

The Juridification of European Identity, its Limitations and the Search of EU Democratic Politics

Jiří Příbáň

The idea of building a European democratic polity has been a part of the European integration process from the beginning. Advocates and critics of further integration agree that the process increasingly depends on the existence of European political identity as both a project and a legitimation of the “ever closer Union.” Prosperity and peace in Europe have become inseparable from ever more cultural and “civilizational” reflections on European integration.

The establishment of democratic political institutions can proceed only if there is democratic constituent power – a polity with the sense of collective self-identification and solidarity. In the context of European integration, this democratic self-reflection and identification may take a radical essentialist form of a political Subject of an organically constituted European people as a nation necessary for pursuing egalitarian democratic politics. Some believe that only this strong concept of the European nation can counterbalance the enormous economic and administrative power of European institutions, and guarantee social welfare and solidarity among European citizens. The absence of a European people as the political Subject is then used by both Euroenthusiasts and Eurosceptics for pursuing their political agenda. While Euroenthusiasts argue that further European integration will eventually result in the creation of this European nation, Eurosceptics warn that its absence makes further political integration even more illegitimate and undemocratic.

However, European democratic self-reflections and identity-building can also have different procedural forms demanding the establishment of a European constitutional domain, which would define shared political identity in the legal language of the rights of citizens, and the establishment of a meta-constitutional European public sphere necessary for democratic political communication and common deliberation. The legal procedural approach is expected to create Euro-citizens by granting them rights and liberties enforceable and protected by the Union’s institutions. However, the constitution of a free and democratic discourse-based European public sphere can materialise only as a spontaneous political process involving different layers and overlapping different national democratic societies.

Whether essentialist or proceduralist, all attempts to build European political identity show that European political institutions cannot evade tensions between constituent and constitutive power (*pouvoir constituant and constitué*) which are typical of modern politics. Any further political integration makes the question of who can legitimize this process more urgent. The nation-state democratic legitimation dilemma grows with the further integration and constitutionalization of the European Union. EU integration is thus ever more dependent on a common European identity and symbolic universe.

In this article, I therefore start by arguing that European integration has progressed as a politics of depoliticization which, despite relying on economic and legal modes of regulation, successfully resolved some of the most urgent European political problems, guaranteed political safety and stability in Europe and facilitated the civil democratic identity-building in the EU. However, the legal communication of European identity could not substitute for political self-identification of the European *demos* necessary for any kind of the EU

project of constitutional statehood. This fact was illustrated by many setbacks and the ultimate failure of European constitution-making in 2005. The EU's progressive political integration without adequate public accountability even contributed to the resurgence of the ethnonationalist identity politics in the Union's member states. The crisis of Europe stretched between the Union's administrative machinery and revived ethnonationalisms is often addressed by normative calls for a common European spirit and ethics inspired by the Kantian cosmopolitanism which allegedly can legitimize further political integration and the creation of a European *demos* and statehood. However, the project of cosmopolitan Europe ignores the fact that Kant himself clearly differentiated between the universality of cosmopolitan ethics and the particularity of citizenship guaranteed by the republican political system.

Reflecting on this need to differentiate between ethics, politics and law, I further argue that EU political integration cannot primarily look for ethical foundations which, like any foundational identity politics, are susceptible to the politics of exclusion and do not necessarily support the reinvention of polemical, conflictual and compromise-oriented negotiating modes of modern democratic politics at the EU level. European identity, rather than imitating the strong identity of *demos* typical of modern nation states, is a hybrid mixture of a civic culture of rights protected by European laws and persisting national loyalties of the peoples of the EU. This identity can be symbolized only as heterogeneity and not as the cultural unity of the political Subject – the European nation which could legitimize further administrative integration of the Union and its transformation to federal statehood.

At the European level, law, politics and public morality codifying common identity get increasingly differentiated and self-regulated: consequently, ethical calls and common culture-based arguments, even when codified by European laws, can neither recreate nor substitute for European politics. The Union's institutional and political reforms, rather than constantly referring to the need of further 'spiritualization' of a common European identity, need to evolve by internalizing specific procedures of publicly accountable politics typical of constitutional democracies. The absence or impossibility to directly implement some democratic procedures at the EU level, such as political will-formation by a simple majority rule or supremacy of the European parliament based on the principle of an equal vote by all citizens of the Union, consequently show institutional limits of democratisation of the EU political system but also the need to pursue it by political rather than moral and legalistic means.

