

## „A Community of History“: A Problematic Concept and its Usage in Constitutional Law and Community Law

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### A. On the Concept of a “Community of History” in the Legal Discourse\*\*

A prevalent assumption in German Constitutional Law and Community Law reads as follows: »If Europe wants to have a future it needs to become a community of history«. But there is a snag in it: Just as it is difficult, if not impossible, to identify national communities of history, it is unlikely that *one* European community of history will emerge.

During the past years the concept of a community of history has found its way into legal discourse mainly in the context of imagining and conceptualizing the conditions and possibilities of democracy on a transnational level. The making of the the European Union presents a formidable challenge in this respect. First of all, the concept of a community of history says that the members of a collective not only share *one* history. Furthermore, it is exactly this crucial element that is responsible for the aggregation and unification of isolated individuals into a particular entity as well as for the peculiarity and individuality of this entity.<sup>1</sup> From

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<sup>1</sup> Paul Kirchhof, *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland*, in: EUROPA ALS POLITISCHE IDEE UND ALS RECHTLICHE FORM 63 (JOSEF ISENSEE ED., 1993), speaks of „autonomy“ (*Eigenständigkeit*): „The current European States perpetuate their autonomy in the cultural commonality of historical experience.“ (*id.*, at 79). Unless otherwise indicated, all translations in this article are by the author.

an internal perspective, the concept implies the assumption that successful social integration, either thought of as an intersubjectively shared feeling of togetherness or as an objective bond between individuals, to a remarkable extent is a result of the ostensibly given fact that individuals share the *same* history with others. Growing up in “a common history”<sup>2</sup>, the “imprint of the citizens through a common history and common experiences”<sup>3</sup>, the “commonness of the historical life”<sup>4</sup> or simply “the altogether shared history” are said to act as an important stimulant for the emergence and stability of a community and are able to “weld together a people over a certain time”<sup>5</sup>. If we take into account not only the “common experiences”, but in addition „the memory of jointly experienced threats” or of “jointly overcome perils” and “the consciousness of jointly performed achievements”<sup>6</sup>, then the bond of togetherness pouring out of a shared history extends beyond the living generation of a community both to the dead and the individuals born in the future.

Within a people a joint and several liability is generated by the “heritage of past richness as well as guilt”, which combines the “present, living people with the previous and future generations”<sup>7</sup>. In other words, what is meant is not only the joint experience of history, but rather the idea that every individual is inevitably exposed to a stream of narratives about the past that transcends generations.<sup>8</sup> According to Carl Schmitt “common historical destinies, traditions and memories” and “the commonness of historical life” are understood as elements existing prior to any political organization and functioning as the substantial or organic basis for the equality of the citizens. These elements “contribute to the unity of the nation and to the awareness of this unity.” On the one hand, “the French Revolution in

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<sup>2</sup> *Id.* at 64 and 91.

<sup>3</sup> Paul Kirchhof, *Der demokratische Rechtsstaat – Die Staatsform der Zugehörigen*, in: HANDBUCH DES STAATSRECHTS BD. IX, § 221 RN. 14 UND 15 (JOSEF ISENSEE AND PAUL KIRCHHOF EDS., 1997), § 221 annotations 14, 15.

<sup>4</sup> CARL SCHMITT, VERFASSUNGSLEHRE 231 (1993).

<sup>5</sup> ROMAN HERZOG, ALLGEMEINE STAATSLEHRE 82 (1971); ANGELA AUGUSTIN, DAS VOLK DER EUROPÄISCHEN UNION 135 (2000).

<sup>6</sup> HERZOG, *supra* note 5; at 43 and 82.

<sup>7</sup> Josef Isensee, *Abschied der Demokratie vom Demos*, in: STAAT, KIRCHE, WISSENSCHAFT IN EINER PLURALISTISCHEN GESELLSCHAFT 705 (DIETER SCHWAB, DIETER GIESEN, JOSEPH LISTL AND HANS-WOLFGANG STRÄTZ EDS., 1989), AT 710.

<sup>8</sup> AUGUSTIN, *supra* note 5, at 135. Augustin is an exception insofar as she analyses the concept of a community of history more closely and as she raises some objections. Yet, also Augustin assumes the plausibility of the concept, in order to subsequently verify whether there is a community of history on a European level.

