



**IILJ International Legal Theory Colloquium Spring 2009:  
Virtues, Vices, Human Behavior and Democracy in International Law**

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Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street  
Thursdays 4pm-5.50pm

[student seminar also meets separately, Tuesdays 4pm-5.50pm]

*Note: speakers' topics listed are indicative of areas, not final titles, and may change*

- January 15** - Derek Jinks, University of Texas Law School  
Topic: *Humanization and Individualization in the Enforcement of International Humanitarian Law*
- January 22** - Anne van Aaken, University of St Gallen Law School, Switzerland  
Topic: *International Investment Law and Rationalist Contract Theory*
- January 29** - Craig Calhoun, NYU Institute for Public Knowledge & President, SSRC  
Topic: *The Idea of Emergency: Humanitarian Action and Global (Dis)Order*
- February 5** - Paolo Carozza, Notre Dame Law School and Chair, IACmHR  
Topic: *Global Values, Local Virtues – Human Rights, Democratic Self-Governance and International Justice*
- February 12** - Leigh Payne, Oxford University Sociology (Latin American Societies)  
Topic: *Performances of Power: Paramilitary Confessions in Colombia*  
Chapter 1 and Conclusion of Leigh Payne's recent book titled: *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence*
- February 26** - William Miller, University of Michigan Law School  
Topic: *Messengers and Intermediaries: Insights from Ancient Law*
- March 5** - Armin von Bogdandy, NYU Law School, Director MPI Heidelberg  
Topic: *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities (paper co-authored with Philipp Dann and Matthias Goldmann)*  
*The Exercise of International Public Authority through National Policy Assessment (paper co-authored with Matthias Goldmann)*
- March 12** - Continued discussion of Armin von Bogdandy's papers on March 5 (see above)
- March 26** - **Joseph Weiler, NYU Law School**  
**Topic: *Europe Against Itself: On the Distinction between Values and Virtues (and Vices) in the Construction and Development of European Integration***
- April 2** - Pierre Rosanvallon, Collège de France  
Topic: *The Metamorphoses of Democratic Legitimacy*
- Tuesday, April 7-** (SPECIAL SESSION, 4:00 pm to 5:50 pm)  
Faculty Club, D'Agostino Hall, 110 West 3<sup>rd</sup> Street  
Alexander Somek, University of Iowa  
Topic: *Democracy-Enhancing International Law: The Argument for Transnational Effect*
- April 16** - Conference in Honor of Professor Andreas Lowenfeld  
(For more information, go to [www.iilj.org](http://www.iilj.org) – all welcome!)
- April 23** - tbc  
Topic: *Virtues, Vices, Human Behavior and Democracy in International Law*

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# **Europe – *Nous coalisons des Etats, nous n’unissons pas des hommes***

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This paper is part of a broader interest in, and research of, three related themes: The way in which international norms and practices reflect and shape political culture; a more general interest in the non-instrumental and functionalist dimensions of international law; and the spiritual dimensions of legal regimes generally and international legal regimes more specifically.

The text below is a version based on a recent oral presentation in Paris. A fuller text with the standard academic apparatus is in preparation.

## I

It is still quite common to tell a history of European integration according to which it was originally an economic project which slowly transformed into a political project. Old wives tale to which the Preamble to the Treaty of Paris gives the lie. It lifts its language directly from the Schumann Declaration and attests that from its inception European Integration was a project with deep political ends, which used economic instruments as means to achieve those political ends. And those politics were not simply a new way for vindicating the national interest of its partners (though it was also that) but predicated on a set of values which have been part of its foundations from inception.

If we consider Monnet’s famous aphorism – *Nous ne coalisons pas des Etats, nous unissons des hommes* – we realize that in its meta-objectives the project went even beyond politics. It had a spiritual dimension: redefining human relations, the way individuals relate to each other and to their community. That it should have had this spiritual dimension is not surprising if we remember the historical context – the horror of World War II – against which the project of European integration was conceived and the deep religious commitment of its founding fathers. Make no mistake: The project

and the process were also *realpolitik* of the highest order. But that, too, should not surprise us for those very same reasons – the historical moment and the political biography of those same men. One should eschew monolithic motivations and explanations when attending to the affairs of men and women.

The narrative of European Integration has, thus, since its inception, combined two notable strands – the functional and the idealist – pragmatism and values, combined. Indeed, one of the European construct's claims for originality had been the proposition that what it proposed was not simply useful but also an expression of deep values and transformative of human relations. *Nous ne coalisons pas des Etats, nous unissons des hommes.*

## II

The substantive discourse of values typically involves two trilogies.

The first trilogy, was a direct manifestation of the European circumstance circa 1951. For the generation which experienced the horrors of war, the depredations of want (triple digit inflation, lifetime savings wiped out) and witnessed the murderous excesses of nationalism, Peace-Prosperity- and, for want of a better word, Supranationalism (as combating the excesses of the nation-state) expressed their noble vision for the project.

That generation is disappearing. The majority of our population, including the present *classe politique*, have grown up in a Europe which is radically different from that of their parents. Maybe an apt appellation to our generation would be the Schengen generation – for whom traveling from Strasbourg to Karlsruhe or from Paris to Brussels is no different than traveling from Mannheim to Karlsruhe or from Paris to Lille. Already 15 years ago, there was something comic, endearing and uplifting to see the aging Helmut Kohl and Francois Mitterrand campaigning for the Maastricht Treaty and speaking about the historic reconciliation between France and Germany to an audience which, to put it bluntly, simply did not understand, experientially, what they were talking about. On all three counts, Europe has been remarkably successful in realizing what, a mere fifty years ago seemed a dream.

Peace, prosperity, supranationalism have become, to the Schengen generation, part of a European *acquis*. They have lost their mobilizing force. And yet values, as a political artifact, are central to the European construct. They are at its core as a means of constructing community an indispensable foundational block of democracy. We shy away from an earlier generation's self understanding of communal bonds rooted in organic, territorial communities. In Germany, for example, that has the odor of blood and soil. The word patriotism, *simpliciter*, is still largely banished from our vocabulary unless qualified as "Constitutional Patriotism" the only Kosher variant. Values, thus, are not a side game. They go to the core of Europe's self understanding, its self understanding as a Community of Values.

The second trilogy of values which is habitually trotted out and which has gradually come to dominate political rhetoric is the trinity of Democracy, Human Rights and Rule of Law with a nod to solidarity (once a code for the European Welfare State now deeply contested) and environmentalism.

In the social and political arena, with the passage of the years, the European value discourse evolved in an interestingly complex and dialectical way. On the one hand, the discourse of values – such as, say, human rights, ecological concerns, social solidarity have become more prominent and explicit even in constitutive texts. It is ironic – the generation of the Founding Fathers, whose motives were no less noble or value laden, wrote a Treaty which was shorn of value-speak but packed with value praxis. Today, we pile up the value rhetoric even if, in the operational part of the treaties, we somehow give it short shrift or engage in ambiguities. For those who want an example, examine carefully the social chapter in the Charter of Fundamental Rights.

At the moment of founding, self-doubt and moral soul searching (provoked by the enormities of WW II) led to very original concepts and constructs. In more recent times, riding on the success of the process, the value discourse has often evolved into smug self satisfaction. On the overall question of values our feeling is that Europe is not only doing alright but doing so much better than that other pillar of Western liberal civilization – the US with, for example, its enthrallment with the death penalty or its deficient health system. 'Third Way', Civilian Power, Global Warming, these are some of the key words in that comfortable self-understanding.

