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Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay

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I Exploring Political and Legal Culture

Typically and importantly, in exploring the systemic aspects of the Union in our attempts both to reach conceptual understanding as well as, instrumentally, explaining its success and failures, we reach out to the political and the legal. As regard the former our systemic approach is to focus on institutional structure and decisional process. As regards the latter our systemic approach focuses not on the substantive, material, primary rules of Union law but on what we commonly call the 'legal order' and its own operating system – the systemic, secondary rules and principles that hold together the substantive content. The interaction between the political and legal has for long been a mainstay of the field, a rich and productive seam, the mining of which has enabled us to give a broader and deeper understanding of both the conceptual and the operational.[1]

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[1] H. Rasmussen, *On Law and Policy in the European Court of Jusice: A Comparative Study in Judicial Policymaking* (Dortrecht: M. Nijhoff, 1986) ; A.-M. Burley, W. Mattli, "Europe before the Court: A Political Theory of Legal Integration", *International Organization*, vol. 47, Winter 1993, pp. 41-76; Garrett, Geoffrey, "The Politics of Legal Integraion in the European Union", *International Organization* , vol. 49, n° 1, pp. 171-181; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); J. Shaw, G. More, *New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995).

In this exploratory essay, I reach to prior questions as regards both the political and the legal, questions concerning the culture which undergirds political structure and process as well as legal order.[2] Political and legal culture are 'prior' in an ontological sense, they inform specific institutional arrangements, at times give them meaning. Culture, including political and legal culture is never static. It may inform the specific institutional arrangements, but in turn it is itself informed, shaped and modified by the arrangements in a continuous cycle of interaction.[3] This poses a formidable methodological Gordian Knot which may explain why, despite our long held understanding of the importance of culture in any systematic analysis of polity, it has received somewhat less attention in European Union studies.

My way of cutting through the knot, rather than unraveling it, has been to examine the temporally 'prior,' the prior-in-time, through what I hope is a fresh look at some of the most noted foundational instruments (texts) of European integration. This is inevitably a limiting methodology since it cuts out the dynamic, that continuous interaction between political institution and processes and political culture. But even this static methodology has yielded some results which I found both unexpected and illuminating as regards the political, the legal and their interaction. I believe these results contribute both to our conceptual understanding as well as, instrumentally, to the extant explanatory apparatus of the successes and failures of the integration narrative.

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[2] J. Bell, ,'Comparative Law and Legal Theory', in W. Krawietz, N. MacCormick, G. H. von Wright (ed.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems, Festschrift for R. S. Summers*, (Berlin 1994), p. 25; P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American law: A comparative study of legal reasoning, legal theory, and legal institutions* (Oxford: Clarendon Press, 1987), P. Legrand, *Le droit comparé* (Paris, Presses Universitaires de France, 1999); C. Varga, *Comparative Legal Cultures* (Budapest, 2010); D. Nelken (ed.), *Comparative Legal Cultures* (Dartmouth, 1997).

[3] M. Crozier, E. Friedberg, *L'acteur et le système* (Paris: Ed. du Seuil, 1977) p.206 ; A.L. Kroeber, C. Kluckhohn, "Culture : A Critical Review of Concepts and Definitions, Papers of the Peabody Museum of American Archeology and Ethnology", vol. 47, n°1, 1952, p. 181 cited *in* F.J. Gould, *A Dictionary of the Social Sciences,* (Tavistock Publications 1964) 165, 'Culture', 1.A ; S. Falk Moore, *Social Facts and Fabrication, 'customary' law on Kilimanjaro, 1880-1980*, (Cambridge, 1986) cited *in* E. Leroy, *Le jeu des lois, une anthropologie 'dynamique' du Droit* (Paris: L.G.D.J., 1999) p. 124; M. Krygier, "Law as tradition", *Law and Philosophy* , vol. 5, 1986, p. 237, at p. 251.

II Europe, the Current Circumstances

This is an interesting time to be reflecting on the European construct. Europe is at a nadir which one cannot remember for many decades and which, various brave or pompous or self-serving statements notwithstanding[4], the Treaty of Lisbon has not been able to redress. The surface manifestations of crisis are with us every day on the front pages: The Euro crisis[5] and discord over Libya being the most current. Beneath this surface, at the structural level, lurk more profound and long term signs of enduring challenge and even dysfunction and malaise.

First, internally, there is the persistent, chronic, troubling Democracy Deficit, which cannot be talked away. Then there is a deeper legitimacy crisis, whereby the citizens' growing indifference is turning to hostility and the ability of Europe to act as a political mobilizing force seems not only spent, but even reversed. Finally, on the world arena, Lisbon notwithstanding, there is the equally persistent, chronic and troubling failure of Europe to translate its economic might into hard political power and the enduring (and in my view irresponsible) abdication of a serious commitment to security, leaving the field as it has for decades to a less and less engaged America.[6]

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[4] See for example, « Plenary session of the European Parliament, Strasbour, 20 February 2008 : Treaty of Lisbon », which includes various statements from the members of the European Parliament, Janez Lenarcic, President of the Council and Margot Wallström, Vice-President of the European Commission, as well as European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)); "Brussels European Council 14 December 2007", Brussels, 14 february 2008, 16616/1/07 REV 1, including the EU declaration on globalisation; European Commission, "Your Guide to the Lisbon Treaty", http://ec.europa.eu/publications/booklets/others/84/en.pdf , President Buzek News of the European Parliament, 1 December 2009, http://www.europarl.europa.eu/president/ressource/static/newsletter/newsletter-3/newsletter.html?ts=1277465318672; José Manuel Durao Barroso, President of the European Commission, "The European Union after the Lisbon Treaty", 4th Joint Parliamentary meeting on the Future of Europe, Brussels, 4th December 2007, SPEECH/07/793, 7 December 2007.

[5] D. Dinan, "Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis", *Journal of Common Market Studies*, vol. 49, n° S1, 2011, p. 103.

[6] See R. Kagan, *Of Paradise and Power: America and Europe in the New World Order*, New York: Alfred A. Knopf, 2003; I. Manners, "Global Europa: Mythology of the European Union in World Politics", *Journal of*

At some level the same could have been said ten and even twenty years ago.[7] What is of interest is the trajectory which on all three issues seems to be negative, things getting worse rather than better.

As indicated, what is, I hope, somewhat novel in this essay, is an attempt, first, to link these enduring problems to political and legal culture of the integration process and, in turn, to link that culture to some of the founding moments of the Union reflected in foundational documents. In what follows I will first elaborate somewhat on the three aspects of the European circumstance identified above, and then turn to an exploration of those early moments.

The manifestations of the so-called democracy deficit are persistent and no endless repetition of the powers of the European Parliament will remove them. In essence it is the inability of the Union to develop structures and processes which adequately replicate or, 'translate,'[8] at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practiced with different modalities in the various Member States. In essence, the two primordial features of any functioning democracy are missing – the grand principles of accountability and representation[9].[10]

Common Market Studies, vol. 48, n° 1, 2010, p. 67, "*The Gender Myth*" at p. 77 *et seq.*; J.J. Sheehan, *Where have all the soldiers gone ?: the transformation of modern Europe*, (Boston and New York: Houghton Mifflin) 2008.