1789 despite its ideas of mankind and universal fraternalism of all people presupposes the French nation as a historically given variable." On the other hand, "genuine revolutions and victorious wars can found the nationwide shared feeling of togetherness."<sup>9</sup> Such remarks can rely on John Stuart Mill, who assumed that the strongest causes for the foundation of a nation lie in the "identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past."<sup>10</sup> In a similar way Ernest Renan perceived the nation as a "principe spirituel", which significantly consists of "la possession en commun d'un riche legs de souvenirs." For Renan, nation is an "aboutissant d'un long passé d'efforts, de sacrifices et de dévouements."<sup>11</sup>

And yet, these authors remain silent as to how history can usually generate the effect of founding a bond of togetherness. This might indicate, however, that these authors do not consider this a difficult question or, a question at all. Very rarely one finds a rudimentary "explanation", a "definition" like the following: a shared history, in Angela Augustin's words, might "build up or at least define the characteristic of a community because it provides the same cultural-historical basis for all members of this community."<sup>12</sup> If we analyze the legal literature, in which the concept of a community is used, we will further ascertain that the effects which are attributed to history are not at all exhausted by its ability to found a sense of togetherness. The shared history ought to foster the "idea of the common interest in the *res publica*" and to „take the public authority back into the boundaries of a liberal democracy."<sup>13</sup> Furthermore, exclusions and inclusions are justified, collective particularities are marked and demarcation lines between "us" and "them" are drawn with reference to a common history. Among other characteristics, like ethnicity, culture, religion or language it is the specific „historical experience" from which a "homogeneous and definable individual community"<sup>14</sup> emerge. Finally, at this point, we can clearly see the assumed connections and interdependencies between history, a community of history and the homogenous structure of a

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<sup>9</sup> SCHMITT, *supra* note 4, at 231.

<sup>10</sup> JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1962), Chapter 6.

<sup>11</sup> ERNEST RENAN, QU'EST-CE QU'UNE NATION? ET AUTRES ECRITS POLITIQUES (1995). I quote from the German translation in: GRENZFÄLLE. ÜBER NEUEN UND ALTEN NATIONALISMUS (MICHAEL JEISMANN AND HENNING RITTER EDS., 1993).

<sup>12</sup> AUGUSTIN, *supra* note 5, at 135-138.

<sup>13</sup> Kirchhof, *supra* note 3, at 14 und 15.

<sup>14</sup> THOMAS SCHMITZ, INTEGRATION IN DER SUPRANATIONALEN UNION 33 (2001).

collective. To some authors the sharing of *one* history ultimately appears as the decisive condition both for the creation of “political unity” and its persistence and stability, for the compliance with majority decisions as well as for the acceptance of redistribution measures.<sup>15</sup> In order to integrate the individuals into a collective, to pacify and stabilize the latter, a „relative”<sup>16</sup> or “effective homogeneity as a joint base stock of similarities”<sup>17</sup>, which in turn finds its basis in a “jointly experienced political history”<sup>18</sup>, becomes an essential element. Within this context history is partly described as a “cultural *fact*”<sup>19</sup> that constitutes community or, as an “objective given fact,”<sup>20</sup> to which individuals are bound regardless of their own deliberate decision.<sup>21</sup> This objectivity and pre-existence of history ascertains or at least renders it likely that a “will to political unity”<sup>22</sup> evolves, “the legal unity of a people is viable on a continuing basis”<sup>23</sup> and that the “state can exist”.<sup>24</sup>

### B. A „European Community of History”?

Taking into account the described functions and effects attributed both to the term “history” and the concept of a “community of history” by the authors quoted above, and the importance and weight of these authors in the German discussion on the conditions and possibilities of democracy on the European level, it is anything but a surprise that the focus of attention in German Constitutional Law

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<sup>15</sup> For a critical discussion of the concept of political unity, see Peer Zumbansen, *Carl Schmitt und die Suche nach politischer Einheit*, in: 29 KRITISCHE JUSTIZ 63 (1997).

<sup>16</sup> Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in: HANDBUCH DES STAATSRECHTS (JOSEF ISENSEE AND PAUL KRICHHOF EDS., 1987), vol. I § 22.

<sup>17</sup> ISENSEE, *supra* note 7, at 708.

<sup>18</sup> Böckenförde, *supra* note 16, at Rn. 64.

<sup>19</sup> HERZOG, *supra* note 5, at 41.

<sup>20</sup> Josef Isensee, *Europa – Die politische Erfindung eines Erdteils*, in: EUROPA ALS POLITISCHE IDEE UND ALS RECHTLICHE FORM 103 (JOSEF ISENSEE ED., 1993), at 122; Kirchhof, *supra* note 1, at 81.