Nowhere does this self satisfaction – with one’s self and with the instrumentality of the Union find better expression than in the Preamble to the so-called Constitution as produced by the Convention.

From the unintended ironical reference to Thucydides (quoting that “democrat” Pericles for whom, if only the drafters of the preamble had actually taken the trouble to read the original and not lift something out of a dictionary of quotations, Thucydides had contempt)

*Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.*

to a text which in the eyes of some outshines even characteristic American bombast in its triumphalist self-congratulation and self-serving evasions. Consider the following selection:

*Conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason,*

*Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law,*

*Believing that reunited Europe intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,*

...

*Convinced that, thus "united in its diversity", Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope*

*Res Ipsa Loquitur.*

Is the self satisfaction justified? In part yes, but only if accompanied by a heavy dose of critical self evaluation.

I want to introduce law now. European Union law has had, too, a value discourse – a synthesis of the two value trilogies. In three successive legal waves European Union law transformed classical international law:

In wave 1 State obligations were converted into enforceable individual Community Rights – turning, in the language of the European Court of Justice the individual from Object to Subject.

In wave 2 Human Rights opposable against the Community and Union Institutions (and in some cases against the Member States directly) were articulated *ex nihili* injecting a human centered core into the market instrumentalities

In wave 3, through which we are living now, Citizen rights are being fleshed out, destined in the rhetoric of the European Court to constitute the fundamental status of Individuals in the Union

The common thread of all three waves is the Individual. In Union law it is claimed with considerable justification, even at the core of market law, stands the individual – as nowhere else in a non-domestic legal regime.

Both in the rhetoric of the European Court of Justice itself and in endless commentary, legal Europe is celebrated as a polity in which the *individual* is in the Center – a very efficient way of summarizing the two trilogies of values the underlying ethos of which is, indeed, a deep humanist commitment.

#### IV

I now need to introduce the central conceptual and theoretical foundation on which my thesis will rest. It is to introduce into the discourse of European integration the concept of virtue – as distinct from values – which was central until not long ago to the moral discourse of Western Civilization in both its secular and religious facets – Athens and Rome -- a perfect illustration of which may be found in Aristotle and in Aquinas.

Values and virtues have a complicated relationship. The two do not necessarily correspond. A value is a moral or ethical proposition: An abstraction, and ideal which we may believe in. Virtues relate to personal traits, an “operative habit” in the language of Aquinas. A “disposition to act” in the language of Aristotle.

Do you believe in honesty – we may ask? Sure would be our response – honesty is part of our matrix of societal values. Are you honest? That may be a very different question. We do not, often enough, possess the necessary virtues which would enable us to honor our values. This encapsulates the distinction between the two concepts.

But there is, too, an inevitable nexus. If there is too big a distance between the discourse of professed collective values, and the practices of individuals the values encapsulated in those collective mores become compromised, even a sham. (Note, I am not talking of hypocrisy: someone who pretends to accept certain values whilst not believing in them in his or her heart. A true patriot, might simply not have the virtue of courage necessary to defend the patria. But his love of country should not be put into doubt. He may be a coward but not a hypocrite.)

In contemporary moral discourse the notion of virtue, as Alasdair Macintyre cogently argued, has largely vanished. Today, we are measured virtuous by what we believe in. I believe in human rights – that makes me virtuous. What I do about them, well that is another matter.

In bringing the distinction of values and virtues to European Integration I follow Aristotle and Aquinas in two respects, but not in a third.

First, they both explain what may seem as obvious that virtue is a personal characteristic, a habit, a disposition. It is not purely or merely cognitive. That insight is indispensable to my thesis.

Second, it is a habit or disposition that is acquired, perfected through practice, impacted by what today we would call the environment, reflective (and constitutive) of the prevailing political culture. That insight, too, is indispensable to my thesis.

Law is part of the environment and culture which shape and impact the virtues of those operating within its sphere. Aquinas is particularly explicit

on that: "Virtue, which is an operative habit, is a good habit productive of good works." Aquinas considers whether the goodness of men and women is an effect of law. His position is that the goodness or virtue of citizens is an effect of good laws. "Law is given for the purpose of directing human acts, and insofar as human acts conduce to virtue, to that extent does law make man good."

This goes to the core of my intellectual endeavor in this essay. What impact does the political culture of the Union, expressed and shaped through its structures and processes and, notably, through its legal structures and processes, have on the virtues of its citizens and residents? It is an obvious and urgent question and yet one that, to my knowledge, has never been asked before in our reflection on the European integration.

In one crucial respect my project is infinitely less ambitious than that of Aristotle and Aquinas: As part of the search for what Aristotle calls "happiness" – living well (not in the material sense which these words are used today) both were seeking "*The Virtues*" – general, essential, universal. My objective is far more modest – I am concerned with a more limited set of virtues, those which are important for the vindication of the values of European Integration. If, say, citizens do not have certain civic virtues – for example caring enough to go and vote, to stand for election, democracy will fail. It will remain a formal and empty structure. Belief alone in the value of democracy is not enough. It has to be practiced. And that practice requires certain personal habits, dispositions, characteristics – certain virtues.

## V

A clarification is needed also in relation to our use of the concept of "Value" or "Ideal". A simple desirable state of affairs -- an idyllic state: "If I were a rich man" -- does not in and of itself qualify as a value in the sense we are discussing here. I am interested in values as ideals. What prevents us from making all our fantasies of desired --idyllic -- states values, is that so often they are selfish, self-serving. We perceive these desiderata, in fact, as an expression of desire, greed, jealousy, of our Hobbesian side. In the words of Genesis: '*...for the imagination of man's heart is evil from his youth.*' (Gen: VIII.21). Value discourse involves not simply putting forward a desired state of affairs -- material or spiritual -- but a recognition of our selfish

tendencies. Values represent a challenge to the ego, a call to our better half. And the virtues necessary to vindicate them share in that same sense – they typically require us to overcome selfishness, personal comfort and personal interest. Values, as discussed here, and this is a central part of their allure, contain an altruistic component. Virtues involve exertion. In my view this challenge accounts for the huge appeal of value discourse. First, there is the per-se attractiveness and satisfaction of self-sacrifice: things that demand sacrifice are cherished more than things that come easily. Sacrifice invests things with value. Additionally, the combination of the idyllic and the altruistic in ideals explain their abiding centrality to all human culture.

## VI

I may now outline my thesis. It is simple enough. I do not contest the values of European Integration as such – they are noble. I do not even contest their bona fides. But my claim is that the habits and practices of European integration, and some of its foundational legal structures and processes, militate against those very values. They do this in two ways. First they corrupt the meaning of the value itself. Second, these habits and practices play a role in cultivating personal dispositions inimical to those values; they contribute to the erosion of the virtues necessary for the vindication of the values of European Integration.

The focus on Law gave us a unifying, synthetic concept for the value discourse of European integration: The individual at the center! The habits and practices of European integration generally and European legal structure and process more specifically are, according to my thesis, instrumental in cultivating self-centered individuals. The ‘Self-Centered Individual’ stands in this contention in defiant contrast with Europe’s deepest spiritual meta-objectives of redefining human relations – ‘Nous Unisson des Hommes.

