



Institute for International
Law and Justice

IILJ International Legal Theory Colloquium Spring 2010
The Turn to Governance:
The Exercise of Power in the International Public Space

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

- | | |
|-----------------|---|
| January 20 | Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice |
| January 27 | Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law |
| February 3 | Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego) |
| February 10 | No Colloquium - Postponed due to weather conditions |
| February 17 | No Colloquium |
| February 24 | Gianluigi Palombella, University of Parma, Law Faculty
Topic: Rule of Law in Extra-National Governance |
| March 3 | Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues in the Process of
European Integration |
| March 10 | David Kretzmer, Hebrew University/Ulster
Topic: State Reports to the UN Human Rights Committee |
| March 11 | (SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies |
| March 17 | No Colloquium – Spring Break |
| March 24 | Marta Cartabia, University of Milan
Topic: Rights in Europe |
| March 31 | No Colloquium |
| April 7 | Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance? |
| April 14 | Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes |
| Thurs April 15- | (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)
Daryl Levinson, Harvard Law School
Topic: Public Law: Constitutional and International |
| April 21 | Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance |

On the Distinction between Values and Virtues in the Process of European Integration

-

JHH Weiler

©2010 Draft – not for publication or citation without approval

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.

I

It is still quite common, even today, to tell a history of European integration according to which it was originally an economic project which slowly transformed into a political project.¹ The Treaty of Paris² gives the lie to this

¹ « C'est de cette dynamique que procède le passage d'une Communauté économique à une Communauté de citoyens. C'est-à-dire d'une Communauté qui repose sur la réalisation d'un Marché commun, dans lequel la libre circulation des personnes (en tant qu'agents économiques), des marchandises, des services et des capitaux est garantie à une Communauté de citoyens, c'est-à-dire une Communauté d'individus appartenant à une Union politique fondée sur les principes – ou pour reprendre la terminologie retenue par le Traité de Lisbonne – de valeurs de liberté, de démocratie, du respect des droits de l'Homme et des libertés fondamentales, ainsi que l'Etat de droit. Autrement dit, c'est de cette dynamique que procède le passage d'une intégration négative à une intégration positive » Jaibi, N.D. & W. Landolsi 'L'Union européenne: d'une Communauté Economique à une Communauté de Citoyens', in R. Ben Achour et Slim LAGHMANI (dir.), *Les droits de l'Homme : une nouvelle cohérence pour le droit international ?*, Paris: Pedone, pp.249-252, (2008) at 250

² Traité instituant la Communauté Européenne du Charbon et de l'Acier, Préambule, 18 avril 1951, non publié au journal officiel, disponible sur <http://europa.eu.int/eur->

proposition. It lifts its language directly from the Schumann Declaration³ 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, naturally, also that⁴) 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*⁵ – 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.⁶ 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.⁷ Make no mistake: The

lex/lex/fr/treaties/dat/11951K/tif/11951K.html; Preamble to 1951 Treaty of Paris, *reprinted in* EUR. COMMUNITY INFO. SERVICE, TREATIES ESTABLISHING THE EUR. COMMUNITIES (1987)

³ Déclaration Schuman, Discours prononcé le 9 mai 1950 par Robert Schuman, ministre français des Affaires étrangères, disponible sur http://europa.eu/abc/symbols/9-may/decl_fr.htm Schuman Declaration of May 9, 1950, *reprinted in* 13 BULL. EUR. COMMUNITIES 14, 15 (1980)

⁴ A. Millward, The European Rescue of the Nation State

⁵ Monnet, J. (1976), *Mémoires. Nous ne Coalisons pas des Etats, Nous Unissons des Hommes*, Paris: Fayard, 1976

⁶ Cf. Schuman, R. (2000) *Pour l'Europe, Écrits politiques*, (3ème édition), avec préface de Jacques Delors, Nagel, 2000 : Nous ne sommes, nous ne serons jamais des négateurs de la patrie, oublieux des devoirs que nous avons envers elle. Mais au-dessus de chaque patrie nous reconnaissons de plus en plus distinctement l'existence d'un bien commun, supérieur à l'intérêt national, ce bien commun dans lequel se fondent et se confondent les intérêts individuels de nos pays. La loi de la solidarité des peuples s'impose à la conscience contemporaine. Nous nous sentons solidaires les uns des autres dans la préservation de la paix, dans la défense contre l'agression, dans la lutte contre la misère, dans le respect des traités, dans la sauvegarde de la justice et de la dignité humaine. (II p.38) Que cette idée d'une Europe réconciliée, unie et forte soit désormais le mot d'ordre pour les jeunes générations désireuses de servir une humanité enfin affranchie de la haine et de la peur, et qui réapprend, après de trop longs déchirements, la fraternité chrétienne. (II p.46) Il faut préparer les esprits à accepter les solutions européennes en combattant partout non seulement les prétentions à l'hégémonie et la croyance à la supériorité, mais les étroitesse du nationalisme politique, du protectionnisme autarcique et de l'isolationnisme culturel. A toutes ces tendances qui nous sont léguées par le passé il faudra substituer la notion de la solidarité, c'est à dire la conviction que le véritable intérêt de chacun consiste à reconnaître et à accepter dans la pratique l'interdépendance de tous. L'égoïsme ne paie plus. (II p.47)

⁷ "Schuman was an ardent Roman Catholic, and his views about the desirability of political unity in Western Europe owed much to the idea that it was above all the continent's Christian heritage which gave

project and the process were also *realpolitik* of the highest order.⁸ 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 all men and women, not least men and women in public service.

