

## A 'THICK' CONSTITUTIONAL PATRIOTISM FOR THE EU? ON MORALITY, MEMORY AND MILITANCY

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“Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals.”

*Edmund Burke*

“Il faut constater que l'Europe ne fait plus rêver. On n'aime pas pas l'Europe telle qu'elle est...”

*Jean-Claude Juncker*

With the apparent failure of the European Constitution (at least on the first try...), the search for a pan-European civic ‘identification mechanism’ is as likely to be intensified as it is to be abandoned.<sup>1</sup> Given that most political theorists are reluctant to formulate a liberal pan-European nationalism, a ‘thicker’ version of constitutional patriotism might seem an attractive (and relatively modest) normative proposal.<sup>2</sup> ‘Thick’ would denote a constitutional patriotism that is ‘enriched’ by forms of particularity; such forms of particularity would make European patriotism distinctive, that is, different from outright cosmopolitanism or universalism.

In this essay, I argue that, in its original German incarnation, constitutional patriotism – rather than being ‘abstract’ and ‘bloodless’ (as a particularly inappropriate metaphor tends to suggest) – already had two important ‘supplements of

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<sup>1</sup> Justine Lacroix, ‘For a European Constitutional Patriotism’, in: (2002) 50 *Political Studies*.

<sup>2</sup> See, also, Matthias Kumm, ‘Thick Constitutional Patriotism and Political Liberalism: On the Role and Structure of European Legal History’, in: (2005) 6 *German Law Journal*.

particularity’, which have made it a morally effective (and affective) force.<sup>3</sup> In particular, it contained what one might call, for shorthand, ‘memory’ and ‘militancy’. Memory here refers primarily to a critical memory of the Holocaust and the Nazi past. Militancy, on the other hand, was shown towards the enemies of democracy, mainly through judicial means, such as banning parties and restricting free speech. In other words, a militant democracy is explicitly not neutral about its own principles and values – and puts in place strong checks on those who are hostile to these principles.

I want to argue that memory and militancy were not accidental forms of particularity associated with constitutional patriotism; rather, there is an inherent normative connection to the universalist liberal-democratic kernel of constitutional patriotism. Put crudely, and in the vocabulary of ‘identity talk’, memory and militancy - thus defined - reinforce ‘identity’ through negative contrasts: on the one hand, with the past that is being repudiated; on the other, with anti-democratic political actors in the present (and/or potentially in the future). Positive political principles do imply these negative contrasts – but this is not to say that all forms of constitutional patriotism would have to come with a strong emphasis on memory and militancy. Positive political principles might equally be affirmed through positive forms of particularity (such as historical examples to be emulated). In other words, and contrary to one of the most widespread clichés of our time, not every ‘identity’ needs primarily to be ‘constructed’ through an ‘Other’. And, of course, the shape and style of a version of constitutional patriotism will always be influenced by the vagaries of history, the particular visions of politicians, the legacies of pre-existing political cultures – in other words, there is only so much that can be *theoretically* pre-determined in any case.

Memory and militancy have repeatedly been advanced as elements that might ‘thicken’ a *supranational* constitutional patriotism – without thereby making constitutional patriotism into a variant of liberal nationalism. In the second part of this essay, I examine whether memory and militancy might work as ‘supplements of particularity’ at the European level. I shall argue that a ‘thick’ constitutional patriotism, enriched by memory and militancy, *could* indeed be made coherent at the

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<sup>3</sup> See, also, Patchen Markell, ‘Making Affect Safe for Democracy? On “Constitutional Patriotism”’, in: (2000) 28 *Political Theory*, 38-53.

European level. What is less clear is whether European political élites *should* embark on a political project of emphasizing memory and militancy. Both memory and militancy, as I shall seek to demonstrate in the third part of this contribution, carry significant dangers of illiberalism. This is not the same as saying that they simply amount to a civic nation-building project and the quasi-nationalist management of popular loyalties, and therefore erase the distinctiveness of constitutional patriotism's normative vision, as liberal nationalists might be tempted to charge. Constitutional patriotism is not simply 'statist nationalism'; it *is* morally different from liberal nationalism; and rendering it more particular through memory and militancy doesn't make a difference to this basic moral difference.<sup>4</sup> However, given the dangers of illiberalism, I cautiously conclude in favour of a 'thinner', liberal conception that seeks to complement and, to some extent, relativise, existing national attachments.

I shall not discuss the psychological background assumptions that are being suggested by the metaphors of 'thickness' and 'richness' in this essay. However, I wish to emphasise that I do not regard these as unproblematical, and that I do not find that particularity automatically motivates, in the way that almost all theorists on both sides of the nationalism-patriotism debate tend to suggest. However, these questions are clearly of profound complexity and simply cannot be treated at the same time as the European context; so all that interests me in the present paper is the theoretical possibility (and normative desirability) of 'thick European constitutional patriotism'.

In the same vein, I leave aside for the moment the question of whether there already is, or, in principle, can be, a 'European public sphere'. Both a 'European nation' and a European constitutional patriotism would depend on such a public sphere, and would partly have to create them. My concern here is with the normative content of 'thick constitutional patriotism', not with providing a manual for actual polity-building.

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<sup>4</sup> Chaim Gans, *The Limits of Nationalism*, Cambridge: Cambridge UP, 2003.

## A Very Brief History of Constitutional Patriotism

Neither constitutionalism, nor patriotism were invented by Germans.<sup>5</sup> Yet, constitutional patriotism, as a theory distinct from both liberal nationalism and republican patriotism, was elaborated most clearly in post-war West Germany. Two background factors contributed to this: one was a long-standing debate about the connections among democracy, cosmopolitanism, and contesting a problematical past, a debate which I will not go into in detail on this occasion; the other factor was the sheer importance of the constitution in West German political culture.