<sup>21</sup> Against the idea of being born into a community and the immediate familiarity with this community MICHEL FOUCAULT, VON DER FREUNDSCHAFT ALS LEBENSWEISE. MICHEL FOUCAULT IM GESPRÄCH 56 (1984), who contrasts the picture of birth as an encounter between strangers which in the course of time must learn to get along with each other.

<sup>22</sup> Isensee, *supra* note 20, at 122 et seq.

<sup>23</sup> Isensee, *supra* note 7, at 708.

<sup>24</sup> Isensee, *supra* note 20, at 122 et seq.

and in European Law has generated a far-reaching search for a genuine European history.<sup>25</sup> In so doing the reference to history can, depending on one's attitude towards a further intensification of the European integration process, either accentuate the historical similarities or emphasize the peculiarity, dominance and significance of the respective national histories. Without questioning the doubtful plausibility of the concept of a community of history already on a national level, it is taken for granted that the need for a European history increases with the deepening of the European integration. To have a future, these authors suggest, Europe must have a past and it needs to transform itself into a community of history.

Indeed, some authors see as one possible origin of a European community of history that "the population perceives the incidents occurring in Europe as European history."<sup>26</sup> They consider a 'community of history' as an essential condition for the emergence of a European feeling of togetherness. Consequently, the foundation of a European nation presupposes that the "previous national histories will be rewritten step by step into a joint European history"<sup>27</sup> or that at least the narrowed perspectives focusing only on national history become open for European history.<sup>28</sup> Against this background it seems self-evident that contemporary research also extends to studying the ways how "Europe" is displayed in schoolbooks used in Member States and to what extent aspects of a particular, "European History" are taught in school.<sup>29</sup> And in view of the immense importance ascribed to a European history for the European integration it is nothing but consequent when some lawyers come forward with the proposal to establish "a general course in European history in European schools based on a

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<sup>25</sup> When we take a look at the corresponding books published in the last 15 years it becomes clear that historians did not remain passive. The number of books that are dealing with „European history“, the „History of Europe“, with the etymology and the history of the term „Europe“ as well as with an „European Identity“ can hardly be overlooked.

<sup>26</sup> AUGUSTIN, *supra* note 5, at 137. See also: Rudolf Speth, *Europäische Geschichtsbilder heute*, in: *UMKÄMPFTE VERGANGENHEIT* 159 (PETRA BOCK AND EDGAR WOLFRUM EDS., 1999), at 165; see also the introduction by Jacques Le Goff, in: *HAGEN SCHULZE, STAAT UND NATION IN DER EUROPÄISCHEN GESCHICHTE* (1994), at 5.

<sup>27</sup> Robert Hettlage, *Euro-Visionen. Identitätsfindung zwischen Region, Nation und transnationaler Union*, in: *KOLLEKTIVE IDENTITÄT IN KRISEN. ETHNIZITÄT IN REGION, NATION, EUROPA* 320 (ROBERT HETTLAGE, PETRA DEGER AND SUSANNE WAGNER EDS., 1997), at 327.

<sup>28</sup> So explicitly : Wolfgang Kahl, *Montesquieu, Staat und Europa*, in: *45 JAHRBUCH DES ÖFFENTLICHEN RECHTS* 11 (1997), at 27.

<sup>29</sup> See also Falk Pingel, *Befunde und Perspektiven – eine Zusammenfassung*, in: *MACHT EUROPA SCHULE? DIE DARSTELLUNG EUROPAS IN DEN SCHULBÜCHERN DER EUROPÄISCHEN GEMEINSCHAFT* 263 (FALK PINGEL ED., 1995).

jointly conceptualized curriculum.”<sup>30</sup> In the “Illustrated History of Europe: A Unique Portrait of Europe's Common History”, fourteen historians from thirteen different European countries emphasize the commonality of the European experience and thereby underscore and reflect the contemporary trend toward the formulation of a European history.<sup>31</sup> But also the coordination of the national language and education policies can be seen as first steps on the way to encourage and support a European perspective of a European history.<sup>32</sup>

What is continuously overlooked, however, is that neither theoretically nor practically can a European community of history be “deduced from the point of view of the science of history or from the perception of the population”.<sup>33</sup> The certainty with which many authors today speak of the self-evidence of a European history (as origin and prerequisite of a community of history), is drawn from a particular use of scientific knowledge: this becomes evident in formula such as “from the point of view of the historiography” or, “from the perception of the population.” Such affirmations stand in striking contrast to the otherwise manifold and contradictory statements concerning the existence and non-existence of a European community of history.

