

## EUROPE IN CRISIS—ON ‘POLITICAL MESSIANISM’, ‘LEGITIMACY’ AND THE ‘RULE OF LAW’

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### I. ON TWO GENRES AND THREE TYPES OF ‘LEGITIMACY’

‘Legitimacy’ is a notoriously elusive term, over-used and under-specified. So the first thing I will do is to explain the sense in which I plan to use ‘legitimacy’ in this essay. Do not, please, argue with me and say: “That is not ‘legitimacy’! It means something else!”<sup>1</sup> This is how I plan to use it, and I hope to convince you that it is a useful way for articulating something terribly important about the present crisis and the current state of European integration.

There are two basic genres—languages, vocabularies—of ‘legitimacy’: ‘normative’ and ‘social’. The vocabulary of ‘normative legitimacy’ is moral, ethical and is informed by political theory. It is an objective measure even though there will be obvious ideological differences as to what should be considered as ‘legitimate governance’. ‘Social legitimacy’ is empirical—assessed or measured with the tools of social science. It is a subjective measure, reflecting social attitudes. It is not a measurement of popularity, but of a deeper form of acceptance of the political regime.

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<sup>1</sup> I found the following most useful, also as a demonstration of the breadth of the concept: Cathryn Johnson, Timothy J. Dowd & Cecilia L. Ridgeway, “Legitimacy as a Social Process” (2006) 32 *Annual Review of Sociology* 53; Barry B. Levine, “Legitimacy” in Jens Beckert & Milan Zafirovski, eds., *International Encyclopedia of Economic Sociology* (London: Routledge, 2006) 396; Wojciech Sadurski, “Constitutional Courts in Transition Processes: Legitimacy and Democratization” (2011) Sydney Law School Research Paper No. 11/53, online: Social Science Research Network <<http://ssrn.com/abstract=1919363>>; Fabienne Peter, “Political Legitimacy” in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, online: The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/sum2010/entries/legitimacy>>.

The two types of ‘legitimacy’ often inform each other and may even conflate, but not necessarily so.

A series of examples will clarify this. By our liberal pluralist normative yardstick, German National Socialism of the 1930s and 40s was a horrible aberration—the negation of ‘legitimate governance’. Yet, socially and empirically, for most Germans almost until the defeat in 1945, it was not only popular, but was considered deeply ‘legitimate leadership’. By contrast, Weimer democracy would pass our normative test of ‘legitimate government’, yet for a very large number of Germans, it was not merely unpopular, but considered ‘illegitimate leadership’—a betrayal of Germany.

However, in less extreme situations, we do expect some measure of conflation between the two ‘legitimacies’. One hopes that if a regime is ‘normatively legitimate’, because, say, it practices constitutional democracy, it will also enjoy widespread ‘social legitimacy’, and that the opposite will be true too: in a regime which fails the normative tests, one hopes that its ‘social legitimacy’ will be low too. One can imagine complicated permutations of these parameters.

‘Legitimacy’, ‘normative’ or ‘social’, should not be conflated with ‘legality’. Forbidding blacks to sit in the front of the bus was perfectly legal, but would fail many a test of ‘normative legitimacy’, and with time lose its ‘social legitimacy’ as well. There are illegal measures which are considered, ‘normatively’ and/or ‘socially legitimate’, and legal measures which are considered ‘illegitimate’.

For the purpose of this paper, it is worth exploring briefly the relationship between ‘popularity’ and ‘legitimacy’. If I am a lifelong adherent of the Labour party in the U.K., I might be appalled by the election of the Tories and abhor every single measure adopted by the Government of the Tory Prime Minister. But it would never enter my mind to consider such measures as ‘illegitimate’. In fact, and this is critical as one of the principal propositions of this paper, the deeper the ‘legitimacy resources’ of a regime, the better able it is to adopt *unpopular* measures critical in the time of crisis where such measures may be necessary.

There is something peculiar about the current crisis. Even if there are big differences between the ‘austerity’ and ‘immediate growth’ camps, everyone knows that a solution has to be European, within a European framework. And yet, it has become self-evident, that crafting a European solution has become so difficult, that the institutions and the European Union (“Union”)’s decision-making process do not seem to be engaging satisfactorily and effectively with the crisis, even when employing intergovernmental methodology; and that it is the governments, national leaders, of a small club, who seem to be calling the shots. The problem is European, but Europe as such is finding it difficult to craft the remedies.

I would like to argue that in the present circumstance, the ‘legitimacy resources’ of the Union—referring here mostly to ‘social legitimacy’—are depleted, and that is why the Union has had to turn to its Member States for salvation. The solutions will still have to be European, but they will not be ideated, designed and crafted using the classical ‘Community method’ but will have to be negotiated among and validated by the Member States. They will require the ‘legitimacy resources’ of the Member States—though in many countries these are close to depletion too—in order to gain valid acceptance in Europe.

Alan Milward famously and convincingly wrote on *The European Rescue of the Nation-State*.<sup>2</sup> The pendulum has swung and in the present crisis, it will be the Nation State who will rescue the Union.

Moving from the genres of ‘legitimacy’ to its typology, I would like to suggest the three most important types or forms of ‘legitimacy’ which have been central to the discussion of European integration. The most ubiquitous have been various variations on the theme of ‘input’ and ‘output legitimacy’.<sup>3</sup>

- ‘Process (or input) legitimacy’, which—in the current circumstance can be, with some simplification—synonymised with democracy. It is easier put in the negative: to the extent that the European mode of governance departs from the habits and practices of ‘democracy’ as understood in the Member States, its ‘legitimacy’, in this case both ‘normative’ and ‘social’ will be compromised.
- ‘Result (or output) legitimacy’, which—again simplifying somewhat—would be all modern versions of ‘bread’ and ‘circuses’. As long as the Union delivers the ‘goods’—prosperity, stability, security—it will enjoy a ‘legitimacy’ that derives from a subtle combination of success per se, of success in realising its objectives and of contentment with those results. There is no better way to legitimise a war than to win it. This variant of ‘legitimacy’ is part of the very ethos of the European Commission (“Commission”).
- ‘*Telos* legitimacy’ or ‘political messianism’, whereby ‘legitimacy’ is gained neither by ‘process’ nor ‘output’ but by promise—the promise of an attractive “Promised Land”. I will elaborate on this below.