[7] See for example, European Commission, "European Governance: A White Paper", COM(2001) 428 final, Brussels; V. Bogdanor and G. Woodcock, "The European Community and Sovereignty", *Parliamentary Affairs*, vol. 44, n° 4, 1991, p. 492: "*The shortcomings of the Community lie in the feelings of remoteness and lack of influence and involvement on the part of many of its citizens*"; D. Grimm, "Does Europe Need a Constitution?", *European Law Journal*, vol. 1, n° 3, 1995, p. 282, at p. 291 *et seq.*; C. Hill, "European Foreign Policy: Power Bloc, Civilian Power – or Flop?" in R. Rummel (ed.), *The Evolution of an International Actor – Western Europe's New Assertiveness* (Boulder: Westview), 1990, p. 35.

[8] N. Walker, "Postnational Constitutionalism and the Problem of Translation" *in* J.H.H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), p. 29.

[9] A. Przeworski, S.C. Stokes, B. Manin (eds.), *Democracy, accountability and representation* (Cambridge: Cambridge University Press, 1999); P.C. Schmitter and T.L. Karl, "What democracy is… and is not", *Journal of Democracy*, (Summer 1991) p. 67.

[10] P. Mair, "Popular Democracy and the European Union Policy", *European Governance Papers* (EUROGOV), n° C-05-03, p. 4.

As regards accountability[11], even the basic condition of representative democracy that at election time the citizens ' '…can throw the scoundrels out''[12] – that is replace the Government – does not operate in Europe.[13] The form of European governance,[14] governance without Government 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 quite the same, not even remotely so. Startlingly, political accountability of Europe is surprisingly weak. There have been some spectacular political failures of European governance. The embarrassing Copenhagen climate fiasco[15]; the weak (at best) realization of the much touted Lisbon Agenda (aka Lisbon Strategy or Lisbon Process),[16] the very story of the defunct "Constitution"[17] to mention but three. It is hard to point in these instances to any measure of political accountability, of someone paying a political price as would be the case in national politics. In fact it is difficult to point to a single instance of accountability for political failure as distinct from personal accountability for misconduct in the annals of European integration. This is not,

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[11] C. Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2003)

[12] I. Shapiro, *Democracy's place* (Ithaca: Cornell University Press) 1996, p. 96; J.H.H. Weiler, "To be a European citizen: Eros and civilization" in *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Massachussetts: Harvard University:1999), *op. cit.*, p. 329.

[13] R. Dehousse, "Constitutional Reform in the EC" in J. Hayward (ed.), *The crisis of Representation in Europe*, (Abigdon: Frank Cass, 1995), p.118, at 123.

[14] P. Allott, "European Governance and the re-branding of democracy", *European Law Review*, n° 1, vol. 27, 2002, p. 60.

[15] See European Parliament resolution of 10 February 2010 on the outcome of the Copenhagen Conference on Climate Change (COP 15), P78TA(2010)0019, Wednesday, 10 February 2010, especially points 5-6.

[16] I. Begg, "Is there a Convincing Rationale for the Lisbon Strategy", *Journal of Common Market Studies*, vol. 46, n° 2, 2008, p. 427; "Facing the challenge. The Lisbon strategy for growth and employment" – Report from the High Level Group chaired by Wim Kok, November 2004,.

[17] I. Ward, "Bill and the Fall of the Constitutional Treaty", *European Public Law*, vol. 13, n° 3, 2007, p. 461; Editorial Comments, "What should replace the Constitutional Treaty?", *Common Market Law Review*, vol. 44, 2007, p. 561.

decidedly not, a story of corruption or malfeasance.[18] My argument is that this failure is rooted in the very structure of European governance. It is not designed for political accountability. In similar vein, it is impossible to link in any meaningful way the results of elections to the European Parliament to the performance of the Political Groups within the preceding parliamentary session, in the way that is part of the mainstay of political accountability within the Member States.[19] Structurally, dissatisfaction with "Europe" when it exists has no channel to affect, at the European level, the agents of European governance.

Likewise, at the most primitive level of democracy, there is simply no moment in the civic calendar of Europe where the citizen can influence directly the outcome of any policy choice facing the Community and Union in the way that citizens can when choosing between parties which offer sharply distinct programs at the national level.[20] The political colour of the European Parliament only very weakly gets translated into the legislative and administrative output of the Union.[21] The Political Deficit, to use the felicitous phrase of Renaud Dehousse[22] is at the core of the Democracy Deficit. The Commission, by its self-understanding linked to its very ontology, cannot be 'partisan' in a right-left sense, neither can the Council, by virtue of the haphazard political nature of its composition. Democracy normally must have some meaningful mechanism for expression of voter preference

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[18] On this aspect, see V. Mehde, "Responsibility and Accountability in the European Commission", *Common Market Law Review*, vol. 40, 2003, p. 423.

[19] J. Priestley, "European political parties : the missing link", *Notre Europe*, Policy Paper 41, 2010; F. Roa Bastos, "Des partis politiques au niveau européen? Etat des lieux à la veille des élections européennes de juin 2009", *Etudes et Recherches 71*, 2009 ; O. Audeoud, "Les partis politiques au niveau européen. Fédérations de partis nationaux", Les cahiers du GERSE, Nancy, 3 février 1999

[20] R. Dehousse, "Constitutional Reform in the EC" in J. Hayward (ed.), *The crisis of Representation in Europe*, *op. cit*., at 123 *et seq*.; A. Follesdal, S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *Journal of Common Market Studies*, vol. 44, n° 3, 2006, p. 533, at p. 536.

[21] V. Bogdanor, "Legitimacy, Accountability and Democracy in the European Union", *A Federal Trust Report* (2007) pp. 7-8; A. Follesdal, S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *op. cit*., p. 545.

[22] R. Dehousse, "Constitutional Reform in the EC" in J. Hayward (ed.), The crisis of Representation in Europe, *op. cit*., at p. 124. See also, J.-M. Ferry, P. Thibaud, *Discussion sur l'Europe* (Paris: Calmann-Lévy, 1992).

predicated on choice among options, typically informed by stronger or weaker ideological orientation.[23] That is an indispensable component of politics. Democracy without Politics is an oxymoron.[24]

Thus the two most primordial norms of democracy, the principle of accountability and the principle of representation are compromised in the very structure and process of the Union.

The second manifestation of the current European circumstance evident in a continued slide in the legitimacy and mobilizing force of the European construct and its institutions. I pass over some of the uglier manifestations of European 'solidarity' both at governmental and popular level as regards the Euro-crisis or the near abandonment of Italy to deal with the influx of migrants from North Africa as if this was an Italian problem and not a problem for Europe as a whole. I look instead at two deeper and longer-term trends. The first is the extraordinary decline in voter participation in elections for the European Parliament. In Europe as a whole the rate of participation is below 45 per cent, with several countries, notably in the East, with a rate below 30 per cent. The correct comparison is, of course, with political elections to national parliaments where the numbers are considerably higher.[25] What is striking about these figures is that the decline coincides with a continuous shift in powers to the European Parliament, which today is a veritable co-legislator with the Council. The more powers the European Parliament, supposedly the *Vox Populi*, has gained, the greater popular indifference to it seems to have developed.[26]

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[23] S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *op. cit*., p. 545.