Furthermore, according to the political scientist Frank R. Pfetsch, is all “held together first of all by joint historical experiences and memories”. A “European bond”, as Pfetsch explains with reference to John Stuart Mill, finds its foundation in “historical recollections of ‘collective pride and humiliation, pleasure and regret’ and in a jointly experienced and suffered history.”<sup>34</sup> By way of contrast, other lawyers, historians, sociologists and political scientists, most of them without critically reviewing the concept of a community of history, are tempted to localize communities of history and memory only in the people of the European nation states. It seems quite obvious, however, that with regard to Europe one couldn’t speak of a “commonality of recollection” because “what has been is not remembered as a joint European past, but as a multiplicity of different pasts of different peoples.” In the search of a European history one could only find

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<sup>30</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *WELCHEN WEG GEHT EUROPA?* 50 (1997).

<sup>31</sup> *DAS EUROPÄISCHE GESCHICHTSBUCH. VON DEN ANFÄNGEN BIS HEUTE* (FREDERIC DELOUCHE ED., 2001).

<sup>32</sup> Cf. Ulrike Liebert, *Transformationen europäischen Regierens: Grenzen und Chancen transnationaler Öffentlichkeiten*, in: *BÜRGERSCHAFT, ÖFFENTLICHKEIT UND DEMOKRATIE IN EUROPA 75* (ANSGAR KLEIN AND RUUD KOOPMANS EDS., 2003), at 80.

<sup>33</sup> AUGUSTIN, *supra* note 5, at 136.

<sup>34</sup> Frank R. Pfetsch, *Die Problematik der europäischen Identität*, B 25-26 *AUS POLITIK UND ZEITGESCHICHTE* 3 (1998), 8-9.

„particular recollections of a particular past“ or “the legacy of a history that is experienced in a different way by each people”, but very rarely would this amount to a *common* European history.<sup>35</sup> “If we tried to define Europe normatively on the basis of its own characteristics and with reference to its idiosyncratic personality but without idealizing it heroically,” it would “immediately disaggregate into different nation states, each of them bearing internally - historically, economically, politically, confessionally - greater affinities as they are ascertainable with regard to other ‘European’ countries. Under these conditions, common history will be perceived as something that separates rather than unites.”<sup>36</sup> Based on this assumptions and without considering both the historical background of the foundation of the European institutions and the importance of particular persons such as Schuman and Monnet it is said that the European integration did neither emanate from revolutions nor from important historical struggles and, due to the lack of charismatic leaders and mythical places, has no symbolic centres. Therefore, it seems that there is “no basis for the recollection of a European history”<sup>37</sup>. From such a perspective, we, the Europeans, cannot look back on an important historical experience like a joint uprising against a foreign usurpation or the successful defence of an outer invasion and therefore there will not be a European community of history.

### C. A holistic, objective and hermetically sealed concept of history

**The present political, social, economic and cultural life of a collective is always and significantly stamped by the past. Historical experiences und narratives affect the thinking of human beings and play a more than negligible role for the creation of individual and collective self-conceptions.<sup>38</sup> There is also an integrative and legitimizing impact that discourses on history as well as the particular historical “pictures” framed and used within these discourses may**

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<sup>35</sup> Peter Graf Kielmansegg, *Lässt sich die Europäische Gemeinschaft demokratisch verfassen?*, 22 EUROPÄISCHE RUNDSCHAU 23 (1994), at 27-29.

<sup>36</sup> Claus Offe, *Demokratie und Wohlfahrtsstaat: Eine europäische Regimereform unter dem Stress der europäischen Integration*, in: INTERNATIONALE WIRTSCHAFT, NATIONALE DEMOKRATIE. HERAUSFORDERUNGEN FÜR DIE DEMOKRATIETHEORIE 99 (WOLFGANG STREECK ED., 1998), at 120.

<sup>37</sup> Bernhard Giesen, *Intellektuelle, Politiker und Experten: Probleme der Konstruktion einer europäischen Identität*, in: LEBENSVERHÄLTNISSE UND SOZIALE KONFLIKTE IM NEUEN EUROPA. VERHANDLUNGEN DES 26. DEUTSCHEN SOZIOLOGENTAGES IN DÜSSELDORF 492 (BERNHARD SCHÄFERS ED., 1993), at 495.