The EU's *Depoliticisation* and its Political Effects

The process of building a European identity and its recent self-reflections need to be examined against the effects of an economically, administratively and legally guided integrative processes. The European Union's self-reflection historically lacks the political conception of democratic polemics, conflict and confrontation of different political agents and movements extending beyond the limits of EU member states. Its public law institutions are not established on the concepts of *polemos* or *hostis*.¹ They, rather, draw on universalistic values and cosmopolitan identity and thus are under the constant threat of "official lyricism and an increasingly distrustful popular indifference."² For a long time, European integration, despite its clear political meaning, has been presented in terms of economic prosperity, international safety, administrative efficiency and legal regulation. The very project of political unification has both been presented and progressed as a *politics of depoliticization*. Politics communicated by the logic of the economy, bureaucracy and law is a founding paradox of the European Union.

Although Carl Schmitt's friend/enemy distinction should not be taken in its existential meaning and one has to be aware of its possible political consequences, it is analytically valuable and illuminates the structural preconditions, achievements and limits of the EU's political and legal systems. Schmitt criticised pluralist theories of the state and defended the autonomy and uniqueness of the political against depoliticising pressures of other social domains, especially economy, law and ethics. According to him, the state is not to be just one of many social associations and the political domain is not to be the mere technology of administration.³ The modern state is in permanent danger of being reduced to the economic state (*Wirtschaftsstaat*) of an unceasing struggle between particular interests and the bureaucratically organized and governed administrative state.⁴

Schmitt claims that the neutralization of political conflicts by legal norms and economic welfare is a typical feature of the moralistic politics and economic regulation of the liberal rule of law the primary purpose of which is to eliminate the political concepts of battle and enemy. From this perspective, the EU's emerging public law system and constitutional framework are undoubtedly founded on demilitarized and depoliticized concepts and thus represent a coherent doctrine of the liberal rule of law criticised by Schmitt. Like liberal doctrines and political institutions, EU law typically moves between ethics (moral and intellectual commitments in politics) and economics (free trade) and thus, using Schmitt's controversial concepts of political and legal theory, attempts "to annihilate the political as a domain of conquering power and repression."⁵

The EU's strategy of establishing a system of permanent negotiations and compromise and preferring legal procedures to political struggles is certainly driven by the Union's goal of making national and international politics *safe*, a possibility which is categorically rejected by Schmitt. The Union's politics of compromise may be only temporary, occasional, and never decisive in the sense of decision-making by the ultimate political sovereign. However, the depoliticization of the EU's political domain and its transformation into neutral public law procedures clearly has some political significance, implications and effects.⁶ It may be argued, contrary to Schmitt's concept of the political, that the European Union historically emerged as a *depoliticizing, yet profoundly political* response to the unprecedented politics of local and universal genocides, extremely aggressive regionalisms, social-class discriminatory regimes and their politically violent totalitarian ideologies.

Europe of Civil Rights?: The Union's Enlargements and Liberal Democratic Identity

The Union's political integration and identity-building, based on the politics of depoliticization, has primarily been a *legalistic project*.⁷ For decades, the systemic logic of European law has been applied by EU institutions, such as the European Court of Justice, to establish, interpret and enforce rights and protect the civil liberties of individuals and different groups.⁸ Citizens of the member states are legally identified as EU citizens and therefore have certain rights and liberties guaranteed by the Union's political and judicial bodies. Reflecting on this evolution of legal rights and the EU's constitutional domain,⁹ there is an optimistic belief that the Union's legal system will gradually inspire a 'thin' European collective identity¹⁰ based on the principle of universality of rights and its political benefits to citizens of the EU.

The EU legalism of rights is expected to minimize negative effects of the Union's 'democratic deficit.'¹¹ Furthermore, the legal communication of civil rights and liberties is to enhance civil self-reflection among European citizens and marginalize the political role of their ethnic national bonds and loyalties. Despite its support for regionalisation and power

devolution,¹² the Union officially stands on the side of democratic political identity in the symbolic conflict of *demos* and *ethnos*.

Focusing on the Union's liberal democratic and cosmopolitan mission and politics of depoliticization, two major political developments related to the collapse of communism occurred in Europe: the ethnically justified unification of Germany in 1990, and the enlargements of the European Union in 2004 and 2007 which had been inspired by the much broader civil democratic sense of togetherness. Although the central European, Baltic and Balkan 'returns to Europe' had economic motives similar to those of German unification, they were not inspired by the same 'one *Volk*' ethnic drive of identity politics and national solidarity. The symbolic identification of 'new Europe' with the old one could be articulated only in terms of common civic virtues, constitutional principles and democratic politics.

