



On the Origins of Constitutional Patriotism

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Political theorists tend to dismiss the concept of constitutional patriotism for two main reasons. On the one hand, constitutional patriotism — understood as a post-national, universalist form of democratic political allegiance — is rejected on account of its abstract quality. On the otherhand, it is argued that constitutional patriotism, while appearing universalist, is in fact particular through and through. According to this genealogical critique, it is held that constitutional patriotism might have been appropriate in the context when it originated — namely West Germany, a half-nation with a deeply compromised sense of nationality on account of the Nazi past — but it is not universally applicable. This article reconstructs the origins of constitutional patriotism arguing that both the ‘protective’ and state-centred patriotism of Dolf Sternberger, and the ‘purifying’ patriotism of Jürgen Habermas — focused mainly on the public sphere — can indeed be understood as relying on ‘supplements of particularity’. However, there are also normative connections between universalist constitutional morality and militant democracy on the one hand, and universalist constitutionalist morality and an imperative to remember on the other. Thus, the genealogical critique by itself is insufficient to invalidate the idea of constitutional patriotism.

Contemporary Political Theory (2006) 5, 278–296. doi:10.1057/palgrave.cpt.9300235

Keywords: constitutional patriotism; Jürgen Habermas; Dolf Sternberger; ethics of remembrance; militant democracy; liberal nationalism

Every collective identity, also a postnational one, is much more concrete than the ensemble of moral, legal and political principles around which it crystallizes.

Jürgen Habermas

‘Man’ is really ‘the German’.

Marx,
The German Ideology

British and American political theorists tend to dismiss the concept of constitutional patriotism for two main reasons.¹ On the one hand, constitutional patriotism — understood as a post-national, universalist form of democratic political allegiance — is rejected on account of its abstract or, as an



especially inappropriate metaphor goes, ‘bloodless’ quality. Given the universalist morality at the heart of constitutional patriotism, so the critics argue, there is no reason to identify with any particular polity. In other words, constitutional patriotism is said to be a kind of aspirational oxymoron, in which the universalist part — indicated by the concept of constitutionalism — will always drive out the idea of loyalty — indicated by the concept of patriotism.

However, a second criticism — much more muted in writing, but often voiced in direct confrontation with the advocates of constitutional patriotism — holds almost exactly the opposite from the first. Here it is argued that constitutional patriotism, while appearing universalist, is in fact particular through and through. According to what one might call a genealogical critique, it is held that constitutional patriotism might have been appropriate in the context where it originated — namely West Germany, a ‘half-nation’ with a sense of deeply compromised nationality on account of the Nazi past. But, so the argument goes, other countries do not have a comparably difficult past, and therefore are better served by forms of liberal nationalism. A further argument holds that other countries either have no (written) constitutions, or that they simply do not venerate the constitution as a focal point of democratic loyalty in the way Germans (and Americans, for that matter) might do. Constitutional patriotism, in short, is a sort of particularism in universalist disguise — and one that might be foisted on Europe as a whole, if the advocates of a ‘European constitutional patriotism’ have their way. In a strange fashion, Thomas Mann’s nightmare — a German Europe, rather than a European Germany — might come true, after all.

In this essay, I shall argue that what has above been called the genealogical critique of constitutional patriotism is indeed not without force. While of course neither constitutionalism nor patriotism were invented by Germans, constitutional patriotism, as a theory distinct from both liberal nationalism and republican patriotism, was elaborated most clearly in post-war West Germany — and for clearly discernible historical reasons. Moreover — and this has been less obvious even to the most informed students of constitutional patriotism — rather than being merely a universalist response to a nationalist past, constitutional patriotism always relied on ‘supplements of particularity’ to become effective as a form of political attachment (Markell, 2000). In the German context, constitutional patriotism has always contained strong doses of ‘memory’ and ‘militancy’. Memory here refers primarily to the memory of the Holocaust and the Nazi past. Militancy, on the other hand, was shown towards the enemies of democracy, mostly 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 hostile to its principles.



In short, political agency, as envisaged by the proponents of constitutional patriotism, has been conceived as animated by a set of universalist norms, but enriched and strengthened by particular experiences and concerns. These particular experiences and concerns have been concentrated in what one might call two negative contrasts, namely a contrast of present democracy with the evils of the past, and a contrast of present democracy with real or potential anti-democratic challenges. Whether such supplementary constitutional identity formation *ex negativo* is normatively desirable or not is a perfectly debatable question. What is not debatable is that, while the stress that was put on these supplements of particularity is historically contingent on the German context, there are in fact important normative connections between constitutional morality and memory and militancy, respectively. Therefore, the genealogical critique of constitutional patriotism does not by itself invalidate the concept. There might be good normative reasons, however, not to put too much stress on memory and militancy as aspects of constitutional patriotism, as both have an illiberal side, or can at least lead to a problematic juridification of politics. While I cannot fully elucidate these illiberal sides and the perils of juridification in the context of this essay, I shall allude to several of them at the end of my reflections.