The manner in which this corrupting effect takes place should also be outlined. It is often the case that practice can shape or reshape the concrete meaning an abstract value may have or affect what we may consider virtuous or non virtuous behavior. It often relates to the distinction between a cognitive and experiential epistemology: The different type of knowledge I may have by, say, reading about friendship and actually having a friend. We may present, say, the ideal of marriage. Imagine, then, a social situation in which domestic violence is accepted and normalized. For those growing up in such a society, the very ideal of marriage may be defined, or redefined, as

to include domestic violence. The very value is thus corrupted. The political and social culture become modified. In the alternative, if the articulation of the ideal of marriage posits harmony as one of its values, the normalization of the domestic violence will instill vices, corrupt the personal virtues such as a disposition to, say, respect and self-control, which are needed for such harmony. If the law, either in its structure or its process, excluded domestic violence from its criminal purview, the impact would be similar. The central socio-psychological instrument is, indeed, normalization of praxis. The effect of praxis can be direct or indirect. It may affect directly specific actors which are involved directly in the praxis. It will affect more slowly society as a whole to the extent that it becomes part of a public mores.

## VII

I will now try to illustrate my thesis – the corrupting tendency of European practices on both values and virtues which are central to the realization of the deepest objectives of European Integration.

The easiest illustration is by reference to the value of democracy. I choose it first not simply because of the importance of democracy but because it easily illustrates the relationship between political culture value discourse and personal virtue.

Europe has been powerfully instrumental in democratizing trends in Greece, in Spain and Portugal and more recently in the new Member States. More generally, Europe has been hugely successful not simply in the attainment of many of its specific market goals but also in the continued effectiveness, despite many doomsayers, of its classical governance structures and processes. Even today, with twenty seven Member States and without the necessary institutional changes Europe has not imploded, far from it.

Success is risky because of a simple fact – it has a powerful legitimating effect. The best way to legitimate a war is to win it. This has always been such in human affairs: Good outcomes legitimate, in the social empirical sense, questionable means.

What are the questionable means in this context? There is no subject which is more likely to bring a yawn to the face of academics and a groan to the faces of politicians than the democracy deficit of the European Union. It is a

matter which should be dealt with without shrill notes. But it will not go away. How to describe and explain the structure and process of European governance is contentious.

In essence it is the inability of the Community and Union to develop structures and processes which adequately replicate at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility which are practiced with different modalities in the various Member States. Even the basic condition of Representative Democracy that at election time the citizens "...can throw the scoundrels out" -- that is replace the Government -- does not operate in Europe. The form of European Governance is – and will remain for considerable time – such that there is no "Government" to throw out. Dismissing the Commission by Parliament (or approving the appointment of the Commission President) is not the equivalent of throwing the Government out.

Likewise, there is no civic act of the European citizen where he or she can influence directly the outcome of any policy choice facing the Community and Union as citizens can when choosing between parties which offer sharply distinct programmes.

Thus the two most primordial norms of democracy, the principle of accountability and the principle of representation are compromised in the actual practices of the Union.

Further, as more and more functions move to Brussels, the democratic balances within the Member States have been disrupted by a strengthening of the Ministerial and Executive branches of government. Certain groups are privileged and others underprivileged. The value of each individual in the political process has inevitably declined including the ability to play a meaningful civic role in European governance.

Added to that is the ever increasing remoteness, opaqueness, and inaccessibility of European governance. An apocryphal statement usually attributed to Jacques Delors predicted that by the end of the century, eighty percent of social regulation would issue from Brussels. Even though it has turned out to be only 50%, the drama lies in the fact that no accountable public authority has a handle on these regulatory processes. Not the European Parliament, not the Commission, not even the Governments. The

press and other media, a vital Estate in our democracies, are equally hampered. Consider that it is even impossible to get from any of the Community Institutions an authoritative and mutually agreed statement of the mere number of committees which inhabit that world of Comitology. A complex network of middle level national administrators, Community administrators and an array of private bodies with unequal and unfair access to a process with huge social and economic consequences to everyday life – in matters of public safety, health, and all other dimensions of socio-economic regulation. And now one can add the institutions of Economic and Monetary Union and the constitutional framework within which they work which, while being very vigilant against all manners of financial, fiscal and monetary deficit, contribute appreciably to the existing political and democratic “deficit” of the Union.

Despite this litany of democratic woes, we must take note of the fact that the European construct, democratic deficit notwithstanding, has been approved *democratically* again and again. The Treaties have been subjected to the constitutional and democratic disciplines prescribed in each Member States with the ratification of the SEA, of Maastricht, of Amsterdam and of each Enlargement. I do not expect this to change. These regular ratifications – despite their “fast track” take-it-or-leave-it nature – are an authentic expression of the Member States’ democratic institutions and, in some countries, of the European electorate. They are a regular ‘referendum’ on the success of the European construct.

Here we are back to the paradox of success. Let us not mince words: These successful ‘referenda’ which give a valid democratic patina to the European Union, represent, too, the corrupting effect of the European success on the civic virtues of the European peoples and on the very meaning of what it means to be a democracy. The fact that so regularly the European construct is approved without a serious challenge to its questionable democratic quotidian praxis represents the invasion of a market mentality into the sphere of politics whereby citizens becomes consumers of political outcomes rather than active participants in the political process. It represents the process whereby we come to cherish the closeted deliberations of civil servants because of the quality of their dialogue and the merit of their outcomes, but in which citizens or their representatives are at best partially informed consumers of such deliberative paradise. In this respect Europe seems to produce a negative moral “spill over” effect. Even in our Member States we are moving to result legitimacy rather than process legitimacy – at best to a

Schumpeterian style of elite democracy, or more ironically, to a Pericles type of Democracy which the Convention so extolled.

It would be, of course, absurd to hang all the ills of our polities at the door of the European Union. It is not only Europe that suffers from democratic deficiencies. The degradation of political culture is part of the story of democracy in many of the Member States. Its signs are obvious enough and we need list only a few. These include the prominence of image and electronic media in political discourse with the consequent blurring (or Blairing) of the lines between politics and entertainment as part of a culture of celebrityship. It includes the trumping of ideology by pragmatism and the ascendance of technocracy and technical competence as supreme criteria of legitimacy. All these things would be with us with or without the European Union. But Europe helps accentuate them, aggravate them and, most insidiously, render them normal and, thus, acceptable.

The external impact of the EC on the political culture of democracy mirrors its internal ethos. Legitimization through successful technocratic accomplishment rather than through the messy processes of democracy has become, too, a central feature of the internal Commission culture. On the one hand a central feature of the self-understanding of the Commission is the notion that it is an autonomous, policy making political Institution and not simply the secretariat of, say, the Council. This self-understanding compels the Commission to be acutely aware of the need to have political legitimacy – both internally to sustain institutional morale and cohesion and externally to sustain support, essential for its power given its lack of a popular political constituency. Legitimation through accomplishment, professionalism and results instead of through process becomes thus, the surrogate for democratic process and democratic legitimation.

Additionally, the Commission celebrates its “non ideological” identity. It was Renaud Dehousse who coined the term Political Deficit – as inimical to political culture as Democracy Deficit. It is not simply the self-delusion or deceit: How can anyone really be non-ideological. One can only mask one’s ideology. But “Politics without politics” (the essence of the political deficit) has in and of itself a corrupting effect, since it takes the citizen who is reduced to a consumer of political results (rather than a meaningful participant in political process) and subtly encourages him or her to make choices based on non-ideological grounds i.e. often a proxy for material self-interest. The Council, too, inadvertently plays a powerful role in this. In their

respective Member States, Presidents and Prime Ministers are, of course the embodiment of a political and ideological choice – socialist, Gaullist, Christian Democrat etc. But when they arrive in Brussels and are situated in the Union Institution such as the Council an interesting political neutering takes place. First, from the perspective of their Member State, they are meant to represent the whole Nation, not the political preference of their party. And from a European perspective, by definition the Council is a non-ideological body, after all, its political/ideological color is totally haphazard, depending on the accident of national elections. It is distinctly not Bon Ton to play “party politics” (vis. Ideological and political preferences) in the European Council process.