While the Weimar Constitution had been seen as a great intellectual and political achievement initially, and then *de facto* failed disastrously, it was more or less the other way around after 1945. Legal theorists regarded the constitution as a problematical construct in 1949 – a list of articles seemingly imposed from outside, deliberated over with hardly any publicity, and unable to withstand serious threats to democracy. Yet, as time went on, the constitution proved not just its resilience; more importantly, it proved its enormous *relevance* in ordering political life.<sup>6</sup> To put it crudely, relevance, in turn, inspired reverence – the Constitutional Court eventually developed into the most respected public institution of West Germany, alongside the *Bundesbank*.

It was against this background that the political scientist Dolf Sternberger explicitly introduced the concept of constitutional patriotism on the occasion of the thirtieth birthday of the Federal Republic.<sup>7</sup> Sternberger was arguably the *doyen* of democratic political theory in West Germany after the Second World War. As early as 1959, he had thought about a ‘patriotic sentiment in the constitutional state’, and, in the early 1960s, had developed the notion of *Staatsfreundschaft* [friendship towards the state]. He framed such friendship as a ‘passionate rationality’ which would make citizens identify with the democratic state and, not least, defend it against its enemies.<sup>8</sup>

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<sup>5</sup> For the following see also Jan-Werner Müller, ‘On the Origins of Constitutional Patriotism’, in: (2006) *5 Contemporary Political Theory*, 278-296.

<sup>6</sup> Dieter Grimm, ‘Das Grundgesetz nach 50 Jahren’, in: *Die Verfassung und die Politik: Einsprüche in Störfällen*, Munich: C. H. Beck, 2001, 295-324 (296-8).

<sup>7</sup> Dolf Sternberger, ‘Verfassungspatriotismus’, in: (1979) *Frankfurter Allgemeine Zeitung*, 23th May.

<sup>8</sup> Dolf Sternberger, *Staatsfreundschaft [Schriften IV]*, Frankfurt/Main: Suhrkamp, 1980.

To give his conception of constitutional patriotism theoretical coherence, Sternberger drew on Aristotelianism and Hannah Arendt's republicanism. To lend it historical credibility, he excavated a tradition of patriotism stretching back to Aristotle, which, he claimed, had not been linked to the nation. Sternberger argued that, at least until the end of the eighteenth century, all forms of patriotism had been 'constitutional patriotism' understood as the love of the laws and common liberties.<sup>9</sup> In other words, constitutional patriotism was on some level to be a return to pre-national patriotism.

Sternberger, scarred by the experience of Weimar, also explicitly called upon the 'friends of the Constitution' to defend the polity. He thereby linked constitutional patriotism to the concept of a *wehrhafte* or *streitbare Demokratie* – that is, a 'militant democracy' capable of defending itself against its internal and external enemies.<sup>10</sup> This concept had been introduced by the exiled German political scientist Karl Loewenstein in 1937.<sup>11</sup> At that time, one European country after the other had been taken over by authoritarian movements using democratic means to disable democracy. Loewenstein argued that democracies were incapable of defending themselves against fascist movements, if they continued to subscribe to 'democratic fundamentalism', 'legalistic blindness' and an 'exaggerated formalism of the rule of law'.<sup>12</sup> Part of the new challenge was that, according to Loewenstein, fascism had no proper intellectual content, relying on a kind of 'emotionalism' with which democracies could not compete. Consequently, democracies had to find, above all, political and legislative answers – as opposed to 'emotional ones' – in order to confront to anti-democratic forces; here, Loewenstein thought of measures such as banning parties and militias. Democracies, according to this vision of democratic self-defence, should also restrict the rights to assembly and free speech, and, not least, the activities of those suspected of supporting fascist movements – who could be 'guilty by association'.<sup>13</sup> As Loewenstein put it, 'fire should be fought

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<sup>9</sup> See, also, Maurizio Viroli, *For Love of Country: An Essay on Patriotism and Nationalism*, Oxford: Oxford UP, 1995.

<sup>10</sup> András Sajó, ed., *Militant Democracy*, Utrecht: Eleven International, 2004

<sup>11</sup> Karl Loewenstein, 'Militant Democracy and Fundamental Rights', in: (1937) *American Political Science Review*, Vol. 31, 417-32 (Part I); 638-58 (Part II).

<sup>12</sup> Loewenstein, *op. cit.*, 424.

<sup>13</sup> Loewenstein, *op. cit.*, 647.

with fire'. And that fire could only be lit by a new, 'disciplined' or even 'authoritarian' democracy.<sup>14</sup>

This idea of a *wehrhafte* or *streitbare Demokratie* then became highly influential in the Federal Republic. It was used to justify the banning of the Nazi Socialist Reich Party and the Communist Party in the 1950s, and, in the 1970s, the draconian measures against those guilty of (suspected) association with terrorists.<sup>15</sup> The Constitutional Court's decisions and the rhetoric used by successive West German governments made it clear that democracy was to be as militant about the left as about the right (whether it actually was is another matter that I shall not deal with here). In other words, militancy was framed as a form of 'anti-totalitarianism', directed as much against the Communist threat from the East as against any revivals of the brown menace from the past. The legal basis for bans and for restricting rights – for anti-democratic measures supposed to serve democracy – was the so-called 'free democratic basic order'. The Court had coined the phrase and elaborated in its judgments in the 1950s. This 'order' consisted of the very values which, according to the Court, permeated the entire legal system. Thus emerged what has been called democratic 'anti-extremism', which, by definition, assumed the symmetry of threats from right and left.<sup>16</sup>

It was then only in the mid-1980s that Jürgen Habermas appropriated the concept of constitutional patriotism. Like Sternberger, Habermas conceived of *Verfassungspatriotismus* as a conscious affirmation of political principles. But unlike Sternberger, Habermas did not think that an unproblematical return to a pre-national (and pre-modern) republican patriotism was possible or even normatively desirable. Put very schematically, the disenchantment of the modern world and its complex division into different spheres of value would necessarily block such a return to a quasi-Aristotelian polity, integrated and 'held together' primarily through civic duty and the individual's overriding devotion to political principles. Individual and collective identities are no longer formed – or should no longer be formed -- by internalising religious or, for that

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<sup>14</sup> Loewenstein, *op. cit.*, 656-7.