The liberal democratic criteria of EU membership profoundly influenced the European enlargement processes and strengthened the civic identity of post-communist political societies.¹³ The prospect of EU membership stabilized and promoted democratic transformations and contained illiberal domestic politics. Any enlargement process affects the existing shape of the Union and threatens to dilute its predominant values, norms and principles. Apart from other goals, the conditionality policy defined by the Copenhagen criteria was thus expected to minimize these identity risks and keep the liberal democratic character of the Union that is to unite the peoples of Europe. Restrictive preconditions for successful accession therefore strengthened the civil and democratic identity of the EU member states and the Union itself.¹⁴

The EU developments in the last two decades, especially the EU enlargements illustrate the difference between the ethno-cultural identity politics still operating at the national level and the more general European civic identity considered both a supplement and antidote to ethnonationalist identity politics. Nation states can be either unified (Germany), or dissolved (Czechoslovakia or, more recently, perhaps even Belgium) on ethnic grounds. On the other hand, the European Union can function only as an extension and reinforcement of the civil and democratic traditions of these states.

The Juridification of European Identity and its Limits

The juridification of European identity expects that the Union's legality is going to be transformed into the symbolic communication used by European citizenry in the process of its political self-identification. Nevertheless, the legal civil identification of European citizens also reveals the limits of the legal symbolisation of a European polity. The evolutionary constitutionalization of the EU, including the failed constitution-making process of 2005, has inspired neither the federal vision, nor the desired awakening of the European public sphere and civic solidarity which are the necessary prerequisites for the strong identity of a European *demos* – the constituent democratic power.¹⁵

Instead, the process of constitution making highlighted the symbolic self-identification limitations and weaknesses of some of the leading principles of the Union's legal system, such as the divided sovereignty doctrine that has dominated EU public law discourse for the last two decades.¹⁶ Vagueness, contradictory conclusions, and the opaque structure of current EU public law is illustrated by Roger Errera, an honorary member of the French Council of the State, who concluded that the very notion of divided sovereignty and competences and the principle of subsidiarity could not be "a clear cut issue and had been painted in grey (and not black and white) as the main colour of the EU's public and constitutional law."¹⁷

Due to the lack of democratic mobilization and support at the member-state level, constitution making and further integration have been pushed forward by a political class without

adequate democratic representation and supported by juridical arguments. Democratic assessment of the proposed European constitution was thus “reactionary” in the sense of responding to a project that could not be actively pursued and supported by the European constituent power. No wonder European nations with strong democratic traditions, such as the Dutch and the French, responded with political anger in the ratification referenda and rejected the Constitutional Treaty.¹⁸ It was easily ratified in countries with a weak democratic tradition that are beneficiaries of the Union’s economic redistribution (Latvia, Spain), and those where the ratification of the Constitutional Treaty was subject of parliamentary vote (Germany, Hungary) and/or where political élites were strongly and almost unanimously pro-European (Belgium, Luxembourg).

The European Convention drafting the EU’s Constitutional Treaty had originally been intended to sideline the politics of depoliticization and make further integration the subject of political deliberation. However, it ended up as the most recent and complex example of this politics, thereby showing the problems and limits of the depoliticized European public law.¹⁹ Although the Convention originally claimed to be following in the footsteps of the two-hundred-year-old United States constitution-making process, the final proposal was anything but a democratic constitution for a united European people, willing to build and share political institutions, make them democratically accountable and representative, and basing this constitutional unity on an abstract political solidarity.²⁰

These and many other contradictions signify the absence of a European public sphere as a communicative network facilitating the process of democratic will-formation. The persistence of national sovereignty and political interests in debates on European issues has not been weakened by a common civil ideology and political ethos.²¹ Instead of one public sphere initiated by progressive integration, the Union is challenged by many different overlapping public issues which resonate differently in individual member states.

The Lisbon Treaty of 2007, which is to replace the failed Constitutional Treaty, attempts to turn the EU’s biggest fear into a strong political desire; its opening part reads: “Desiring to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action. . .”²² However, the statement mainly replicates structural irritations and political deficits behind the failure of the constitution-making process. It depicts the Union split between instrumental and democratic legitimacy, driven by an elite-controlled integration processes and losing “permissive consensus”²³ between citizens of the EU to continue these publicly unaccountable policies.

Europe’s *Repoliticization* by the Revival of Ethnonationalism?