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

In addressing values, rather than articulating a normative theory of European integration⁹ I propose to be empirical: Identifying the content of value discourse as a matter of fact.¹⁰ The substantive discourse of values typically involves two trilogies.

consistence and meaning to the identity of European civilisation. And the Europe he knew and loved best was the Carolingian Europe that accorded with his religious faith and his experience of French and German cultures.” Sutton, M. (2007), ‘Chapter 1: Before the Schuman Plan’, *France and the Construction of Europe, 1944-2007: The Geopolitical Imperative*, New York, Oxford: Berghahn Books, p.34. *It is with deep faith in our cause that I speak to you, and I am confident that through the will of our free peoples, with your support and with God's help, a new era for Europe will soon begin*. Extracts from a speech by Alcide De Gasperi at the Consultative Assembly of the Council of Europe in Strasbourg on 16 September 1952 – volume 3/1952 of the OFFICIAL REPORTS OF DEBATES of the Consultative Assembly of the Council of Europe

De Gasperi; Adenauer

⁸ Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell Studies in Political Economy) by (1998)

⁹ Cf. Richardson, J. (2002), ‘The European Union in the World – A Community of Values’, *Fordham Journal of International Law*, vol.26, no.1, pp.12-35, at 14. Pascal Boniface (éd.), *Quelles valeurs pour l'Union européenne?*, Paris, IRIS-PUF, 2004 (112p.). Dony, M. (2005), ‘Les Valeurs, objectifs et principes de l'Union’, in *Commentaire de la Constitution de l'Union européenne*, (Bruxelles : Editions de l'Université de Bruxelles), p. 33. Benoît-Rhomer, F. (2005), ‘Valeurs et droits fondamentaux dans la Constitution’, *Revue Trimestrielle de Droit Européen*, vol. 41, no. 2, p. 261-284. Editorial (2008), ‘L'Union, une communauté de valeurs?’, *Revue Trimestrielle de Droit Européen*, no. 1, p. 1-4. Euzéby, A. (2004) ‘La Constitution – Constitution de l'Union Européenne : des valeurs à défendre !’, *Revue du Marché Commun et de l'Union Européenne*, vol. 482, pp. 566-568.

¹⁰ In this section of the essay I have no interest in “unmasking.” I am interested instead in a distillation of the most common value laden

vocabulary gleaned from speeches of Heads of State and Government and from official texts. It is a story of how we want to appear in the mirror. The following is a selection of such statements by authorities of several of the

member States. Austria: It [the discussion about the European Constitution] is also about the European way of life. I have never understood why the USA can boast about the American way of life, while we Europeans never have the confidence to refer to our own way of life with pride: peace, democracy and solidarity are not self-evident and come at a price.

http://www.eu2006.at/en/News/Speeches_Interviews/1801schuesselredeep.html 18.01.2006. Speech by the President of the European Council, Federal Chancellor Wolfgang Schüssel (Austria) before EP Presentation of the Austrian Presidency's programme. The Memorandum of Understanding [btw the EU and the Council of Europe] should deepen and extend the co-operation and political dialogue between the two organisations, building on existing agreements of 1987 and 2001. We should build on and around, the attachment of both organisations to the same values, our common commitments to the promotion of a pluralistic democracy, respect for and protection of human rights, fundamental freedoms and the rule of law. http://www.eu2006.at/de/News/Speeches_Interviews/1104schuesseleuroparat.html 11.04.2006 Rede von Bundeskanzler Wolfgang Schüssel before the Parliamentary Assembly of the Council of Europe.

Czech Republic: In my view, the main European values, as shaped by the turbulent spiritual and political history of Europe, and as adopted by other parts of the world, or at least some parts of the world, are obvious. Respect for the individual and for his freedoms, his rights and his dignity, the principle of solidarity, equality before the law and the rule of law, protection of all ethnic minorities, democratic institutions, separation of the legislative, executive and judicial estates, political pluralism, respect for private property and free enterprise, a market economy and the development of the civil society. The form which these values currently assume naturally reflects countless modern European experiences, including the fact that our continent is becoming a main multicultural crossroads.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20000216+ITEM-012+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-228>, Address by Mr Vaclav Havel, President of the Czech Republic 16.2.2000. Denmark: The Copenhagen Summit also marked the beginning of a new era for the European Union. In Copenhagen, the EU carried out the greatest task in the history of the Community. Following the Copenhagen Summit, the European Union stands as the overall framework around the Europe of the future: cooperation based on the shared values of freedom and the market economy, community spirit and social responsibility, democracy and human rights; effective cooperation that respects the national characteristics of our peoples and states (...) Fogh Rasmussen,

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20021218+ITEM-003+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-010>, 18.12.2002. Finland: The importance of European cooperation and integration to promote peace, stability and prosperity in our continent is obvious, and the results are striking. Our efforts are based on a common set of values. They are freedom, democracy, a respect for human rights and fundamental freedoms and a commitment to the principles of the rule of law (...) Tarja Halonen, *President of the Republic of Finland to EP*. France: As a result of this Charter [of Fundamental Rights], our Union will be stronger and have greater guarantees of the values of dignity, freedom and solidarity that are its cornerstones. We shall now echo this as widely as possible and very shortly consider its status. I realise how much importance your Parliament attaches to this Charter. J. Chirac to European Parliament, 12.12.2000