The Birth of Constitutional Patriotism out of the Spirit of German Guilt: From Free Communication to Republican Loyalty

Perhaps some of the deepest roots of the idea of constitutional patriotism, as it later emerged in the thought of Jürgen Habermas, can be traced to the political interventions of the liberal philosopher Karl Jaspers in the immediate post-war period (for the following see also Müller, 2000). In his famous *The Question of German Guilt*, Jaspers drew seminal distinctions between criminal, moral, political and metaphysical guilt. Definitions of criminal and moral guilt were relatively straightforward. Political guilt, in Jaspers's conception, attached to all those living under cruel and unjust regimes. Metaphysical guilt, however, referred to a rupture in a deep level of solidarity that Jaspers assumed existed among all human beings.

In the same context Jaspers, (1946, 10–14) also advocated a notion of 'collective responsibility'. He opposed such a notion to the charge of 'collective guilt', which he (and many others) felt was being levelled against Germany. At the same time, he linked collective responsibility with the question of German unity. According to Jaspers, a democratic political identity and a German *Gemeinsamkeit* [togetherness], that is, proper social integration, could only be achieved if the Germans shouldered collective responsibility. For Jaspers, even a negative past could become a source of social cohesion. In fact, in the



German case, he held, not facing up to the past would make social cohesion difficult, if not impossible.

However, Jaspers's account of the institutional expression of the imperative to assume responsibility remained ambiguous. Had the Germans once and for all squandered their nation-state? If so, would this allow for the emergence of what Jaspers called the 'true German as world citizen', even, in some sense, making the Germans take the place of the Jews as a 'pariah'-nation? Or was the German nation to be a 'pariah' for a certain time only, potentially regaining its statehood after a period of political and moral 'purification' (Rabinbach, 1997, 138)? The first option was suggested by Jaspers's remark in a letter to Hannah Arendt that 'Germany is the first nation that, as a nation, has gone to ruin', and by his admission that 'now that Germany is destroyed, I feel at ease for the first time' (Arendt-Jaspers, 1985, 82, 93).

Jaspers linked a 'working through the past' explicitly with a new kind of cosmopolitanism — the project of continuously contested memory and the (perhaps incoherent) idea of 'universal membership' were to become inseparable. He repudiated his previous nationalism, which he had adopted from his teacher Max Weber, explicitly denying that a liberal political identity and a nation-state framework could go together for the Germans. He also insisted that, as much as moral guilt was a question for one's individual conscience, the only way to deal with German guilt as a whole was through 'free public communication' and what he called the 'solidarity of charitable struggle' — instead of mutual moral condemnations (Jaspers, 1946, 17). This claim, rooted in Jaspers's philosophy of free communication between equals, was eventually taken up by numerous intellectuals, who established a link between remembrance and a democratic political culture — most importantly by Jaspers' pupil Dolf Sternberger and, much later, by Habermas (Salamun, 1985, 105).

It would not be unfair to say that ultimately Jaspers was an apolitical thinker. He could not find any lasting institutional, let alone affective expression for the connection between collective responsibility and democratic citizenship that he was advocating. However, he was not the only theorist in the aftermath of the War who was concerned with the interplay of political identity and political stability — and the institutional fortification of such a link (for the following see also Müller, 2003, part II). Political and legal thinkers in post-war West Germany were haunted by the failure of the Weimar Republic. Germany's first Republic had been based on what many saw as the world's most progressive constitution at the time. However, Weimar had also been a 'democracy without democrats', and, in the eyes of many observers, it had partly been rendered vulnerable by the most democratic clauses of the constitution — clauses and mechanisms which had eventually been abused by the enemies of democracy. Consequently, post-war thinkers were deeply



anxious whether a properly liberal democratic constitution could survive in post-war West Germany at all, other than through the backing of the Allies.

Not surprisingly, then, Carl Schmitt's question — who guards the constitution against the enemies of democracy — came to be central to many post-war legal debates. Candidates for such guardianship ranged from a strong president (who would have been Schmitt's choice) to the state bureaucracy, and even the trade unions. Soon, however, the Constitutional Court emerged as the main contender for the role of defending democracy against its enemies. The crucial step in this direction was the so-called Lüth decision of 1958, in which the Court held that the 'objective principles' embodied in the Basic Rights permeated the entire legal order. With this decision, the Court bootstrapped itself into a position where judicial review of almost all legal and political decisions became permissible.