The commonly discussed democratic deficit of the Union is part of a more general *political deficit*, caused by allocating ever-greater powers to the Union’s institutions without adequate political accountability and democratization. A number of European law experts and pro-European politicians are concerned that the current vagueness may become a future political chaos and warn against the “there is no alternative” attitude.²⁴ At the same time, this genuine and justified fear is often successfully exploited by various Eurosceptic nationalists who, under the guise of criticizing European integration, criticize the very concept of the Union’s existence. Eurosceptic nationalists constantly repeat that democracy cannot exist outside the nation-state and that any attempts to extend democratic politics to supra-national levels are doomed to fail and end up as the authoritarian regulatory politics of the powerful against the powerless. According to them, cultural differences have fundamental political consequences

and the fact that individual European nations have profoundly different cultural traditions and social policies effectively rules out any chance of setting up a functioning political entity.²⁵

The Union's continuing depoliticization has a potentially far-reaching and damaging effect at the nation as level: it rehabilitates nationalism and nationalist identity politics as part of the democratic political discourse.²⁶ Similarly, as in the nineteenth century, nationalism becomes the guardian of democracy and nation-state democratic institutions are made part of the modern nationalist illusion according to which democracy is a reflection of national culture and even the spirit of the nation (*Volksgeist*).²⁷ It has become obvious that the populist right and left in many member states have benefited hugely from the never-ending and unrestrained process of EU integration which lacks adequate democratic accountability. These populists count on the EU's democratic deficit and, like the nationalists of the nineteenth century, claim that democracy must be defended at the national level against the Union as a supra-national undemocratic and unaccountable entity. They often successfully use the Euroenthusiasts/Eurosceptics conflict in the otherwise depoliticized European domain and make 'Europe' subject to the political debates, deliberations and conflicts arising at nation-state level. The depoliticized EU is tragically *repoliticized* and made the subject of nationalist propaganda at the level of its member states.

Emphasising the Union's democratic deficit, contemporary nationalists point to the simple fact that the EU lacks that kind of abstract collective solidarity felt by citizens of nation states during the nineteenth century. A nationalist sense of collective togetherness has been important for individuals to identify with one another, both as members of the same pre-political ethnicity and citizens of the democratic nation state. Two centuries ago, democracy and nationalism established a dangerous, yet often successfully functioning pact which still inspires nationalist critics of the European Union – a political entity without any solid collective identity.

Contemporary nationalists can pretend to be the only 'true democrats' because they still exploit the modern complex process of inventing the nation which could play "the role of a catalyst in the transformation of the early modern state into a democratic republic."²⁸ They have accommodated the democratic doctrine of the identification of state and people, yet define the people in pre-political categories of history, spontaneity, ethnic autonomy, and organic immemorable development. As Craig Calhoun notes: "[I]t is rather surprising . . . that the idea that national identities are ancient and stable, even primordial, has survived with such force."²⁹ Myths of ethnonationalism thrive in Europe and are even claimed to be the continent's main democratic force.

The Other *Repoliticization*? a Critique of Legality by the Spirit of European Cosmopolitanism

Ethnonationalist identities have always been contrasted with calls for Europe's cosmopolitan identity and global mission. Advocates of progressive political integration therefore keep confronting ethnic nationalism by emphasising Europe's cosmopolitan legacy. At the same time, these adherents also increasingly confront another structural defect of the European Union – a growing gap between the idea of Europe and its economic, legal and political manifestation. Apart from old ethnonationalist enemies, advocates of progressive political integration increasingly criticize the Union's legal machinery and bureaucratic, technical decision-making. According to committed Euroenthusiasts, the depoliticized technocratic Union now paradoxically obfuscates the ideal of the cosmopolitan Europe. It is even

considered an obstacle to political integration and identity-building and therefore apparently needs to be eliminated by further ethical humanization.³⁰

A machine is a popular critical metaphor for the Union's political structure and legal system. A catalogue of legal rights is contrasted with human existence. The language of legality is treated as an example of dehumanizing rationalism which needs to be politically counterbalanced by emotional attachment and the sense of identification, sharing and belonging. Advocates of a cosmopolitan Europe, such as Zygmunt Bauman or Václav Havel, are highly critical of the formal concept of legality. Europe's identity apparently cannot be conveyed by the incomprehensible language of legality which, due to its fixation with words and political institutions, could bring the whole European project to a fatal end.