<sup>38</sup> For the importance of history in collective discourses on memory and identity: DIE VIELFALT DER KULTUREN: ERINNERUNG, GESCHICHTE, IDENTITÄT (JÖRN RÜSEN ED., 1998); JAN ASSMANN, DAS KULTURELLE GEDÄCHTNIS. SCHRIFT, ERINNERUNG UND POLITISCHE IDENTITÄT IN FRÜHEN HOCHKULTUREN (1999).

develop. Obviously history can be used as a “resource for mobilisation in political struggles for power and for influencing the mass,” narratives on the past can be applied as a means to “create common bonds between diffuse and separated groups”<sup>39</sup> and to generate legitimacy for political systems.<sup>40</sup> If we recapitulate the meanings attributed to “history”, the contexts in which the concept of “history” are applied as well as the conjunctions between “history” and terms like objectivity, (given) facts or homogeneity, it is noticeable that the understanding of history implied with the concept of a “community of history” as it is used in judicial discourse is perceived in a significantly different way. Here an understanding of history appears that can be described as holistic, objective and hermetically sealed. Holistic, because the concept of a community of history tacitly includes the message that history not only supplies the members of a particular collective with a sense of togetherness, but above all is capable of constituting a particular collective as a political unity. However, the development of such an effect strongly suggests that there is *one* history that is the very same for all members of a collective. Closely linked with this assumption, and this seems to make it legitimate to speak of a hermetically sealed perception, history is often explicitly understood as an objective fact existing before any individual cognition as well as before any form of political organisation. Every political organisation, as this perspective suggests, can refer to a consolidated reference point in terms of an arsenal of objective statements about the past. Here we can observe an “objectivistic concept of history as of the one and total history” that had been widely accepted in the science of history during the 19<sup>th</sup> and 20<sup>th</sup> century and that had been necessary for the emancipation, establishment and professionalisation of history as a science. If we consider the conditions of the emergence of history as a scientific discipline at the end of the 18<sup>th</sup> century while keeping in mind the importance that empiricism and idealism have played in this process, it becomes clear why just this kind of “naïve objectivism” could prevail in the science of history throughout the 18<sup>th</sup> and 19<sup>th</sup> century. On the one hand, due to the epistemological requirements of empiricism, historical conclusions would be defined as ‘scientific’ just because they were based on empirical data, on primary sources, on facts. With the “documentary trace and the archive an epistemological paradigm appears that guarantees the autonomy of the science of history opposite to another authority, the natural sciences. The Galileic paradigm, defined by the relations among experiment, modelling and verification, is

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<sup>39</sup> Edgar Wolfrum, *Geschichtspolitik und deutsche Frage. Der 17. Juni im nationalen Gedächtnis der Bundesrepublik (1953-89)*, in: 24 *GESCHICHTE UND GESELLSCHAFT* 382 (1998), at 382.

<sup>40</sup> Speth, *supra* note 26, at 159; Günther Sandner, *Hegemonie und Erinnerung: Zur Konzeption von Geschichts- und Vergangenheitspolitik*, 30 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT* 5 (2001); Dieter Langewiesche, *Geschichte als politisches Argument: Vergangenheitsbilder als Gegenwartskritik und Zukunftsprognose – die Reden der deutschen Bundespräsidenten*, 43 *SAECULUM* 36 (1992).



confronted with a paradigm that pays attention to the semiotic nature of the object."<sup>41</sup> On the other hand, idealism has made it possible to "decipher the general, the secret of the course of the world" out auf the individuality of historical manifestations and to tie a teleological bond between historical particularities. In doing so, as the idealistic thinking suggested, a "privileged access to the meaningful course of the world on the whole"<sup>42</sup> was assured. According to the German historian Reinhart Koselleck, "since the earliest beginnings of the recording of time, it is part of the topology of the arts and of the science of historiography reports on human behaviour, on actions and woes that it should be composed truthfully. And the affirmation of wishing to do so appears perpetually in historiography. The rule that the historian must not lie, but that he must speak the absolute truth are part of the methodological self-insurance of all historians since Lukian and Cicero, in order not to be banned into the empire of the fabulists."<sup>43</sup> Skepticism whether the demands with which historians are confronted can be met, i.e. to reflect the past like a mirror "in a not distorted, blurred or skewed way"<sup>44</sup>, are indicated. In light of the epistemological and theoretical as well as methodological challenges to historical recording, it becomes highly doubtful whether the task posed to historians by the famous German historian – often considered the founder of "scientific" history: Leopold von Ranke – to write history "as it actually was"<sup>45</sup>, can be performed by historians. On the one hand, *the* historical truth that "only can be one"<sup>46</sup> will not appear immediately and pure, on the other hand, it causes remarkable difficulties to think history as an (total) object being opposed to the discerning subject.