I will now try and illustrate the collapse of all three forms of ‘legitimacy’ in the current European circumstance.

## 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<sup>4</sup>, the *Treaty of Lisbon* has not

<sup>2</sup> Alan S. Milward, *The European Rescue of the Nation-State*, 2nd ed. (London: Routledge, 2000).

<sup>3</sup> I have found the following helpful: Mijke Boedeltje & Juul Cornips, “Input and Output Legitimacy in Interactive Governance” (Paper presented at the International Conference on Democratic Network Governance, 21, 22 October 2004) [unpublished], online: ERASMUS University Repository <<http://repub.eur.nl/res/pub/1750/NIG2-01.pdf>>; Karl-Oskar Lindgren & Thomas Persson, “Input and Output Legitimacy: Synergy or Trade-Off? Empirical evidence from an EU Survey” (2010) 17 *Journal of European Public Policy* 449.

<sup>4</sup> See e.g., the Plenary session of the European Parliament, Strasbourg on 20 February 2008 on the Treaty of Lisbon, which includes various statements from the members of the European Parliament, Janez Lenarčič, President of the Council and Margot Wallström, Vice-President of the European Commission, as well as the EC, *European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI))*, [2009] O.J. Electronic 184-05/25; The European Council, *14 December 2007 Presidency Conclusions* (2008) 16616/1/07 REV 1 CONCL 3, including the E.U. declaration on globalisation; EC, Commission, *Your Guide to the Lisbon Treaty* (Luxembourg: Publications Office of the European Union, 2009) online: Europa <<http://ec.europa.eu/publications/booklets/others/84/en.pdf>>; EC, Jerzy Buzek, *President (of the European Parliament) Buzek News*, 3rd ed. (1 December 2009), online: European Parliament <[http://www.europarl.europa.eu/former\\_ep\\_presidents/president-buzek/ressource/static/newsletter/newsletter-3/newsletter.html?ts=1277465318672](http://www.europarl.europa.eu/former_ep_presidents/president-buzek/ressource/static/newsletter/newsletter-3/newsletter.html?ts=1277465318672)>; José Manuel Durão Barroso, “The

been able to redress.<sup>5</sup> The surface manifestations of crises are with us every day on the front pages—the Euro crisis<sup>6</sup> being the most current. Beneath the surface, at the structural level, lurk more profound and long-term signs of enduring challenges and even dysfunction and malaise. Let us refract them through the lens of ‘legitimacy’.<sup>7</sup>

First, as regards ‘process legitimacy’, there is the persistent, chronic, troubling democracy deficit, which cannot be talked away.

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’,<sup>8</sup> at the Union-level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practiced with different modalities in its various Member States. Make no mistake: it is perfectly understood that the Union is not a State. But it is in the business of governance, and it has taken over extensive areas previously in the hands of its Member States. In some critical areas, such as the interface of the Union with the international trading system, the competences of the Union are exclusive. In others they are dominant.

Democracy is not about the States. Democracy is about the exercise of public power—and the Union exercises a huge amount of public power. We live by the credo that any exercise of public power has to be ‘legitimated’ democratically and it is exactly here that ‘process legitimacy’ fails.

In essence, the two primordial features of any functioning democracy are missing—the grand principles of accountability and representation.<sup>9, 10</sup>

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European Union after the Lisbon Treaty” (Speech delivered at the Global Jean Monnet Conference, Brussels, 25 May 2010) [unpublished] online: Europa <[http://europa.eu/rapid/press-release\\_SPEECH-10-261\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-10-261_en.htm?locale=en)>.

<sup>5</sup> EC, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007* [2007] O.J. C. 306/01 [*Treaty of Lisbon*].

<sup>6</sup> Desmond Dinan, “Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis” (2011) 49 (Issue Supplement s1) *Journal of Common Market Studies* 103.

<sup>7</sup> The literature is rich. Here is a partial sample of some truly helpful studies: Jacques Thomassen, ed., *The Legitimacy of the European Union after Enlargement* (Oxford: Oxford University Press, 2009); Jacques Thomassen & Hermann Schmitt, “Introduction: Political Representation and Legitimacy in the European Union” in Hermann Schmitt & Jacques Thomassen, eds., *Political Representation and Legitimacy in the European Union* (Oxford: Oxford University Press, 1999) 3; David Beetham & Christopher Lord, *Legitimacy and the European Union* (London: Longman, 1998); Max Haller, “Is the European Union Legitimate? To What Extent?” (2009) 60 *International Social Science Journal* 223; Andrew Moravcsik, “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union” (2002) 40 *Journal of Common Market Studies* 603; Barbara Guastaferrero & M. Moschella, “The EU, the IMF, and the Representative Turn: Addressing the Challenge of Legitimacy” (2012) 18 *Swiss Political Science Review* at 199.

<sup>8</sup> Neil Walker, “Postnational Constitutionalism and the Problem of Translation” in J.H.H. Weiler & Marlene Wind, eds., *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003) 27 at 29.

<sup>9</sup> Adam Przeworski, Susan C. Stokes & Bernard Manin, eds., *Democracy, Accountability and Representation* (Cambridge: Cambridge University Press, 1999); Philippe C. Schmitter & Terry Lynn Karl, “What Democracy Is... and Is Not” (1991) 2:3 *Journal of Democracy* 75 at 76.

<sup>10</sup> Peter Mair, “Popular Democracy and the European Union Polity” (2005) *European Governance Papers*, No. C-05-03 at 4, online: Institute For Advanced Studies <<http://www.ihs.ac.at/publications/lib/ep3.pdf>> (last accessed: 11 October 2012).

