

ARTICLES : SPECIAL ISSUE
CONFRONTING MEMORIES - INTRODUCTION

**Introduction to the Special Issue: Confronting Memories:
European “Bitter Experiences” and the Constitutiona-
lization Process: Constructing Europe in the Shadow of
its Pasts**

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The contributions to this Special Issue of the German Law Journal originate from a meeting in July 2004 at the European University Institute, which was convened following a disappointing experience. The participants – lawyers, historians, political scientists – had co-operated intensively in the preparation of a project on “The Shadows of the Past(s) over the Construction of Europe” which they had submitted to the *Volkswagen Stiftung*. Although the foundation acknowledged the core aspirations and importance of its individual components, our application was, however, criticized for its overly broad scope and alleged lack of coherence. Should we, however, retain our loose multi-disciplinary, multi-issue and multi-national exploratory approach? Or, should we instead seek to tighten up the whole enterprise and explain what form of common result we would like to deliver? What was planned as a debate on these alternatives developed into enormously interesting, sometimes breath-taking discussions. At the end, we felt that we were able to articulate what we had more intuitively sought for, namely, a formula that would link our concern about European past(s) with our concern for Europe’s present and future.

A. “Darker Legacies”

The past had been the object of the proceeding project. The “constitutionalizing moment” to which the European integration project responded was the sum of the atrocities of the twentieth century in general, and the persecution and

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extermination of European Jews in particular.¹ The post-war effort to create a European community derives its strength and legitimacy from the dignity of this response. However, this legacy is not merely precious, it is also precarious. We must be aware of as well as ashamed of and on guards against the “darker legacies of law in Europe”:² the involvement of law and lawyers in the *Untaten* and the atrocities committed and both the weaknesses in good constitutions and the fragility of seemingly stable political cultures. It is one thing to acknowledge the importance of such a “working through the past”³ but quite another to appreciate the messages they entail. Germans are captives of their history. The war generation may have somehow and more or less effectively managed to *verdrängen* their experiences and their guilt. All post-war generations continue to experience their identity as Germans through shaming memories. So strong is the weight of this past that acts of “working through the past” necessarily become somewhat ambivalent wherever they do not occur in exclusively and specifically German frames. This is what made the “*Darker Legacies of Law in Europe*” both an ambivalent and a risky project. The project was not just about German legacies and the continuities and discontinuities in German traditions. Instead, it implicitly and unavoidably raised unsettling questions:⁴ how proud can the non-Germans be that it did not happen to them; and how sure can we be that it will not happen again?

¹ In the FRANKFURTER ALLGEMEINE ZEITUNG: “Das heutige Europa ist durch die Erfahrungen der totalitären Regime des zwanzigsten Jahrhunderts und durch den Holocaust – die Verfolgung und Vernichtung der europäischen Juden, in die das NS-Regime auch die Gesellschaften der eroberten Länder verstrickt hat – gezeichnet... Eine bellizistische Vergangenheit hat einst alle europäischen Nationen in blutige Auseinandersetzungen verstrickt. Aus den Erfahrungen der militärischen und geistigen Mobilisierung gegeneinander haben sie nach dem Zweiten Weltkrieg die Konsequenz gezogen, neue supranationale Formen der Kooperation zu entwickeln (“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.” Translation by Iain Fraser).

² See DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS (CHRISTIAN JOERGES / NAVRAJ S. GHALEIGH, EDS., 2003) and *The Darker Side of a Pluralist Heritage: Anti-liberal Traditions in European Social Theory and Legal Thought*, special issue of 14 LAW AND CRITIQUE 14: 3 (CHRISTIAN JOERGES, GUEST ED., 2003).

³ On this notion, see note 12 below.

⁴ Cf., BERNHARD SCHLINK, VERGANGENHEITSSCHULD UND GEGENWÄRTIGES RECHT 146-152 (2002).