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<sup>41</sup> Paul Ricoeur, *Zwischen Gedächtnis und Geschichte*, 22 TRANSIT 3 (2002), at 6. For the changes of the epistemological paradigms and the related effects for the emergence of modern historiography, see CHRIS LORENZ, KONSTRUKTION DER VERGANGENHEIT 22 (1997); CHRISTIAN SIMON, HISTORIOGRAPHIE 164 (1996), at 187.

<sup>42</sup> JAEGER and RÜSEN, *supra* note 42, at 147.

<sup>43</sup> Reinhart Koselleck, *Standortbindung und Zeitlichkeit. Ein Beitrag zur historiographischen Erschließung der geschichtlichen Welt*, in: OBJEKTIVITÄT UND PARTEILICHKEIT IN DER GESCHICHTSWISSENSCHAFT 17 (REINHART KOSELLECK, WOLFGANG J. MOMMSEN AND JÖRN RÜSEN EDS., 1977), at 19.

<sup>44</sup> LUKIAN, WIE MAN GESCHICHTE SCHREIBEN SOLL, chapter 51. Cited in: Koselleck, *supra* note 43, at 20.

<sup>45</sup> In his 1824, „Geschichte der romanischen und germanischen Völker von 1494 bis 1514“, SÄMTLICHE WERKE, BD. 33/34, LEIPZIG 1874 (INTRODUCTION TO THE 1<sup>ST</sup> EDITION FROM 1824), at VII. For Ranke's concept of historical objectivity, see: Rudolf Vierhaus, *Ranke's Begriff der historischen Objektivität*, in: OBJEKTIVITÄT UND PARTEILICHKEIT IN DER GESCHICHTSWISSENSCHAFT 63 (REINHART KOSELLECK, WOLFGANG J. MOMMSEN AND JÖRN RÜSEN EDS., 1977). For Ranke's work with sources, archives and its importance for his „new approach that has based on a new way of research and has appeared in a new form of documentation“: ANTHONY GRAFTON, DIE TRAGISCHEN URSPRÜNGE DER DEUTSCHEN FUßNOTE 48 (1998).

<sup>46</sup> LEOPOLD VON RANKE, DEUTSCHE GESCHICHTE IM ZEITALTER DER REFORMATION (1881), vol. 1, X.

D. Interdisciplinary Glances: Epistemology and Theory of History, Nationalism Research

**The previous remarks have already revealed the untenability of an holistic, objectivistic and hermetically sealed understanding of history. Such an understanding has become particularly untenable with regard to its inherent linkages with the contemporary European law discourses and the ever recurring statements concerning the – national and European – communities of history. When we take into account insights from epistemology or from the science of history it becomes apparent that this conception of history has lost its plausibility long ago. Thus, the effects attributed to history by lawyers have to be reconsidered and reconceptualised anew. From the perspective of theoretical approaches in history we actually need not go so far as to follow the *linguistic turn* with its radical textualism in which history is just seen as text.<sup>47</sup> We do not have to agree that there is no longer a convincing distinction between poetic literature and scientific history, historiography and science of history, facts and fictions, as to recognise that claims of objectivity and truth have become problematic in the science of history. Even historians that are skeptical about this theoretical position know for sure that there neither is nor will be *the* historical truth. In contrast, this totalizing perception of the *one* history has to be replaced by an irreducible variety of differentiating interpretations of history: *histories* instead of *history*.<sup>48</sup> Furthermore, insights originally provided by hermeneutics and gradually absorbed by historians could strengthen this comprehension. Hermeneutically inspired approaches could show that respective political, religious, social and intellectual imprints of the interpreter play a decisive role not only in the work of historians but also for the public sphere in which historical aspects and narratives are discussed. The interpretation and the result of the interpretation, historical terms and statements are inevitably affected by**

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<sup>47</sup> See, e.g., the work by Hayden White: HAYDEN WHITE, *METAHISTORY. THE HISTORICAL IMAGINATION OF NINETEENTH-CENTURY EUROPE* (1975); HAYDEN WHITE, *THE CONTENT OFF THE FORM. NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* (1990); Hayden White, *The Fictions of Factual Representation*, in: *ID.*, *TROPICS OF DISCOURSE. ESSAYS IN CULTURAL CRITICISM* 121 (1985). For the „linguistic turn“ in the science of history, see, e.g., Lorenz, *supra* note 41, at 127. (chapter VIII); Simon, *supra* note 43, at 276. For a very polemical statement, see HANS ULRICH WEHLER, *HISTORISCHES DENKEN AM ENDE DES 20. JAHRHUNDERTS* 63 (2001).