The main jurisprudential justification for the approach of the Constitutional Court was the 'integration theory' of Rudolf Smend (1994). Smend had been one of the most important opponents of legal positivism and of purely conceptual jurisprudence during the Weimar Republic. He had argued that lawyers should draw on a mixture of legal theory and sociology to understand political integration as a truly dynamic process. Smend famously distinguished personal, functional and objective (or *sachliche*) factors of integration. The first related to personalities, whether that of a monarch or a strong parliamentary leader. The second involved institutions like parliament. The third, finally, referred to basic laws and liberties — understood not so much as defensively directed against the state than as embodying shared political values or principles. Smend further held that democratic integration was to be accomplished through plebiscites and, in particular, democratic symbols. Such symbols could include the flag and the national anthem, but also a state's territory. Crucial, however, was a general trust and pride in the political system.

During the 1920s, Smend had entertained an ambivalent relationship with democracy. He had come to think that Mussolini's fascism might be a more effective way of achieving democratic integration. After the War, however, he became one of the most important legal theorists to support the new democratic constitution. He also influenced a wide range of Social Democratic thinkers who sought to overcome what was often referred to as the 'German view of the state' (Hennis, 1959). This particular view was usually taken from the heights of the executive or state administration, and insisted on seeing a strict separation between state and society — with the often unspoken (and quasi-Hegelian) assumption that the state would envelop and organize society.

From this legal and institutional perspective, Smend and his many followers turned towards a more sociological and cultural focus on the polity. For them, the Constitution was indeed squarely at the centre of the political order. More



importantly, however, the Constitution embodied an order of values that derived from the political culture and traditions of a particular country. Decisions by the Constitutional Court were to be based on these values, which, at least according to Smend, could be put in a clear order. In turn the deliberations and decisions of the Constitutional Court itself would contribute to social integration. Rather than being alienated through ‘government by judges’, citizens would come to understand their political system better and identify with its institutions.

Thus, the Constitution assumed an extraordinary position in post-war German thinking about politics. 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. Many legal theorists regarded the Constitution as a problematic construct in 1949 — a list of articles seemingly imposed from outside, deliberated over with hardly any publicity, and probably unable to withstand serious threats to democracy. Yet, as time went on, the Constitution proved its resilience; more importantly, it also proved its enormous *relevance* in ordering political life (Grimm, 2001, 296–298). In fact, the Constitutional Court eventually developed into the most respected public institution of West Germany, alongside the central bank.

It was against this background that the political scientist Dolf Sternberger, 1979 explicitly introduced the concept of constitutional patriotism on the occasion of the thirtieth birthday of the Federal Republic (Sternberger, 1979). Sternberger had been a close associate of Jaspers and became the doyen of democratic political theory in West Germany after the War. As early as 1959, Sternberger 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 (Sternberger, 1980; Lietzmann, 1993, 207–210).

To give his conception of constitutional patriotism theoretical coherence, Sternberger drew on Aristotelianism, Hannah Arendt’s republicanism and an emphatic notion of civic conduct, or *Bürgerlichkeit*. 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 18th century, all forms of patriotism had been ‘constitutional patriotism’ understood as the love of the laws and common liberties. In other words, constitutional patriotism was on some level to be a return to pre-national patriotism.

However, as much as Sternberger was trying to transcend the *nation-state*, he was much less sceptical about the *nation-state*. While he was highly critical of Max Weber and his category of ‘legal domination’, or *Herrschaft*, his



conception of constitutional patriotism was still substantially indebted to traditions of German *étatisme*. Sternberger, born in 1907, had been marked by the experience of Weimar's failure. It was not surprising, then, that he focused primarily on loyalty to the state and, in a very broad fashion, to the rule of law, rather than on specific civil liberties or the social rights which a constitution might also guarantee. Constitutional patriotism was still a form of what German political theorists in an almost untranslatable phrase call *Staatsbewußtsein* — a 'consciousness of belonging to the state'.

Sternberger 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. For instance, when Heinrich Böll suggested 'mercy' for Ulrike Meinhof of the Baader-Meinhof gang in 1972, Sternberger shot back that 'the democratic state is also a state ... render unto the state what is the state's, Böll!' (Sternberger, 1972). Sternberger's 'friends of the Constitution' were polemically opposed to the 'enemies of the constitution' — a highly contested concept used mostly in the 1970s for terrorists and those suspected of supporting them. This idea of 'constitutional enmity' justified the restriction of civil liberties, the choice of jobs in the civil service in particular, and, to this day, has left a legacy of illiberal legislation designed to deal with those suspected of opposing the Constitution.