[24] See. P. Manent, *La raison des nations, réflexions sur la démocratie en Europe* (Paris: Gallimard, 2006), p. 59.

[25] A. Menon and J. Peet, "Beyond the European Parliament: Rethinking the EU's democratic legitimacy", *Center for European Reform Essays*, 2010; P. Magnette, "European Governance and Civic Participation: Can the European Union be politicised", *Jean Monnet Working Paper* 6/01.

[26] J. Buzek, « State of the Union : Three Cheers for the Lisbon Treaty and Two Warnings for Political Parties », *Journal of Common Market Studies*, 2011, vol. 49, p. 7, at p. 15; see also, J.H.H. Weiler, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, *op. cit*., p. 266.

No less consequential is a seemingly contagious spread of 'Anti-Europeanism' in national politics.[27] What was once in the province of fringe parties on the far right and left has inched its way to more central political forces. The "Question of Europe" as a central issue in political discourse was for long regarded as an 'English disease.' There is a growing contagion in Member States in North and South, East and West, where political capital is to be made among non-fringe parties by anti-European advocacy.[28] The spill-over effect of this phenomenon is the shift or mainstream parties in this direction as a way of countering the gains at their flanks. If we are surprised by this it is only because we seem to have air brushed out of our historical consciousness the rejection of the so-called European Constitution, an understandable amnesia since it represented a defeat of the collective political class in Europe by the *vox populi*[29], albeit not speaking through, but instead giving a slap in the face to, the European Institutions.[30]

The final feature of the current circumstance is a manifestation of an equally persistent and at times embarrassing European lack of both capacity and resolve (and a lack of resolve to have capacity) to defend and protect the values it professes to hold most dear.[31] It is only the same propensity for amnesia which enables us to avoid this problem – to look in our collective mirror without at least

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[27] C. Leconte, *Understanding Euroscepticism*, (Palgrave Macmillan, 2010).

[28] R. Harmsen and M. Spiering (eds), *Euroscepticism: Party Politics, National Identity and European Integration*, (Amsterdam: Rodopi, 2005), p. 13; A. Szczerbiak, P.A. Taggart, *Opposing Europe?*, (Oxford: Oxford University Press: 2008) vol. I & II.

[29] N. Fligstein, *Euroclash. The EU, European Identity, and the Future of Europe*, (Oxford: Oxford University Press, 2008).

[30] For former examples, see J.H.H. Weiler, U.R. Haltern, F.C. Mayer, "European Democracy and Its Critique" in J. Hayward (ed.), *The crisis of Representation in Europe*, (Abigdon: Frank Cass, 1995), p. 4.

[31] J. Richardson, "The European Union in the World – A Community of Values", *Fordham Journal of International Law*, vol. 26, n° 1, 2002, p. 12; P. Boniface (ed), *Quelles valeurs pour l'Union européenne?* (Paris: IRIS-PUF, 2004); M. Dony, "Les valeurs, objectifs et principes de l'Union" in *Commentaire de la Constitution de l'Union européenne* (Brussels: Editions de l'Université de Bruxelles, 2005), p. 33 ; F. Benoît-Rhomer, « Valeurs et droits fondamentaux dans la Constitution », *Revue Trimestrielle de Droit Européen*, vol. 41, n° 2, 2005, p. 261; « Editorial », "L'Union, une communuté de valeurs ? ", *Revue Trimestrielle de Droit Européen*, vol. 44, n° 1, 2008, p. 1; A. Euzéby, « La Constitution – Constitution de l'Union européenne: des valeurs à défendre! », *Revue du Marché Commun et de l'Union Européenne*, vol. 482, 2004, p. 566.

some measure of shame. In the 1990s, in the heart of Europe, not even 500 kms from Rome, for the second time in the same century, Europe allowed that which one had vowed would never be allowed to happen again, something the European Construct was meant to guarantee would never happen again: The genocide (so qualified by the World Court) of a non-Christian religious minority. And then, when finally the endless talking came to an end and the resolve was found to prevent the Bosnian humanitarian catastrophe from repeating itself in Kosovo, Europe discovered that it did not possess the capacity to realize its resolve.[32] Once again, the ''cavalry'' from across the Atlantic had to be called in. Europe alone could not plan, target, let alone execute, this relatively simple operation.

Bosnia points, in my eyes, to a deeper facet of the political failure. The Srebrenica incident where Dutch soldiers allowed worst atrocity of that war to take place without any attempt to intervene and put a stop to it.[33] These could have been Italian or British soldiers or soldiers from any other of our Member States. And these immobile soldiers were, like all of us, firm believers in human rights, solidarity and all the other values we profess. Their values were in place but evidently they lacked the virtues necessary to vindicate such. They lacked the courage that is born from a conviction that some things, like preventing a mass slaughter of the innocent for the simple reason that they do not share your faith, is worth killing for and dying for. They were the product of a culture in which it would appear that nothing is worth dying for or killing for, and if it is, it should be others who do the dying and killing. If anyone wants to entertain the illusion that Kosovo was an aberration, we now have Libya with a repetition of at least part of the Kosovar pathology: without massive American military involvement, Europe, let us be clear, would have simply been unable to undertake any action in so-called Mare Nostrum.

It is not only a question of arms. All the Lisbon efforts to strengthen and give coherence to the international manifestation of European Union were showed up in

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[32] See J.J. Sheehan, *Where have all the soldiers gone ?: the transformation of modern Europe*, (Boston and New York: Houghton Mifflin) 2008, p. 199, p. 204 *et seq*.

[33] *Ibid*., p. 206.

their embarrassing poverty. Not only was it the expected absenteeism from the Libyan crisis management of the European Presidents and ''Foreign Minister'' with the usual Member State leaders taking front and back seat, but even at this intergovernmental level Europe was seen to be fragmented and fractured with the world treated to a divided vote among the very pillars of European integration within the Security Council.[34]

III Europe as Political 'Messianism'

The critique of the democracy deficit of the Union has itself been subjected to two types of critique itself. The first has simply contested the reality of the democracy deficit by essentially claiming that wrong criteria have been applied to the Union.[35] The lines of debate are well known.[36] For what it is worth, I have staked my position above. But I am more interested in the second type of critique which implicitly is based on the distinction between democracy and legitimacy. Since the Union, not being a State, cannot replicate or adequately translate the habits and practices of Statal democratic governance, its legitimacy may be found elsewhere.[37]

In analyzing the legitimacy (and mobilizing force) of the European Union, in particular against the background of its persistent democracy deficit, political and social science has long used the distinction between process legitimacy and outcome legitimacy (aka input/output, process/result etc).[38] The legitimacy of the

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[34] See J. Dempsey, "Libya Crisis Reveals Splits on EU Goals", *The New York Times*, 18 April 2011; "Extraodinary European Council, Declaration,"11 March 2011, Brussels, 20 April 2011, EUCO 7/1/11 REV1.