From an ethical standpoint, legality is criticized as a technical tool and part of the failing instrumental rationality which dominates modern societies. According to this critical view, the Union's political decisions cannot be constantly obscured by an epistemological community of EU legal and administrative experts.³¹ Europe and the European Union in its institutionalized form have to morally address urgent problems, crises and tasks of global dimensions and therefore cannot be restricted to public law discourse. Instead, legality is to be used as a communicative mode to enhance the symbolic power of European cosmopolitan identity, and become a point of cultural and moral reference.

For instance, Václav Havel proposed "A Charter of European Identity" in his speech to the European Parliament on 8 March 1994. According to him, Europe was supposed to be identified as a community of values such as tolerance, humanity and fraternity which historically facilitated the establishment of democracy, freedom and political responsibility.³² In the same address, Havel spoke of the need to reconcile reason (speaking the machine language of EU economic and legal regulation) and heart (speaking the emotional language of ethical bonds and attachments). According to Havel, the machine of European institutions and regulations is expected to operate in the most efficient mode but it can hardly inspire the awakening of the European *demos*.³³ The structure is too cold for any emotions of belonging, abstract solidarity and togetherness. Unlike modern nationalism based on organic solidarity and ethnic bonds, European identity-building must obviously use different fuel to warm the hearts of the peoples of the EU. In the absence of a European political people, the political identity behind European integration can be constructed only against the background of a general European *spirit*.³⁴ Europeans are expected to be defenders of the European spirit of universal values and cosmopolitan ethics.

The EU between 'Hot' Ethics and 'Cold' Law

The call for a spirit of the European Union signifies a return of ethics and ethical politics which, according to adherents of European integration, can counterbalance the EU's legal and administrative machinery and strengthen the we-feeling of a common European identity and togetherness of the peoples of the EU. The Maastricht Treaty and all subsequent European treaties including the Reform Lisbon Treaty are naturally expressions of the European spirit but they obscure it by "systemic, technical, administrative, economic, monetary and other measures."³⁵ A simple declaratory act or charter therefore should be an answer to this technical obscurity and move Europeans to identify with their spirit.

Havel refers to this ramification of European ethos and values as the task of formulating the *charisma* of the European Union.³⁶ According to him, there is no identity without willingness to act responsibly and a readiness to sacrifice, both politically and individually. European identity therefore demands charismatic bonds even more than constitutional acts and political

resolutions, because these are the bonds which will make us act responsibly and sacrifice our egotistic goals for the interest of Europe as a commonly shared polity.

According to this view, the charisma of European self-identification and the techniques of constitutionalization and legal regulation of the EU can be reconciled in an official declaration of a shared European ethos. These calls for a general European spirit attempt to overcome the ambivalence of European integration by defining the European origins and moral foundations of the grand technical project of European integration. A declaration of European ethos and values would have the force of a charismatic document invoking the popular faith of Europeans and creating mutual bonds and solidarity. However, calls for the reconciliation of 'cold' European law and a 'hot' European ethos can scarcely lead to the desired synthesis of European identity and usually initiate rather 'lukewarm' responses among peoples of Europe. They incorporate new ambivalences permeating the process of European integration.

The absence of a European people, political charisma and public sphere forces some adherents of further integration to speak, rather, about the European cosmopolitan spirit that could be used in a Montesquieu-like manner to justify the emerging architecture of European constitutionalism.³⁷ Law is criticised in the name of the spirit of a civic and democratic ethos but this creation of an ethical spirit of civility needs to be politically negotiated, declared by the general European will, and implemented by the European legal system.

In fact, calls for a cosmopolitan ethos are deeply entrenched in modern European humanism that critically reflects on the crisis of European culture and pursues the goal of saving it through its very spirit of universal humanity and ethics. Every political and social crisis is considered a cultural crisis that can only be successfully resolved by the further 'Europeanization of Europe' and by injecting the universal spirit into the specific and technical problems of modern European societies.³⁸

European Cosmopolitanism and the Kantian Legacy

Contemporary social and political scholars of both the political right and left often describe Europe as 'Kantian' and contrast it with the 'Hobbesian' United States. While Robert Kagan perceives Kantianism as evidence of Europe's decline,³⁹ left-wing European scholars such as Jürgen Habermas and Zygmunt Bauman perceive it as Europe's universal legacy and, setting aside current US foreign policy, contrast it with the dark 'Herderian' tradition of modern ethnic nationalism. Habermas considers Kant's idea of republican autonomy and self-legislation a triumphant tradition which lies behind the modern welfare-state democracies and needs to be developed beyond national limits. It should become a formative trend in globalisation leading to a "postnational constellation."⁴⁰ Contradicting Kagan's defence of Hobbesian US foreign policy, Bauman also says that "Europe is well prepared if not to *lead*, then most certainly to *show* the way from the Hobbesian planet to the Kantian 'universal unification of the human species.'"⁴¹