Constitutional patriotism, then, became closely associated with 'militant democracy' — a concept first defined by the German exile political scientist Karl Loewenstein in 1937 (Loewenstein, 1937a). 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' (Loewenstein, 1937a, 424). 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 political and legislative answers to anti-democratic forces — such as banning parties and militias. They 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' (Loewenstein, 1937b, 647). As Loewenstein put it, 'fire should be fought with fire'. And that fire could only be lit by a new, 'disciplined' or even 'authoritarian' democracy (Loewenstein, 1937b, 656–657).

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, later, the draconian measures against those guilty by (suspected) association with terrorists (Preuss, 1999). The 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 the right. 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 Constitutional Court had coined the phrase and elaborated in its judgements in the 1950s. This 'order' consisted of the very values that, according to the Court, were permeating the entire legal system. Thus emerged what has been called democratic 'anti-extremism', which, by definition, assumed the symmetry of potential threats from right and left (Niesen, 2003).

Critics charged from the beginning that this anti-extremism could easily be instrumentalized against legitimate left-wing opposition, while, at the same time, it did little to help deal with the Nazi past. If anything, its implicit equation of Soviet Communism (and its alleged foreign agents) and Nazism seemed to relativize the specific evil of Nazism. On a more philosophical plane, critics — most prominently Carl Schmitt and his pupils — claimed that any 'order of values' was essentially indeterminate (Schmitt, 1967). To the extent that values could be made determinate, they would require positing some opposite values. Thus, an adversarial structure would come to characterize the legal order as a whole. Since ultimately persons were the carriers of values, such an adversarial structure would also translate into a strict friend–enemy thinking in actual politics among persons. And in any case, all explications and trade-offs between values would ultimately remain subjective. Thus, the emphasis on values would juridify politics *and* make it more indeterminate at the same time.

Against the background of such peculiar legal traditions, it should become clear that the primary purpose of what one might call Sternberger's 'protective constitutional patriotism' was to ensure political stability and social cohesion. These in turn contributed to what Sternberger construed as the ultimate purpose of politics: the establishment and maintenance of peace. Protective patriotism of this sort entailed a low level of democratic tolerance, but also strong pedagogical elements (Behrmann, 1993). Its moral substance was a conception of civic Aristotelian friendship: citizens could make substantial claims on each other, and, ultimately, the polity as a whole could demand loyalty from citizens.

The affective ties of Sternberger's constitutional patriotism were thus vertical, rather than horizontal — and, in particular, citizens would 'care for'



concrete, particular institutions by identifying their interests with those of the institutions. Their attachment was 'political' in the sense that they expressed a continuous will to uphold particular political institutions — and feelings motivating this will were pride in having built these institutions and in possessing them now. Patriotism, then, was not a matter of uncomplicated belonging or a kind of 'feeling at home' that could be taken for granted. Rather, it was based on a political *achievement* and on an explicitly *adversarial* relationship with democracy's enemies, real or presumed, in the past as much as in the present. In the end, loyalty was owed to political and legal institutions as embodiments of a particular constitutional tradition (Ingram, 1996, 15).

Habermas's Constitutional Patriotism: Towards Rational Collective Identities

Jürgen Habermas first advanced his version of constitutional patriotism during the so-called 'historians' dispute' of 1986 (see Maier, 1988). On a purely historiographical level, this acrimonious controversy revolved around the singularity of National Socialism and the Holocaust and, in particular, their comparability to Stalinism and the Gulag. On a political level, however, both the participants in the dispute and many observers felt that German collective identity was at stake. In particular, Habermas claimed that a number of conservative historians were attempting to 'normalize' German identity, and facilitating the return of a conventional form of national pride. This new national consciousness, in Habermas's view, was to shore up the stability of the political system and, indirectly, that of the Western Alliance as a whole. Against such a form of national pride, Habermas advocated constitutional patriotism as the only permissible form of political identification for West Germans.

In accordance with Sternberger, Habermas portrayed constitutional patriotism as a conscious affirmation of political principles. However, he did not think that an unproblematic return to a pre-national (and pre-modern) patriotism centred on civic friendship was possible. Very broadly speaking, one might say that the disenchantment of the modern world and its complex division into different spheres of value would block such a return to an Aristotelian polity. Individual and collective identities are no longer formed by internalizing religious or, for that matter, nationalist imperatives. Put differently, an unproblematic 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, has called 'post-conventional identities'. They learn to adopt as impartial a point of view as possible and to step back from their own desires and from the conventional social expectations with which society and



its institutions confront them. Identity becomes ‘de-centred’, as individuals relativize what they want and what others expect from them in the light of moral concerns.