<sup>15</sup> Ulrich K. Preuss, 'Political Order and Democracy: Carl Schmitt and His Influence', in: Chantal Mouffe, *The Challenge of Carl Schmitt*, London: Verso, 1999, 155-79.

<sup>16</sup> Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties', in: Shlomo Avineri and Zeev Sternhell (eds.), *Europe's Century of Discontent: The Legacies of Fascism, Nazism and Communism*, Jerusalem: Magnes Press, 2003, 249-68.

matter, nationalist imperatives. In other words, an unproblematical reference to quasi-sacred objects – including the *patria* – is no longer available. Instead, in a disenchanted world, individuals develop what Habermas, following the psychological models of Lawrence Kohlberg, called ‘post-conventional identities’. They learn to adopt as impartial a point of view as possible and to step back not only from their own desires, but also from the conventional social expectations with which society and its institutions confront them. To put it again rather schematically, identity becomes ‘de-centred’, as individuals relativise what they want and what others expect from them in the light of moral concerns.

A similar process can be observed at the level of society.<sup>17</sup> The exercise of coercion over citizens can no longer be justified by reference to sacred or quasi-sacred sources. One way or another, actual popular sovereignty becomes the sole source of legitimacy. Religious legitimacy tends to be abandoned alongside traditionalism and other transcendent sources of authority. Thus emerges what Habermas has termed ‘post-traditional society’. This concept does not imply that religion, tradition and other forms of conventional morality are simply superseded. Instead, they are, at least partially, re-interpreted in the light of the universalist claims that have also been at least partially realised as basic rights and constitutional norms. Citizens are asked to reflect critically upon particular traditions and group identities in the name of shared universal principles. This also means that they reflectively have to endorse or reject the national traditions with which they find themselves confronted.

Unconditional or even unreflective identification is then supposed to be replaced by dynamic and complex processes of identity formation – or, expressed differently, by open-ended political, legal and, not least, moral learning processes. And what unfolds at the level of the individual through social interaction needs a delicate web of communicative processes at the collective level. It is in a public sphere as porous as possible that collective identities are renegotiated and revised over time. Open-ended communication is thus a crucial precondition for what Habermas has termed the ‘rationalisation of collective identities’ – a rather off-putting term

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<sup>17</sup> Jürgen Habermas, ‘Können komplexe Gesellschaften eine vernünftige Identität ausbilden?’, in: *Zur Rekonstruktion des Historischen Materialismus*, Frankfurt/Main: Suhrkamp, 1976, 92-126.

perhaps, especially for conservatives, but one that captures the critical distancing from unquestioned inherited beliefs well.

The privileged site for the formation of this kind of identity – and the emergence of proper constitutional patriotism – is thus the public sphere. And its purpose, one might say, is the normative *purification* of public argument, as opposed to the *protection* of the polity, which had been the main purpose of Sternberger’s version of *Verfassungspatriotismus*. The primary question, here, is about the democratic quality of political culture – not the defence of a democracy perpetually under threat from anti-democrats or those prone to neglect the public good.

Even shortly after the initial formulation (or, rather, reformulation) of constitutional patriotism by Habermas, criticisms were levelled that were to reappear in the arguments of Anglo-American liberal nationalists many years later. Most frequently, there was a question about the *specificity* of patriotic attachment. After all, ‘something prior to constitutional principles determines who falls under their authority’.<sup>18</sup> Or, to put the question differently, why should those supporting universalist moral norms not give their loyalty to polities which attain them in a fuller sense of a more coherent fashion? Constitutional patriotism, at first sight at least, seems to beg this question.

From the very beginning, however, Habermas himself presented an answer to this problem. He stressed that the particular -- in fact, unique -- experience of National Socialism *had* to be the implicit reference point for German constitutional patriotism. It was only after the ultimate evil of Nazism that Germany, at least its Western part, had finally and fully embraced the Enlightenment and firmly anchored itself in the West. He affirmed that:

“...our patriotism cannot hide the fact that in Germany democracy has taken root in the motives and the hearts of citizens, at least of the younger generation, after Auschwitz - and in a way only through the shock of this moral catastrophe”.<sup>19</sup>

And he added that:

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<sup>18</sup> Pablo de Greiff, ‘Habermas on Nationalism and Cosmopolitanism’, in: (2002) 15 *Ratio Juris*, 418-38 (431).

<sup>19</sup> Jürgen Habermas, *Die nachholende Revolution*, Frankfurt/Main: Suhrkamp, 1990 (152).

“...the overcoming of fascism forms the particular historical perspective from which a post-national identity centred around the universalist principles of the rule of law and democracy understands itself.”<sup>20</sup>

After all, ‘conventional morality’, in the sense of obeying law and order, following ‘common sense’ or acting according to national traditions had all spectacularly failed to prevent the moral catastrophe of the Third Reich. Consequently, post-fascist identity *in particular* had to be post-traditional (and post-national).

So, in conclusion, at least in the German context, the universalist moral norms at the core of constitutional patriotism have always relied on supplements of particularity to become effective (and affective) as moral motivation, and to be translated into political action. Sometimes militancy and memory have even come together directly, as in the law against the Auschwitz lie, which made it a criminal offence to deny the Holocaust. Denial was not just seen here as offensive to the victims and their descendants – it was also seen as damaging the quality of democracy more broadly.<sup>21</sup>

It is my contention that memory and militancy, as conceived here, were not arbitrarily related to the universalist values at the heart of constitutional patriotism. They are located in different conceptual space, so to speak, but the imperatives of purification and protection consistently follow from the idea of constitutional patriotism. Those who subscribe to universalist liberal democratic values will see their past in a different light; and they will want to draw a legal and political line, as far as the possibility of endangering these values is concerned. Clearly, to what extent actual citizens feel different about their pasts, and to what extent democratic militancy is elaborated before any particular threat emerges are open empirical questions and will depend on much that is contingent. Existing national traditions will have a profound influence on the shape and style of a constitutional patriotism.