[35] J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", *European Law Journal*, vol. 1, n° 3, 1995, p. 219, especially p. 225 *et seq*.

[36] P. Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy" in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press,1999) p. 25.

[37] N. MacCormick, "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'", *Law and Philosophy*, 16: 331-356, 1997.

[38] See for example, C. R. Beitz, *Political equality: an essay in democratic theory*, chapters 2 and 4; R.A. Dahl, *Democracy and its critics*, (New Haven: Yale University Press, 1991) p. 163. See also more specifically, G.

Union more generally and the Commission more specifically, even if suffering from deficiencies in the state democratic sense, are said to rest on the results achieved – in the economic, social and, ultimately, political realms.[39] The idea hearkens back to the most classic functionalist and neo-functionalist theories.[40]

I do not want to take issue with the implied normativity of this position – a latter day *Panem et circenses* approach to democracy, which at some level at least could be considered quite troubling. It is with its empirical reality that I want to take some issue. I do not think that outcome legitimacy explains all or perhaps even most of the mobilizing force of the European construct. Instead, I would argue, that at the conceptual level there is a third type of legitimation which, in my view, played for a long time a much larger role than is currently acknowledged. In fact, in my view, it has been decisive to the legitimacy of Europe and to the positive response of both the political class and citizens at large. I will also argue that it is a key to a crucial element in the Union's political culture. It is a legitimacy rooted in the '*politically messianic*'.

In political 'messianism', the justification for action and its mobilizing force, derive not from process, as in classical democracy, or from result and success, but from the ideal pursued, the destiny to be achieved, the 'Promised Land' waiting at the end of the road. Indeed, in messianic visions the end always trumps the means.

Majone(ed.), *Regulating Europe* (London: Routledge, 1996); F.W. Scharpf, *Governing in Europe: Effective and Democratic?*, (Oxford: Oxford University Press) 1999, p. 7 *et seq.*

[39] K. Featherstone, "Jean Monnet and the Democratic Deficit in the European Union", *Journal of Common Market Studies*, vol. 32, n° 2, 1994, p. 149, at p. 150.

[40] *Ibid.*, p. 155; C. Pentland, "Political Theorie of European Integration: Between Science and Ideology", in D. Lasok and P. Soldatos (eds.), *The European Communities in Action*, (Brussels: Bruylant, 1981), p. 545, at p. 550 *et seq.*; B. Rosamond, *Theories of European Integration* (New York: Palgrave Macmillan, 2000), p. 20 *et seq.*; D. Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966); E.B. Haas, *The Uniting of Europe*, (Stanford: Stanford University Press, 1958); E.B. Haas, "Trubulent Fields and the Theory of Regional Integration", *International Organization*, vol. 30, Spring 1976, p. 173; L.N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press, 1963); L.N. Lindberg and S.A. Scheingold (eds.), *Regional Integration: Theory and Research*, (Cambridge: Cambridge University Press, 1971).

Mark Mazower, in his brilliant and original history and historiography of 20th-century Europe ,[41] insightfully shows how the Europe of monarchs and emperors which entered World War I was often rooted in a political messianic narrative in various states (in Germany, and Italy, and Russia and even Britain and France). It then oscillated after the War towards new democratic orders, that is to process legitimacy, which then oscillated back into new forms of political messianism in fascism and communism. At the tale is usually told, after World War II Europe of the West, was said to oscillate back to democracy and process legitimacy. It is here that I want to point to an interesting quirk, not often noted.

On the one hand, the Western states, which were later to become the member states of the European Union, became resolutely democratic, their patriotism rooted in their new constitutional values, narratives of glory abandoned and even ridiculed, and messianic notions of the State losing all appeal. Famously, former empires, once defended with repression and blood, were now abandoned with zeal.[42]

And yet, their common venture, European integration, was in my reading a political messianic venture *par excellence,* the messianic becoming a central features of its original and enduring political culture. The mobilizing force and principle legitimating feature was the vision offered, the dream dreamt, the promise of a better future. It is this feature which explains not only the persistent mobilizing force (especially among elites and youth) but also key structural and institutional choices made. It will also give more depth to explanations of the current circumstance of Europe.

IV. The Schuman Declaration as a Manifesto of Political Messianism

The Schuman declaration is somewhat akin to Europe's "Declaration of Independence" in its combination of vision and blueprint. Notably, much of its text found its way into the preamble of the Treaty of Paris, the substance of which was

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[41] M. Mazower, *Dark Continent –Europe's Twentieth Century* (London: Allen Lane, 1998).

[42] J. Lacroix, "For a European Constitutional Patriotism", *Political Studies*, 2002, vol. 50, p. 944, at p. 949 *et seq*.

informed by its ideas. It is interesting to re-read the declaration through the conceptual prism of political messianism. The hallmarks are easily detected as we would expect in its constitutive, magisterial document. It is manifest in what is in the Declaration and, no less importantly, in what is not therein. *Nota bene*: European integration is nothing like its European messianic predecessors – that of monarchies and empire and later fascism and communism. It is liberal and noble, but politically messianic it is nonetheless.

The messianic feature is notable in both its rhetoric and substance. Note, first, the language used – ceremonial and "sermonial" with plenty of pathos (and bathos).

> *World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it….*

> *The contribution which an organised and living Europe can bring to civilization is indispensable …*

> *…a first step in the federation of Europe [which] will change the destinies of those regions which have long been devoted to the manufacture of munitions of war…*

> *[A]ny war between France and Germany becomes not merely unthinkable, but materially impossible.*

> *This production will be offered to the world as a whole without distinction or exception…*

> *[I]t may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.*

It is grand, inspiring, Churchillian one might even say with a tad of irony. Some old habits, such as the White Man's Burden and the missionary tradition, die hard:

> *With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.*

But it is not just the rhetoric. The substance itself is messianic: A compelling vision which has animated generations of European idealists where the 'ever closer

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union among the people of Europe', with peace and prosperity an icing on the cake, constituting the beckoning promised land.[43]

It is worth exploring further the mobilizing force of this new plan for Europe. At the level of the surface language it is its straight forward pragmatic objective of consolidating peace and reconstructing European prosperity. But there is much more within the deep structure of the Plan.

Peace, at all times an attractive desideratum, would have had its appeal in purely utilitarian terms. But it is readily apparent that in the historical context in which the Schumann Plan was put forward the notion of peace as an ideal probes a far deeper stratum than simple Swords into Ploughshares, Sitting under ones' Vines and Fig Trees, Lambs and Wolves -- the classic Biblical metaphor for peace. The dilemma posed was an acute example of the alleged tension between Grace and Justice which has taxed philosophers and theologians through the ages -- from William of Ockham (pre-modern), Friedrich Nietzsche (modernist) and the repugnant but profound Martin Heidegger (post-modern).

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 yesterday's enemies, represented more than the wise counsel of experienced statesmen.