As regards accountability,<sup>11</sup> even the basic condition of representative democracy, that at election time the citizens “can throw the scoundrels out”<sup>12</sup>—that is by replacing the Government—does not operate in Europe.<sup>13</sup> This form of European governance,<sup>14</sup> governance without Government, is—and will remain for a 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, but not surprisingly, political accountability of Europe is remarkably weak. There have been some spectacular political failures of European governance—the embarrassing Copenhagen climate fiasco;<sup>15</sup> the weak (at best) realisation of the much touted “Lisbon Agenda” (also known as the “Lisbon Strategy” or “Lisbon Process”);<sup>16</sup> and the very story of the defunct *European Constitution*<sup>17</sup> 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, decidedly not, a story of corruption or malfeasance.<sup>18</sup> My argument is that this failure is rooted in the very structure of European governance. It was not designed for political accountability. In a 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.<sup>19</sup> Structurally, dissatisfaction with ‘Europe’ when it exists, has no channel to affect—at the European level—the agents of European governance.

<sup>11</sup> Carol Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002).

<sup>12</sup> Ian Shapiro, *Democracy’s Place* (Ithaca: Cornell University Press, 1996) at 96; “To be a European Citizen: Eros and Civilization” in J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 324 at 329 [Weiler, *The Constitution of Europe*].

<sup>13</sup> Renaud Dehousse, “Constitutional Reform in the European Community. Are there Alternatives to the Majority Avenue?” in Jack Hayward, ed., *The Crisis of Representation in Europe* (London: Frank Cass, 1995) 118 at 123.

<sup>14</sup> Philip Allott, “European Governance and the Re-branding of Democracy” (2002) 27 *Eur. L. Rev.* 60.

<sup>15</sup> See EC, *European Parliament resolution of 10 February 2010 on the outcome of the Copenhagen Conference on Climate Change (COP 15)* [2010] O.J. Electronic 341-06/25 especially at 26, points 5, 6.

<sup>16</sup> Iain Begg, “Is there a Convincing Rationale for the Lisbon Strategy” (2008) 46 *Journal of Common Market Studies* 427; EC, The High Level Group, *Facing The Challenge: The Lisbon Strategy for Growth and Employment (Report from the High Level Group chaired by Wim Kok)* (Luxembourg: Office for Official Publications of the European Communities, 2004).

<sup>17</sup> EC, *Treaty establishing a Constitution for Europe* [2004] O.J. C. 310/1 [*European Constitution*]. See Ian Ward, “Bill and the Fall of the Constitutional Treaty” (2007) 13 *European Public Law* 461; “What Should Replace The Constitutional Treaty?”, Editorial Comments, (2007) 44 *C.M.L. Rev.* 561.

<sup>18</sup> On this aspect, see Veith Mehde, “Responsibility and Accountability in the European Commission” (2003) 40 *C.M.L. Rev.* 423.

<sup>19</sup> Julian Priestley, “European Political Parties: The Missing Link” in Raffaello Matarazzo, ed., *Democracy in the EU after the Lisbon Treaty* (Rome: Edizioni Nuova Cultura, 2011) 15; Francisco Roa Bastos, “Des ‘partis politiques au niveau européen’? Etat des lieux à la veille des élections européennes de juin 2009” (2009) *Notre Europe, Etudes & Recherches* No. 71; Olivier Audéoud, *Les partis politiques au niveau européen. Fédérations de partis nationaux*, vol. 3 of *Cahiers du G.E.R.S.E* ([Lorraine?]: Université de Nancy, 1999).

Likewise, at the most primitive level of ‘democracy’, there is simply no moment in the civic calendar of Europe when a 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. The political colour of the European Parliament only very weakly gets translated into the legislative and administrative output of the Union.<sup>20</sup>

This ‘political deficit’, to use the felicitous phrase of Renaud Dehousse,<sup>21</sup> is at the core of the ‘democracy deficit’. The Commission, by its self-understanding—which is linked to its very ontology—cannot be ‘partisan’ in a right-left sense; neither can the European Council (“Council”), by virtue of the haphazard political nature of its composition. ‘Democracy’ normally must have some meaningful mechanism for expression of voter preference predicated on choice among options, typically informed by stronger or weaker ideological orientation.<sup>22</sup> This is an indispensable component of politics. ‘Democracy’ without politics is an oxymoron.<sup>23</sup> And yet this is a feature of Europe—the “non-partisan” nature of the Commission—which is celebrated. The stock phrase found in endless student textbooks and the like—that the supranational Commission vindicates the ‘European interest’, whereas the intergovernmental Council is a clearing house for Member State interest—is, at best, naïve. Does the ‘European interest’ not necessarily involve political and ideological choices? At times explicit, but always implicit?

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 is evident in the continued slide in the ‘legitimacy’ and mobilising 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.<sup>24</sup> What is striking about these figures is that the decline coincides with a continuous shift in powers to the European

<sup>20</sup> Vernon Bogdanor, “Legitimacy, Accountability and Democracy in the European Union” (2007) A Federal Trust Report at 7, 8; Andreas Follesdal & Simon Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik” (2006) 44(3) *Journal of Common Market Studies* 533.

<sup>21</sup> Dehousse, *supra* note 13 at 124. See also, Jean-Marc Ferry & Paul Thibaud, *Discussion sur l’Europe* ([Paris]: Calmann-Lévy, 1992).

<sup>22</sup> Follesdal & Hix, *supra* note 20 at 545.

<sup>23</sup> See Pierre Manent, *La raison des nations: réflexions sur la démocratie en Europe* (Paris: Gallimard, 2006) at 59.

<sup>24</sup> Anand Menon & John Peet, “Beyond the European Parliament: Rethinking the EU’s Democratic Legitimacy” (2010) Center for European Reform Essays; Paul Margette, “European Governance and Civic Participation: Can the European Union be Politicized?” (2001) Jean Monnet Working Paper No. 6/01.