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20071113+ITEM-006+DOC+XML+V0//EN&language=EN&query=INTERV&detail=2-111>. Germany: I am very glad – and I think the majority of us here are agreed on this – that we succeeded in finding a solution regarding the Charter of Fundamental Rights. The Charter strengthens the citizens' rights vis-à-vis the institutions. The Charter of Fundamental Rights will be legally binding, which in my view is entirely fitting for a value-conscious Europe. Ladies and Gentlemen, all institutional progress and the reorientation of the European Union are in the end only possible if we Europeans are conscious of our values, indeed if we make these values the guiding principles for all our actions. I believe these guiding principles can also help to convince the citizens about Europe, if we make it clear that we are acting together in the world on the basis of our values. Europe does not mean "anything goes". Europe is an obligation to help ensure that our Earth remains a habitable planet, that fewer and fewer people are forced to leave their homes because of war or

violence, that diseases such as Aids, malaria and tuberculosis can be fought successfully.

http://www.eu2007.de/en/News/Speeches_Interviews/Juni/0628BKinEP.html Speech by Federal Chancellor Dr Angela Merkel to the European Parliament, Brussels, on 27 June 2007 reviewing the German EU Presidency. When we look at the Berlin Declaration, we see that highlighting our common values forms an important part. It also very ambitiously states that we have an ideal of European society and that we will work together to preserve this ideal. This ideal of European society consists of a canon of values close to our hearts: freedom, solidarity, equity.

http://www.eu2007.de/en/News/Speeches_Interviews/March/0328BK.html Speech by Chancellor Angela Merkel to the European Parliament in Brussel, 28.03.2007. Ireland: Through our European neighbourhood initiative, we will enhance relations with those countries to the east and south on the basis of the values of democracy, respect for human rights and the rule of law.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20040114+ITEM-001+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-005>, Bertie Ahern, European Council, 31.3.2004. Italy: Mr President, President of the Commission, ladies and gentlemen, establishing conditions for international security is now a key task for the countries which share a set of universal values based on freedom, democracy and peace. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20030702+ITEM-001+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-005>. Berlusconi to European Parliament, 2.7.2003. Netherlands: Europe is a respected world player, and an example to the world. What makes it that is our unique form of cooperation, our focus on solidarity, and our capacity for commitment, united by values and dialogue rather than by battle. Prime Minister Balkenende, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20070523+ITEM-009+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-241>, 23.5.2007. Poland: Freedom and democracy know no borders. A united Europe is not just about a common market, funds and subsidies. It is a community of values. A society cannot be about just a bit of freedom, a bit of democracy and a few rights. A Europe without the Berlin Wall cannot be a Europe with just a bit of freedom, a bit of cooperation and a bit of solidarity. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20030514+ITEM-016+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-237> Address by Mr Aleksander Kwasniewski, President of the Republic of Poland, 14.5.2003 Portugal: ...On taking the presidency of the Union's Council of Ministers for the third time, I want to reassert before you all the Portuguese government's determination and commitment to defend and further the values of peace, freedom, solidarity and prosperity that inspired the founding fathers in 1957. The now twenty seven member states, with almost 500 million citizens, all reaffirmed these values together in Berlin last March. <http://www.ue2007.pt/NR/rdonlyres/4DBF3C34-31C4-483F-8CAC-6753B9EBFDB5/0/70712ENParlamentoEuropeufinal.pdf>. *Presentation of the Programme of the Portuguese Presidency Speech of Prime Minister José Sócrates to the European Parliament, Strasbourg 11th July 2007.* Sweden: ...Firstly, foreign policy action is increasingly a matter of values, democracy and human rights. Secondly, foreign policy action is also increasingly linked to economic relations, not least trade. Thirdly, foreign policy action is increasingly tied – and where we are concerned will continue to be tied – to a progressive and just development assistance policy. This last aspect is a point to which we devote too little time and attention. It is an underestimated factor in foreign relations. These three factors in combination indicate that developments are going the EU's way. Given this situation, if we are able to act on the basis of our values we will also be in a position to make an impact.

http://eu2001.se/eu2001/news/news_read.asp?iInformationID=16429 Speech by Prime Minister Göran Persson to the European Parliament, Strasbourg, 3 July 2001. United Kingdom: This week's European Council in Brussels takes place at the end of a tumultuous year for the European Union. It has been a year in which the voters of France and the Netherlands rejected the draft Constitutional Treaty; a year in which the need for Europe to face the realities of a globalised economy has become ever clearer; and most tragically, a year in which terrorism has once again struck in the streets and trains of a European capital. But Europe has responded. We have developed a clearer sense of our common response to globalisation. We have shown a sheer determination, which Mr Schulz has been generous enough to acknowledge in previous debates in this chamber, in the face of terrorism which has reaffirmed the strength of our solidarity, our democratic values and our common resolve to see those values triumph. We have

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, hunger) and witnessed the murderous – genocidal -- excesses of nationalism, Peace-Prosperity- and, for want of a better word, Supranationalism (as a proxy for those arrangements designed to combat the excesses of the nation-state) expressed their noble vision, the holy trinity,¹¹ for the project.

That generation is disappearing. The majority of our populations, 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 Schengen¹² 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.¹³ 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, have remained central to the European construct. They are at its core as a means of constructing community an indispensable foundational block of democracy. Europe continues to shy away from an earlier generation's self understanding of communal bonds rooted in organic, territorial communities – let alone ethnic. In Germany, for

asserted Europe's truly global role and responsibility, whether it is in New York, in Montreal last week, the Gaza Strip, or in Aceh, Indonesia. (...)