<sup>48</sup> See only Chris Lorenz, Paul Ricoeur, Wolfgang J. Mommsen, Reinhart Koselleck or Jörn Rüsen. HAGEN SCHULZE, *KLEINE DEUTSCHE GESCHICHTE* 253 (1996), has impressively demonstrated the multiplicity of histories und the plurality of the many possible interpretations of *the* history considering as example the parliamentary debate on the so-called „Ostverträge“ (the treaties between the Federal Republic of Germany and the former German Democratic Republic) in March 1972.

different prejudices in a positive hermeneutical sense, i.e. the question how sources are interpreted is always dependent on the ideological or political character of the exegete and his social background. However, in any historical statement we will inevitably and irreversibly find elements which are not part of the historical object but of the particular point of view of the historian.<sup>49</sup> Therefore, the historian might "never be able to immediately recognise the historical truth in its infinite multifariousness, but rather always only through the perspectives that he brings into his process of cognition, and through the categories, hypotheses, theories and paradigms with which he selects relevant data out of the endless bulk of primary information and – what is comparatively much more important – with which he arranges the collected information."<sup>50</sup>

In order to continue the deconstruction of the holistic, objectivistic and hermetically sealed understanding of history we can finally refer to recent results from research projects that have examined the responsible conditions for the emergence of the European nation states. In particular, the work of Eric J. Hobsbawm, Ernest Gellner, Benedict Anderson, Hagen Schulze or Dieter Langewiesche<sup>51</sup>, but also the research of many mediavists,<sup>52</sup> could impressively show to what extent specific historic narratives have been created and how national history was constructed and misused. Points of origin and ancestry have been searched and – not surprisingly – in most cases could be "found". Processes have been portrayed as genetic and teleological, as continuous stabilities,

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<sup>49</sup> Cf. particularly the contributions in: OBJEKTIVITÄT UND PARTEILICHKEIT IN DER GESCHICHTSWISSENSCHAFT (REINHART KOSELLECK, WOLFGANG J. MOMMSEN AND JÖRN RÜSEN EDs., 1977). More recently, see Wehler, *supra* note 47.

<sup>50</sup> Mommsen, *Der perspektivische Charakter historischer Aussagen und das Problem von Parteilichkeit und Objektivität historischer Erkenntnis*, in: OBJEKTIVITÄT UND PARTEILICHKEIT IN DER GESCHICHTSWISSENSCHAFT 441 (REINHART KOSELLECK, WOLFGANG J. MOMMSEN AND JÖRN RÜSEN EDs., 1977), at 445.

<sup>51</sup> ERIC J. HOBSBAWM, NATIONEN UND NATIONALISMUS. MYTHOS UND REALITÄT SEIT 1780 (1991); ERIC J. HOBSBAWM AND TERENCE O. RANGER, THE INVENTION OF TRADITION (1983); ERNEST GELLNER, NATIONALISMUS: KULTUR UND MACHT (1999); ERNEST GELLNER, NATIONALISMUS UND MODERNE (1995); BENEDICT ANDERSON, DIE ERFINDUNG DER NATION. ZUR KARRIERE EINES ERFOLGREICHEN KONZEPTS (1993); HAGEN SCHULZE, DIE WIEDERKEHR EUROPAS (1990); HAGEN SCHULZE, GIBT ES ÜBERHAUPT EINE DEUTSCHE GESCHICHTE? (1998); Hagen Schulze, *supra* note 26; Hagen Schulze, *supra* note 48; Dieter Langewiesche, Nation, Nationalismus, Nationalstaat in Deutschland und Europa (2000).

<sup>52</sup> Important results regarding continuities and discontinuities could be delivered by the special research project „The Emergence of the European Nation States in Mediaeval Times“ that has been supported by the German Research Foundation. Cf.: Joachim Ehlers, *Die deutsche Nation des Mittelalters als Gegenstand der Forschung*, in: Ansätze und Diskontinuität deutscher Nationsbildung im Mittelalter 11-58 (Joachim Ehlers ed., 1989); Joachim Ehlers, *Mittelalterliche Voraussetzungen für nationale Identität in der Neuzeit*, in: Nationale und kulturelle Identität: Studien zur Entwicklung des kollektiven Bewusstseins in der Neuzeit 77-99 (Bernhard Giesen ed., 1991).