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.<sup>25</sup> It is sobering but not surprising to note the absence of the European Parliament as a major player in the current crisis, but the institutional crisis runs deeper.

The Commission has excelled as a creative secretariat, and implementer and monitor, but neither as the sources of ideas or veritable political leadership. It has been faithful and effective as ‘His Master’s Voice’. But most striking has been the disappearing act of the Council. It is no longer the proud leader of Europe according to the Giscardian design, but an elaborate rubber stamp to the Union’s two Presidents—Merkel and Sarkozy.<sup>26</sup> This is a double failure of ‘institutional legitimacy’—of the European Parliament and Council—of supranationalism and intergovernmentalism. The resort to an extra-Union Treaty as the centrepiece of the reconstruction, is but the poignant legal manifestation of this political reality.

This 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.<sup>27</sup> The lines of debate are well-known.<sup>28</sup> 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 an invocation of ‘result or output legitimacy’. Since the Union, not being a State, cannot replicate or adequately translate the habits and practices of state democratic governance, its ‘legitimacy’ may be found elsewhere.<sup>29</sup>

In analysing the legitimacy (and mobilising force) of the Union, in particular against the background of its persistent ‘democracy deficit’, political and social science has indeed long used the distinction between ‘process legitimacy’ and ‘outcome legitimacy’ (also known as ‘input/output’, ‘process/result’ etc.).<sup>30</sup> The ‘legitimacy’ of the 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.<sup>31</sup>

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<sup>25</sup> Jerzy Buzek, “State of the Union: Three Cheers for the Lisbon Treaty and Two Warnings for Political Parties” (2011) 49 (Issue Supplement s1) *Journal of Common Market Studies* 7 at 15; see also “European Democracy and its Critics: Polity and System” in Weiler, *supra* note 12, 264 at 266.

<sup>26</sup> This article was written before Mr. François Hollande was elected President of France.

<sup>27</sup> J.H.H. Weiler, “Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision” (1995) 1 *Eur. L.J.* 219 especially at 225 *et seq.*

<sup>28</sup> Paul Craig, “The Nature of the Community: Integration, Democracy, and Legitimacy” in Paul Craig & Gráinne de Búrca, eds., *The Evolution of EU Law*, 1st ed. (Oxford: Oxford University Press, 1999) 1 at 25.

<sup>29</sup> Neil MacCormick, “Democracy, Subsidiarity, and Citizenship in the ‘European Commonwealth’” (1997) 16 *Law & Phil.* 331.

<sup>30</sup> See for example, Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1989) cc. 2, 4; Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1991) at 163. See also more specifically, Giandomenico Majone, *Regulating Europe* by Jeremy Richardson (London: Routledge, 1996); Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999) at 7.

<sup>31</sup> Kevin Featherstone, “Jean Monnet and the ‘Democratic Deficit’ in the European Union” (1994) 32 *Journal of Common Market Studies* 149.

The idea harkens back to the most classic functionalist and neo-functionalist theories.<sup>32</sup>

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 take some issue with. I do not think that ‘outcome legitimacy’ explains all or perhaps even most of the mobilising force of the European construct. But whatever role it played, it is dependent on the ‘*panem*’. Rightly or wrongly, the economic woes of Europe, which are manifest in the Euro crisis, are attributed to the European construct. So when there suddenly is no ‘bread’, and certainly no cake, we are treated to a different kind of ‘circus’ whereby the citizens’ growing indifference is turning to hostility, and the ability of Europe to act as a political mobilising force seems not only spent, but even reversed. The worst way to legitimise a war is to lose it, and Europe is suddenly seen not as an icon of success but as an emblem of austerity, thus—in terms of its promise of prosperity—a failure. If success breeds legitimacy, failure, even if wrongly allocated, leads to the opposite.

Thus, not surprisingly there is a seemingly contagious spread of anti-Europeanism in national politics.<sup>33</sup> 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 the North and South, East and West, where political capital is to be made among non-fringe parties by anti-European advocacy.<sup>34</sup> The spillover effect of this phenomenon is the shift of 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 airbrushed 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*,<sup>35</sup> albeit not speaking through—but instead giving a slap in the face to—the European institutions.<sup>36</sup>

<sup>32</sup> *Ibid.* at 155; Charles Pentland, “Political Theories of European Integration: Between Science and Ideology” in Dominik Lasok & Panayotis Soldatos, eds., *The European Communities in Action* (Brussels: Emile Bruylant, 1981) 545 at 550 *et seq.*; Ben Rosamond, *Theories of European Integration* by Neil Nugent, William E. Paterson & Vincent Wright (New York: Palgrave, 2000) at 20 *et seq.*; David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966); Ernst B. Haas, *The Uniting of Europe* (Stanford: Stanford University Press, 1958); Ernst B. Haas, “Turbulent Fields and the Theory of Regional Integration” (1976) 30 *International Organization* 173; Léon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press, 1963); Léon N. Lindberg & Stuart A. Scheingold, eds., *Regional Integration: Theory and Research* (Cambridge: Harvard University Press, 1971).

<sup>33</sup> Cécile Leconte, *Understanding Euroscepticism* (Basingstoke: Palgrave Macmillan, 2010).

<sup>34</sup> Robert Harmsen & Menno Spiering, “Introduction: Euroscepticism and the Evolution of European Political Debate” in Robert Harmsen & Menno Spiering, eds., *Euroscepticism: Party Politics, National Identity and European Integration* (Amsterdam: Rodopi, 2004) 13; Aleks Szczerbiak & Paul Taggart, *Opposing Europe?: The Comparative Party Politics of Euroscepticism*, vols. 1, 2. (Oxford: Oxford University Press: 2008).

<sup>35</sup> Neil Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford: Oxford University Press, 2008).