<http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1115146994906&a=KArticle&aid=1134649715170&date=2005-12-14> European Parliament plenary debate on preparations for the European Council: Speech by Douglas Alexander, UK Minister of State for Europe, 14 December 2005 (14/12/05).

¹¹ I privilege the first three and the Trinity allusion is deliberate. They are, I would contend, to be understood as interdependent – democracy having no validity without human rights and the Rule of Law etc.

¹²

¹³

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.¹⁴

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. By contrast, 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.¹⁵

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 an important identity marker (even if at times containing an element of smug self satisfaction.¹⁶) It is most noticeable in the self-distancing from 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 affirming a form of European exceptionalism.¹⁷

¹⁴ I privilege the first three and the Trinity allusion is deliberate. They are, I would contend, to be understood as interdependent – democracy having no validity without human rights and the Rule of Law etc.

¹⁵ For those who want an example, examine carefully the social chapter in the Charter of Fundamental Rights.

¹⁶ Von Bogdandy, *Altneuland*...

¹⁷ Nowhere does this self satisfaction – with one’s self and with the instrumentality of the Union find better expression than in the original Preamble to Europe’s defunct 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)

III

I want to introduce law now. European Union law has had, too, a remarkably express and explicit value discourse – which in its content is, I would suggest, 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.¹⁸

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 instrumentalities¹⁹

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 Union²⁰

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.

18

19

20

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 will introduce the central conceptual and theoretical foundation of my thesis in this essay. It is simple enough and rests on the resurrection of the 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, for example, Aristotle, Maimonides and Aquinas and more recently in MacIntyre.²¹

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, somewhat simplistically, illustrates 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

²¹

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. In this essay a central part of my thesis will be the argument that upholding or believing in a value, has replaced the virtue – has become the virtue.

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."²² 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."²³ The law is there not simply to ensure certain outcomes but to affect our virtuous dispositions.

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

²²

²³

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. Value discourse involves not simply putting forward a desired state of affairs -- material or spiritual -- but a recognition of our selfish tendencies. Values will oft 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. Things that demand sacrifice are cherished more than things that come easily. Sacrifice invests things with value.

VI

I may now outline my thesis. 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.²⁴ 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.

24

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.

VII

It is, I believe, easy enough to illustrate this mechanism in relation to the value and ideal of prosperity and solidarity.

Prosperity was one of 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 the inception of the Union 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 when we come to the means to achieve these objectives that the picture becomes complex. For let us look at the very structure of the Treaty, in a methodology which combines both positive law but also symbolic meaning. At the core of the Union enterprise, its ‘Pillar One,’ its original EEC is the Common Market Place – the Market.²⁵ The principal motor towards prosperity is based on ordo-liberalism of the Freiburg school.²⁶ 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,

²⁵

²⁶ Cf. Eucken, W. (1989), *Die Grundlagen der Nationalökonomie* (9th ed.), Berlin: Springer. Eucken, W. (1952), *Grundsätze der Wirtschaftspolitik*, Mohr/Siebeck, Tübingen. Peacock, A. and H. Willgrodt (1989) (eds.), *Germany's Social Market Economy: Origins and Evolution*, London: Macmillan. Friedrich, C.J. (1955), ‘The Political Thought of Neo-Liberalism’, *American Political Science Review*, vol.49, no.2, pp.509-525. Böhm, F. (1980), *Freiheit und Ordnung in der Marktwirtschaft*. Baden-Baden: Nomos. Grosseckler, H.G. (1989) ‘On Designing an Economic Order. The Contributions of the Freiburg School’, in Walker, D.A. (ed.) *Perspectives on the History of Economic Thought*, Vol.II, Aldershot: Edward Elgar, pp.38-84. Kasper, W. and Streit, M. (1993), *Lessons from the Freiburg School. The Institutional Foundations of Freedom and Prosperity*, The Center for Independent Studies, Australia. Razeen, S. (1996), ‘Ordoliberalism and the Social Market: Classical Political Economy from Germany’, *New Political Economy*, vol.1, no.2, pp.233-257.

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 the most central provisions, of the Pre Lisbon Treaty, Articles 28-30. 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. It does not, however, represent a monolithical free market commitment. 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.²⁷ What does this have to do with the market? A great deal. It too, conditions a certain way of thinking about the world which goes well beyond technicalities. Though borrowed from Catholic social doctrine, it really inverts the Catholic tradition.²⁸ 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. 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, one 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.²⁹

And thus, even at that core value of prosperity and solidarity we find the inadvertent and surprising tendency towards corruption of private virtue.

²⁷ See generally, Lenaerts, K. e Ypersele, P., "Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité de l'Union Européenne", *Cahiers de Droit Européen*, n. 1-2, 1994, pp. 3-83. Mattera, A., "Le principe de subsidiarité au service d'une Communauté à la dimension des problèmes de notre temps", *Revue du Marché Unique Européen*, n. 2, 1994, pp. 189-192. Strozzi, G., "Le principe de subsidiarité dans la perspective de l'intégration européenne. Une énigme et beaucoup d'attentes", *Revue Trimestrielle de Droit Européen*, vol. 30, n. 3, 1994, pp. 373-390. Cass, D., "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community", *Common Market Law Review*, vol. 29, n. 6, 1992, pp. 1107-1136. Inman, R.P. (1998), 'Subsidiarity and the European union', *National Bureau of Economic Research Workign Paper No. W6556*. Peterson, John. 1994. "Subsidiarity: a definition to suit any vision?" *Parliamentary Affairs* 47. 117-132. Constantinesco, V., "Les clauses de coopération renforcée, Le protocole sur l'application des principes de subsidiarité et de proportionnalité", *RTD eur.*, 33(4), octobre-décembre, 751-67, 1997. Bribosia, H., "Subsidiarité et répartition des compétences entre la Communauté et ses États membres", *Revue du Marché Unique Européen*, n. 4, 1992, pp. 165-188.