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<sup>20</sup> Habermas, *op. cit.*

<sup>21</sup> Eric Stein, ‘History against Free Speech: The New German Law against the “Auschwitz” – and Other – “Lies”’, in: (1986) 85 *Michigan Law Review*, 277-324.

Constitutional patriotism, then, as Ciaran Cronin has pointed out, is not much post-national as it is post-*nationalist*.<sup>22</sup> Nationality is not simply suppressed, although it is, to use a somewhat ugly phrase, ‘de-centred’. It was Benedict Anderson who once pointed out that “if one wished to see modern world history as an endless soap opera, in every country, the one character centrally cast in each interminable episode would be one’s own nation”. Constitutional patriotism does not make the nation-character die; it merely relegates him (or her) to a supporting role.

Thus, a ‘thicker’ constitutional patriotism does not simply turn into a particularly liberal variant of liberal nationalism. Superficially, there are, of course, similarities: liberal nationalists might also ask co-nationals to adopt a critical attitude towards a problematical past; in fact, it is hard to see how they would not counsel an attitude which is, at least to some extent, somewhat similar to what Habermas advocated for the Germans after 1945. They will also call upon co-nationals to defend a ‘liberal way of life’, if necessary, although they might, perhaps, even turn out to be more tolerant than some constitutional patriots.

Yet, the essential moral difference remains in place: in the eyes of real liberal nationalists, nationality carries an unquestioned (and, it seems, unquestionable) ethical significance. It is, after all, what people *feel* themselves to be. Constitutional patriotism, on the other hand, concedes only a pragmatic (and, in all likelihood, temporary) significance to nationality. It agrees with liberal nationalism that particularity – in the form of particular political communities in which some human beings are privileged over others – is not, *per se*, illegitimate. It also agrees with liberal nationalism that such communities are the only way to attain certain ‘relationship goods’. But nationality, for constitutional patriotism, does not generate these goods; and, in particular, it is not an extension of (and does not constitute an analogy with) the family.

### **Mystic Chords of European Memory?**

“Democracy is a matter of having a good memory.”

*Kurt Schumacher*

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<sup>22</sup> Ciaran Cronin, ‘Democracy and Collective Identity: In Defence of Constitutional Patriotism’, in: (2003) 11 *European Journal of Philosophy*, 1-28.

Now, what about these kinds of supplements of particularity (which, I argued above, do have a moral connection with constitutional patriotism) in Europe? Are such supplements even imaginable at the European level?

Let me first take *memory*. The last fifteen years or so have seen the rise of what has been called a ‘politics of regret’. Simply put, this is a politics in which national leaders increasingly assume collective responsibility for past misdeeds and engage in public acts of atonement.<sup>23</sup> Whether this public repudiation of the past constitutes a new form of political legitimacy as such is still very much open to question – that it is spreading as a type of political claim-making is not.

Yet, a shared, Europe-wide constitutional patriotism might be more demanding than a series of seemingly national instantiations of the politics of regret. In particular, it seems that it would have to include ‘new pasts’ for each member. This could mean either that Europeans acknowledge the collective memories of other countries, or that ‘transnational memories’ might have to be the basis of a European sense of belonging. On the surface of it, the first option seems somewhat awkward, perhaps even absurd. A national collective *can* take responsibility for its past, and even argue about its past in continuous public communication. Yet, it is far from clear that nations could – let alone should - argue about *other* nations’ pasts. Should the Germans judge France’s ‘Vichy syndrome’, that is, the supposed repression of French collaboration with the Nazis after 1945? Should the French debate the British treatment of the Irish? Are the Spanish in a position to feel sorry for Portuguese colonialism? There is a sense in which one can acknowledge (and emulate) the success of other countries in coming to terms with their past – but one cannot do it for them.

Yet, some European countries have already been moving strongly in the direction of dealing with other nations’ pasts. For instance, the French National Assembly and the French Senate and other national bodies of representation have passed resolutions condemning the Armenian genocide, often against the explicit wishes of the foreign ministries of their own countries. The point of such resolutions

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<sup>23</sup> Jeffrey K. Olick, and Brenda Coughlin, ‘The Politics of Regret: Analytical Frames’, in: John C. Torpey, *Politics and the Past: On Repairing Historical Injustices*, Lanham, Md.: Rowman & Littlefield, 2003, 37-62.

was officially - and, in particular, internationally – to acknowledge the character of the events from ninety years ago as ‘genocide’. Defenders of such resolutions have argued that the fact of genocide did not depend on an acknowledgement by the national collective of the perpetrators. For instance, the fact that *French* politicians had named what had to be named was irrelevant. Shameful truths, one might say, are not national property.

It is against this background that Jean-Marc Ferry has suggested a self-critical ‘opening’ of European national memories to each other.<sup>24</sup> The point is not somehow to ‘dilute’ national memories; instead, such a mutual opening would ‘de-centre’ national memories, and could contribute to the creation of an ‘enlarged mentality’, as far as thinking about Europe’s pasts is concerned.

Secondly, it is not *prima facie* impossible to ‘merge’ historical memories to some extent or to draw on ‘transnational memories’ – and to forge a common political culture in the process of arguing about these pasts. At first sight, this prospect might seem to be on an equal footing with the well-known nationalist manipulation of memories, or even evoke Orwellian images of the manipulation of individual consciousness for the sake of political conformity. Moreover, it seems to come up against the argument that only ethical communities, such as families and nations, have a duty to remember in the first place – while moral relations (and humanity at large) are not concerned with memory.<sup>25</sup>

Here, a basic distinction has to be put in place between collective or national memory on the one hand, and individual mass memory on the other.<sup>26</sup> The former refers to ‘frames’ of remembrance, while it is only the latter that designates the memories of participants in actual historical events. And it is collective (or cultural) memory, as a kind of *narrative* that nations or other groups tell about themselves, that is subject to moral claims and counter-claims.