<sup>36</sup> For more examples, see J.H.H. Weiler, Ulrich R. Haltern & Franz C. Mayer, “European Democracy and its Critique” in Hayward, *supra* note 13, 4.



### III. EUROPE AS 'POLITICAL MESSIANISM'

At some level the same could have been said ten and even twenty years ago.<sup>37</sup> The 'democracy deficit' is not new—it is enduring. And how did Europe legitimate itself before it scored its great successes of the first decades?

As I hinted above, 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 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 mobilising 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.

Mark Mazower, in his brilliant and original history and historiography of 20<sup>th</sup> century Europe,<sup>38</sup> 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, Italy, 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. As 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.<sup>39</sup>

And yet their common venture, European integration, was in my reading a 'political messianic' venture *par excellence*, the messianic becoming a central feature of its original and enduring political culture. The mobilising force and principal 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 mobilising 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.

Since, unlike the 'democracy deficit' which has been discussed and debated *ad nauseam* and *ad tedium*, 'political messianism' is a feature of European 'legitimacy'

<sup>37</sup> See e.g., EC, *European Governance—A White Paper COM(2001) 428 final* [2001] O.J. C. 287/1; Vernon Bogdanor & Geoffrey Woodcock, "The European Community and Sovereignty" (1991) 44 *Parliamentary Affairs* 481 at 492: "[T]he shortcomings of the Community lie in the feelings of remoteness and lack of influence and involvement on the part of many of its citizens."; Dieter Grimm, "Does Europe Need a Constitution?" (1995) 1 *Eur. L.J.* 282 at 291 *et seq.*; Christopher Hill, "European Foreign Policy: Power Bloc, Civilian Power—or Flop?" in Reinhardt Rummel, ed., *The Evolution of an International Actor: Western Europe's New Assertiveness* (Boulder: Westview, 1990) 31 at 35.

<sup>38</sup> Mark Mazower, *Dark Continent: Europe's Twentieth Century* (London: Allen Lane, 1998).

<sup>39</sup> Justine Lacroix, "For a European Constitutional Patriotism" (2002) 50 *Political Studies* 944 at 949 *et seq.*

which has received less attention, I think it may be justified if I pay to it some more attention.

#### 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.<sup>40</sup> Notably, much of its text found its way into the preamble of the *Treaty Establishing the European Coal and Steel Community*,<sup>41</sup> the substance of which was 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. Note though that 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 *Declaration*’s messianic feature is notable in both its rhetoric and substance. Note, first, the language used—ceremonial and ‘sermonial’ with plenty of pathos (and bathos):<sup>42</sup>

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized 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, and one might even say with a tad of irony. Some old habits, such as the “White Man’s Burden”,<sup>43</sup> and the missionary tradition, die-hard: “[w]ith increased resources[,] Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.”<sup>44</sup>

But it is not just the rhetoric. The substance itself is messianic—a compelling vision which has animated now at least three generations of European idealists where

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<sup>40</sup> Robert Schuman, “Schuman Declaration” (delivered on 9 May 1950, Paris at the Salon de L’Horloge, Quai D’orsay) online: Europa <[http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm)> [*Declaration*].

<sup>41</sup> *Treaty establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140 [*Treaty of Paris*].

<sup>42</sup> *Declaration*, *supra* note 40 [paragraphing omitted].

<sup>43</sup> “The White Man’s Burden” in Rudyard Kipling, *The Collected Poems of Rudyard Kipling* (Ware: Wordsworth Editions, 1994) 334.

<sup>44</sup> *Declaration*, *supra* note 40.

the “ever closer union among the people of Europe”, with peace and prosperity an icing on the cake, constituting the beckoning “Promised Land”.<sup>45</sup>

It is worth exploring further the mobilising force of this new plan for Europe. At the surface-level, the language conveys a straightforward pragmatic objective of consolidating peace and reconstructing European prosperity. But there is much more within the deep structure of Schuman’s plan (“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 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 metaphors 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 1950s with the horrors of war still fresh in the people’s minds and, in particular, the memory of the unspeakable savagery of the 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 was, first, a ‘peace of the brave’ requiring courage and audacity. At a deeper level it managed to tap into the two civilisational pillars of Europe: The Enlightenment and the heritage of the French Revolution and the European Christian tradition.<sup>46</sup>

Liberty was already achieved with the defeat of Nazi Germany, and Germans (like their Austrian brethren-in-crime) embraced with zeal the notion that they too were liberated from National Socialism. But here was a project, encapsulated in the *Declaration*, which added to the transnational level both equality and fraternity. The Post-World War I Versailles version of ‘peace’ was to take yesterday’s enemy, diminish him and keep his neck firmly under one’s heel, with, of course, disastrous results. Here, instead was a vision in which yesterday’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 interdependent lock that, indeed, would make the thought of resolving future disputes unthinkable.<sup>47</sup> This was, in fact, the project of the Enlightenment taken to the international level as Kant himself had dreamt. To embrace the Plan

<sup>45</sup> Franco Piodi, “From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet” (2010) 6 *CARDOC Journals*; Thomas Hoerber, “The Nature of the Beast: The Past and Future Purpose of European Integration” (2006) 1 *L’Europe en formation* 17; “Introduction: We will do, and hearken”, Weiler, *Constitution of Europe*, *supra* note 12, 8.

<sup>46</sup> See *e.g.*, Jürgen Habermas & Jacques Derrida, “February 15, or, What Binds Europeans Together: Plea for a Common Foreign Policy, Beginning in Core Europe” in Daniel Levy, Max Pensky & John Torpey, eds., *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War* (London: Verso, 2005) 3 at 5, 10-12; Alain Finkielkraut, *La défaite de la pensée* ([Paris]: Gallimard, 1987); J.H.H. Weiler, *L’Europe chrétienne?: Une excursion* (Paris: Éditions du Cerf, 2007); Jean-Marc Ferry, *La république crépusculaire. Comprendre le projet européen in sensu cosmopolitico* (Paris: Éditions du Cerf, 2010); Robert Schuman, *Pour l’Europe* (Paris: Nagel, 1963) at 55 *et seq.*

<sup>47</sup> Angeles Muñoz, “L’engagement européen de Robert Schuman” in Sylvain Schirmann, ed., *Robert Schuman et les pères de l’Europe: cultures politiques et années de formation* (Brussels: Peter Lang, 2008) 39 at 44.

was to tap into one of the most powerful idealistic seams in Europe’s civilizational mines.