Drawing on Europe's Kantian legacy, cosmopolitan thinkers believe that European civilization can internalize differences and is therefore both "a transgressive civilization" and "a civilization of transgression."⁴² This civilization apparently can politically construct its own collective identity which would guarantee that "[C]itizens who share a common political life also are others to one another, and each is entitled to *remain* an Other."⁴³ Adherents of the Kantian Europe claim that normative universalism needs to be reconciled with specific social and political heterogeneities. European identity is imagined as the culture of unity and difference, externalisation and internalisation. As Bauman paraphrases a comment made by

Hans-Georg Gadamer: “[T]he European way of life is a continuous negotiation that goes on despite the otherness and the difference dividing those engaged in, and by, negotiation.”⁴⁴

Europe’s identity may have the Other as its necessary component,⁴⁵ but this ‘otherness’ can exist only because of the legacy of Kant’s *allgemeine Vereinigung der Menschheit* and the Enlightenment notions of equality, rule of law, human reason and solidarity.⁴⁶ The Kantian notions of cosmopolitan identity and citizenship have been popular as a response to our contemporary, globalized social and political condition.⁴⁷ They also have often been used as a response to problems of European integration, globalization and international conflicts. The fantasy of the international community, which emerges as a constitutionalized world society, organizes a sovereign collectivity and specifies the decision-making hierarchies of this cosmopolitan equivalent of the nation-state, is solid part of legal and political theory.⁴⁸

However, Kant used the notion as an ethical category and not as a prerequisite of world political organization. For Kant, there is a difference between cosmopolitan politics and ethics, and citizens of a cosmopolitan federation of states who still need their individual republics in order to be citizens.⁴⁹ While ethics should be universal, political communities keep their particular nature. The ethics of civility can be cosmopolitan but political citizenship may be exercised only within bounded particular political societies.

According to Kant, the states must finally enter into a cosmopolitan constitution due to the constant wars and “form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under a commonly accepted *international right*.”⁵⁰ This federation guarantees “perpetual peace” in the international state in which there is no chance for the nations to constitute a utopian “*world republic*.”⁵¹ In this state, cosmopolitan ethics is restricted to the conditions of universal hospitality and legally specified by the cosmopolitan *right* “of a stranger not to be treated with hostility when he arrives on someone else’s territory.”⁵²

From Fantasies of a Cosmopolitan Polity to the Search for European Politics

Despite Kant’s differentiation of ethics, national politics and international law, the ethics of cosmopolitan civility has been recently blended with cultural ‘Eurocentrism’ that allegedly can morally mould and politically lead global society.⁵³ This illusionary ethicalization and myth of Europe has even become an obstacle to recognizing and solving the real political problems of the continent.⁵⁴ Politics may use cultural symbols as expressions of collective unity but it also can easily be paralysed by the semantic structural limitations of these symbols. Politics as a mere technique of power is a favourite target of moral criticisms. However, problem-recognition and conflict-resolution political mechanisms cannot be ultimately subjected to the system of symbolic cultural expressions and moral evaluations. The ethical ideal of Europe as a humanitarian polity cannot be fully grasped and implemented by European politics. The particularity of democratic politics can never accommodate the universality of cosmopolitan ethics.

Despite numerous moral projects of European cosmopolitanism based on the notions of civil rights and constitutional democracy, the European legal ‘community of rights’ has a weak sense of being-in-common and solidarity. There is no ‘European charisma’ waiting to be brought to life in this community and the absence of the European *demos* has actually been an argument in disputes between European and member states’ national institutions and legal systems.⁵⁵

The notion of *demos*, which is used in European legal and political debates on sovereignty and normative superiority, is often presented as an essentialist concept even if it is not defined

ethnically. It assumes a community that integrates individual citizens into an organic whole composed of ethical values and cultural traditions. Ethnic nationalism and ethics of republican nationalism can surprisingly have similar exclusionary effects. The idea of the democratic nation as a political unity free of ethnic meaning can, like ethnonationalist notions of political society, exceed its civic boundaries and start using the mythical language of historical roots, a genealogy of morals and values, and cultural commitments. Like ethno-nationalist fantasies of the people's historical destiny and uniqueness, the democratic republican concept of the nation as the grand political Subject can acquire cultural fundamentalist and communitarian meaning.