B. Constitutionalisation as “*Aufarbeitung der Vergangenheit*” (Working Through the Past)

It seems worth mentioning that the responses to the “*Darker Legacies*” project did not refute the “Europeanization” of our concerns with law. Editors and contributors felt relieved. But the responses were unsettling in another sense. The sheer number of reviews, their intensity and their thoughtfulness, came as a real surprise. Did our book deserve so much attention? Was it so much better than we had thought? Had we been overly scrupulous in our own perceptions? In our discussions, we began to venture an explanation which we are now exploring in more depth. Could it be that we had hit a nerve in the constitutionalization debate? The “*Darker Legacies*” project had pointed to the ambivalent heritage of law in Europe. But its messages were fundamentally constructive, if not affirmative. The memory of the Holocaust is the strongest conceivable *raison d’être* for the integration project. The memory of the failures and weaknesses of the law provides an indispensable way-marker in the debate on good European constitutionalism. But these were not the messages that reviewers found worthy of intense discussion. The nerve that we have hit seems to be the need to reconsider and renew what Fabrice Larat, in his contribution to this issue of the German Law Journal, calls the *acquis communautaire historique*.⁵ Nobody is seriously questioning the importance of this basis for the European project even if the language used is less dramatic and less normative than, for example, that of the Habermas-Derrida manifesto of the 31st of May 2003.⁶ And yet, as Tancredi put it so well in GIUSEPPE TOMASI DI LAMPEDUSA’S *IL GATTOPARDO*: “*Se vogliamo che tutto rimanga come è, bisogna che tutto cambi.*” We can preserve the great European accomplishments only if we reflect upon their context and upon the responses that this context requires. The challenge is three-dimensional, namely, technocratic, normative and historical.

Enlargement is the most visible new challenge to the technocratic and economic *potentia* of the Union. It is also a challenge to the historical bases for and the aspirations of the integration project. The new Member States did not take part in the post-war settlement and their motivations for joining the Union need to be brought into harmony with the post-war settlement of the founding members of the European Economic Community.

The second challenge may be a bit more subtle. The move towards a deepened constitutionalization has provoked an enormous debate with which hardly anyone

⁵ See Fabrice Larat, *Present-ing the Past: Political Narratives on European History and the Justification of EU Integration*, in this issue.

⁶ In the *FRANKFURTER ALLGEMEINE ZEITUNG*.

can keep pace. Constitutionalization is primarily perceived as an effort to cope with the so-called democracy deficit in the European project. Whether, and if so, to what degree, the perceived “democracy deficit” is connected with a “social deficit” and how the dimension of this deficit may be tackled is more contested today than ever before.

The historical dimension of these challenges and the European project, in which we are interested, has mainly been tackled with benign neglect in the debates on the European Constitution. But at the very end of the process, less than a month before our meeting in July 2004, and following a Polish initiative, the Intergovernmental Conference changed the Preamble to the Draft Constitutional Treaty of 18 July 2003 quite considerably.⁷ The first two somewhat ostentatious passages⁸ were dropped. The reference to “re-united Europe” was replaced by a “Europe, re-united after bitter experiences”.

One could have imagined a more substantiated reference. The “bitter experiences” are copied from the Preamble of the Polish constitution.⁹ It would have been difficult, but nonetheless conceivable, to find a formula which included the European need for reconciliation, or to cite a more drastic term, “*Entgiftungsarbeit*”¹⁰ (decontamination work). The title that we agreed upon at the end of our July meeting for our own analytic and normative responses to these challenges was: “*Die Konstitutionalisierung Europas als Aufarbeitung seiner Vergangenheit*”, without, however, discovering a translation which seemed truly adequate for this heading.¹¹ “*Was bedeutet: Aufarbeitung der Vergangenheit*” is the title of a famous essay by Theodor W. Adorno, written in 1959, in which he took issue with what the Germans have coined “*Vergangenheitsbewältigung*”: How can Germans ever “come to terms” with Auschwitz – “*Vergangenheitsbewältigung*” is definitely and rightfully resistant against/to translation exercises. But this is then also true for Adorno’s counter-concept.¹²

⁷ OJ C 310/2004, 1 of 16 December 2004.

⁸ Namely, the reference to Thucydides and the praise of Europe as the herald of civilisation.

⁹ Which reads: “Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland...”

¹⁰ Cf., Theodor W. Adorno, *Zum Gedächtnis Eichendorffs*, in: NOTEN ZUR LITERATUR Vol. I 105 (1958).