In other words, then, what are at issue are public, collective memories and public claims about these memories – *not* private, unarticulated, or even involuntary

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<sup>24</sup> Jean-Marc Ferry, *La question de l’État européen*, Paris: Gallimard, 2000 (177).

<sup>25</sup> Avishai Margalit, *The Ethics of Memory*, Cambridge, Mass.: Harvard UP, 2002.

<sup>26</sup> Timothy Snyder, ‘Memory of Sovereignty and Sovereignty over Memory: Poland, Lithuania, and Ukraine, 1939-1999’, in: Jan-Werner Müller (ed.), *Memory and Power in Post-War Europe: Studies in the Presence of the Past*, Cambridge: Cambridge UP, 2002, 39-58.

memories. ‘Memory claims’ of the former sort are *always* political, in the sense that they demand collective recognition and are aimed at creating legitimacy. They are consciously shaped and re-shaped both by the ‘producers’ and the ‘consumers’ of memory; and they are not a matter of ‘trauma’ and ‘repression’, as false analogies with individual psychology often suggest. They can, therefore, be subject to shared public reason, historical scrutiny and moral argument in a way that individual memories are not.<sup>27</sup>

Now, there is no *prima facie* reason why such public, collective memories should be restricted to ‘thick’ ethical communities. It is a mere definitional stipulation that only ethical communities have such memories and thus have a ‘duty to remember’. Communities of memory are, for the most part, shaped politically; the fact that the nation-state is the dominant political form of modernity explains (but does not automatically justify) the fact that nations have come to be the prime communities of memory. The ‘thickness’ of the national community is not least the result of the thickness of the legal relations that co-nationals entertain with each other. In other words, communities of memory are politically configured (to avoid the term ‘constructed’) – which is not to suggest that they can be changed or reconfigured at (political) will.<sup>28</sup> But it does mean that communities of memory are not simply the result of pre-existing solidarities or even histories.

Even on an empirical level, one finds a variety of transnational and subnational memories, in addition to seemingly dominant national memories. An example of a recent ‘transnational memory’ might be the collective European failing (and shame) over Bosnia in the early to mid-1990s. An ‘overlapping moral consensus’ seems to have emerged that Europe betrayed its own liberal and internationalist ideals in its reluctance to intervene on behalf of European Muslims. Clearly, it is difficult to draw a line between European and international memories here. But given how fervently European politicians claimed, at the beginning of the Yugoslav wars, that this was ‘Europe’s hour’, the responsibility for successive failures would have to be

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<sup>27</sup> Melissa Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, Princeton: Princeton UP, 1998

<sup>28</sup> Richard J. Bernstein, ‘The Culture of Memory’, in: (2004) 43 *History and Theory*, 165-78.

attributed to the EU at least as much as to the UN or to the ‘international community’ as such.

More importantly, perhaps, there have recently been some intimations of a ‘Europeanisation’ of the Holocaust – although, on closer inspection, it becomes clear that – for obvious reasons -- British, French and German views of the Holocaust also remain deeply divided. Nevertheless, a pattern seems to be emerging that individual European nations acknowledge their role in the Holocaust, while at the same time affirming its ‘universal significance’. In France, Italy and even in Switzerland, Denmark, Sweden as well as Holland, the last decade of the twentieth century saw extensive debates about collaboration, slave labour and ‘Nazi Gold’. In fact, one might say that, after the collapse of Communism, memories of the Second World War were ‘unfrozen’ on both sides of the former Iron Curtain. This is not to say that some pristine, pre-representational memory, free of any political instrumentalisation, could suddenly be recovered. But it is to say that both personal and collective memories were liberated from constraints imposed by the need for state legitimation and the ‘friend-enemy’ thinking associated with the Cold War.<sup>29</sup>

This process of a genuine re-engagement with the past was not simply prompted by the string of half-century anniversaries stretching from 1989 to 1995, let alone the general desire for ‘closure’ or settling historical records at the end of the last century. For the most part, there has been a genuine opening towards national and transnational wrongs – committed both during and after the Nazi occupation of Europe. In particular, the policies of retribution after the War, as well as the extensive expulsion policies, have increasingly become subject to historical scrutiny. Detailed studies have demonstrated how punishment contributed to myths of national expiation and rebirth.<sup>30</sup>

The upshot has been that many myths of resistance and purity of the post-war period seem to have dissolved – which, of course, is not to claim that guilt or responsibility are all of a sudden distributed equally across the continent. Immediately

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<sup>29</sup> See, also, Jan-Werner Müller, ‘Introduction: The Power of Memory, the Memory of Power and the Power over Memory’, in: Jan-Werner Müller (ed.), *Memory and Power in Post-War Europe*, Cambridge: Cambridge UP, 2002.

<sup>30</sup> István Deák, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and its Aftermath*, Princeton: Princeton UP, 2000.

after the War, nations quickly needed to assert themselves and to find – and legitimise – their role in the global confrontation between East and West. Arguably, European integration has helped Western European countries to gain some distance from their own pasts, as these pasts ceased to serve the particular post-war function as moral foundations of individual nations. Integration lessened the need for national self-assertion, for homogeneous narratives of national continuity – and thereby the need to present a morally pristine past.

Now, however, *la hantise du passé* is clearly no longer a German peculiarity. It might be too much to claim that the Nazi experience as a whole has now been ‘Europeanised’. But it is not unreasonable to claim that a sufficiently common language now exists about guilt, moral-political entanglements and fateful exclusions. In short, national memories have become more heterogeneous and discontinuous, but free-floating particles of these memories, in turn, might possibly coalesce into a thin, transnational European memory.