It managed to tap into the two civilizational pillars of Europe: The Enlightenment and the heritage of the French Revolution and the European Christian tradition.[44]

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[43] F. Piodi, "From the Schuman Declaration to the Birth of the ECSC: the Role of Jean Monnet", European Parliament, Directorate-General for the Presidency, Archive and Documentation Centre, *CARDOC Journals*, n° 6, May 2010; T. Hoerber, "The Nature of the Beast: the past and future purpose of European integration", *L'Europe en formation*, n° 1, 2006., p. 17; J.H.H. Weiler, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, *op. cit.,* "Introduction: We will do, and hearken", p. 8.

[44] See for example, J. Habermas and J. Derrida, « February 15, or, What Binds Europeans Together : Plea for a Common Foreign Policy Beginning in Core Europe » in D. Levy et al., *Old Europe, New Europe, Core Europe : Transatlantic Relations after the Iraq War* (London : Verso, 2005) 5, 10-12; A. Finkielkraut, *La défaite de la pensée*

Liberty was already achieved with the defeat of Nazi Germany – and Germans (like their

Austrian bretheren-in-crime) embraced with zeal the notion that they, too, were liberated from National Socialism. But here was a Project, encapsulated in the Schuman Declaration, which added to the transnational level both Equality and Fraternity. The Versailles version of Peace was to take yesterday's enemy, diminish him and keep his neck firmly under one's heel. Here, instead was a vision in which yesteryear's enemy was regarded as an equal – Germany was to be treated as a full and equal partner in the venture – and engaged in a fraternal inter-dependent lock that, indeed, the thought of resolving future disputes would become unthinkable.[45] This was, in fact, the project of the enlightenment taken to the international level as the misogynist Kant himself had dreamt. To embrace the Schuman Plan was to tap into one of the most powerful idealistic seams in Europe's civilizational mines.

The Schuman Plan was also a call for forgiveness, a challenge to overcome an understandable hatred. In that particular historical context the Schumannian notion of Peace resonated with, was evocative of, the distinct teaching, imagery and values of the Christian call for forgiving one's enemies, for Love, for Grace – values so recently consecrated in their wholesale breach.[46] The Schuman plan was in this sense, evocative of both Confession and Expiation, and redolent with the Christian belief in the power of repentance and renewal and the ultimate goodness of humankind. This evocation is not particularly astonishing given the personal backgrounds of the Founding Fathers -- Adenauer, De Gaspari, Schumann, Monnet

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(Paris : Gallimard, 1987); J.H.H. Weiler, *L'Europe chrétienne: Une excursion*, (Paris: Editions du Cerf, 2007); J.M. Ferry, *La république crépusculaire. Comprendre le projet européen in sensu cosmopolitico* (Paris: Editions du Cerf, 2010) ; R. Schuman, *Pour l'Europe*, p. 55 *et seq*.

[45] A. Munoz, « L'engagement européen de Robert Schuman », in S. Schirmann (ed.), *Robert Schuman et les pères de l'Europe: cultures politiques et années de formation*, (Brussels: Peter Lang, 2008) p. 39, at p. 44.

[46] J.H.H. Weiler, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, *op. cit.*,"7. Fin-de-siècle Europe: do the new clothes have an emperor?", p. 241.

himself – all seriously committed Catholics.[47]

The mobilizing force, especially among elites, the Political Classes who felt more directly responsible for the calamities of which Europe was just exiting, is not surprising given the remarkable subterranean appeal to the two most potent visions of the idyllic "Kingdom" -- the humanist and religious combined in one Project.[48] This also explains how, for the most part, both Right and Left, conservative and progressive, could embrace the project.

It is the messianic model which explains (in part) why for so long the Union could operate without a veritable commitment to the principles it demanded of its aspiring members – democracy and human rights. Aspirant States had to become

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[47] A. Fimister, "Integral Humanism and the Re-unification of Europe", in S. Schirmann (ed.), *Robert Schuman et les pères de l'Europe: cultures politiques et années de formation*, (Brussels: Peter Lang, 2008), p. 25 ; "*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 consistence and meaning to the identity of European civilization. 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*"; M. Sutton, "Chapter 1: Before the Schuman Plan", *France and the Construction of Europe, 1944-2007: The Geopolitical Imperative*, (New York and Oxford: Berghan Books, 2007), 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 Constultative Assembly of the Council of Europe in Strasbourd on 16 September 1952 – Volume 3, 1952 of the *Official Reports of Debates o the Consultatve Asembly of the Council of Europe*.

[48] One should add that the transnational reach of the Schuman plan served, as one would expect, a powerful internal interest the discussion of which even today meets with resistance. The challenge of "fraternity" and the need for forgiveness, love and grace was even more pressing internally than internationally. For each one of the original Member States was seriously compromised internally. In post war Germany, to put it bluntly, neither State nor society could function if all those complicit in National Socialism were to be excluded. In the other five, though ostensibly and in a real sense victims of German aggression, important social forces became complicit and were morally compromised. This was obviously true of Fascist Italy and Vichy France. But even the little Luxembourg contributed one of the most criminally notorious units to the German army and Belgium distinguished itself as the country with the highest number of indigenous volunteers to the occupying German forces. The betrayal of Anna Frank and her family by their good Dutch neighbors was not an exception but emblematic of Dutch society and government who tidily handed over their entire Jewish citizenry for deportation and death. All these societies had a serious interest in "moving on" and putting that compromised past behind them. If one were to forgive and embrace the external enemy, to turn one's back to the past and put one's faith in a better future, how much more so, how much easier, to do the same within one's own nation, society even family.

members of the European Convention of Human Rights, but the Union itself did not. They had to prove their democratic credentials, but the Union itself did not – two anomalies which hardly raised eyebrows.

Note however, that its messianic features are reflected not only in the flowery rhetoric. In its original and unedited version the declaration is quite elaborate in operational detail. But you will find neither the word democracy, nor human rights. It's a 'Lets-Just-Do-It' type of programme animated by great idealism (and a goodly measure of good old state interest, as a whole generation of historians such as Alan Milward[49] and Charles Maier[50] among others have demonstrated). The European double helix has from its inception been Commission and Council: an international (supposedly) a-political transnational administration/executive (the Commission) collaborating not, as we habitually say, with the member states (Council) but with the governments, the executive branch of the member states, which for years and years had a forum that escaped in day-to-day matters the scrutiny of any parliament, European or national. Democracy is simply not part of the original vision of European integration.[51]

This observation is hardly shocking or even radical. Is it altogether fanciful to tell the narrative of Europe as one in which 'doers and believers' (notably the most original of its institutions, the Commission, coupled with an empowered executive branch of the member states in the guise of the Council and COREPER), an elitist (if well-paid) vanguard, were the self-appointed leaders from whom grudgingly, over decades, power had to be arrested by the European Parliament? And even the European Parliament has been a strange *vox populi*. For hasn't it been, for most of its life, a champion of European integration, so that to the extent that, inevitably, when the Union created fears (only natural in such a radical transformation of European politics) the European Parliament did not feel the place citizens would go to express those fears and concerns?

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[49] A. Milward, *The European Rescue of the Nation State*, (London and New York: Routledge, 2nd ed., 2000).

[50] C. S. Maier and G. Bischof (eds.), *The Marshall Plan and Germany: West German Development within the Framework of the European Recovery Program* (Providence: Berg Press, 1991).

[51] K. Featherstone, *op. cit.*, p. 150; J. Delors, *Independent*, 26 July 1993.