**whereas discontinuous breaks, heterogeneous structures, amorphous complexities, floating fusion and transitions have been eliminated. In addition, the objective and unchangeable existence of the collective with all its characteristics and properties was rooted in a distant past and the intended literary relocation of the collective into archaic times, the formulation of romantic appeals to old traditions as well as the nostalgic aspirations for ancient times were used to generate a common consciousness of origins. The appropriation and manipulation of history ought to secure the identity of a collective in the presence and to give information about the shaping of its future. With an enormous intellectual effort the science of history contributed to the emergence and consolidation of the European nation states by creating myths and deliberately misusing the past. This should be kept in the back of our minds if today we speak about a European community of history.**

### **E. Conclusions**

In contrast to the above described understanding of history as it is widely used in contemporary legal discourse, the fiction of the *one* history should be abandoned. Rather, the term 'history' should be used as a metaphor describing a space where a plurality of competing histories prevails, a plurality that permanently irritates and undermines existing identities, considered as self-evident and prone to consolidation. Lawyers must grow sensitive to the disputed uses and understandings of history. They must begin to listen to the doubts that are being voiced among historians themselves. For example, the historian Wolfgang Mommsen writes with regard to Max Weber, that "there is no other way for us as to accept the disenchantment (*Entzauberung*) of history as the only, objective and for us visible process and that we cannot take for granted any longer the one history in an objective sense or that the historical process bears an intrinsic objective sense, that can be objectively grasped and explained if only we would inspect the sources sufficiently intensive enough."<sup>53</sup> If this is true, then a space is opened up in which various actors are engaged in 'working on the historical memory' and arguing about the interpretation of the past. Under these conditions, a liberally and democratically organized and pluralistically structured society has to provide for spaces in which history remains a contentious issue. The yardstick of democratic culture becomes society's capacity to remain aware of the "particularity" and contestedness of historical interpretation. Scientific and public discourses on history need to be structured in a way that they can resist state-aided official interpretations of history. They must be capable of unmasking such interpretations as dangerous attempts to legitimise and stabilise political power with reference to

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<sup>53</sup> Mommsen, *supra* note 50, at 449.

alleged historical continuities. In other words, in a democratic society communication on history should be a "discussion without an end".<sup>54</sup> It is neither the contrariness nor the "plurality of standpoints which are necessarily part of historical cognition,"<sup>55</sup> that we should be concerned about, but rather every attempt to close the discourse, every instance of censorship and every hegemonic definition of the past as well as every imposition of authoritative historical narratives. Jean-François Lyotard's argument that "due to a multiplicity of final identities there are several narratives in a republic, but only one narrative in despotic systems because there is just one origin"<sup>56</sup>, which he developed through an analysis of the differences between mythical and emancipatory narratives and between despotism and republicanism, can teach us a lot about a society deals with its past. Once we observe that rulers resort to one particular historical narrative in order to legitimize a particular political system, whereas other histories are simultaneously being discriminated, we should be alarmed. We always have to keep in mind that conflicts between numerous and irreconcilable interpretations of the past reflect the political and cultural situation of a pluralistic society. In this sense they are always an expression of the republican openness and tolerance that can be found in a society. On the other hand, these numerous and contrarian historical narratives produce the structure of conflicts permanently anew and are, therefore, an element of the social struggle for cultural hegemony.<sup>57</sup> A European community of history cannot be, like some German Constitutional and Community Lawyers obviously seem to believe, the result of something given or of an objectivity in which Europeans are born into, but rather a "European community of history" can and should be understood as a metaphor for a decentralised place where Europeans discuss and argue about the infinite multiplicity of *their histories*. In this case, the uniting element that triggers something like a feeling of togetherness would, according to a paradoxical statement by Yehuda Bauer, lie in the fundamental dissension about the same past.

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<sup>54</sup> Lorenz, *supra* note 41, at 34.

<sup>55</sup> Koselleck, *supra* note 43, at 29.

<sup>56</sup> JEAN-FRANCOIS LYOTARD, *POSTMODERNE FÜR KINDER: BRIEFE AUS DEN JAHREN 1982-1985* (1996), at 70. See *id.*, at 66: "... our tendency to overstrain the narrative as an archaic legitimation is, here in our problem, namely that of modern totalitarianism, interesting as such. It is even essential. Exactly this overstraining illuminates how National Socialism could draw successfully on a myth in order to oppose the republican authority its own despotic authority. National Socialism has replaced the idea of the citizen with the name of the Aryan. It has based its legitimacy on the saga of the Nordic folks and given up the modern horizon of cosmopolitanism. [...] National Socialism has delivered to the German people the names and narratives which have exclusively permitted that people to identify with the Germanic heroes and to let heal the wounds caused by events like defeat as well as crisis."

<sup>57</sup> For cultural hegemony in the context of politics dealing with history and the past, see: Sandner, *supra* note 40, at 5; Langewiesche, *supra* note 40).