We have thus a bi-directional or circular process whereby the degradation of politics in the Member States enables the Community to claim its legitimation on the basis of its achievement and receive its regular constitutional pound of flesh from the Member States after each IGC a legitimization which in-turn contributes to that very degradation of what democracy is meant to be about.

One will also note that the tendency of Citizen-as-Consumer (of political outcomes), and a consumer who is subtly conditioned to make his choices not on the basis of principle, but self-interest, provides the first building block to my parallel legal thesis of a legal system which places the individual in the center but renders him a self-centered individual – in strong tension with the spiritual ideal of human integration.

The discussion on democracy, if persuasive, illustrates both the impact

## VIII

I can be much shorter in providing a similar illustration in relation to the value and ideal of prosperity and solidarity.

Prosperity was the second grand ideal in the formative years of the founding fathers. It still remains a very important part of European value discourse. This is captured in, among other places, Article 2 of the original Treaty of

Rome.

The Community shall have as its task ... to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living ...

The focus on prosperity at that time should not come as a surprise. After all, the economic reconstruction of the devastated continent was intimately connected with the notion of peace. Each was the means for the other.

At first blush it is hard to capture the altruistic, non-hedonistic dimension of the quest for prosperity. Are we not here in the presence of pure self-interest, something to be almost ashamed of -- the very antithesis of altruism, challenge, sacrifice which are essential parts of idealistic narrative? Where is the value?

There was an idealistic dimension, nuanced to be sure, to the quest for prosperity which mediated its utilitarian aspects. Its virtue appears when set against a backdrop of destruction and poverty. In these conditions (individual and social) prosperity assumed an altogether different meaning: Dignity -- both personal and collective. In an Enlightenment bound vision of the individual, poverty resonates with the embarrassment of dependence on others, with the humiliation bred by helplessness, with the degradation of lack of autonomy. There is, thus, nothing shameful in aspiring for prosperity when it comes to mean dignity.

More importantly, linking prosperity to a cooperative enterprise inevitably blunted the sharp edges of avidity. The Community in its reconstructive effort was about collective responsibility: It was a regime which attempted to constrain unchecked search for economic prosperity by one Member State at the expense of others. And the Member States share a basic commitment to solidarity with the weakest elements in society through the networks of the welfare state.

Put in this way -- we also detect here the deeper roots of the Community notion of Prosperity as a basic ethical value: It links up with, and is evocative of, a different but no less central strand of European idealism since the mid 19th century: Be it socialism, Fabianism, Communism, Welfare Statism all sharing an underlying ethos of collective societal responsibility

for the welfare of individuals and the community as a whole. It is not surprising, it is very typical of Europe at that time – that it could reach into its self understanding with perfect equanimity both to its Christian and Enlightenment, even social heritage.

It is the shared commitment of the Member States, which hides a certain discomfort. For let us look at the very structure of the Treaty, in a methodology which combines both positive law but also symbolic meaning. What is Pillar One? It is the Market Place! The principal motor towards prosperity is based on ordo-liberalism of the Freiburg school. Competition, level playing field and strict regime on State Aids are the super-structural mechanisms which Pillar One represents. And at the deeper human level, market models appeal to, are driven by the very notion of self-interest. That is their premise. And they work. They do generate prosperity.

But note now the internal structure of Pillar one, represented for example in its most central provisions, Articles 28-30 of the Treaty. Article 28 is materially about Open Markets and spiritually about self-interest. About the efficient displacing the inefficient, thus resulting in higher productivity and wealth creation. We are not, however, monomaniacal free marketers. Article 30 represents the competing values – public morality, public order, ecological concerns, health and safety etc.

But several things are noticeable in this structure (which is replicated in relation to services, labor etc.).

- a. Europe represents the Market. The Member States represent the competing values.
- b. The norm, the “default” position, the legal “presumption” is Free Market. Competing values have to be defended, proven, justified.
- c. We apply to this construct one of the great hermeneutic principles of Treaty interpretation in general and European Union interpretation more specifically: Derogations to a general norm must be interpreted strictly. Derogations to a Fundamental Freedom must be interpreted even more strictly. The fundamental freedom here is not freedom of expression, or of association etc. It is Market Freedoms: Free movement of the factors of production. The market we interpret expansively; the competing values, restrictively.

This is the dogma you will find in most expositions of positive Union law.

Vis a vis the external world, the matter is even more problematic. As Europe attained untold and unprecedented prosperity, we continue to utter the notion of solidarity. But do we live it globally at the level of the Union? Is it internalized – in our policies of agricultural trade? In the social attitudes and legal regimes vis a vis migrants from the new Member States? I spend a great part of my time researching, teaching and trying to understand frameworks such as the WTO and the discontents of Globalization. I have learned caution. Very often (not always to be sure) the ‘valuespeak’ against social dumping, about linking trade to labour conditions is a comfortable moral shield for the protection of the privileges of the already prosperous. Can we put our hand on our heart and claim that there are not strong shades of that in our internal European discourse about market, solidarity and the future of the welfare state?

Finally, there is an additional dimension to the discourse of solidarity which is germane to the issue of values and should give pause. I refer to subsidiarity. What does this, you will ask, have to do with the market? A great deal. It too, conditions a certain way of thinking about the world which goes well beyond the technicalities. Though borrowed from Catholic social doctrine, it really inverts the Catholic tradition. We normally think of Subsidiarity as a principle which may limit the reach of the Union since it requires that the Union act only when its action can be shown to be more efficient than that of other levels of government. That is fine. But note how implicitly it is always about finding the most apt level of *government*. It is reflective and constitutive of a pervasive dimension of our political culture – responsibility through Agency. Thus, even our social solidarity is almost entirely through agency – agency of the State, of the Union, of the Region of the City but always of some public authority. Make no mistake, we would not wish to live in a society which did not provide a social safety net to the less fortunate. Those are important values. But they risk the impoverishment of private virtue. These are values which responsabilize others, and deresponsibilize the self. There is a tell tale sign in the level of charitable giving and voluntary organization in Europe -- which leaves food for thought.

And thus, even at that core value of prosperity and solidarity we find the inadvertent and surprising tendency towards corruption of private virtue. Individual self-interest (Article 28) will produce the prosperity. Public

Agency (Article 30) at national and infranational level will take care of the less fortunate.

## IX

I turn now to peace. It is a delicate value. It can be noble, worthy, human. But like all values and ideals it is such when it requires courage and sacrifice. For Rabin and Arafat it was called , *a titre juste*, the Peace of the Brave.

Peace can also be the negation of values – a “leave me in peace”, an “I don’t care – so long as I am left in peace.” The “Peace in our Time” of Chamberlin, that piece of paper he came back with from Munich, appeasing the unappeasable, remains a badge of dishonor.

In the immediate wake of World War II, peace was the most explicit objective of the new construct, an objective for the attainment of which the would-be-polity was to be an instrument. This is a hard nosed desideratum of all contemporary diplomacy to which the functionalist European methodology was to be employed to the full.