V Law and the Rule of Law

The horrors of WWII but also of the six years leading to it within Germany provoked a conceptual reconsideration of the ideal of the rule of law. One may take as an example the degradation and dispossession of the Jews within Germany in the first eight years of the regime prior to their deportation and mass murder. There were of course violent and lawless episodes such as Krystalnacht in 1938 which saw the burning and looting of most synagogues in 1938 and in which the government was complicit by commission (incitement and encouragement) and omission (failure to prosecute the perpetrators.) But what is striking is the exceptional nature of this episode. For the most part, degradation and dispossession were orderly, systematic, following a legal and, hence, lawful path. The exclusion of Jews from public life was effected by the infamous Nuremberg Law of 1935 which contained elaborate legal definitions and mechanisms. The disposal of Jewish property followed a similar path of legality. Similar legal structures, including courts and judicial procedures were put in place to enforce even the most invidious features of the regime. Enemies, real and imagined, were not hunted down by clandestine death squads or simply "disappeared." They were arrested, tried and then, lawfully, executed. The quiet chilling horror of legalized and bureaucratized discrimination, humiliation and death is captured by a marvelous book, One Lifeby Tom Lampert[52] which presents some episodes captured through extrapolation from official files and the strength of which is very absence of blood and gore. In effect the process was achieved through, and with full respect for, the "rule of law."[53]

It is this reality which, already in the context of the Nuremberg Trials, provoked a conceptual reassessment. Since the rule of law was considered as one of the assets of liberal democracies, one could not grace German practice in those years with that appellation. Put differently, one had to move away from a formalist entirely

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[52] T. Lampert, *One Life* (Houghton Mifflin Harcourt, 2004).

[53] See also, H. Arendt, *Eichmann in Jerusalem: a report on the banalit of evil* (New York: Penguin, 1994), p. 21, p. 24.

positivist (even Kelsenian) notion of the rule of law and replace it with one which would, for example, incorporate the source and procedure of authority and authorship of the legal rules and procedures, as essential components into an understanding of the rule of law. A legal regime not validated in democratic practices and not respecting human rights would not qualify as a manifestation of the rule of law.[54]

We may return now to the analysis of the Schuman Declaration and the early foundations of European integration. We have already noted the conspicuous lexical and substantive absence of democracy and human rights from the original rhetoric and structures. Equally conspicuous is the heavy reliance on law and legal institutions. The Treaty of Paris – with its explicit reference to supranationalism -- represents a radical and unprecedented exercise in the legalization of a transnational regime, far exceeding the already innovation of the ECHR. It involves institutions of governance, of transnational administration, of adjudication and enforcement. The political project of European integration was to be realized by an economic program (Coal and Steel Community, European Economic Community) effectuated through and by the rule of law. Over the years one has celebrated that audacious and fateful choice. Notably, giving such centrality to a judicial organ, enabled the European Court of Justice and the law it administered, to play in later years, years of political stagnation, the decisive role it played in the construction of European integration.[55]

Electing to place such pronounced reliance on the law and legal institutions for the achievement of their political and economic project was not only an audacious but also a prudentially wise choice. Transnational legality helps prevent free riding and provides stability and continuity to any *acquis* even in periods of political instability and wavering commitment. Famously, once the constitutional revolution was effectuated through the introduction of direct effect, transnational legality

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[54] Most famously, J. Habermas, "Paradigms of Law", in M. Rosenfeld and A. Arato, *Habermas on law and democracy: critical exchanges* (Berkeley and Los Angeles: University of California Press, 1998), p. 13; J. Habermas, *Between Facts and Norms: contributions to a discourse theory of law and democracy* (Cambridge: MIT Press, 1998); J. Habermas, *Postnational Constellation* (Cambridge: MIT Press, 2001).

[55] See R. Lecourt, *L'Europe des juges*, (Brussels : Bruylant, 2008).

harnessed individuals, pursuing their personal interests as a powerful agent of compliance by Member States with their Treaty obligations.[56]

But, inevitably, it also meant an account of the principle of the rule of law which was old school: formalist, self-referential and self-legitimating. Why should I obey? Either -- because it is "The Law" or because it is in the service of the self-legitimating messianic dream. Indeed, I would argue, that political messianic projects by their very nature go hand in hand with a formalist, self-referential concept of the rule of law.[57]

It should not need saying that here, too, it is not my intention to argue any substantive similarity with the national socialist regime. The European integration project is as noble as national socialism was vile. But I am arguing that the European construct represents an interesting structural and conceptual continuity.

If I am right in this characterization (and I assume it will be contested) interesting implications follow in understanding the relationship between law and politics in the narrative of European integration.[58]

It is quite common when assessing its jurisprudence to cast the European Court, virtuously, in a dialectical relationship with (a typically stalling) political process. The following has been told in many, many variants over the years:

In the face of political stagnation and stasis in the late 60s and a lack of 'political will' (favorite, meaningless phrase) the Court steps in and compensates by its

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[56] T. Hartley, *The Foundations of European Union Law*, (Oxford: Oxford University Press, 7th ed., 2010), "7. Direct effect and national remedies"; A.-M. Burley and W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration", *International Organization*, vol. 47, n° 1, 1993, p. 41 , at p. 60 *et seq*.

[57] J.H.H. Weiler, "The Transformation of Europe", *op. cit.*, at p. 2410.

[58] A.-M. Burley and W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration", *International Organization*, vol. 47, n° 1, 1993, p. 41 , at p. 60 *et seq*.; K. Alter, *The European Court's Political Power: Selected Essays* (Oxford: Oxford University Press, 2009).

remarkable constitutionalizing jurisprudence, virtually salvaging European integration.[59]

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.[60]

In the face of the failure of the harmonization process in constructing the common market place, the Court steps in with its highly innovative doctrineof functional parallelism (Mutual Recognition) in 'Cassis' providing a jurisprudential breakthrough to move ahead.[61]

There is more than a grain of truth in all the variants, more and less sophisticated, of this narrative. But in all of them, the political problem is extraneous to the Court, which, within the limits of its powers, steps in 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 of political challenge.

But, in the light of my thesis on rule of law, it becomes possible to see the Court as part of the problem and not only as part of the solution. The argument is obvious enough and follows from the formalist premise of the rule of law. The very same

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[59] J. Bengoetxea, The Legal Reasoning of the European Court of Justice (Oxford: Clarendon Press, 1993) p. 101; J.V. Louis, "The Rule of Law", in M. Westlake (ed.), *The European Union beyond Amsterdam: new concepts of European integration*, p. 79, at p. 89 *et seq.*; J. Baquero Cruz, "Disintegration of the Law of Integration in the External Relations of the European Community", *Columbia Journal of European Law*, n° 3, 1997, p. 257; J.H.H. Weiler, "The Transformation of Europe", *Yale Law Journal*, June 1991, p. 2403, at p. 2425.

[60] G.F. Mancini, "Safeguarding Human Rights: the Role of the European Court of Justice" in G.F. Mancini, *Democracy and Constitutionalism in the European Union: collected essays* (Oxford and Portland: Hart Publihing, 2000), p. 177, at p. 185; J.H.H. Weiler, "Eurocracy and Distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental human right within the legal order of the European Communities", *Washington Law Review*, vol. 61, 1986, p. 1103.