¹¹ Published, for example, in THEODOR W. ADORNO, *EINGRIFFE* 143 (1963), in which Adorno took issue with what the Germans have coined “*Vergangenheitsbewältigung*”: Germany cannot “come to terms” with Auschwitz, and the term is rightfully resistant against translation exercises.

¹² *The Meaning of Working Through the Past* in THEODOR W. ADORNO, *CRITICAL MODELS* 89 (TRANS. HENRY W. PICKFORD, 1998) may be the best conceivable translation. The dilemma is that “*Aufarbeitung der Vergangenheit*” owes its meaning to the critique of the notion of “*Vergangenheitsbewältigung*”.

C. "Zukunftsbewältigung" (Mastering the Future)?

"The new Europe is thus being built upon historical sands at least as shifting in nature as those upon which the post-war edifice was mounted... From Spain to Lithuania, the transition from the past to the present is being recalibrated in the name of a 'European' idea which is itself an ahistorical and illusionary product with different meanings in different places."¹³ This may all be true. But do these historical conditions really affect the performance of the Union? Are these effects totally contingent or can we speculate about them? It is, indeed, a core premise of our project that we have to pay attention to the legacies of the past in Europe's present, and that we must always be aware of the burdens that this implies. How can we be so sure? What we can see are the ambivalences within the current situation, disquieting events which accompany the deepened "constitutionalization" of the European Union and its enlargement. It seems so evident that the new tasks that Europe seeks to shoulder will require a strengthening of its governance structures and its bureaucracy; but national governments are not willing to cede new significant powers to the Commission, and we cannot find a deepened acceptance for bureaucracy and technocracy among the European citizenry. There is wide support for a strengthening of the European Parliament; but its acceptance as the representative body of European citizens remains precarious, while citizen participation within European elections continues to disappoint the protagonists of democratization. Ever more policy fields and governmental responsibilities are being "Europeanized"; can Europeans, however, welcome these developments as progress where they tend to erode national welfare-state traditions and put an "open method of co-ordination" in their place without knowing where they may lead?

"Convinced that, while remaining proud of their own national identities and history, the people of Europe are determined to transcend ancient divisions and, united even more closely, to forge a common destiny".

This statement from the Preamble to the Draft Constitutional Treaty¹⁴ stands in sad contrast with antisemitism, xenophobia and a new anti-Americanism all over Europe, even in countries which are proud of their long traditions of democracy and tolerance. As Bo Stråth notes, "today, popular mobilisation occurs in referendums on politics against a reinforced European institution-building, and not

¹³ Tony Judt, *The past is another country: myth and memory in post-war Europe*, in: MEMORY AND POWER IN POST-WAR EUROPE. STUDIES IN THE PRESENCE OF THE PAST 157,182-3 (JAN-WERNER MÜLLER, ED., 2002).

¹⁴ *Supra* note 4.

for a European democracy". Is it really too speculative to assume an interdependence between these developments and the failure of Europe to cope with its social deficit? In Alexander Somek's pessimistic account, ordinary Europeans "feel belittled by the Union" because of the neglect of their material concerns. A social deficit is likely to provoke a crisis in the social acceptance of Europe and is challenging the *potentia* of Europe's constitutionalism.

To generalize from these scattered observations: even though the original ideals of the post-war period are by no means outdated, they seem to have lost their mobilizing strength. This is the concern that motivates our efforts to understand the presence of European pasts. The order of the essays should be self-explanatory and their significance for the current debates on the constitutionalisation of Europe seems equally obvious. Bo Stråth spells out the methodological premises underlying the whole project. We cannot ask the historians, as Ranke did, to tell us "*wie es wirklich gewesen ist*". Instead, history is a reflection on the past from the present, and we must be aware that the common identities that we forge and the narratives that we live with emerge from processes of remembering and forgetting. In a very similar vein, Fabrice Larat reconstructs the political narratives on the history of the European integration project and its justification, thereby revealing an *acquis communautaire historique* – and the need to renew its legacy and redefine its *finalité*.

"Integration through law" has been the *credo* of institutionalized Europe ever since the formation of the European Economic Community, and the present endeavour to establish a written Constitution is testimony to its strength. It is not by accident that 9 out of the 16 contributors to this issue are lawyers who focus on the role of law in the integration process in general, and in European constitutionalism in particular.