Nowhere is this captured better than in the oft repeated phraseology of the Schumann Declaration of May 9, 1950.

World peace cannot be safeguarded without the making of constructive efforts proportionate to the dangers which threaten it...  
The gathering of the nations of Europe requires the elimination of the age-old opposition of France and the Federal Republic of Germany; The first concern in any action undertaken must be these two countries....  
[This] solidarity ... will make it plain that any war between France and the Federal Republic of Germany becomes, not merely unthinkable, but materially impossible....

It is readily apparent that in the historical context in which the Schumann Plan was put forward the notion of peace as articulated in the European construct probed a far deeper stratum than simple cessation of hostilities, co-existence, the kind of stuff one saw at the end of World War I.

These were, after all, the early 50s with the horrors of War still fresh in the mind and, in particular, the memory of the unspeakable savagery of German occupation. It would take many years for the hatred in countries such as The Netherlands, Denmark or France to subside fully. The idea, then, in 1950, of a Community of Equals as providing the structural underpinning for long term peace among yesteryears enemies, represented more than the wise counsel of experienced statesmen. It was also a call for forgiveness, a deep spiritual challenge to overcome an understandable hatred. In that particular historical context the Schumannian notion of Peace resonates with, is evocative of, the distinct discourse, imagery and values of Christian Love, even of Grace -- not, I think, a particularly astonishing evocation given the personal backgrounds of the Founding Fathers -- Adenauer, De Gaspari, Schumann, Monnet himself.

That context, which allowed peace to touch the depths of human dignity, of humanity, no longer exists. The peace which Europe thankfully gained from that age old opposition of France and Germany, shows signs of ossifying, and imploding on itself, betraying the commitment to the very values of which that peace was meant to be foundation. Today we want peace in the Leave-me-peace mode. In some respects the very success of Europe has sapped our will.

Europe has eschewed the responsibility for peace. It hides behind slogans like “Civilian Power” – a small fig leaf to cover up its concession that ultimately it will be the USA to whom it always has to turn. That fatal choice, made with the rejection of the European Defense Community in the mid 50s, was emblematic of a Europe, recoiling from the use of force, relying for decades on American guns to enable it to produce European butter and has conditioned a pervasive public ethos that nothing is so important that it is worth fighting for. A “peace at all costs” mentality.

Bosnia (and Kosovo) are traumatic events about which Europe has developed almost instant amnesia. In the heart of Europe horrible persecution of a religious minority was taking place, leading eventually to genocidal acts. Europe prevaricated, talked and talked, and eventually, far too late, when it decided to take action, it was clear that it had not the means to assert its alleged values. The cowboys from across the Atlantic had to be called in. It was a moment of shame.

Even at a micro level one cannot rid the mind of the images of those Dutch soldiers who stood by as some of the worst massacres took place. They were not fascists, they believed in human rights just as you and I do. Still, they did not move. In some respects they too are emblematic of our crisis of values – of the growing gap between social mores and personal virtue.

The peace of Schumann was an act of strength, of self control, of collective magnanimity of spirit. Bosnia was the degradation of all of that. Peace here, was about comfort, about turning, not the other cheek, but turning the eyes away from that which one did not want to face.

It was Samuel Johnson who famously suggested that patriotism was the last refuge of a scoundrel. Dr Johnson was, of course, only partly right. Patriotism can also be noble. But Europe's response or rather non response to Bosnia and Kosovo are a reminder that Constitutional Patriotism can provide equal refuge. To me, if I look at the Constitution, if I look at the European agenda, I cannot tell if that lesson has been learnt.

It is here that one may add a delicate note on Supranationalism. Nationalism and patriotism, as European history demonstrates, can be easily abused leading to unspeakable degradation of the human spirit. It is only right that the European construct sought to tame them. But part and parcel of the patriotic package was the spirit of public service, of commitment to the community, of loyalty to one's co-national even when he or she were not family or even tribe. One has to wonder whether in relation to these altogether positive virtues, the European construct has not thrown out the baby with the bath water?

## X

As we turn to the rule of law – we shift our focus to the Court.

It is quite common when assessing the jurisprudence to cast the European Court, virtuously, in a dialectical relationship with (a typically stalling)

political process. The following has been told in many, many variants over the years:

*In the face of political stagnation and stasis in the late 60s and a lack of 'political will' (favorite, meaningless phrase) the Court steps in and compensates by its remarkable constitutionalizing jurisprudence, virtually salvaging European integration*

*In the face of a growing democratic legitimacy, the Court develops its human rights jurisprudence. Community (and Union) norms might suffer from democratic deficiencies, but at least they will be protected against violation of fundamental human rights*

*In the face of the failure of the harmonization process in constructing the common market place, the Court steps in with its highly innovative doctrine of functional parallelism (Mutual Recognition) in Cassis providing a jurisprudential breakthrough to move ahead.*

There is more than a grain of truth in all the variants, more and less sophisticated, of this narrative. But, grant me, they are also very self-serving and partial. In all of them, the political problem is extraneous to the Court, which, within the limits of its powers, steps in, Knight in Shining Armor, to correct that which politics and politicians are unable to do. According to this view – the Court cannot (and should not) solve all the problems but it is always cast as part of the solution rather than part of the problem. It is tempting, particularly in the present circumstance, to view the Court as such, after all, it was not the Court that advocated for the new formal constitution etc.

Be that as it may, I want to argue now that the Court is part of the problem. That the very jurisprudence, inescapably and inextricably, implicates the Court in the very issues of democratic and social legitimacy which are at least partially at the root of current discontent. I want to argue further that the Court has responsibilities all of its own which do not even fit under the rubric of “implicated”.

But before I explain this thesis I want to state clearly what I am not arguing:

My critique is not part of ‘the Court has no legitimacy,’ *gouvernement des juges* and all that. Nor is it an attack on the “activism” of the Court or its hermeneutics i.e. it is not part of more contemporary trends, notable in the USA, which have (re)discovered Bickel’s silent virtues and normatively embrace restraint and a reduced role for courts and all that. I do not think Europe has a *gouvernement des juges* (whatever that means) nor do I find fundamental fault with the hermeneutics of its essential jurisprudence. Importantly, this critique does not have as its purpose to argue that the constitutional jurisprudence was a normative mistake, a road which should not have been taken. As a matter of its underlying values I believe it was not simply expedient but, in post WWII Europe, no less than noble. The critique is, thus, not methodological but substantive.

My approach rests on two propositions. First, it highlights a certain irony in the constitutional jurisprudence. As noted above it was often perceived (and there are indications in the cases that it was so perceived by the Court itself) as being a response to, and part of, a broader political discourse of integration often a response to non-functioning dimensions of the political process. But there has been, both by the Court itself and its observers a myopic view which failed to explore deeper some of the consequences and ramifications of the constitutional jurisprudence. There has been a refusal to see the way in which the essential [legal order] constitutional jurisprudence is part and parcel of the political democratic legitimacy crisis; how the essential market integration case law is part of the social legitimacy crisis, how certain elements in the human rights jurisprudence mask and impede the most essential in the human rights agenda of the Union and, finally, how the brave new case law on citizenship feeds and aggravates some of the worst challenges facing Europe in the area of immigration. Very often one has the impression that though the political (in the sense of institutions) is well grasped in relation to the case law, the social (in the sense of human dimension and communities) has been far less understood.

How then is the Court implicated in the democratic deficit?