The Plan was also a call for forgiveness, a challenge to overcome an understandable hatred. In that particular historical context, the Schumanian notion of ‘peace’ resonated with, and was evocative of, the distinct teaching, imagery and values of the Christian call for forgiving one’s enemies, and for love and for grace—values so recently consecrated in their wholesale breach. The 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 Gasperi, Schuman, and Monnet himself—were all seriously committed Catholics.<sup>48</sup>

The mobilising 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.<sup>49</sup> This also explains how, for the most part, both the 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 members of the *European Convention of Human Rights*,<sup>50</sup> 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.

<sup>48</sup> Alan Fimister, “Integral Humanism and the Re-unification of Europe” in Schirmann, *ibid.*, 25 at 25; Michael Sutton, *France and the Construction of Europe, 1944-2007: The Geopolitical Imperative* (New York: Berghahn Books, 2007) at 34:

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.

See also Council of Europe, C.A., Fourth Ordinary Sess. (Second Part) Debates, vol. 3 (1952) at 293, De Gasperi: “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.”

<sup>49</sup> One should add that the transnational reach of the 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 the 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 were complicit and morally compromised. This was obviously true of Fascist Italy and Vichy France. But even 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 neighbours 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 and even family.

<sup>50</sup> 4 November 1950, 213 U.N.T.S. 221 [ECHR].

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 words “democracy” nor “human rights”—but a thunderous silence. 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<sup>51</sup> and Charles Maier<sup>52</sup> among others have demonstrated).

The European double helix has from its inception been the Commission and Council—an international (supposedly) apolitical 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 from the scrutiny of any parliament, European or national. ‘Democracy’ was simply not part of the original vision of European integration.<sup>53</sup>

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 the Committee of Permanent Representatives), 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 and European integration inspired fear and caution among citizens (only natural in such a radical transformation of European politics), the European Parliament did not feel like the place citizens could go to express those fears and concerns?

## V. LAW AND THE ‘RULE OF LAW’

The horrors of World War II, but also of the six years leading up 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 the *Kristallnacht* 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 was striking was the exceptional nature of this episode. For the most part, degradation and dispossession were orderly, systematic, and followed a legal path. The exclusion of Jews from public life was effected by the infamous *Nuremberg Laws* of 1935 which contained elaborate legal definitions and mechanisms. The disposal of Jewish property followed a similar path

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<sup>51</sup> Milward, *supra* note 2.

<sup>52</sup> Charles S. Maier & Gunter Bischof, eds., *The Marshall Plan and Germany: West German Development within the Framework of the European Recovery Program* (New York: Berg, 1991).

<sup>53</sup> Featherstone, *supra* note 31 at 150; Jacques Delors as quoted in Vernon Bognador, “Futility of a House with No Windows” *The Independent* (26 July 1993), online: <http://www.independent.co.uk/voices/futility-of-a-house-with-no-windows-1487252.html>.

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 legalised and bureaucratised discrimination, humiliation and death is captured by a marvellous book—*One Life* by Tom Lampert,<sup>54</sup> which presents some episodes captured through extrapolation from official files—and the strength of which lies in the very absence of blood and gore. In effect, the process was achieved through, and with full respect for, the ‘rule of law’.<sup>55</sup>

It is this reality which, already in the context of the Nuremberg Trials, provoked a conceptual reassessment. Since the ‘rule of law’ was considered 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 formalistic, entirely positivistic (and 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’.<sup>56</sup>

We may return now to the analysis of the *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 legalisation of a transnational regime, far exceeding the already innovation of the *ECHR*. It involves institutions of governance, of transnational administration, and of adjudication and enforcement. The political project of European integration was to be realised by an economic program (Coal and Steel Community, European Economic Community) effected 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 (“Court”) 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.<sup>57</sup>

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’

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<sup>54</sup> Tom Lampert, *One Life* (London: Harcourt, 2004).

<sup>55</sup> See also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994) at 21, 24.

<sup>56</sup> Most famously, Jürgen Habermas, “Paradigms of Law” in Michel Rosenfeld & Andrew Arato, eds., *Habermas on Law and Democracy: Critical Exchanges* (Berkeley and Los Angeles: University of California Press, 1998) 13; Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996); Jürgen Habermas, *Postnational Constellation: Political Essays* by Max Pensky (Cambridge: MIT Press, 2001).

<sup>57</sup> See Robert Lecourt, *L’Europe des juges*, 3rd ed. (Brussels: Bruylant, 2008).

and provides stability and continuity to any *acquis* even in periods of political instability and wavering commitment. Famously, once the constitutional revolution was effected through the introduction of direct effect, transnational legality harnessed individuals, pursuing their personal interests as a powerful agent of compliance by Member States with their Treaty obligations.<sup>58</sup>

But, inevitably, it also meant an account of the principle of the ‘rule of law’ which was old-school—formalist, self-referential, and self-legitimizing. Why should I obey? Either, because it is ‘the law,’ or because it is in the service of the self-legitimizing ‘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’.<sup>59</sup>

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 characterisation (and I assume it will be contested), interesting implications follow in understanding the relationship between law and politics in the narrative of European integration.<sup>60</sup>

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

- In the face of political stagnation and stasis in the late 1960s and a lack of ‘political will’ (a popular if meaningless phrase), the Court steps in and compensates through its remarkable constitutionalising jurisprudence, virtually salvaging European integration;<sup>61</sup>
- In the face of a growing democratic illegitimacy, 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;<sup>62</sup> and

<sup>58</sup> See “Direct Effect and National Remedies” in T.C. Hartley, *The Foundations of European Union Law*, 7th ed. (Oxford: Oxford University Press, 2010), c. 7; Anne-Marie Burley & Walter Mattli, “Europe Before the Court: A Political Theory of Legal Integration” (1993) 47 *International Organization* 41 at 60 *et seq.*

<sup>59</sup> J.H.H. Weiler, “The Transformation of Europe” (1991) 100 *Yale L.J.* 2403 at 2410 [Weiler, “Transformation”].