A similar process of ‘unfreezing’ and fragmentation has taken place in Central and East Central Europe. The painful Polish self-interrogation over the massacre at Jedwabne, the debates surrounding Budapest’s ‘House of Terror’, and the German-Czech disputes over the Beneš-decrees – these are only a few examples of intense recent historical controversies, in which, often enough, Nazism, Communism and collaboration were all at stake simultaneously. In each case, history and national identity have been linked more or less directly – and, in each case, a European dimension was eventually added to the discussions. In fact, for some Central and Central Eastern European countries waiting to join the EU, establishing Holocaust memorial days seems to have almost become a ‘test case’ of their liberal democratic morality.

Arguably, European integration has helped these processes of critical self-reflection. The prospect of inclusion has made Central and Eastern European politicians and intellectuals *more* willing to ‘de-centre’ and question national identities. Eventually, the security of ‘belonging to Europe’ – even if sometimes on rather unfavourable terms – has also made self-questioning more secure. This fact also weakens the frequent claim that the accession countries do not have traditions of constitutional patriotism, or that, since they have only just regained sovereignty in the

name of nationality, they would resent supra-national integration (even if they might consent to it as a sheer economic necessity). But again, constitutional patriotism only asks for a post-nationalist, critical kind of political attachment, rather than a complete abandonment of national cultures.

In the EU itself, on the other hand, reference to the Holocaust has been linked explicitly with an affirmation of tolerance and diversity in the present. For all their inclusiveness, these measures have clearly been part of an adversary structure, except that it is a diachronic, and not a synchronic, political or national one. The present political communities reaffirm themselves against an image of absolute moral evil in the past, thereby inextricably linking memory and morality.

The choice of the Holocaust as a horizon of absolute political evil is, of course, not accidental, and says much about European political realities since 1989. After the end of the Communist ‘evil empire’, the Third Reich appeared as a new (or old) standard of political evil. Moreover, in the presence of ‘rogue states’ and genocide – apparently, the worst political spectres of the post-Cold War period – the Third Reich seemed as the most ‘useful past’.

Memories of the Holocaust have served to legitimate both multicultural integration and humanitarian intervention. And, at least until 11 September 2001, it seemed that integration and intervention were the two major political projects of Europe (and the West more generally) after the end of the Cold War. They are also connected, although often in complex ways. The wars of Yugoslav succession flooded the continent with refugees in a way not seen since the Second World War and its aftermath. Military intervention was partly designed to manage (and limit) the problems of integration at home, while the goals of intervention often included the vision of an integrated multi-ethnic society. For both purposes, the Holocaust proved a useful past.

So, in sum, a ‘European memory’ in the service of a European constitutional patriotism is certainly conceivable, and it is arguably no less feasible than ‘national memories’ that can be shaped by the speeches of politicians, and the style and content of commemorations, *etc.* How such ‘official’ collective memories eventually frame private and individual memories – both for those who lived the past in question and

for those who did not – is a complex question and almost impossible to verify empirically; but the fact that they *do* frame memories is no longer in dispute.

And yet, a conscious ‘memorialisation’ of politics is not as unambiguously desirable from a normative point of view, as it might seem at first sight. For one thing, such a ‘memorialization’ tends to open the Pandora’s box of problems associated with historical analogies. James Bryce’s judgement that ‘the chief practical use of history is to deliver us from plausible historical analogies’ will not deter politicians, intellectuals and citizens from rummaging through the past. Yet, such analogical reasoning is likely to have poor results, for reasons deeply rooted in cognitive psychology.<sup>31</sup> Mainly, analogies simply create ‘instant legitimacy’. If nothing else, they serve to reduce complexity and short-circuit critical reflection. In summary, there is a real danger that analogy comes to substitute argument and analysis.

Furthermore, invoking the past frequently furnishes the participants of political debates with a moral certainty which otherwise can hardly be obtained in pluralist democratic societies. Drawing on memories for the justification of foreign and military policies, as frequently happened in the Kosovo War of 1999, can simply be designed to lend these policies a self-evident character and moral legitimacy. They might or might not have had this kind of legitimacy, had there been a proper debate about their meaning for the present. In short, appealing to the past can function as a way of avoiding political argument. Perversely, perhaps, they can also end up de-moralizing political argument. After all, reference to the Holocaust might set the standard for military intervention, for instance, far too high.

Moreover, as critics have long pointed out, the Holocaust is perhaps the last form of acceptable, albeit negative, ‘Eurocentrism’. Its uniqueness in the annals of genocide, at least in the eyes of some, is derived precisely from the fact that it occurred in Europe and, in particular, in ‘highly cultured Germany’, as the phrase goes. Since we are still far from what sociologists have called a ‘globalisation’ (or even ‘glocalisation’) of the Holocaust, a European ‘Holocaust identity’ would result in its own, novel forms of ‘mnemonic exclusion’.<sup>32</sup> Immigrants and minorities,

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<sup>31</sup> Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bien Phu and the Vietnam Decisions of 1965*, Princeton: Princeton UP, 1992

<sup>32</sup> Daniel Levy, and Natan Sznaider, *Erinnerung im globalen Zeitalter: Der Holocaust*, Frankfurt/Main:

especially, would be alienated from constitutional patriotism if this historical dimension were to be over-emphasised.

### **Militancy: ‘Un-European Activities’?**

“...when the constitution itself is secure, there is no reason to deny freedom to the intolerant.”

*John Rawls*

What about militancy, then? Almost all EU Member States have traditions and provisions of militant democracy, or what Peter Niesen has called ‘negative republicanism’, that is, mechanisms for defending democracy that both refer back to and repudiate particular national pasts.<sup>33</sup> Moreover, the European Court of Human Rights has affirmed the idea of militant democracy in reviewing national legal decisions<sup>34</sup>, thus setting a precedent for the EU. Could there, then, not be an ‘overlapping consensus’ through which European states can find cohesion by defining internal limits to political speech and behaviour? And is militant democracy not the obvious way of making memory politically relevant for the present?