Our starting point can be, the fountainhead of this part of the constitutional jurisprudence, *Van Gend en Loos* itself. In arguing for the concept of a new legal order the Court reasoned in the following two famous passages as follows:

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.* (Emphasis added)

The problem is that this “cooperation” was extremely weak. This is, in truth, a serious “dumbing down” of democracy and its meaning by the European Court. At the time, the European Parliament had the right to give its opinion – when asked, and it often was not asked. Even in areas where it was meant to be asked, it was well known that Commission and Council would tie up their bargains ahead of such advice which thus became *pro-forma*. But can that level of democratic representation and accountability, *seen through the lenses of normative political theory* truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions? Surely posing the question is to give the answer.

The implication of the Court of Justice in the democratic travails of the Union is easily stated even if usually uncomfortably discussed. The late Federico Mancini in his *Europe: The Case for Statehood* forcefully articulated the democratic malaise of Europe. There were many, myself included, who shied away from Mancini’s remedy, a European State and

shied away from his contention that this remedy was the only one which was available. But few quibbled with his trenchant and often caustic denunciation of the democratic deficiencies of European governance.

But could the Court distance itself from this malaise so trenchantly and caustically denounced?

It is precisely on these occasions, I argued, that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would I want to give effect to a principle which rendered the Community's undemocratic laws—adopted in his words by 'numberless, faceless and unaccountable committees of senior national experts' and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If democracy is what one cared about most, could one unambiguously consider much of the Community edifice a major *advance*? Whatever the hermeneutic legitimacy of reaching supremacy and direct effect, the interaction of these principles with the non-democratic decision making process was and is, highly problematic. Similar dilemmas would of course face national judges.

The paradox is thus that the legitimacy challenge to the Court's constitutional jurisprudence does not rest as often has been assumed in its hermeneutics – a good outcome based on a questionable interpretation. But quite the opposite: An unassailable interpretation but an outcome which underpins, supports and legitimates a highly problematic decisional process. Substantively, then, the much vaunted Community rights which serve, almost invariably the economic interests of individuals were “bought” at least in some measure at the expense of democratic legitimation.

Procedurally we find a similar story. The secret of the Rule of Law in the legal order of the European Union is that genius Article, 234 (previously 177). The Compliance Pull of law in liberal Western Democracies does not rest on the gun and coercion. It rests on a political culture which internalizes, especially public authorities, obedience to the law rather than to expediency. Not a perfect, but one good measure of the rule of law is the extent to which public authorities in a country obey the decisions, even uncomfortable, of their own courts.

It is by this very measure that international regimes are so often found wanting. Why we cannot quite in the same way speak about the Rule of International Law. All too frequently, when a State is faced with a discomfiting international norm or decision of an international tribunal, it finds ways to evade them.

Statistically, as we know, Article 234 in more than 80% of the cases, is a device for judicial review of Member State compliance with their obligations under the Treaties. It is ingenious for two reasons: First, it deploys individuals, vindicating their own rights as the monitors and enforcers of Community obligations vis-à-vis the Member States. It has been called the Private-Attorney-General Model. And second, it deploys national courts. The judgment is spoken through the mouths of Member State courts. The habit of obedience associated with national law is, thus, attached to European law. The gap between the rule of law and the rule of international law is narrowed, even closed.

However, it is precisely in this context that we can see the dark side of this moon. The situation implicated in Article 234 always posits an individual vindicating a personal, private interest against the public good. That is why it works, that is part of its genius, but that is also why this wonderful value also constitutes another building block in that construct which places the individual in the center but turns him into a self-centered individual.

## XI

Human Rights. Protection of fundamental human rights has been a central feature of modern constitutions as well as much of the judicial review activity of supreme courts in Western Countries in the Post War era. Concepts such as individual dignity and privacy as well as more classical notions of liberty and equality before the law have been the standard repositories of constitutional interpretation by courts exercising judicial review of governmental legislation and administrative action. Both the concept and practice of judicial review have penetrated, albeit in a limited way, even legal cultures which for long have resisted, such as Britain and France. Indeed, judicial review in general and the protection of individual rights in particular are widely considered as a conditio sine qua non of constitutional democracy and the rule of law.

The Treaties establishing the European Community -- the Constitution of the EC -- did not contain a Bill of Rights nor, indeed, any reference at all to the need for, or the means of, protecting fundamental human rights against encroachment by Community and Union public authorities.

The absence of a reference to human rights in the Treaties was not unique. Many regulatory treaties do not contain human right protection clauses. Should a State in pursuance of its international treaty obligation seek to violate the rights of the individual, or should an international organization seek to do the same thing, the individual would, it could be thought, receive his or her protection from national courts applying national constitutions and from transnational bodies specifically set up for the protection of Human Rights. But the European Community developed in a way which rendered the absence of human right protection problematic. It was not after all a mere coordinatory treaty: It was a treaty of governance. Moreover, the European Court of Justice put in place starting in the early 60s a constitutional reading of the Founding Treaties which gave many of their provisions "direct effect" meaning that they were to be considered part of the law of the land. What is more, these directly effective provisions were to be the "supreme" law of the land -- a higher law overriding conflicting national provisions. It became legally and politically imperative that a way be found to vindicate fundamental human rights at the Community level. How could one assert the direct effect and supremacy of European law -- vesting huge constitutional power in the political organs of the Community - - without postulating embedded legal and judicial guarantees on the exercise of such power? After all, the effect of direct effect and supremacy would be to efface the possibility of national legislative or judicial control of Community law. This imperative was all the more urgent given the notorious democratic deficiencies of European governance, in some respects more acute in the 60s than in the 80s and 90s. How could one expect the constitutional and other high courts of the Member States, especially of those Member States with national constitutional orders and judicial review such as, at the time, Germany and Italy, to accept the direct effect and supremacy of Community norms without an assurance that human rights would be protected within the Community legal order and, critically, that individuals would not lose any of the protections afforded under national constitutions? Protecting human rights became a joined legal and political imperative.

Among the human rights narratives in the European Union two themes seem to be of utmost importance. The first is structural, namely the ways in which the constitutional gap came to be fully or partially filled. The second relates more directly to the theme of this essay: The way in which the concept of human rights as a value enmeshes (or otherwise) with the specificity of European integration as distinct from normal constitutional orders.

The Standard Version of the Human Rights narrative reads something like this: In the absence of a written Bill of Rights in the Treaties and an apparent freedom to the Community legislative and administrative branches to disregard individual rights in Community legislation and administrative action, the European Court of Justice, in an exercise of bold judicial interpretivism, and reversing an earlier caselaw, created an unwritten higher law of fundamental human rights, culled from the Constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights, and against which legislative and administrative acts of the Community organs binding on or affecting individual citizens could be struck in the normal course of judicial review provided by the Treaty. In later years the Court extended the purview of this judicial power to certain limited classes of Member State acts, principally in cases where Member State authorities act as the executive arm of the Community. The content of this “unwritten bill of rights” was rather traditional and represented an attempted synthesis of the constitutional traditions of the Member States. The Court has also stated that Community measures which violate the relevant substantive provisions of the European Convention on Human Rights are not acceptable in the Community.

