.1525/gp.2020.13380>, who reminds us, that the populist fiction of a singular and/or homogeneous will is irreconcilable with the very idea of democratic will-formation.

<sup>96</sup> This is how I read Armin Schäfer and Michael Zürn, *Die demokratische Regression*: Berlin Suhrkamp, 2021, with their observation that populism represents a “thick” rather than a “thin” ideology. 64 ff.

<sup>97</sup> Sections I. (4) and IV.2 (1)

<sup>98</sup> See Dorothee Bohle and Béla Greskovits, *Capitalist Diversity on Europe’s Periphery*, Ithaca, NY: Cornell University Press, 2012.

<sup>99</sup> See Section IV.2 (2) and (3).