In a sense, the EU has already had one experience with supranational militancy. In fact, not only militancy, but also political morality and memory played a role in the decision to sanction Haider’s Austria in the spring of 2000. Suddenly, there seemed to be a determined political will shared by a number of European leaders to show that Europe finds its real limits not with any geographical borders, but with a certain kind of politics. Individual democracies enacted bilateral sanctions against Austria, while encouraging their civil societies to ‘shame’ the Austrians. These sanctions were of a particularly (and peculiar) moral character – official representatives of European democracies would deny their Austrian counterparts recognition in diplomatic encounters by refusing handshakes, by leaving the room and through other similar gestures.

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Suhrkamp, 2001.

<sup>33</sup> See, also, Gregory H. Fox, and Georg Nolte (1995), ‘Intolerant democracies’, in: (1995) 36 *Harvard International Law Journal*, 1-70.

<sup>34</sup> Sven Eiffler, Die “wehrhafte Demokratie” in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: (2003) 36 *Kritische Justiz*, 218-25.

Memory also played an important role in European democracies acting in concert against Austria. It was not an accident that European leaders took steps against Austria almost immediately after the Stockholm ‘Holocaust Forum’ in January 2000, where they solemnly pledged ‘collective responsibility’. The moralisation and memorialisation of European politics went hand in hand, as memory was invoked as a motivational resource for moral action and for renewed identification with universal norms.

Why not then build on this example and flesh out an idea of a proper EU militant democracy? Arguably one needs to distinguish two potential scenarios here: one is an EU Member State actually becoming un-democratic in an obvious way – a case which would require the expulsion of the state from the Union, and for which, in a sense, no pan-European idea of militant democracy is required. The other scenario is the rise of anti-democratic parties and movements *within* Member States. Here, the principle of subsidiarity would suggest that the Member States are themselves in the best position to judge how they wish to confront such parties and movements, and how important a place political toleration ought to have in their political cultures. Given how difficult it is to predict the results which measures commonly associated with militant democracy might have, European countries could certainly learn from each other, and perhaps, over time, improve the legal-technical ‘tool kit’ of militant democracy. Brussels might help this process, but it must not enter into anything that might resemble taking decisions on what constitutes ‘un-European activities’.

The matter is different again, if one shifts from state-initiated measures of militant democracy to civil society. After all, to return to the Austrian example, anti-Haider protests were also expressed through demonstrations by ordinary citizens in various European countries (and in Austria itself), as well as through individual measures, for example, boycotting Austria for holidays. Such symbolic gestures were largely attempts at political shaming, of drawing attention to and expressing disgust at acts seen as political shameful.

*Prima facie*, there is much to be said in favour of such shaming through ordinary citizens – as opposed to politicians or judges exclusively handling the machinery of militant democracy. Politicians, after all, would often be suspected of hypocrisy, that is, of pushing their own popularity or the national interest of their

country behind the veil of moral concern. Judges, on the other hand, might react too slowly; or they might be hindered from taking the appropriate measures quickly because of procedural constraints. To put it differently, politicians might be too political, while judges might be not political enough in the event of real anti-democratic challenges. These potential problems are not specific to the European level; but, arguably, they would be exacerbated once one shifted beyond the framework of a particular nation-state.

Yet, there is a general normative worry about shaming through civil society – a worry that is arguably much amplified at the level above the nation-state. As James Q. Whitman has pointed out, political shaming, especially when encouraged, if not organized by governments, is easily complicit with a kind of unreflective and emotional crowd politics that might damage the quality of democratic life.<sup>35</sup> This suspicion applies even more at the supranational level. Shaming across borders is easily ‘nationalised’; it might encourage a politics of national indignation and defensiveness – as was very much the case with Austria in 2000.

It seems, then, that there is no obvious place for an affirmation of militant democracy at EU level. Clearly, the EU excludes what is non-democratic, but below the level of clear-cut deviance from democratic principles, it is not obvious what the Union could do, and whether an elaboration of a European militant democracy would yield a strengthening of a European constitutional patriotism. Militancy, significantly more than memory, might indeed become decidedly illiberal, if artificially forced upon Member States as part of ‘constructing a European identity’.

### **The EU’s ‘Constitutional Morality’ – a Modest Proposal**

Should one, perhaps, then refocus attention on what is actually at the core of constitutional patriotism (in contrast to any supplements of particularity), namely, a ‘constitutional identity’ centred on universalist liberal democratic values, refracted and interpreted through particular historical experiences and political cultures? Clearly, there will be significant overlap between EU Member States and the EU itself, as far as such ‘constitutional identities’ are concerned. And yet, it is, arguably,

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<sup>35</sup> James Q. Whitman, ‘What Is Wrong with Inflicting Shame Sanctions?’, in: (1998) 107 *Yale Law Journal*, 1055-92.

here that a positive form of particularity can find another foothold in order to become a force of motivation or even of loyalty. It is a thought that I only want to sketch for now, partly because discussions about the EU's constitution – whether it be a newly written one, or the actually existing one – remain so much in flux, and partly because there is still comparatively little agreement among scholars as to the actual inner workings of the Union and normative principles that might be extracted from these workings.

The EU is distinguished by at least three peculiar characteristics: first, its constitutionalisation has been an essentially open-ended process of deliberation and political struggle. It therefore might fit a notion of a constitution as an ongoing project actually much more closely than constitutions at the level of the nation-state. Clearly, there is nothing good in itself about change for its own sake or the character of a political association as a project; as Glyn Morgan has pointed out, the ‘qualities of flux and flexibility’ which proponents of a post-modern (and, in particular, ‘post-sovereign’) EU highlight, do not have obvious political value as such.<sup>36</sup> All will depend on the specific character of the projects (or enterprises) themselves. But it does distinguish the EU as a particular kind of polity, a polity not based on pre-existing civic solidarities, but on mutually agreed projects and enterprises.<sup>37</sup>

Secondly, this process is open not just with regard to its ultimate outcome, it is also open with regard to its constituents. What has been called the EU's normative ‘power to attract’ new members translates into a further institutional peculiarity: the European constituent power is itself subject to enlargement. The EU is not based on one constituent power, or one *demos*. Instead, it is based on an expanding *group of demoi*. It is not about creating a basic identity which supports a constitution, but about a dynamic and complex process of ‘sharing identities’, while at the same time tolerating and preserving difference.<sup>38</sup> European peoples will continuously have to negotiate, and will have to decide how much they wish to share in common, and how much they wish to keep apart.