²⁸

²⁹

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.

VIII

Democracy, too, may provide a similar illustration. 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.³⁰ It is

³⁰ In this note I track some of the signal contributions chronologically from the 70s through the present. Sommer, T. (1973), 'The Community in Working', *Foreign Affairs*, 51(4), p.747
Weiler, J.H.H. (1986), 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities', *Washington Law Review*, 61(XX), pp.1103-XX. Laprat, G. (1991), 'Réforme des Traités: le risque du double déficit démocratique. Les Parlements nationaux et l'élaboration de la norme communautaire', *Revue du Marché Commun et Unique*, no. 351, pp. 710-721. Reich, C. (1991), 'Qu'est-ce que ... le déficit démocratique', *Revue du Marché Commun et de l'Union Européenne*, vol.343, pp.14-18. Scoffoni, G. (1992), 'Les relations entre le Parlement européen et les parlements nationaux et le renforcement de la légitimité démocratique de la Communauté', *Cahiers de Droit Européen*, vol.28, n. 1-2, pp. 22-41. Boyce, B. (1993), 'The Democratic Deficit of the European Community', *Parliamentary Affairs*, vol. 46, no.4, pp. 458-477. Featherstone, K. (1994) 'Jean Monnet and the "Democratic Deficit" in the European Community', *Journal of Common Market Studies*, vol.32, no. 2, pp. 149-170. Piris, T. D. (1994), 'Après Maastricht, les institutions communautaires sont-

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, perhaps forever -- 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.

elles plus efficaces, plus démocratiques et plus transparentes?", *Revue Trimestrelle de Droit Européen*, vol.30, no. 1, pp. 1-37. Neunreither, K.-H. (1994), 'The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments', *Government and Opposition*, vol.29, no.3, pp. 299-314. Obradovic, D. (1996) 'Policy Legitimacy and the European Union', *Journal of Common Market Studies*, vol. 34, no.2, pp.191-221. Viciano Pastor, R. (1997), 'El futuro de la Unión Europea ¿déficit democrático o déficit constitucional?', in E. Linde Paniagua (dir.), *Los retos de la Unión Europea ante el siglo XXI*, Madrid, UNED-Banco del Comercio. Norris, P. (1997), 'Representation and the Democratic Deficit', *European Journal of Political Research*, vol.32, no. 2, pp. 273-282. Craig, P. (1997), 'Democracy and rulemaking within the EC: an empirical and normative assessment', *European Law Journal*, vol.3, no.2, pp.105-130. Majone, G. (1998), 'Europe's democratic deficit: The question of standards', *European Law Journal*, vol.4, no.1, pp.5-28. Matlary, J.H. (1998) 'Democratic Legitimacy and the Role of the Commission', in *Democracy and the European Union*, Berlin: Heidelberg. Lindseth, P.L. (1999), 'Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community', *Columbia Law Review*, vol.99, no.3, pp.628-738. Quermonne J.-L. (dir.) (1999) *L'Union européenne en quête d'institutions légitimes et efficaces*, Paris, La Documentation française. Höreth, M. (1999), 'No Way Out for the Beast? The Unsolved Legitimacy Problem of European Governance', *Journal of European Public Policy*, vol.6, no. 2, pp. 249-268. Moussis, N. (2000), 'La Construction Européenne et le Citoyen: Déficit Démocratique ou Déficit d'Information?', *Revue du Marché Commun*, no.436, pp.153-159. Decker F. (2001), 'Mehr Demokratie wagen: Die Europäische Union braucht einen institutionellen Sprung nach vorn', *Aus Politik und Zeitgeschichte*, no. 5, p. 33-38. Moravcsik, A. (2002), 'Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, vol.40, no.4, pp. 603-624. Mény, Y. (2002), 'De la Démocratie en Europe : Old Concepts and New Challenges', *Journal of Common Market Studies*, vol.41, no.1, pp.1-13. Majone, G. (2003), 'Déficit démocratique, istituzioni non-maggioritarie e il paradosso dell'integrazione europea', *Stato e mercato*, vol.67, no. 1, p.3. Giuliani, M. (2004), 'Il deficit democratico dell'Unione', *Il Mulino*, vol.412, no. 2, pp. 341-351. Petit, I. (2006), 'Dispelling a Myth? The Fathers of Europe and the Construction of a Euro-Identity', *European Law Journal*, vol.12, no.5, pp. 661-679. Kohler-Koch, B. & B. Rittberger (2007), *Debating the Democratic Legitimacy of the European Union*, Lanham, MD -- Plymouth: Rowman & Littlefield, p. 34.