As with the individual, so with society (Habermas, 1976). The exercise of coercion over citizens can no longer be justified with reference to sacred or quasi-sacred sources. One way or another, actual popular sovereignty becomes the sole source of legitimacy. Religious legitimacy, or ‘political theology’, tends to be abandoned alongside traditionalism and other transcendent sources of authority. Democracy, in turn, requires rights and liberties, which by their very nature contain a universalist kernel. Their realization, however, requires a particular polity. *De facto*, they require the nation-state, the only political framework, in which democracy has appeared in the modern world. Yet, their universalist normative content always exceeds any necessarily particular realization in time.

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. Rather, they are at least partially re-interpreted in the light of the universalist claims that have been realized as basic rights and constitutional norms more generally. Citizens are asked critically to reflect upon particular traditions and group identities in the name of shared universal principles. This also means that they have reflectively to endorse or reject the national traditions with which they find themselves confronted.

Unconditional or even unreflective identification becomes replaced by dynamic and complex processes of identity formation — or, put differently, by open-ended political and legal learning processes. There is no unchanging object of identification — whether the nation or, for that matter, a historical constitution. In fact, the precise object is less important than the appropriately ‘post-conventional’ stance that subjects attachments and loyalties to critical reflection and, if necessary, revision.

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. Open-ended communication is thus a crucial precondition for what Habermas has termed the ‘rationalization of collective identities’. A sense of attachment, one might say, is formed then both to the general character of the society that emerges from collective learning processes — and to the very procedures and situated practices that make collective reflection and contestation possible as an ongoing project.

According to Habermas, post-conventional, ‘reflexive’ identities were most likely to emerge where national traditions had been put decisively into question and where citizens felt acutely ambivalent about affirming historical



continuities. A prime example was of course the Federal Republic, which, at least according to Habermas, had developed a form of patriotism focused not so much on historical identities, as on rights and democratic procedures. In short, West Germans were able to develop a more abstract patriotism, which pointed beyond itself to even more abstract, inclusive, and increasingly universalist forms of political belonging.

Habermas thus added a much stronger universalist element to the original conception of constitutional patriotism. Yet he also sought to reduce the statist and some of the republican elements in Sternberger's theory. The traditionally German idea of the state as a substantial, or even metaphysical entity above and beyond society, was to be replaced by the *Rechtsstaat* [the rule of law] on the one hand and the *Sozialstaat* [the welfare state] on the other. The former was to give force to universal norms and guarantee democratic procedures, whereas the latter was to provide a material foundation for citizens' effective political participation. Most importantly, where Sternberger's patriotism had centred on democratic institutions worth defending, Habermas focused on the public sphere as providing a space for public reasoning among citizens. In the public sphere citizens could recognize each other as free and equal, engage in democratic learning processes and subject each other's claims to the very universal principles that they endorsed patriotically.

Territory, organization and the monopoly of legitimate violence (including the violence against constitutional enemies), the traditional Weberian reference points for the state, were de-emphasized in favour of an open-ended process of communication. Such a process was formally underpinned by the rights guaranteed through the *Rechtsstaat* and materially by the welfare provided through the *Sozialstaat*. Citizenship consisted of effective access to this communication process among free and equal citizens, rather than passive, inherited nationality. Where Sternberger's civic friendship had essentially centred on the state, Habermas envisaged civic solidarity as an outcome of unconstrained discourse leading to mutual civic recognition.

As Ciaran Cronin has pointed out, in the early versions of this argument, 'communicative processes' were still located outside or underneath the political system (Cronin, 2003, 9). A society's self-understanding was to be shaped by debates among politicians, intellectuals, journalists and academic specialists. A prime example for such a debate was the *Historikerstreit* itself. While obviously revolving around historiographical questions, the ultimate issue was 'who do we want to be?' and 'how do we want to position ourselves to our past in light of this identity?' Identity, in short, had to be based on public interpretations in the light of universalist norms, rather than ascriptive, 'pre-political' criteria. However, this was not simply a matter of replacing national with 'postnational' identity. 'Identity' itself had to become de-centred and even, to some extent,



ambivalent. At the same time, the process of identity-formation itself had to be rendered more open, dynamic and fluid.