"Is law a sword or a shield"? Vivian Curran, David Fraser, Mattias Kumm, Matthias Mahlmann, András Sajó and Alexander Somek all confront this question. The law has legalized suffering and protected perpetrators. It is important that the Preamble underlines European commitments to human rights, democracy, and the rule of law. It is equally important to remember the history of suppression and the betrayal of these ideals. And it is simply dishonest to conceal the fact that the institutional construction of Europe was deliberately non-democratic. True and wonderful: "It was from experience of the military and intellectual mobilization against each other that, after the Second World War, they [the European nations] drew the conclusion that they had to develop new supranational forms of co-operation."¹⁵ It is unsurprising, however, that the architects of the (then) new

¹⁵ Habermas / Derrida (note 3).

Europe had limited trust in the sustainability of political democracies.¹⁶ And it is much too simplistic to criticise technocratic governance structures because of their incompatibility with the normative underpinnings of constitutional democracies. And, last but not least, the experiences of Europeans with constitutional law are bitter, in that even good constitutions could not provide the protection they were designed to ensure. The fragility of constitutionalized governance is a generally traumatic experience, and not simply an attribute of the Weimar Republic. Vivian Grosswald Curran summarizes many of her earlier pertinent studies when she observes that “[t]he post-war focus on judicial methodology has caused an unfortunately irrational faith in its power. This focus draws attention away from identifying domains of analysis and action that would be more influential in affecting the institutional and individual values of society, those values that are strongly correlated with whether the courts are a force for or against justice and a humane rule of law.”

Constitutionalism has to reflect this experience. One issue that deserves and receives special attention is the quest for a European identity and its “juridification”. Just because Europe is seeking its unity while preserving its diversity, or, as the Preamble puts it so solemnly, just because Europeans are prepared “to forge a common destiny” although they still remain “proud of their own national identities and history”, the law has to provide an answer to this seemingly paradoxical task. But the possible contours of an answer are readily apparent, or, at least, have been so ever since Dolf Sternberger’s famous response to Germany’s post-war identity crisis.¹⁷ We owe the transplantation of this notion into the European constitutional discourse to Jürgen Habermas.¹⁸ Did Habermas’ constitutional patriotism abstract too rigidly from the social, political and cultural embeddedness of human beings? By no means, argues Matthias Mahlmann in his contribution. Probably, but Habermas’ intuitions are, nevertheless, pointing in the right direction and can be enriched, argues Matthias Kumm.

Alexander Somek’s and Bo Stråth’s scepticism about the constitutionalization project is of a different kind. European citizens, they argue, have legitimate reasons

¹⁶ See SONJA PUNTSCHE-RIEKMANN, *DIE KOMMISSARISCHE NEUORDNUNG EUROPAS. DAS DISPOSITIV DER INTEGRATION* (1998).

¹⁷ Dolf Sternberger, “*Verfassungspatriotismus*”. *Rede bei der 25-Jahr-Feier der “Akademie für Politische Bildung” in Tutzing am 29.6. 1982*, in: *POLITISCHE REDEN 1945-1990* 702 (MARIE-LUISE RECKER, ED., 1999). In the same vein, NORBERT ELIAS, *STUDIEN ÜBER DIE DEUTSCHEN* 159 *et seq.* (4th ED., 1990); M. Rainer Lepsius, *Nation und Nationalismus in Deutschland*, in: *INTERESSEN, IDEEN UND INSTITUTIONEN* 232 (1988).

¹⁸ *STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT* (1991). The short monograph was reprinted in: *FAKTIZITÄT UND GELTUNG* 632 (1992).