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 if it turns out that it was 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.³¹ 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.³²

31

32

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 witness to that 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.³³ 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

33

ascendancy 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. Legitimation 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.³⁴ 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 Deficit³⁵ – as inimical to political culture as Democracy Deficit. It is not simply the self-delusion or deceit: How can anyone really be non-ideological.³⁶ One can only mask

³⁴

³⁵

³⁶ In this footnote I have tried to assemble the most important literature that tracks the debate on the character of the Commission as technocratic v political. Wessels, W. (2003), ‘Reassessing the Legitimacy Debate: A Comment on Moravcsik’, in Weiler, J.H.H., Begg, I. and Peterson, J. (eds.), *Integration in an Expanding European Union – Reassessing the Fundamentals*, Wiley-Blackwell, pp.103-109. The technocracy argument is also taken up – though in a specific variation – by a third school of thought that stresses the technical nature of the legal output. The EU is portrayed as ‘Zweckverband’ (an association for limited purposes) (Ipsen, 1972, pp.66-7), as a functional agency (Mitrany, 1966, p.145), or as a purely regulatory state (Majone, 1996, 1998). Such machinery does not need to pass the conventional litmus test of democratic standards, since its legitimacy rests on its contribution to problem-solving. The apolitical nature of the decisions to be taken by technocratic bodies simply does not demand traditional input procedures as applied in states. Fischer, R. (2008), ‘European Governance Still Technocratic? New Modes of Governance for Food Safety Regulation in the European Union’, *European Integration Online Papers*, vol.12, no.6, 22p., available at <http://eiop.or.at/eiop/texte/2008-006a.htm> p.3: The democratic deficit of Commission decisions is not the only reason why the Commission is deemed to be a technocratic institution. Due to limited human and financial resources of the Commission and the mainly regulatory character of European policy-making, the Commission is heavily dependent on expert advice (Majone 1996; Majone 1998). p.3: Some scholars argue that the deliberative style of this technocratic system leads to efficient and effective decision-making in the European Union and will increase the output legitimacy (Majone 1997; Neyer 2004). Others point out that politicians merely pretend to solve purely technical problems, and that the European Commission in particular has an interest in presenting its policy proposals

as depoliticised technical solutions (Landfried 1997). However, both agree that the European decision making is done by experts in a technocratic way. Harcourt, A., & Claudio R. (1999), 'Limits to EU technocratic regulation?' *European Journal of Political Research* 35 (1): 107-122. p.107: In public discussions on technocracy, the European Union (and particularly the European Commission) almost invariably takes the lead when notorious examples of technocracy are brought up. Nothing better illustrates the idea of a Moloch alienated from the ordinary citizen, yet endowed with extraordinary powers to change our daily lives, than the European Commission. p.110: The point to stress is that the *whole institutional set-up* of the European Community was designed in order to support the growth of the European regulatory state. *Copinage technocratique*, regulatory policy, incrementalism, and de-politicised technocratic debate among experts (or epistemic communities, see Haas 1992) represent the genetic code of European institutions. H. Wallace (1996: 22) has even asserted that the debate on the role of epistemic communities 'in some senses is a reprise of the Monnet approach to European integration'. W. Wallace (1996: 442), consistent with this argument, points out that 'the institutions were designed to stress administration and regulation, to minimise the visibility of the political choices at stake, and to operate on the basis of a permissive popular consensus'. Citing: Haas, P.M. (1992), 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, vol.46, no.1, pp.1-35. Wallace, H. (1996), 'Politics and policy in the EU: the challenge of governance', in H. Wallace & W. Wallace (eds.), *Policy-making in the European Union* (pp. 3-36). Oxford: Oxford University Press. Wallace, W. (1996), 'Government without statehood: the unstable equilibrium', in H. Wallace & W. Wallace (eds.), *Policy-making in the European Union* (pp. 439-460). Oxford: Oxford University Press. But see *contra*, p.119: If the EU is becoming a polity, political conflict cannot be avoided. Of course, experts, bureaucrats, pressure groups and highly technical policy issues are bound to remain central features of the EU policy process, but the smooth making of regulatory policies has been substituted by political conflict. [...] The arguments raised in section three above suggest that technocracy can continue to operate in certain regulatory policies, but not in others. How can this trend toward politicisation be assessed, in conclusion? We argue that the trend illustrates a shift along the trade-off between efficiency and democracy. Technocratic regulation is undoubtedly more efficient: regulation is produced among experts in a highly consensual style. By contrast, regulating for media pluralism engenders contestation and even periods of policy stalemate, so much so that we are still waiting for a formal proposal of the Commission for a directive to be adopted by the Council. But what is lost in terms of efficiency is gained in terms of democratic policy-making. Nobody has ever argued that democracy is the most efficient device for producing public policy: indeed, the democratic choice is advocated for very different reasons (Dahi 1989). In this sense, inefficiency and prolonged conflict may be the price that the EU is forced to pay in its progress toward a more democratic polity. Bracq, S. (2004), 'La Commission Européenne entre Fonctions d'Arbitrage et Rôle Politique', *Revue du Marché Commun et de l'Union Européenne*, vol.480, pp.440-449. Wonka, A. (2004), *The European Commission: technocratic bureaucracy or fully-fledged EU executive?*, (Cambridge: Cambridge University Press). Bach, (1993), 'Integrationsprozesse in der Europäischen Gemeinschaft: Von Zweckverband zum technokratischen Regime?', in H. Meulemann & A. Elting-Camus (eds.), *Lebensverhältnisse und soziale Konflikte im neuen Europa* (Westdeutscher Verlag), 264p. Ernst B. Haas, "Technocracy, Pluralism and the New Europe," in Joseph S. Nye, ed., *International Regionalism: A Reader* (Boston: Little, Brown, 1968), 149-166. Dubois V. & Dulong D. (1999): "Introduction générale", in V. Dubois et D. Dulong, (eds.), *La question technocratique. De l'invention d'une figure aux transformations de l'action publique*, (Strasbourg, Presses universitaires de Strasbourg).