<sup>60</sup> Burley & Mattli, *supra* note 58 at 60 *et seq.*; Karen J. Alter, *The European Court’s Political Power: Selected Essays* (Oxford: Oxford University Press, 2009).

<sup>61</sup> Joxerramón Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Clarendon Press, 1993) at 101; Jean-Victor Louis, “The Rule of Law” in Martin Westlake, ed., *The European Union beyond Amsterdam: New Concepts of European Integration* (London: Routledge, 1998) 89; Julio A. Baquero Cruz, “Disintegration of the Law of Integration in the External Economic Relations of the European Community” (1997) 3 *Colum. J. Eur. L.* 257; Weiler, “Transformation”, *supra* note 59 at 2425.

<sup>62</sup> “Safeguarding Human Rights: the Role of the European Court of Justice” in G.F. Mancini, *Democracy & Constitutionalism in the European Union* (Oxford: Hart Publishing, 2000) 81 at 85; Joseph H.H. Weiler, “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” (1986) 61 *Wash. L. Rev.* 1103.

- In the face of the failure of the harmonisation 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.<sup>63</sup>

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 to cast the Court in this way, particularly in the present circumstance of political challenge. Tempting but unconvincing.

But, in light of my thesis on the ‘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 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 the current discontentment.<sup>64</sup>

I want to argue further that the Court has responsibilities which do not even fit under the rubric of ‘implicated but actively responsible’. But before I explain this thesis, I want to state clearly what I am not arguing: my critique is not that the Court has no ‘legitimacy’, or that it comprises some kind of *gouvernement des juges*;<sup>65</sup> 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, as I argued, that the ‘messianic’ project was not particularly concerned with “democracy” (or, at its inception, “human rights”). It sought its ‘legitimacy’ in the nobility of its cause.<sup>66</sup> Thus, importantly, this critique does not have as its purpose an argument 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.<sup>67</sup> But there has been, both

<sup>63</sup> Martin Shapiro, “The European Court of Justice” in Craig & de Búrca, *supra* note 28, 321 at 335; Miguel Poiares Maduro, *We, the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart Publishing, 1998).

<sup>64</sup> Philip Allott, “Preliminary rulings—another infant disease” (2000) 25 Eur. L. Rev. 538; Weiler, “Transformation”, *supra* note 59.

<sup>65</sup> For a review of the literature in this regard, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986) at 154 *et seq.*

<sup>66</sup> Pierre Pescatore, “The Doctrine of Direct Effect: An Infant Disease of Community Law” (1983) 8 Eur. L. Rev. 155 at 157.

<sup>67</sup> G. Federico Mancini, “The Making of a Constitution for Europe” (1989) 26 C.M.L. Rev. 595; Pierre Pescatore, “Jusqu’où le juge peut-il aller trop loin?” in Kirsten Thorup & Jens Rosenlov, eds., *Festschrift til Ole Due* (Copenhagen: GEC Gads Forlag, 1994) at 326, 327; Hjalte Rasmussen, “Towards a



by the Court itself and its observers, a myopic view which failed to explore some of the consequences and ramifications of the constitutional jurisprudence.<sup>68</sup> There has been a refusal to see the way in which the essential legal order of constitutional jurisprudence is part and parcel of the ‘political’ and ‘democratic legitimacy’ crisis. Very often one has the impression that though the ‘political’ (in the sense of institutions) is well-grasped in relation to 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 the ‘legitimacy’ crisis?

Our starting point can be the fountainhead of this part of the constitutional jurisprudence, *Van Gend en Loos*.<sup>69</sup> In arguing for the concept of a new legal order, the Court reasoned in the following two famous passages as follows:<sup>70</sup>

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.*

The problem is that this ‘cooperation’ was extremely weak. This is, in truth, a serious dumbing down of ‘democracy’ and its meaning by the Court. At that 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 the Commission and Council would complete their bargaining ahead of such advice which thus became *pro forma*. But can that level of democratic representation and accountability, *seen through the lens 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

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Normative Theory of Interpretation of Community Law” [1992] Chicago Legal F. 135 at 137; Constantinos N. Kakouris, “La Cour de Justice des Communautés européennes comme Cour Constitutionnelle: trois observations” in Ole Due, Marcus Lutter & Jürgen Schwartze, eds., *Festschrift für Ulrich Everling* (Baden-Baden: Nomos, 1995) 629 at 635.

<sup>68</sup> In this regard, see Rasmussen, *supra* note 65.

<sup>69</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen* C-26/62 [1963] E.C.R. I-1.

<sup>70</sup> *Ibid.* at 12 [emphasis added]. Note that the second passage precedes the first passage in the actual judgment.

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’s input 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.<sup>71</sup> 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.<sup>72</sup> 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 which was so trenchantly and caustically denounced? It is precisely on these occasions, I argued, that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep ‘democratic deficit’ which he described so unflinchingly and which according to him could only be cured by the creation of 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”,<sup>73</sup> and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If democracy is what one cares about most, could one unambiguously consider much of the Community’s 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 unsailable interpretation but an outcome which underpins, supports, and ‘legitimizes’ 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 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 internalises, especially public authorities, obedience to the law rather than 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 ones, of their own courts.

It is by this very measure that international regimes are so often found wanting, and why we cannot quite in the same way speak about the ‘rule of international law’. All too frequently, when a state is faced with an uncomfortable international norm or decision of an international tribunal, it finds ways to evade them.