Early attempts to codify such practices into a written “bill of rights” entrenched in the Treaties such as the April 1989 European Parliament Declaration of Human Rights did not find favor in the several IGCs convened over the years to modify the Treaties. Likewise, several initiatives to push for the adhesion of the Communities to the European Convention on Human Rights – notably a Commission initiative in 1978 – were rebuffed by both the Member States and the European Court of Justice. But then, in a celebrated ‘change of heart’ as part of the ‘Constitutional Process’ of the first years of this decade, the Charter of Fundamental Human Rights was adopted and is now, through the back door, about to be formally integrated into the legal order of the European Union through the Lisbon Treaty – if indeed that is finally ratified. The Jurisprudence of the European Court of

Justice, though at first reticent, already now makes reference to that instrument.

There is an undeniable celebratory tone to our human rights discourse and that celebratory tone is in part justified. We brandish human rights, with considerable justification, as one of the important achievements of our civilization. We hail our commitment to human rights and their embedment in our legal systems among the signal and mature proofs of Europe's response to, and overcoming of, its inglorious recent past in World War II. We consider human rights, alongside democracy, as a foundational value of our political order, something it is even worth fighting for. The "adoption" of the EU Charter (however ambiguous its present formal status in the EU legal order may be) is a final apotheosis of this discourse. Human rights have undoubtedly achieved an iconographical position in European culture. And though we distance ourselves, with disdain, from the more vulgar expressions of American end-of-history triumphalism which gushed forth with the fall of the Soviet empire, that very disdain cannot but conceal Europe's sense of its cultural superiority and hence its own brand of self-satisfaction and triumphalism. We raise the mirror of human rights, as evidenced by both national and transnational instruments before our collective face, and smile with satisfaction:

The following are three central features in the debate on human rights, constitutionalism and integration.

1. First, human rights are part of a broader discourse of, and commitment to, constitutions and constitutionalism, often to the thick, hard version of constitutions and constitutionalism found in, say, the German and Italian legal orders, which embody the notion of Constitution as a higher law. Such developments are noticeable even in countries such as Denmark, Belgium, France and others which had a softer version of constitutionalism and a long tradition of skepticism towards American style judicial empowerment. For its part, the EU already has a very robust version of constitutionalism and the EU Charter is, as noted, perceived by many as the first element in a would-be European Union formalization of that brand of constitutionalism.

Concomitantly, human rights also signify the ever increasing acceptance of (and resignation to) the central role of courts and judges in public discourse. Courts are most audacious in asserting their power when they garb themselves in the mantle of guardians of the human rights guaranteed by

constitutional documents. They are, too, most successful in mobilizing support for and legitimating their power in the context of human rights. Europe adds an interesting nuance to this phenomenon too. First, one should not forget this little element of self-serving and self-interest as the European Court of Justice rushes to embrace the Charter into its Jurisprudence, a Charter which pointedly was not made part of the European legal order by those whose political and democratic legitimacy is much higher than that of the European Court. Second, whilst there have always been and there is currently perhaps an even increasing specific critique of the so called “activism” of the European Court of Justice and it has even been couched, from time to time, in the language which objects to a *Gouvernance des Juges*, a more careful look at such criticism usually discovers that it issues from a nationalist sentiment worried more about the loss of national sovereignty to Europe than of popular or parliamentary power to judges. If the European Court were “activist” in the opposite direction, namely slashing European Union power (and make no mistake, this too would be a form of judicial activism) you would find the same critics celebrating the European Court of Justice. In other words, most of the critique is not of the judicial empowerment as such, but of the content which it embraces. Significantly, when national courts, in acts of *national judicial empowerment*, claiming to protect *nationally defined human rights*, strike out at the European Court of Justice (and there have been quite a few such expressions) they are celebrated as protecting national values and identity and sovereignty. Few seem to protest that it is the judiciary, often in ways constitutionally shielded from parliamentary challenge, which is deciding fundamental issues which define the relationship of a Member State to the Union.

2. Second, beyond constitutionalism and its concomitant commitment to, or acceptance of, courts and judges as such, there is in the discourse of human rights a great faith in the *judicial protection* of human rights. We may call this the Habeas Corpus syndrome. The point I wish to make is simple enough: Increasingly, the measurement of the efficacy of these documents, of their very reality as meaningful legal instruments is in their invocability by individuals and their enforcement, at the instance of individuals, against public authority by courts. It is the *Writ* of Habeas Corpus which solidified its position in legal history. In today’s world, documents and declarations which do not have such a quality are oft derided as “hortatory”, aspirational,

embryonic, all awaiting realization of their potential by arriving at the promised lands of individual invocability and judicial enforceability.

3. Finally, human rights have become an important part of European Integration and European identity discourse. This debate takes place at two levels. The first is the bland affirmation of human rights as being part of a common patrimony et cetera et cetera, good stuff for politicians to drone on about, something akin to Beethoven's Fifth or the Blue Flag with the Golden Stars. But there is a more serious dimension to this prattle. As the polity grows, as the ability of national mechanisms and instruments to provide democratic legitimacy to European norms is increasingly understood as partial and often formal rather than real, the necessity of democratizing decision making at the European level become ever more pressing. Such democratization requires, in its turn, the emergence of a polity with social commitments, allegiances and ties which is a *conditio sine qua non* for the discipline of majoritarian decision making. No demos, no democracy. Europe rightly shies away from an ethnic, religious or any other thick form of organic self-understanding and political identity. The only normatively acceptable construct is to conceive the polity as a Community of Values, much in the original spirit (though not practice) of Post-Revolution France and the United States. When one grasps for a content for such a community of values, the commitment to human rights becomes the most ready currency. Here are values around which, surely, Europeans can coalesce (and celebrate).

There is much truth and much value to our polities in our commitment to constitutional orders which celebrate democracy, human rights and the rule of law; in the seriousness with which we take this commitment as evidence by our willingness to make human rights a veritable legal instruments, often of superior normative value, opposable by individuals against public authorities and adjudicated and enforced by our courts; and in our placing human rights, alongside markets and economic prosperity as defining the values of our emerging European polity. But there are, too, shades, nuances, warts and downright ugly aspects to this picture too which is also worth bearing.

It will come as no surprise that I do not lament the demise of the Charter with the Constitution. European citizens and residents do not suffer from a deficit of judicial protection of Human Rights. Their human rights in most

Member States are protected by their constitution and by their constitutional court or other courts. As an additional safety net they are protected by the European Convention on Human Rights and the Strasbourg organs. In the Union, they receive judicial protection from the ECJ using as its source the same Convention and the Constitutional Traditions common to the Member States. So why a new Charter at all? I will skip a full analysis of this question.

The real problem of the Community is the absence of a *human rights policy* with everything this entails: A Commissioner, a Directorate General, a budget and a horizontal action plan for making those rights already granted by the Treaties and judicially protected by the various levels of European Courts effective. Much of the human rights story, and its abuse, takes place far from the august halls of courts. Most of those whose rights are violated have neither knowledge or means to seek judicial vindication. The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programs and agencies to make rights real, not simply negative interdictions which courts can enforce.

The best way to drive the point home is to think of Competition Policy. Imagine our Community with an Article 81 and 82 interdicting Restrictive Practices and Abuse of Dominant Position, but not having a Commissioner and a DG4 to monitor, investigate, regulate and prosecute violations. The interdiction against competition violations would be seriously compromised. But that is exactly the situation with human rights. For the most part the appropriate norms are in place. If violations were to reach the Court, the judicial reaction would be equally appropriate. But would there be any chance effectively to combat Anti-Trust violations without a DG4? Do we have any chance in the human rights field, without a similar institutional set up?