Radaelli C. (1999): *Technocracy in the European Union*, Harlow, Addison Wesley Longman. *Contra*: Christiansen, Thomas. 1997. Tensions of European governance: politicized bureaucracy and multiple accountability in the European Commission. *Journal of European Public Policy* 4 (1): 73-90. p.76: It is a common reflex to view the Commission as a bureaucracy. In many ways, of course, the Commission does fulfil functions and appropriates roles comparable to bureaucracies in domestic systems. Regularly, the Commission acts as the extension of national bureaucracies. Indeed, the Commission has for many in Europe become synonymous with the very concept of 'bureaucracy'. But to treat the Commission as just another bureaucracy either disregards its exceptional circumstances or else implies a departure from established definitions of 'bureaucracy'. p.77: What detracts from the bureaucratic element in the Commission's activity – what makes the Commission 'less bureaucratic' than other bureaux – is the nature of continuous bargaining in the Union. The major fields of Commission activity – proposing legislation and

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

supervising the implementation of decisions – are highly politicized tasks. In the EU systems, policies are not only subject to the extensive deliberations in the legislative phase, but are also bound to be renegotiated when it comes to their implementation in different national contexts. In this system the Commission is a 'politicized bureaucracy', faced with a dilemma between its duty to develop and apply common rules and continuous political pressure for deviation. This dilemma is with any bureaucracy, national or international. But the nature of much of the Commission's work – the overarching regulatory function it fulfils for the European Union, the large degree of symbolism that is often involved in EU decision-making, the continuing process of expansion of the EU's institutional framework, the ongoing process of 'constitutional reform' – has meant that numerous political forces take exceptional interest in the internal proceedings of the Commission. Quermonne, J. L. (2002), 'La question du gouvernement européen', Groupement d'études et de recherches Notre Europe, *Études et Recherches* n. 20, available at <http://www.notreeurope.asso.fr>. p.23 : Mais en agrégeant, dans un souci de cohésion, la pluralité des intérêts nationaux afin de dégager un intérêt général européen, la Commission dite de Bruxelles a donné au processus de décision une plus-value que la négociation intergouvernementale à elle seule aurait été incapable d'apporter. D'ailleurs, il ne faut rien exagérer, l'apolitisme de la Commission a toujours été relatif. Car sa composition a mêlé, dès l'origine, des hommes politiques expérimentés (tel son premier président Walter Hallstein) à des personnalités choisies en raison de leur compétence, pour ne pas dire des "technocrates". Citing Joana, J. & A. Smith (2002), *Les commissaires européens, technocrates, diplomates ou politiques ?* Paris, Presses de Sciences-Po. Landfried, C. (1997), 'Beyond Technocratic Governance: The Case of Biotechnology', *European Law Journal*, vol. 3, no. 3, pp. 255-272. Christiansen, T. (1997) 'Tensions of European governance: politicized bureaucracy and multiple accountability in the European Commission', *Journal of European Public Policy*, 4(2); March. 73-90. Barker, Anthony, and Guy B. Peters. 1993. *The Politics of Expert Advice. Creating, Using and Manipulating Scientific Knowledge for Public Policy*. Pittsburgh: University of Pittsburgh Press. Majone, G. (1998), 'Europe's democratic deficit: The question of standards', *European Law Journal*, vol.4, no.1, pp.5-28, at 23

Also, the Commission's right of legislative initiative – which, as we saw in the first part of the paper, is regarded by many as the root cause of the democratic deficit – is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community (as defined by the Treaties) as opposed to national or sectoral self-interests. Like any bureaucracy, the Commission has interests of its own, and is not free from pressures from special interests when making decisions. It is, however, better placed than the other political institutions to take into account the general interests of the Community in its legislative proposals. The members of the Council are often swayed by short-term considerations relating to the needs of their own constituencies, while the European Parliament is not yet institutionally suited to develop a coherent legislative strategy to achieve the objectives laid down in the Treaties.⁵² On the other hand, the fundamental interests of the Commission are aligned with those of the Community as a whole. Indeed, the Commission has never subscribed to the view that there is no conception of the Community public interest which is independent of the competition between individual state preferences.⁵³ On the contrary, it has always seen itself as the guardian of that interest. This commitment is credible not only because it is sustained by institutional self-interest, but also because the Treaties are considerably more explicit than national constitutional documents in identifying the public good: the four economic freedoms, a system of undistorted competition, prohibition of discrimination on the basis of nationality or gender and, since the Single European Act, the protection of non-commodity values like environmental quality. (emphasis added)

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 another 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.

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 and illustrates well the Janus aspect of Peace as a value and a vice.

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 Gasperi, Schumann, Monnet himself.³⁷

That context, which allowed peace to touch the depths of human dignity, of humanity, no longer exists. The peace which Europe thankfully gained from

37

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 commitment to the values for which peace seemed so important.

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.³⁸ 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. Once again American forces 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. Still, they did not move.³⁹ In

³⁸ **CTY ruling:** ICTY - Prosecutor v. Radislav Krstic - Trial Chamber I - Judgment - IT-98-33 (2 August 2001), paras.539-599, confirmed in Prosecutor v. Radislav Krstic - Appeals Chamber - Judgment - IT-98-33 (19 April 2004)

598. The Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide.

The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995.