<sup>71</sup> G. Federico Mancini, “Europe: The Case for Statehood” (1998) 4 Eur. L.J. 29 [Mancini, “The Case for Statehood”]. See also J.H.H. Weiler, “Europe: The Case Against the Case for Statehood” (1998) 4 Eur. L.J. 43.

<sup>72</sup> Weiler, *ibid.*

<sup>73</sup> Mancini, “The Case for Statehood”, *supra* note 71 at 40 [footnote numbers omitted].

Statistically, as we know, the preliminary reference procedure is, overwhelmingly, a device for judicial review of Member States' compliance with their obligations under the Treaties.<sup>74</sup> 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.<sup>75</sup> It has been called the "private-Attorney-General Model".<sup>76</sup> And second, it deploys national courts.<sup>77</sup> 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.<sup>78</sup> The gap between the 'rule of law' and the 'rule of international law' is narrowed, even closed.<sup>79</sup>

However, it is precisely in this context that we can see the problematic nature of the solution. 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 artefact of the principle of the 'rule of law' in the thin political space constituted by the Union places the individual at odds with his or her thicker national political space. This is how it should be legally. This is what creates the most effective drive for compliance. But this is why it also contributes to the national social and political turn against the Union.<sup>80</sup>

The argument about the 'rule of law' I am trying to make is that formalistic and positivistic Kelsenian models are no longer accepted as representing a meaningful and normatively acceptable form of the 'rule of law', if they are not respectful of two conditions—rootedness in a democratic process of law-making, and being respectful of fundamental human rights. The Court accepted the 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

<sup>74</sup> Robert 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 Boulois* (Paris: Dalloz, 1991) at 349 [Lecourt, *L'Europe et le droit*]; Henry G. Schermers et al., eds., *Article 177 EEC: Experiences and Problems* (Amsterdam: North-Holland, 1987); Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010); Thomas de La Mare, "Article 177 in Social and Political Context" in Craig & de Búrca, *supra* note 28, 215.

<sup>75</sup> Pescatore, *supra* note 66.

<sup>76</sup> J.H.H. Weiler, "Cain and Abel—Convergence and Divergence in International Trade Law" in J.H.H. Weiler, ed., *The EU, The WTO and The NAFTA: Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000) 1.

<sup>77</sup> Fernand Grevisse & Jean-Claude Bonichot, "Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les Etats membres" in Lecourt, *L'Europe et le droit*, *supra* note 74 at 297.

<sup>78</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) especially cc. 3, 10; Mark L. Jones, "The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System" (1984) 17 *Cornell Int'l L.J.* 1.

<sup>79</sup> Gerhard Bebr, "Court of Justice: Judicial Protection and the Rule of Law" in Deirdre Curtin & Ton Heukels, eds., *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, vol. 2 (Dordrecht: Martinus Nijhoff, 1994) 303 at 305; Weiler, "Transformation", *supra* note 59 at 2420 *et seq.*

<sup>80</sup> Allott, *supra* note 64.

no hint of that proposition in the Treaties. Indeed, when the Court decided its first cases the terms “human rights” or “fundamental rights” were nowhere to be found in the Treaties. There has never been, however, a similar jurisprudence as regards the decision-making processes of the Union. In that respect the Court is complicit in the status quo.

## VI. ‘POLITICAL MESSIANISM’ AND THE COLLAPSE OF ‘LEGITIMACY’

The ‘political messianic’ was offered not only for the sake of conceptual clarification but also as an explanation of the formidable past success of European integration in mobilising support. They produced a culture of praxis, achievement, and 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 mobilising 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 mobilisation 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 the seeds of its own collapse. At one level, the collapse is inevitable, part of the very phenomenology of the ‘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 mobilisation and legitimation, but actual rancour.

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 U.S. are very different from the dreams which preceded them and their like. Individually, this is the story of many a courtship and love affair. The honeymoon is always better than the reality of marriage. 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 Schuman’s dream and the 154,183 very real words of the (defunct) *European Constitution* now reinvented in the *Treaty of Lisbon*.

But in the case of Europe, there are additional contingent factors to the collapse of the messianic narrative as a mobilising and legitimising factor. At one level Europe is a victim of its own success. The passage of time coupled with the consolidation of peace, the internalisation of the alternative interstate discourse which Europe presented, has been so successful that to new generations of Europeans, both the pragmatic and idealist appeal of Schuman’s dream seem simply incomprehensible. The reality against which their appeal was so powerful—the age-old enmity between France and Germany and all that—is no longer a living memory, a live civilisational 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 centre of political attention, has contributed to the emergence of the self-centred individuals. Social mobilisation in Europe is at strongest when the direct interest of the individual are 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 for the loss of mobilising force of Schuman's dream is in the fact that what it offers either 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 thus, when failure hits as in the Euro crisis, when the *panem* is gone, all sources of 'legitimacy' suddenly, simultaneously collapse.

The precariousness of the 'rule of law' suddenly itself becomes evident. When the law only has its formal status as the central artefact of its compliance pull, it becomes not only a weak source of 'legitimation' but even a catalyst of 'delegitimation'. It is not surprising that one hears talk, with great equanimity, of solutions to the problem which would, on their face, violate European law.

This collapse comes at an inopportune moment, at the very moment when Europe of the Union needs all its legitimacy resources. The problems are European and the solution has to be at the European level. But for that solution to be perceived as legitimate, for the next phase in European integration not to be driven by resentful fear, the architects will not be able to rely, sadly, on the decisional process of the Union itself. They will have to dip heavily into the political structure and decisional process of its Member States. It will be national parliaments, national judiciaries, national media and, yes, national governments who will have to lend their 'legitimacy' to a solution which inevitably will involve yet a higher degree of integration. It will be an entirely European phenomenon at what will have to be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of 'legitimacy' in the integration project will be affirmed yet again.