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<sup>36</sup> Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration*, Princeton: Princeton UP, 2005 (121).

<sup>37</sup> See, also, Kalypso Nicolaïdis, ‘Our European Demoi-crazy’, in: Kalypso Nicolaidis and Stephen Weatherill (eds.), *Whose Europe? National Models and Constitution of the European Union*, Oxford: Oxford UP, 2003, 137-52.

<sup>38</sup> Nicolaïdis, *op. cit.*

Given this persistent plurality of peoples within the EU, the Union requires a large degree of what Joseph Weiler has called ‘constitutional tolerance’<sup>39</sup>. It also requires – and ideally enables – a great deal of mutual learning against the background of persistent plurality. Again, this characteristic might not be an exclusive EU-property – but it certainly requires a different kind of constitutionally patriotic disposition than other kinds of polities. It is not so much about the ‘purification’ of a public sphere or the ‘protection’ of democracy as such (although both elements are, at least somewhat, present in the EU), as it is about taming raw power and sovereignty, and establishing a politics of compromise and mutual recognition that are unprecedented at the supranational level. Again, it is important not to idealise a process for the understanding of which we still lack adequate conceptual tools – but it is not entirely fanciful, in this context, to speak of a ‘silent cosmopolitan revolution’ that has transformed nation-states, as opposed to superseding them with a ‘supra-nation state’.<sup>40</sup>

Finally, a conscious endorsement of the particular principles and practices that have evolved in the EU does not exclude a simultaneous constitutionally patriotic attachment within Member States. In fact, much of what makes the EU both distinctive and successful can only be sustained, because the existing Member States remain liberal-democratic, stable and conscious of a will to integration which is, at least partly, informed by memory. The EU is able to remain so open to change – so open-ended – partly because the Member States are unable to do so. To put it differently, an expanding, self-transforming EU depends on already transformed and ‘tamed’ nation states.<sup>41</sup> This is the peculiar dynamic of democratic inclusion which does not supplant nation states, but continuously transforms them.

Thus, a European constitutional patriotism and constitutional patriotism in and for the existing Member States might - at least partly - inform and enrich each other. Mutual learning for the sake of addressing common political challenges and mutual identification over shared projects – rather than ‘common identity’ – might qualify as

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<sup>39</sup> Joseph H. H. Weiler, ‘Federalism Without Constitutionalism: Europe’s *Sonderweg*’, in: Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford UP, 2001, 54-70.

<sup>40</sup> Marcel Gauchet, ‘La Nouvelle Europe’, in: *La condition politique*, Paris: Gallimard, 2005 (501).

<sup>41</sup> James Sheehan, ‘What it Means to be a State: States and Violence in Twentieth-Century Europe’, in: (2003) 1 *Journal of Modern European History*, 11-23.

practices that would allow for a kind of back-and-forth between the European and the national levels. In this sense, the very ‘multi-level’ political architecture of today’s Europe might also enable multiple levels of identification, depending on the particular problem or project in question. At the same time, this conception does not exclude, or automatically distrust, the very possibility of the emergence of a ‘European collective identity’ in a way that a political hermeneutic informed by post-modern suspicions – often based on unarticulated normative premises – would suggest.

Now, it would be to evict politics from political theory, if one did not take into account the possibility of conflict between different levels, and the need to choose among them. Such a thought would indeed give credence to the charge that post-modern visions of a perpetually evolving, infinitely varied and yet harmonious entity called the ‘European Union’ are profoundly apolitical.<sup>42</sup> However, the fact that these kinds of conflicts tend to be contained in a political culture in which only a certain kind of political claim-making is publicly acceptable, reinforce the point that the EU has, in fact, produced a range of practices and principles that distinguish a particular EU constitutional political culture.

It is, I submit, these demanding political principles – and the no less demanding political dispositions needed to sustain them in the long run – that make for the *differentia specifica* of the EU’s constitutional identity. It is what renders the EU *sui generis* – which, once again, is not a good thing in itself, unless one wants to be a victim of what Paul Valéry once called the Moderns’ *néomanie*. But it is these characteristics which have - at least partly - contributed to making the EU the most successful innovation in political forms since the nation state.

How these principles could be made clearer in the eyes of the public, more obvious, more *lisible* – is again a question that goes beyond the scope of this essay. But it is a task that is arguably more promising than the mere concentration on the ‘thickening’ of the negative contrasts of memory and militancy, even if memory, in particular, might also be used extensively in order to explain and to justify these principles.

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<sup>42</sup> Morgan, *op. cit.*.

## Conclusion

A ‘thicker’ constitutional patriotism could indeed be made coherent in and for Europe. Memory and militancy might, at first sight, seem artificial and removed from the daily political concerns of citizens (not to mention their non-political concerns). Yet, past experience suggests that the treatment of public collective memory by political élites, and the formulation as well as the actual application of the legal means for dealing with the enemies of democracy, do have profound long-term effects on the framing of political cultures.

I have suggested, however, that there are good reasons to put an emphasis on the principles and practices that the EU has developed as part of a distinct constitutional identity, rather than the potential supplements of particularity. This is not a question of either/or: a European constitutional patriotism would – over time - change the perspectives on Europe’s past; it would certainly mandate a vigorous response – even of the EU’s specific principles and practices -- were there to be a serious challenge to liberal democracy, either in an individual European country or even somehow within Europe as a whole. The distinctions between memory and militancy on the one hand, and morality on the other, are, after all, analytical.

Whether European political élites can render the principles and practices of the EU more *lisible* is an open question. But normatively, as I hope to have shown, such a project is more desirable than a ‘thickening’ of a European constitutional patriotism. And once again: thinness does not automatically imply weakness.