³⁹ “Report of the Secretary General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica”, United Nations doc. A/54/549, 15 November 1999

Para.252: during the early afternoon, the Dutchbat Commander appears to have spoken to the UNPROFOR Chief of Staff in Sarajevo, again requesting close air support in response to the attack on OP Foxtrot. As before, the Chief of Staff discouraged the request, favouring instead the option to withdraw the personnel

some respects they too are emblematic of one thesis of this essay – 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.

from that post. His immediate superiors at UNPF headquarters in Zagreb appear to have concurred with the decision. (...)

Para.253: (...) Accordingly, the Company Commander, with the concurrence of the Dutchbat Commander, ordered the personnel in OP Foxtrot not to return fire but to withdraw instead.

Para. 304: (...) Srebrenica had fallen. Until that point, at least three (but possibly up to five) requests for air support by Dutchbat had been turned down at various levels in the chain of command. **Dutchbat had also not fired a single shot directly at the advancing Serb forces.** (emphasis added)

Para.312: Upon the Force Commander's request, the acting UNPROFOR Commander then issued instructions to Dutchbat, ordering them to enter into negotiations with the BSA to secure an immediate ceasefire. He added that "giving up any weapons and military equipment [was] not authorized and [was] not a point of discussion". He ordered Dutchbat to concentrate their forces in the Potocari compound and to withdraw from the remaining observation posts. He ordered them to "take all reasonable measures to protect refugees and civilians in [their] care". He added that they should "continue with all possible means to defend [their] forces and installation from attack". This was "to include the use of close air support if necessary". **While noting the clarity of the instructions, the Dutchbat commanders assessed that they were simply no longer in a position to carry them out.** (emphasis added)

Para.315: Returning to the battalion compound at Potocari, the Dutchbat Commander sent a report to Zagreb, Sarajevo and Tuzia, as well as to the crisis staff in the Hague, describing the two meetings that he had had with Mladic. He concluded his report by stating "there are now more than 15,000 people within one square kilometer, including the battalion, in an extremely vulnerable position: the sitting duck position, not able to defend these people at all". (*sic*) He went on describe precisely the location of BSA artillery and tanks within direct sight of the compound. He ended his message with a plea:

"I am responsible for these people [yet] I am not able to: defend these people; defend my own battalion; (...)"

Para.371: (...) However, the Dutchbat debriefing report reveals that two Dutchbat soldiers, on their way back from Nova Kasaba to Bratunac on 14 July, had seen between 500 and 700 corpses on the roadside. However, the same report indicated that two other members of Dutchbat traveling in the same vehicle saw only a few corpses. **No written record has been located indicating that Dutchbat made either account available to the UNPROFOR chain of command on 14 July, or in the days immediately thereafter.** (...) (emphasis added)

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. Patriotism at its best is a discipline of love. It is, perhaps, an unintended victory of the fascist regimes. 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:⁴⁰

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.

40

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.⁴¹ 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)

41

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.*⁴² (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*⁴³ 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 argued⁴⁴, 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

42

43

44

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 process of Preliminary References and Preliminary Rulings. 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, the Preliminary Reference 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 Preliminary References 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. Community rights, in some interesting way, become anti-community rights. If the social reality of the European construct were stronger, this could be seen as mitigating this effect. But the reality of the situation from a social perspective is that – for good legal reason – the principal artifact of the Rule of Law in the thin political space constituted by Union places the individual at odds with his or her thicker political space. This is how, it should be legally. This is what creates the most effective compliance pull. But it has this collateral effect.

XI

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:⁴⁵ 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

45

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 – through 'stealth' – in the Treaty of Lisbon 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 in at least three ways:

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. 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.⁴⁶ 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

⁴⁶

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.

The celebration of the Charter is somewhat puzzling. 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? One rejoices, it seems, in the symbol, in the value it represents, rather than in the results it may or may not achieve.

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 provisions, as we have, outlawing 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? The Commissioner for Justice and Home Affairs may be said to play this role, but he is a general without troops in the absence of a veritable human rights policy.

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. 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.

I do not intend here to replicate a European version of the American critique of rights, but to try and articulate at least a variant that brings into sharp relief the manner in which it most affects virtues. In normal rights discourse the “I”, the subject, is the bearer of the rights. The critique is premised on this proposition. Notionally, this of course is true. But it does not correspond to the reality of how we actually experience rights discourse in action. That reality is ‘triangular’ with a violator (typically a public authority) the victim of the violation who, when it comes to fundamental human rights (as distinct, say, from consumer rights) is an outsider of sorts, and the “I” or the “We” are typically observers – reading about it in the press, or through some other media.

Against that reality it is easy to observe that the culture of human rights demands 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 seems to be a common asset of all parties and thus of no electoral consequence.) The point is that there is something significant that the value placed 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

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.⁴⁷ 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, first, 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 remain mostly inane not to say meaningless.⁴⁸ 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.

⁴⁷

⁴⁸

In a jurisprudential line coming up to the two decade mark, the Court has been hailed as giving robust substance to this anemic provision – i.e. taking citizenship seriously.⁴⁹ From its early jurisprudence, it proclaimed that European Citizenship was destined to become the fundamental status of individuals in Europe.⁵⁰ 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.⁵¹ 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 as 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 case law 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 – with great attention to his social condition, his unique identity, his vulnerability in a manner which mixed culminating in the notion of Reverse Discrimination under which the Migrant enjoyed rights that even the local worker did not. Interestingly, and germane to this discussion is the fact that the comparable jurisprudence in classical international law which gives non nationals a higher level of protection under the doctrine of minimal international standards also comes

49

50

51

under the appellation of Protection of Aliens. 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.