This transformation of the democratic nation into an organic exclusive community is described by Etienne Balibar as a paradox of 'republican communitarianism' according to which: "[R]epublican communitarianism' has made the cultural, scholastic, and administrative *non-recognition* of 'particular identities' (be they linguistic, religious, national) within the nation into the mark of purity that allows one to recognize the character of one's own political universality."⁵⁶ Balibar and others persuasively argue that universalist values can easily become expressions of exclusive and discriminatory particularisms. Europe's self-reflection and search of common identity, though entirely uncharismatic, has not been spared of this risk of the identity politics of exclusive communitarian fantasies of the political Subject. However, too much identity-building would amount to a social rigidity that is inconsistent with Europe's diversity, flexibility and cultural differences.

From the Union's perspective, there certainly is one overarching pattern of integration manifested, for instance, in the EU treaties and the accession conditions set up for EU candidate states.⁵⁷ From the national perspective, however, there is only a pluralistic pattern of many localised Europeanizations.⁵⁸ The umbrella of the European Union can be manifested only as a plurality of different laws and peoples of Europe.⁵⁹ The interplay of EU laws and different constitutional frameworks of member states is commonly described as European "constitutional pluralism."⁶⁰ The EU has been shaped by the 'plurinational' coexistence of many nations and nationalities, both with and without statehood, which build a series of interlinked normative orders and, apart from constitutional pluralism, enjoy the practice of cultural and political pluralism.⁶¹ The most important European political questions, therefore, are: how much identity is a good thing in a large-scale economic, political and cultural unification of Europe, and how much unification can be pursued in the Union without the constituent democratic power? These questions reflect a more general risk of European politics, namely, that European collective political identity based on strong cultural identification may easily become a 'hobgoblin' of Euro-chauvinism and little minds,⁶² hiding behind the symbolic formula of the European people as a political nation.

The Union cannot operate politically on the basis of ceaselessly communicating its essential values and historical destiny and existence.⁶³ Instead of extending a spiritual moral legitimation of Europe, the depoliticised Union needs to adopt democratic politics of conflicts, deliberations, negotiation, compromises, and public mobilization of both support and opposition to its current forms and level of integration and institutional transformation. It is lacking its own democratic public and political class of active citizens, ready to define what European political society has in common. EU institutions are too rich in terms of legalised decision-making and too poor in terms of conflict-driven democratic politics. In other words, the Union has to produce *less morality and law and more politics*.

If following a cosmopolitan spirit, Europe has political meaning free of moralist clichés and fantasies of cultural superiority, it is a return to liberal democratic politics that builds on unity "achieved daily anew, by confrontation, debate, negotiation and compromise between

values, preferences and chosen ways of life and self-identifications of many and different, but always self-determining, members of the *polis*.”⁶⁴ The European cultural and ethical heritage may be described as never-ending transgressive adventures and pursuits of otherness. However, these moral exercises in European cosmopolitanism and humanism obfuscate the fact that European politics desperately needs more democratic accountability, conflicts, struggles and negotiated compromises. Instead of continuing with the moral symbolic communication of European values, historical missions and identity, advocates of a politically unified and internationally strong Europe need to address their “search for politics”⁶⁵ and “the reinvention of politics”⁶⁶ within the context of the European Union.

The current level of European integration shows that the politics of depoliticization has exhausted itself and it is no more possible to substitute the spirit of cosmopolitan ethics or the systems of EU market economy, legality and bureaucratic governance for democratic politics of public deliberations, conflicts and their resolutions. The absence or impossibility to directly implement some democratic procedures at the EU level, such as political will-formation by a simple majority rule or supremacy of the European parliament based on the principle of an equal vote by all citizens of the Union, consequently show institutional limits of democratization of the EU political system but also the need to pursue it by political rather than moral and legalistic means. One lesson to be learned from Schmitt’s otherwise idiosyncratic and ideologically flawed legal and political philosophy is that operations of the political system cannot be replaced by operations of other social subsystems, such as the economy, law and morality.

Concluding Remarks: on European Legislation of Rights, Constitutional Patriotism and Hybrid Identity

The Union must continue expanding civil liberties and democratic principles and its laws should have a liberal democratic surplus which is missing in the established legal systems of its member states. European integration persuasively shows that the European legal system does not have the communicative capacity to substitute for ethics and codify European collective identity of strong bonds, solidarity and togetherness. It is false to assume that the “thin” legal, civil rights-based sense of European identity could eventually support the establishment of the “thick” European *demos* as the grand Subject of European political history and the constituent power, legitimising the project of European federal statehood.⁶⁷ It is unlikely that European citizenry will transform themselves into a sovereign people with both symbolic and real power to support the establishment of a supreme political and legislative authority in federal Europe.