[61] M. Shapiro, "Chapter 9. The European Court of Justice", in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, *op. cit.*, p. 335; M.P. Maduro, *We, the court: the European Court of Justice and the European Economic Constitution; A Critical Reading of Article 30 of the EC Treaty* (Oxford and Portland: Hart Publishing, 1998).

case-law, 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.[62]

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.[63] I do not think Europe has or had a *gouvernement des juges* (whatever that means) nor do I find fundamental fault with the hermeneutics of its essential jurisprudence. On the contrary – in a deep sense I think the Court gave effect, and sought to render effective, the project of the High Contracting Parties encapsulated in their respective Treaties. It is simply, that as I argued that messianic project was not particularly concerned with democracy (or, at inception, human rights). It sought its legitimacy in the nobility of its cause.[64] Thus, 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. But the road taken had and continues to have consequences inherent in its messianic nature.

My approach rests on two propositions. First, it highlights a certain irony in the constitutional jurisprudence. As noted above it was often perceived (and there are indications in the cases that it was so perceived by the Court itself) as being a response to, and part of, a broader political discourse of integration often a response to non-functioning dimensions of the political process.[65] But there has

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[62] P. Allott, "Preliminary rulings – another infant disease", *op. cit.*, p. 538; J.H.H. Weiler, "The Transformation of Europe", *Yale Law Journal*, June 1991, pp. 2409-2410.

[63] For a review of the literature in this regard, see H. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making* (Dordrecht: Martinus Nijhoff, 1986), p. 154 *et seq.*

[64] P. Pescatore, "The Doctrine of Direct Effects: An Infant Disease of Community Law, *European Law Review*, vol. 8, 1984, p. 155, at 157.

[65] G. F. Mancini, "The Making of a Constitution for Europe", *Common Market Law Review*, vol. 26, 1989, p. 596; P. Pescatore, "Jusqu'où le juge peut-il aller trop loin?" in K. Thorup and J. Rosenlov (eds.), *Festriskrift til Ole Due* (Copenhaguen: GEC Gads Forlag, 1994), pp. 326-327; H. Rasmussen, "Towards a Normative Theory of Interpretation of Community Law", *The University of Chicago Legal Forum*, 1992, p. 135, at p. 137; C.N. Kakouris,

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.[66] 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. 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 and legitimacy crisis?

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

"La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations" in O. Due, M. Lutter? J. Schwartze, *Festschrift für Ulrich Everling* (Baden-Baden: Nomos, 1995), p. 635.

[66] In this regard, see H. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making*, *op. cit.*

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. In some deep unintended sense, the Court was giving its normative imprimatur to a caricature of democracy, not the thing itself.

The implication of the Court of Justice in the democratic travails of the Union is easily stated even if usually uncomfortably discussed. The late Federico Mancini in his 'Europe: The Case for Statehood' forcefully articulated the democratic malaise of Europe.[67] 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 denunciated? It is precisely on these occasions, I argued, that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would I want to give effect to a principle which rendered the Community's undemocratic laws—adopted in his words by 'numberless, faceless and unaccountable committees of senior national experts' and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If

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[67] G. F. Mancini, "Europe: The Case for Statehood", *European Law Journal*, n° 4, 1998, p. 29. See also J. H. H. Weiler, "Europe: The Case against the Case for Statehood" , *European Law Journal*, n° 4, 1998, p. 43.

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 principle 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 preference procedure is, overwhelmingly, a device for judicial review of member state compliance with

their obligations under the Treaties.[68] 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.[69] It has been called the private-Attorney-General Model.[70] And second, it deploys national courts.[71] 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.[72] The gap between the rule of law and the rule of international law is narrowed, even closed.[73]

However, it is precisely in this context that we can see the problematic nature of dark side of this moon. The situation implicated in preliminary references always posits an individual vindicating a personal, private interest against the public good. Paradoxically, European 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 the

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[68] R. Lecourt, "Quel eut été le droit communautaire sans les arrêts de 1963 et 1964 ? » in *L'Europe et le droit – Mélanges en hommage à Jean Boulouis* (Paris : Dalloz, 1991), p. 349 ; H.G. Schemers *et al.* (eds), Art. 177 EEC: Experiences and Problems (The Hague: Elsevier, 1987) ; M. Broberg, N. Fenger, *Preliminary references to the European Cout of Justice*, (Oxford: Oxford University Press, 2010); T. de La Mare, "Article 177 in Social and Political Context" in P. Craig and G. De Burca (eds), *The Evolution of EU Law*, *op. cit.*, p. 215.

[69] P. Pescatore, "The doctrine of direct effect: an infant disease of Community law", *European Law Review*, vol. 8, June 1983, p. 155.

[70] J.H.H. Weiler, "Cain and Abel – Convergence and Divergence in International Trade Law", in J.H.H. Weiler, *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?* (Oxford: Oxford University Press, 2000), p. 1

[71] F. Grevisse and J.C. Bonichot, "Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les Etats membres" in *L'Europe et le droit – Mélanges en hommage à Jean Boulouis* (Paris : Dalloz, 1991), p. 297.

[72] See H.L.A. Hart, *The Concept of Law*, *op. cit.*, especially chs 3 & 10; Jones, "The Legal Nature of the European Community: A jurisprudential Analysis Using H.L.A. Hart's Model of Law and Legal System", *Cornell International Law Journal*, vol. 17, n° 1, 1984, p. 1.

[73] G. Bebr, "Court of Justice: Judicial Protection and the Rule of Law", in D. Curtin and T. Heukel (ed.), *Institutional Dynamics of European Integration. Essays in honour of H.G. Schemers*, vol II, (Dordrecht: Martinus Nijhoff, 1994), p. 303, at p. 305; J.H.H. Weiler, "The Transformation of Europe", *Yale Law Journal*, June 1991, p. 2403, at p. 2420 *et seq.*

principle 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 this is why it also contributes to the national social and political turn against the Union.[74]

The argument about the rule of law I am trying to make is that it formalist positivist Kelsenian models are no longer accepted as representing a meaningful and normatively acceptable form of the rule of law, if not respectful of two conditions: Rootedness in a democratic process of law making and respectful of fundamental human rights. The European Court of Justice accepted second of these conditions in an activist jurisprudence beginning in 1969 which proclaimed that European norms not respectful of the common constitutional traditions of the Member States and enshrined in the ECHR would be unacceptable. It understood that even democracies may lead to a tyranny of the majority. Its jurisprudence was bold since there was no hint of that proposition in the Treaties. Indeed, when the Court decided its first cases the words human rights or fundamental rights were no where to be found in the Treaties. There has never been, however, a similar jurisprudence as regards the decisional processes of the Union. In that respect the Court is complicit in the status quo.