Sources, Supplements and Solidarity

Even at the time of Habermas's initial formulation of his conception of constitutional patriotism, numerous critics doubted whether this conception could yield attachment to a *particular* polity. In other words, given the central place of universalist norms in Habermas's theory, the question had to be answered whether constitutional patriotism could ground a *distinctive* identity. After all, 'something prior to constitutional principles determines who falls under their authority' (de Greiff, 2002, 431). Alternatively, why should those supporting universalist moral norms not give their loyalty to polities which realize them in a fuller sense or a more coherent fashion? Constitutional patriotism, at first sight at least, seems to beg this question.

Habermas himself presented one answer. He stressed that the particular — in fact unique — experience of National Socialism had to be the implicit reference point for German constitutional patriotism. Only after the ultimate evil of Nazism had Germany, at least its Western part, 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' (Habermas, 1990, 152). And he added that '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' (*ibid.*). After all, 'conventional morality' in the sense of obeying law and order, following what might have appeared like 'common sense' or acting according to national traditions had all spectacularly failed in preventing the moral catastrophe of the Third Reich.

There was, then, a certain dialectic to the fascist experience. It had been *aufgehoben*, that is, both transcended and negatively preserved, in a new post-fascist identity. Such an identity could be based only on traditions that had been reflected upon and passed the critical 'filter' of Auschwitz. As Habermas put it:

Tradition means, after all, that we continue something as unproblematic, which others have started and demonstrated. We normally imagine that these 'predecessors', if they stood before us face to face, could not completely deceive us, that they could not play the role of a *deus malignus*. I for one think that this basis of trust has been destroyed by the gas chambers (Habermas, 1990, 150).



Consequently, post-fascist identity *in particular* had to be post-traditional.

This claim was not peculiar to Habermas: many post-war German intellectuals argued that a German identity had to be a ‘Holocaust identity’, since the ‘break in civilization’, which the Holocaust constituted, was the one defining feature of the nation after 1945. In the most radical form of this argument, the nation as such had been inextricably bound up with National Socialism, and, consequently, its moral substance had been fatally compromised. The idea of a ‘Holocaust identity’ was also polemically opposed to grounding the identity of the West Germans in the ‘economic miracle’ of the 1950s, or in anti-totalitarianism, which, as I mentioned above, primarily meant anti-communism in the 1950s and 1960s (Giesen, 1998, 145–163).

However, where intellectuals like the writer Günter Grass had first and foremost defended the ‘Holocaust-identity’ of the post-war Germans as a cultural one, Habermas primarily affirmed the democratic, post-fascist *political* identity of the citizens of the Federal Republic. As with Jaspers, remembrance was linked to free public communication and, especially, the public contestation of the past. Rather than enshrining a particular view of the past with sacralized rituals, interpretations of the past had to be renegotiated in an open public sphere. The controversies surrounding, for instance, trials, the extension of statues of limitations, films and monuments could all contribute to a process of moral self-clarification, as long as claims about memories were subjected to a kind of shared public reason (Williams, 1998, 177–8). This was true even if such shared public reason could itself not be isolated from controversy and disagreement. Here the hope was that controversial reflections on standards for treating the past would themselves contribute to finding a core political morality.

Memory would thus unfold a motivational power and supplement the universalist norms at the heart of constitutional patriotism. It would furnish the basis for a democratic consciousness, as democratic identity became inextricably bound up with a German ‘Holocaust identity’, as well as an ongoing ‘coming-to-terms-with-the past’ in the Federal Republic (Habermas, 1989). This identity was not so much a matter of achievement, as with Sternberger’s pride in the post-fascist democratic institutions of the Federal Republic (although Habermas also occasionally stressed these democratic institutions). Even less was it a matter of unproblematic belonging. Identity was not to be understood in static (or, for that matter, statist) terms — it was constituted precisely by a continuous civic self-interrogation and open argument about the past. In short, it was a *process*.

Potentially, this process also had a more elaborate theoretical justification, as dealing with the past could be said to have an inherent connection with democracy. Memories, rather than being monolithic and serving as the



instruments of nationalism, would always be conflicted, contested and competing in an open public sphere. But, after all, democracy itself is a form of contained conflict. Rather than aiming for some elusive thick social consensus in which one narrative of the past is enthroned, arguing about the past within liberal legality and on the basis of what has been called an 'economy of moral disagreement' could itself be a means of fostering social cohesion and solidarity. This would be precisely the solidarity of 'charitable struggle' Jaspers had already talked about in the late 1940s (see also Allen, 1999; Gutmann and Thompson, 2000).