The system and networks of the EU cannot inspire such identity and its constituted protection of civil rights is far too weak to create any kind of essentialist political solidarity and the “we-feeling” of a “thick” political community of organic bonds. Struggling with limited and weak internal commonality, the political identity of Europe may be fortified mainly by potential civic or constitutional patriotism in its “lowest-common-denominator form”⁶⁸ that can inspire a “we-Europeans” feeling but cannot replicate the solid collective identity and abstract solidarity typical of the modern nations of Europe.

The legislation of EU civil rights and liberties is a technique potentially supporting the emergence of European patriotism.⁶⁹ At the same time, European constitutional patriotism is a *paradox*: the European legal system is criticised by Euro-patriots as “cold” and dehumanizing but “hot” emotions of togetherness and self-identification are to be

inspired by the legal communication of the rights, liberties and mutual responsibilities of Europeans.

A particular European identity overarching collective identities of different European nations is fictionalized by supporting itself on the moral universalism of human rights and constitutional democracy.⁷⁰ In the European constitutional patriotism discourse, human rights semantics is appropriated by the moral system and accommodated by “the logic of global responsibility and global aspiration.”⁷¹ As a meta-constitutional structure, constitutional rights and liberties may be constituted as a set of discursive political strategies and moral values. The European legal system, especially its emerging constitutional domain, is then expected to define what is “good” for Europe and what is both morally and politically desirable for citizens of the Union, that can be symbolized by law as a common cultural pattern.

Nevertheless, European constitutional patriotism is also another evidence of the impossibility of constituting an ultimate integrative political framework through culture and collective self-identifications.⁷² The European Union cannot be built according to the political architecture and principles of modern nations and nation states because the notion of political sovereignty based on the interplay of identity and difference between the people and the state is inapplicable to the very process of European integration.⁷³ National identities continue to be strong despite the Union’s enactment of the principle of divided sovereignty which significantly limits political sovereignty and constitutional democratic power of the EU member states. It turns out that the *European nation* cannot be political in the sense of the political Subject – the mythical body disposing of the ultimate constituent power. However, it can be imagined and fictionalized as *a civic or political culture of human rights and democratic values*.

European patriotism and identity obviously draw on the concept of European citizenship.⁷⁴ Political rights are enforced by the sovereign coercive power of the Union’s member states but supra-nationally guaranteed by EU institutions. A de facto constitution of European citizenship has been in place for decades even in the absence of a European public sphere and democratic deliberation. The legal conditions of European citizenship define the common ground and boundaries of those possessing the same European rights and duties. The multifaceted collective identity of Europe and the different collective identities of European nations eventually link the process of common identity-building to the legal formation of a European citizenry and the distribution of rights and duties guaranteed for citizens by European law.⁷⁵

The making of a European civic or political culture is possible by extending legal communication of EU citizenship to the moral domain but this extension, at the same time, leaves the different national legacies of collective identities in Europe untouched as cultural traditions. One cultural layer defined by the legal symbolism of European citizenship is thus constituted next to other layers of different European cultures. A large-scale collective identity, such as the European one, is a field of “multiple, overlapping, and sometimes even conflicting identities.”⁷⁶

European symbolization of political space goes beyond the common understanding of democratic legitimacy based on the question of who constitutes the people, to which there is a mutually agreed and settled answer.⁷⁷ Unlike the image of one European people, European identity may be constructed only as a *hybrid mixture* of common civil ethos and persisting different national loyalties of the peoples of Europe that, due to its irreducible heterogeneity, is impossible to ultimately consolidate and codify by the EU’s legal system.

NOTES

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44. Bauman, op. cit., n. 32, 7. Bauman uses Gadamer's *Das Erbe Europas: Beiträge* (Frankfurt: Suhrkamp, 1989).
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Jiří Příbáň is Professor of Law at Cardiff Law School, Cardiff University, United Kingdom. He is author of numerous books in English and Czech, especially *Dissidents of Law* (2002) and *Legal Symbolism* (2007). He also edited *The Rule of Law in Central Europe* (with J. Young, 1999), *Law's New Boundaries: the consequences of legal autopoiesis* (with D. Nelken, 2001), *Systems of Justice in Transition* (with P. Roberts and J. Young, 2003) and *Liquid Society and Its Law* (2007).