VI Defending Values

The second story, brief and rude, is usually considered a historical curiosity, but it, too, had a profound effect on the political culture of the Union and European Integration. I refer to the saga of the European Defence Community. A Treaty was actually signed in May 1952 but failed, by a relatively small number of votes, to be ratified in the French Parliament in May 1954 and the project was abandoned.[75]

What is most striking about this historical event is that the governments were actually able to agree among themselves on a treaty concerning this most hallowed

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[74] P. Allott, "Preliminary rulings – another infant disease", *European Law Review*, n° 2, vol. 25, 2000, p. 538.

[75] "International Organizations: Summary of Activities: III. Political and Regional Organizations – European Defence Community", *International Organizations*, volume 8, n° 4, 1954, p. 599, at p. 601.

of "sovereign" core. It made huge sense. Quite apart from the fact that, history notwithstanding, a war among the partners of the Union was an unreal possibility, this would be a very symbolic and concrete step to make it unthinkable. But even more importantly, in the face of an external threat, and the ambiguity of American patronage, this project which at one and the same time brought about considerable savings whilst at the same time enhancing the defense capabilities of Europe jointly and severally.

My contention is that this 'childhood' trauma has had profound effects, not just material but principally political and cultural.[76] It became part of European faith that defense, security and military matters had to be kept separate from the European construct – in a 'it is not politically feasible, it is not politically desirable' unholy alliance of arguments.[77] It has bred amazing pathologies, not least wasteful replications of the defense efforts of the Member States coupled with a total reliance on American force. If America has become the 'policeman of the world', it is in part because Europe allowed it to become so – since when in trouble Europe itself would call not its own police but 911.[78] Paradoxically, the failure to cooperate has also weakened each state individually, since the magnitude of expense simply removed certain projects from national agendas.

Even worse, Europe failed to develop, slowly and painfully, the habits of cooperation, consensus-building, etc. in this field which remained outside the European construct. Like its democratization, it had to graft alien bodies – European Political Cooperation, Third Pillar, Common Defense and Security, et cetera.

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[76] "*chosen traumas and chosen glories provide, in other words, the linking objects for later generations to be rediscovered, reinterpreted, and reused*", C. Kinval, *Globalization and Religious Nationalism in India: The Search for Ontological Security*, (London: Routledge) 2006, p. 58 cited in I. Manners, "Global Europa: Mythology of the European Union in World Politics", *op.cit.,* p. 82.

[77] See for example F. Duchêne, "The European Community and the Uncertainties of Interdependence", in M. Kolistamm, W. Hager (eds), *Nation Writ Large: Foreign Policy Problems Before the European Communities* (London: Macmillan, 1973), p. 19 *et. seq.*; J.J. Sheehan, *Where have all the soldiers gone ?: the transformation of modern Europe*, *op.cit.*, p. 222 *et seq.*; S. Rynning, "Less May Be Better in EU Security and Defence Policy", *Oxford Journal on Global Governance*, vol. 2, n° 1, 2005, p. 45.

[78] See J.J. Sheehan, *Where have all the soldiers gone ?: the transformation of modern Europe*, *op.cit.*, p. 204 *et seq.*

Worst of all, it developed a whole new rationalization which was grafted on to the original political messianic project – the 'civilian power'[79] – in a questionable attempt to justify the failure of its own early project. Here there has been a veritable spill over also into national politics. Reasonable people can debate the extent of any existential threat to Europe. But there can be no debate that at times, unless one is a pacifist (a comfortable luxury when your friendly neighbour is not), the only way to prevent the worst kind of trampling on the most hallowed values might require decisive use of force. The consequences of this failure are to be found in the graveyards of Bosnia, Darfur and elsewhere.

VII End Game

The political messianic and its concomitant corollary in a central but formal conception of the rule of law were offered not only for the sake of conceptual clarification but also as an explanation of the formidable success of European integration. They produced a culture of praxis, achievement, ever expanding agendas. Given the noble dimensions of European integration one ought to see and acknowledge their virtuous facets.

But that is only part of the story. They also explain some of the story of decline in European legitimacy and mobilizing pull which is so obvious in the current circumstance. Part of the very phenomenology of political messianism is that it always collapses as a mechanism for mobilization and legitimation. It obviously collapses when the messianic project fails. When the revolution does not come.

But interestingly, and more germane to the narrative of European Integration, even when successful it sows its seeds of collapse. At one level the collapse is

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[79] F. Duchêne, "The European Community and the Uncertainties of Interdependence", *op. cit.*; A. Shonfield, *Europe: Journey to an Unknown Destination*, (London: Allen Lane, Penguin Books) 1973, p. 62; H. Bull, "Civilian Power Europe : A Contradiction in Terms ?", *Journal of Common Market Studies*, vol. 21, n° 2, 1982, p. 149; K. Nicolaïdis and R. Howse, "'This is my Eutopia…': Narrative as Power", *Journal of Common Market Studies*, vol. 40, n° 4, 2002, p. 767, at p. 769.

inevitable, part of the very phenomenology of messianic project. Reality is always more complicated, challenging, banal and ultimately less satisfying than the dream which preceded it. The result is not only absence of mobilization and legitimation, but actual rancor. The original Promised Land, Canaan, was a very different proposition, challenging and hostile, to the dream which preceded it. Independent India, or Kenya, or even the USA were very different to the dreams which preceded them and their like. Individually this is the story of many a marriage and love affair. Just as paradise becomes such, only when lost, The land itself, always falls short of the promise. It is part of the ontology of the messianic. The emblematic manifestation of this in the context of European integration is the difference between the 868 inspiring words of the Schumann dream and the 154,183 very real words of the (defunct) European Constitution.

But in the case of Europe, there are additional contingent factors which the collapse of the messianic narrative as a mobilizing and legitimizing factor. At one level Europe is a victim of its own success. The passage of time coupled with the consolidation of peace, the internalization of the alternative inter-state discourse which Europe presented, has been so successful that to new generations of Europeans, both the pragmatic and idealist appeal of the Schuman vision seem simply incomprehensible. The reality against which their appeal was so powerful – the age hold enmity between France and Germany and all that -- is no longer a living memory, a live civilizational wire, a wonderful state of affairs in some considerable measure also owed to the European constructs.

At another level, much has changed in societal mores. Europe in large part has become a post-Christian society, and the profound commitment to the individual and his or her rights, relentlessly (and in many respects laudably) placing the individual in the center of political attention, has contributed to the emergence of the self-centered individuals. Social mobilization in Europe is at strongest when the direct interest of the individual or at stake and at their weakest when it requires tending to the needs of the other, as the recent Euro crisis, immigrant crisis and other such instances will readily attest. So part of the explanation of the loss of mobilizing force of the Schuman Vision is in the fact that what it offers eithers

seems irrelevant or does not appeal to the very different idealistic sensibility of contemporary European society.

The result is that if political messianism is not rapidly anchored in the legitimation that comes from popular ownership, it rapidly becomes alienating and, like the Golem, turns on its creators.

Democracy was not part of the original DNA of European Integration. It still feels like a foreign implant. With the collapse of its original political messianism, the alienation we are now witnessing is only to be expected. And the formal rule of law only serves to augment the alienation. There are no easy fixes to these problems. That is the nature of problems which are not rooted in institutional arrangements but are a reflection of what has become part of a deep-seated political and legal culture.