More importantly perhaps, one might say that democracy itself is about reiterated moments of collective responsibility, in which the governed examine the record of the governors (and their promises for the future, needless to say). By definition, democracies committed to the notion of accountability cannot forget at least their immediate past, whereas under less accountable forms of government the past is often either mythologized or perhaps even eradicated. Accountability in turn presumes some kind of autonomy — after all, politicians will not be held accountable for what is beyond their control. In turn, assuming responsibility for the past — or even guilt — would strengthen, rather than damage autonomy. In that sense, one could speak of an at least loose conceptual connection between autonomy, accountability and memory — even though of course the sheer complexity of day-to-day political life would make this a very loose connection indeed.

However, one might object that ultimately it is the judicial branch that has to deal with the past, rather than the legislature or government. Democracy, it could be said, is primarily about the assertion of collective agency over the future — not a reckoning with the past. Also, the judiciary is in a position to deal with individual cases that occurred in the past. Legislatures and governments can officially acknowledge the past, and of course pass laws dealing with restitution and reparation. But as far as the inner logic of institutions is concerned — their 'spirit', so to speak — the past appears to be a matter for the courts. Constitutional liberalism — and not democracy — is thus the answer to a past of mass atrocity. But if that is correct, then concentrating on memory will encourage both the juridification of politics and a focus on the individual, rather than democratic collectives and their actions.

At the very least, however, one could say that 'coming to terms with the past' was a shared, and necessarily particular, activity for post-war Germans. In Germany there was, then, no question about the particular context of constitutional patriotism. Patriotism would call for the repudiation of a particular past in the name of universal moral values. It would also call for the institution of political procedures to deal with moral arguments about the accountability of particular perpetrators and the claims of particular victims. Universal values were instantiated in a specific context shaped by a particular



past and the common experience of instantiating universal values in an effort to overcome that past.

Present-day Germans had to assume collective responsibility for the past, as ‘a kind of intersubjective liability’ or debt arising from the ‘historical complex of forms of life that have been passed on from generation to generation’, as Habermas put it (Habermas, 1989). It was not ‘collective guilt’ that was passed on — it was, rather, the cultural contexts and ‘forms of life’ that might have facilitated crimes in the past. German law in fact does recognize cultural influence as a factor mitigating guilt. But neither Habermas nor German law see this as a kind of ‘collective guilt’ attaching directly to the descendants of the perpetrators. As Habermas put it,

our own life is linked to the life context in which Auschwitz was possible not by contingent circumstances but intrinsically. Our form of life is connected with that of our parents and grandparents through a web of familial, local, political, and intellectual traditions that is difficult to disentangle — that is, through a historical milieu that made us what and who we are today. None of us can escape this milieu, because our identities, both as individuals and as Germans, are indissolubly interwoven with it (Habermas, 1989, 233).

This intersubjective and intergenerational liability provided an additional answer to the criticism that ‘the liberal state has no home, and generates no loyalty towards generations, which, being either dead or unborn, form no part of the contract’ (Scruton, 1990, 75). Generations did not form part of a ‘contract’ — yet the suffering of the victims imposed a debt of ‘intersubjective liability’ on successive generations — binding them together (though of course often also sometimes alienating them from each other).

Some Peculiarities and Consequences of ‘German Constitutional Patriotism’

The purpose of Habermas’s constitutional patriotism was not so much protection as ‘purification’ of the public sphere and political culture more widely as well as the promotion of universalist moral principles. It was in no sense culturally neutral, since patriotism also required a particular attitude towards national culture. On an affective level, it did not so much draw on a feeling of pride, and it did not simply ‘redirect’ existing emotions from one object, the pre-political nation, to the political constitution (Markell, 2000; Cronin, 2003, 14). Rather, it brought into play a much more complex set of emotions. This set contained guilt, shame and possibly pride, as far as the democratic achievements of the post-war period were concerned. Arguably it also included anger and indignation — with respect to the past, but also with regard to failures to live up to constitutional norms in



the present. Constitutional patriotism produced solidarity rather indirectly through the common contestation of the past, as well as the common goal of promoting universal norms — yet perhaps its most explicit form of solidarity (and caring) was reserved for the victims, rather than present fellow citizens.

Moreover, constitutional patriotism, in its initial formulations, was never intended as an especially inclusive form of membership. There was an almost automatic assumption that these specific demands were directed at German citizens — the ‘we’ of constitutional patriots appeared not to be in question. At least initially, then, constitutional patriotism as a form of political attachment was decidedly not a solution to the multicultural predicament.