to expect some respect for the social dimension of their citizenship. The “European social model” is certainly a widely discussed issue. But the contours of “social Europe” are not very visible. Instead, Europe’s political élites have, ever since the 1973 Copenhagen summit, responded to the deepening of the integration project by a deliberate turn to “identity politics”. Can one build up an identity without excluding minorities living in Europe or would-be Europeans on cultural or social grounds? Should tolerance of diversity, rather than identity, be the *leitmotiv* of a polity seeking “unity in diversity”? Is identity politics being used as an *ersatz* for a stronger social policy? Whatever the answer, it cannot be denied that the failure of Europe to cope with its social deficit is being extensively exploited by populist leaders. And Tony Judt points to the example of the last years of the Habsburg monarchy, “where economic modernization, a common market and the free movement of peoples was accompanied by a steady increase in mutual suspicion and regional and ethnic particularism.”¹⁹ European populism has no constitutional status. But it is a phenomenon that threatens the aspiration for constitutional patriotism and for European constitutionalism in general. The contributions by Paul Blokker, Patricia Chiantera-Stutte and Andrea Pető all deal with Eastern Europe. But they do not subscribe to the comfortable thesis that populism can be characterized as a phenomenon which is specific to the accession countries and attributed either to their political cultures or their difficulties with the transition to Western economic and political models.

“Transitions” are supposed to move us into a better world. The move will require and, sooner or later, be accompanied by some sort of “*Vergangenheitsbewältigung*”. This is an enormous challenge which, once again, cannot be undertaken in a uniform form across Europe, but which instead needs to discriminate between bitter experiences. Germany is something like the natural leader in this respect. Thomas Mertens’ reconstruction of The Eichmann Trial as analysed by Hannah Arendt in her classical study, David Fraser’s comparative study on the involvement of Belgium and Bulgaria in the Holocaust, and András Sajó’s quest for a shame dictated legal policy and culture cover a broad time-span and a great diversity of pasts. Anton Legerer pays tribute to an unspectacular and encouraging model of non-legal *Vergangenheitsbewältigung* whereas Stefan Seidendorf addresses a more spectacular example in which the instrumentalisation of memories is clearly visible, scarcely avoidable and difficult to civilize.

¹⁹ Tony Judt (note 13), 183.

D. Instead of a Conclusion: A Brief Outlook

Within European integration studies, as Claus Offe observes,²⁰ the philosophers and the lawyers have specialised in bringing in the good news, mainly framed as normative answers to the problems that they identify, whereas sociologists, political scientists and economists more often tend to present sceptical findings and analyses that question the workability of the suggested solutions. This is anything but surprising. Lawyers are expected to explain what is fair and just. They will, therefore, seek normative perspectives with which their addressees can identify. Social scientists who believe in the separability of facts and norms have fewer problems with addressing phenomena that policy-makers are uncomfortable with. This schism is certainly present in our interdisciplinary project. The lawyers among us are in closer contact than the historians and the political scientists with an epistemic community that has embarked upon the venture of constitutionalising Europe. Irritating messages are not so welcome and are perceived as destructive interventions. For better or for worse, the presence of the past is a fact in the construction of Europe. It simply does not make sense to choose between Doctor Pangloss on the one hand, and Cassandra's or other apocalyptic visions on the other. What seems indispensable and even urgent in view of the many problems that Europe is exposed to is that our memories, their divergencies and collisions, become an integral part of the European project. We cannot unify our pasts. Nor should we try to harmonize them or expect our neighbours to honour our own *Erinnerungsarbeit*. We will mutually have to recognize all our traumas and to learn tolerance or even reconciliation. To cite the Habermas/Derrida manifesto²¹ for a third time:

"The political and ethical will asserted in the hermeneutics of processes of self-understanding is not arbitrary. The distinction between the heritage we are entering into and the one we want to reject calls for just as much circumspection as the decision on the interpretation in which we are taking it on. Historical experience has to be adopted in deliberate fashion or it cannot attain its identity-creating force".

Among all the disciplines involved, legal history may be the most promising candidate for a bridging the schism in integration studies. Mattias Kumm's reconstructive approach to the history of constitutionalism and Thorsten Keiser's

²⁰ Claus Offe, *Sozialpolitik und internationale Politik. Über zwei Hürden auf dem Wege zum "Zusammenhalt" Europas*, ms. Madrid-Berlin 2002 (on file with author).

²¹ Note 3.

critique of the treatment of Europeanization by legal historians nurture such hopes.²²

The *German Law Journal* has become an important platform for so many debates. We hope to have opened another one – and are extremely grateful to the editors of the GLJ for accepting our contributions. They are not the conclusion of a common long term project, but are merely another small step in its development. We would be grateful to receive comments from the GLJ readership. Details about the contributors and their e-mail addresses are included in footnote * of each contribution.