One reason we do not have a policy is because the Court, in its wisdom, erroneously in my view, announced in Opinion 2/94 that protection of human rights is not one of the policy objectives of the Community and thus cannot be a subject for a proactive policy.

Far more important than any Charter for the effective vindication of human rights would have been a simple Treaty amendment which would have made active protection of human rights within the sphere of application of Community law one of the policies of the Community alongside other

policies and objectives in Article 3 and a commitment to take all measures to give teeth to such a policy expeditiously. Not only was such a step not taken, but Article 51(2) made absolute that such a development would be even more difficult to take in the future.

It is to be seen to what extent the new Monitoring Agency will constitute a first step to remedy this.

But I want to probe the question of human rights and European values even deeper. With the lessons of European history, our commitment to a political and social order in which fundamental rights are constitutionally protected should be without compromise. Let us repeat this: Our commitment to constitutionally protected fundamental rights should be without compromise. I would not like to live in a society where such commitment does not exist. And, yet, the culture of human rights may produce unintended consequences on that very deep ideal of European integration, the one that places the individual at the center and calls for a redefinition of human relations.

First the culture of human rights demands very, very little of all of us who believe in them. In fact for the most part it demands little more than that we should profess a belief in them. The responsibility for their violation is typically not individuals, but public authority, and the responsibility for addressing such violation falls on other public authorities such as courts. Our role is typically to say Tz Tz as we read about such during breakfast. What is a fundamental social more becomes a pretty cheap private virtue. The point made here is not one that inveighs against laziness and indifference. It is indeed the case that the violation of human rights is mostly at the hands of public authorities and there is, in fact, not much one can do than protest at different level of intensity and express our preferences through our voting (though commitment to human rights does not seem to feature high on European electoral politics). The point is that there is something significant that the value place higher than any other in the inventory of European integration, is precisely one that is structured on the responsabilization of the other, of public authorities and one that demands so little of those who, in good faith, profess such. The way human rights play out in the broader matrix of political culture resembles the critique offered in relation to solidarity – it is constitutive of the culture of Agency which itself is not conducive to the virtues and sensibilities necessary for real community and solidarity.

Second, in the passage from social more to private virtue, frequently the vocabulary of human rights is lost-in-translation. The inviolability of human dignity becomes the inviolability of the I, of the ego. The culture of rights, want it or not, undermines somewhat the counter culture of responsibility and duty. We vastly underplay the language of responsibility and duty at the individual level compared to the language of rights and liberties. The individual has rights; society, public authorities have duties and responsibility. It is easy to see how not only the prosperity of the market but its very internal set of values and ethos of competition and material efficiency coupled with the culture of rights contribute to that matrix of personal materialism, self-centeredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights.

## XII

European Citizenship. It was only the Treaty of Maastricht – the Treaty of European Union of the early 90s – which introduced a Citizenship clause into the constitutional vocabulary of the Union. Nationals of the Member States are henceforth, the Treaty proclaimed, European Citizens entitled to all rights and duties therein mentioned. European citizenship was meant, *inter alia*, to deepen the quality of human interpersonal relations among the nationals of the Member States. The articulation of Citizenship both in the legislative structure and the jurisprudence of the European Court might be producing the opposite effect.

It is noticeable that in the Citizenship Chapter in the Treaty Duties are nowhere to be found. Citizenship thus clearly falls into the culture of rights. Even the list of rights were rather inane not to say meaningless. Noticeably, one right which actually had substance, i.e. the right of European Citizens to move and live anywhere throughout the Union, was drafted in such a way as to make it co-terminus with the pre-existing free movement of workers.

In a jurisprudential line already 10 years old and more, the Court has been hailed as giving robust substance to this anemic provision – i.e. taking citizenship seriously. It proclaimed that European Citizenship was destined to become the fundamental status of individuals in Europe. It gave the citizenship clause direct effect and tied it to the prohibition on discrimination on grounds of nationality. It reversed the presumption of ‘right to residence’

and as a consequence materially extended its scope— no longer a right the individual had to probe, but a presumption the curtailment of which the Member States had to justify. On its face the free movement of persons was cut off from its market rationale and grafted on to the altogether more robust platform of citizenship.

And yet, a critical analysis of this jurisprudence would show that inadvertently the Court has not weaned itself from its market proclivities where deep down the individual is perceived as a factor of production, has failed to appreciate the rich and challenging nature of citizenship is a political concept and inadvertently is shaping the immigration debate in an area fraught with delicate tension where the judicial contribution might undermine other positions.

The thrust of my thesis is as follows: The free movement caselaw has historically been driven by two principal objectives. First, the elimination as far as possible of any obstacles to the movement of workers (and self employed persons) within the Union. Second, once allowed in, a vigorous protection of the rights of such workers. The two objectives are connected of course: Only the vigorous protection of such rights would make the free movement a real right rather than a paper right. Importantly, the rights that needed protection, went beyond the basic prohibition on discrimination on grounds of nationality, i.e. the right of a worker to be treated as an equal with national workers. The jurisprudence was particularly adept at ensuring rights of the migrant worker's special status as such, culminating in the notion of Reverse Discrimination under which the Migrant enjoyed rights that even the local worker did not. The new citizenship jurisprudence of the Court took that case law and gave it an even sharper edge in relation to both limbs – access and treatment.

The troubling aspect of this jurisprudence is that it precisely fails to make the conceptual transition from a market based free movement to a citizenship based concept. What it does, both in its positive law, but also in its rhetoric and in the conversation it creates, is to militate against the integration of migrants into their host communities. Materially, it often “pays” to remain a migrant rather, than, say to naturalize. But it is not the material consequences of the jurisprudence that are problematic. Conceptually the jurisprudence “ghettoizes” the Migrant. The ideal type “free movement” is not one in which a host country embraces the migrant and the migrant embraces the host country – leading to a slowly developing new cultural

synthesis and ever changing national identities. Instead it puts in place a model in which the Migrant for ever is to regard himself or herself, and even their children as such, as migrants, and for the host society to regard them as migrants albeit, with very special rights, at times exceeding that which citizens enjoy.

The problem, I think, is not necessarily with the European migrant. The problem is that the European discourse becomes normative across the board, spilling over into the general conversation about the appropriate normative models for dealing with new “citizens”.

#### XIV

Against policy. A curious phenomenon – noble values, dearly held: democracy, prosperity and solidarity, human rights, rule of law, European citizenship, no less. Yes, the European Union is a legal order which places the individual in the center. But in its modus operandi it curiously militates against the very virtues which are necessary to achieve, and are meant to be the byproduct of, these very values. What has become of Monnet’s famous aphorism -- “*Nous ne coalisons pas des Etats, nous unissons des hommes?*” Wonderfully successful in bringing our states together. Far more questionable in its deep spiritual pursuit.

It is at this point that the discussion usually turns to the necessary policy fixes: What should the Union do? How could we or should we reform in order to avoid or at least mitigate some of these unintended consequences?

In inveighing against the typical ‘turn to policy’ move, I am not only motivated by a conviction that many of the features described above are structural and either incapable of reform, or that any reform will create other intended or unintended pernicious consequences.

The ‘turn to policy’ move itself is part of the problem – of responsabilizing others, of addressing the issue in technocratic, governance terms. The redress if any, may be found in greater attention to the spiritual dimensions to our lives and that of our children; the way we think of ours and educate, and cultivate theirs. Education to the necessary virtues of decency and true human solidarity, if achieved, can easily enough counteract the almost inevitable impact of the structure and process of governance. If achieved.