When the emphasis on militancy, as in Sternberger’s account, and the stress on memory, as in Habermas’s theory, merged, the result could be measures like the 1985 law against the ‘Auschwitz lie’. Based on the theory of criminal libel, the law made denial of the Holocaust into an insult punishable by up to one year in prison (Stein, 1986; Douglas, 1996). The relevant insult here was not just seen as being directed against the immediate victims (and possibly their descendants) — it was also an offence to the ‘civic community of inquirers’. As many advocates of free speech pointed out, the supposedly liberal loyalty of constitutional patriotism seemed to have produced a decidedly illiberal result. Yet, the defenders of the law would have argued that for any democratic deliberation, or, to use Jaspers’ term, ‘free communication’, about the past to take place at all, some of what Michael Ignatieff has called ‘impermissible lies’ had to be eliminated (Ignatieff, 1998, 174). Claiming that the Holocaust was a product of the Zionist imagination was a way not just of denying the dignity of the victims — but also of denying the dignity of one’s democratic interlocutors. In the absence of agreement on basic historical facts, not even a proper ‘economy of moral disagreement’ about what the past meant, could be constructed (Gutmann and Thompson, 1996). Consequently, denial would make it simply impossible for any legitimacy to emerge from democratic contestation.

The law, then, was to fulfil a triple function. It was publicly to preserve historical truth, achieve a form of democratic exclusion and ensure social integration among democrats committed to working through a difficult past. Yet, it remained an open question whether it had to be the task of the government to concern itself with the beliefs its citizens held about historical events — even if one conceded that these beliefs were held for reasons and that sometimes these reasons should be seen as morally unacceptable. This still left the question whether the ‘elimination of impermissible lies’ should not be left to civil society in an open process of contestation. This process might include the shaming or marginalization of those clinging to denial. The juridification of ‘working through the past’ remained a distinctive feature of German political



culture — even though making arguments about the past into a matter of legality appeared to be in direct conflict with the civic ideal of ‘charitable struggle’.

Conclusion

This essay has highlighted the historical circumstances and conceptual contexts in which the idea of constitutional patriotism was conceived. In itself, it is of course no surprise that constitutional patriotism has particular origins — after all, ‘the universal has no voice, no authentic representative of its own’. As Marti Koskenniemi has put it recently, the universal ‘can only appear through something particular; only a particular can make the universal known’ (Koskenniemi, 2005, 115).

More interesting is the fact that constitutional patriotism has relied on, so to speak, particular ‘supplements of particularity’ — or, put differently, a constellation of subsidiary concepts that have allowed the universalist morality at the centre of constitutional patriotism to be embedded within (necessarily) particular political cultures. Sternberger’s ‘protective patriotism’ became linked with the idea of militant democracy, whereas Habermas’s ‘purifying patriotism’ — oriented towards the public sphere, rather than the state — understood itself as relying on particular public memories.

However, while the association of constitutional patriotism with militancy and memory respectively was due to the peculiar situation of post-war West Germany, there are, I have suggested, also important conceptual links between the morality of constitutional patriotism, militancy and memory. Constitutional patriotism is likely to set clearer boundaries to anti-democratic forces than, for instance, liberals nationalism, and it is far less likely to be compatible with uncritical histories of heroic national pasts than other forms of political belonging.

Do the stress on memory and militancy mitigate the appeal and applicability of constitutional patriotism beyond Germany itself? It seems to me that the most plausible answer is ‘no’, although I can only sketch here some preliminary arguments in favour of this conclusion. First, it is not theoretically necessary to build ‘political identity’ primarily through these contrasts with negatives. Constitutional patriotism — like liberal nationalism or any other form of political allegiance will imply differences and oppositions. But a responsible fashioning of political identity might well put positive goals first — all other things being equal (which of course they never are in politics). Second, even where memory and militancy are stressed, the illiberal tendencies described above can be kept in check by some of the values at the heart of the morality of constitutional patriotism itself. The ideals at the heart of constitutional



patriotism would not allow a relentless and unconstrained persecution of 'enemies of democracy'. Whether in practice they would always do so is of course a legitimate question. But it's a question that is not peculiar to constitutional patriotism as an ideal, and it is one to which the defenders of constitutional patriotism, it seems to me, have a better, theoretical answer than, let's say, defenders of liberal nationalism.

To conclude, then: Constitutional patriotism is not an example of the kind of pristine and politically impractical universalism that caricatures have made it out to be — but neither is it reducible to its genesis in a particular nation with a problematic past. 'Empty universalism' is not enough of an objection by liberal nationalists, and genealogy cannot automatically count as critique.

Date submitted: 9 September 2004

Date accepted: 8 December 2004

Notes

1 Thanks to two anonymous referees for very valuable comments. The first two parts of this essay draw selectively on Müller (2000, 2003).

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