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Editorial

60 Years since the First European Community – Reflections on Political Messianism

I

The European construct has played a decisive role in the history of the last 60 years. It has created the framework for post-war reconstruction and has ingeniously provided the inspiration and mechanisms for a historical reconciliation between nations which hitherto had gone to war with each other – the horrors of which surpass even the worst of today’s excesses – in every generation for the previous two centuries. This cannot but give inspiration and a sliver of hope in the face of our own intractable conflicts. The European Coal and Steel Community, the 60th Anniversary of which we mark this year, incorporated the Schuman Declaration and combined peace and prosperity in its blueprint, whereby peace was to breed prosperity and prosperity was to consolidate peace. It has all worked out splendidly – revisionist history notwithstanding. Europe has also been a catalyst (not more) – at times the ‘prize’ – for the achievement and subsequent consolidation of democracy, first in Greece, Spain and Portugal, and later across Eastern Europe.

It is against this most consequential background that we must assess the current circumstance of Europe. It is at a nadir which one cannot remember for many decades and which, various brave or pompous or self-serving statements notwithstanding, the Treaty of Lisbon is not about to redress.

Let me mention what in my view are the three most pressing and profound manifestations of the current weakness, some would say crisis, of Europe.

1. Democracy, or rather the partial absence of which, continues to beset the Europe of 27. 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 at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practised with different modalities in the various Member States. Even the basic condition of Representative Democracy that at election time the citizens ‘... can throw the scoundrels out’ – that is, replace the Government – does not operate in Europe. The form of European Governance, indeed 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, political accountability of Europe is surprisingly weak. In European governance, who has ever paid a real price for failure (rather than misconduct)?

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 programmes. The political colour of the European Parliament hardly gets translated into the legislative and administrative output of the Union. The Political Deficit, to use the felicitous phrase of Renaud Dehousse, is at the core of the Democracy Deficit. The Commission, by necessity, cannot be 'partisan', neither can the Council, by virtue of the haphazard political nature of its composition. So where does that leave us? Democracy without Politics? Is that not an oxymoron? Thus the two most primordial norms of democracy, the principle of accountability and the principle of representation are compromised in the actual practices of the Union.

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

2. The second weakness is a manifestation of an equally persistent and at times shameful 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. It is only our propensity for amnesia which enables us to avoid this problem – to look in our collective mirror without shame. Consider the evidence. In the 1990s, in the heart of Europe, not even 500 km 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 in The Hague) of a non-Christian religious minority. When finally the endless talking came to an end and the resolve was found to prevent the Bosnian genocide from repeating itself in Kosovo, Europe discovered that it had no capacity and, 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. The numbers tell the sad story. Each of the European states participating in the action to prevent a Kosovar humanitarian disaster executed at most several hundred aerial sorties. The Americans executed in excess of ten thousand.

Kosovo represents, in my eyes, a deeper failure. I refer to the Srebrenica incident where Dutch soldiers within reach, and with full knowledge of the worst atrocity

of that war, did not intervene to put a stop to it. Make no mistake: these could have been Italian or British soldiers or soldiers from any other of our Member States. And make no second mistake: these immobile soldiers were, like all of us, firm believers in human rights, solidarity and all the other values we profess from morning to evening. Their values were just fine. It is their virtue, our virtue, which was lacking. 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 dying for, is worth killing for. They are 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 shown up in their embarrassing poverty. Not only was it the expected absenteeism from the Libyan crisis management of the European Presidents (we now have two, no less!) and its 'Foreign Minister' replaced by the usual Member State leaders – Merkel, Sarkozy and Cameron (with an embarrassing, if understandable, reluctance to involve the Italian government; Spain has long disappeared as a serious international player) – but even these leaders were unable to find an accord and the world was treated to a divided vote among the pillars of European integration within the Security Council. I recommend placing a bet with some London bookie on the chances of Germany gaining a seat on the Security Council. A penny might win you a million.

3. The third and final manifestation of the current sad European circumstance is the evidence of 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 and 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 with political elections to national parliaments where the numbers are considerably higher. 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 gains, the greater popular indifference to it – and this is the presumed *vox populi*.

No less worrying is a seemingly contagious spread of 'Anti-Europeanism' in national politics. What was once an 'English disease' seems to have taken root in several other Member States where political capital is to be made among non-fringe parties by anti-European advocacy. Here is another case of amnesia. 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, yes, the *Vox Populi*, albeit not speaking through, but instead giving a slap in the face to, the European Institutions.

II

I want to offer some reflections on these three manifestations of this European circumstance. But first, some words of caution. There are many factors which explain complex political and social phenomena of the type I have described above. In my reflection I will not be offering ‘the explanation’ since, indeed, there is no single explanation, but rather one factor which to my mind has not received sufficient attention, namely political and institutional culture, and especially what is, in my view, the abiding effect of the early political culture of the Union. I want to identify, in particular, two signal early features of that political culture.

In analysing 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). The legitimacy of the Union more generally and the Commission more specifically, even if suffering from deficiencies in the democratic process, are said to rest on the results achieved – in the economic, social and, ultimately, political realms. The idea harkens back to the most classic functionalist and neo-functionalist theories – ‘James, please clear up that Spillover. ...’

But there is a third type of legitimation which, in my view, played for a long time a much larger role than is currently acknowledged. We may call this destiny legitimation, or mission legitimation or, more colourfully, 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. In messianic visions the End always trumps the Means. Mark Mazower, in his brilliant history and historiography of 20th-century Europe (*Dark Continent – Europe’s Twentieth Century*, 1998), 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 a shift to process legitimacy, which then retreated back into new forms of political messianism in Fascism and Communism. As it oscillated back after World War II it would seem that an interesting choice was made, 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 and empire abandoned and even ridiculed, and messianic notions of the state losing all appeal. And yet, their common venture, European Integration, was in fact a political messianic venture *par excellence*.

The hallmarks are easily detected as we would expect in its constitutive document, the Schuman Declaration. 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 rhetoric speaks for itself:

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 civilisation 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 noble, 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.

It is a compelling vision that has animated generations of European idealists, where the Ever Closer Union Among the People of Europe, with peace and prosperity an icing on the cake, constitutes the beckoning Promised Land. It is this compelling vision 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. They had to become Members of the European Convention of Human Rights, but not the Union itself. They had to prove their democratic credentials, but not the Union itself. The difficult path to (partial) democracy is not accidental, if we examine the Declaration with an eye, this time, to what is not to be found in its magisterial narrative.

In its original and unedited version it is quite elaborate in operational detail. But you will find neither the word democracy, nor human rights. It's a Let's-Just-Do-It type of programme animated by great idealism (and a godly measure of good old State Interest, as a whole generation of historians, such as Alan Milward and Charles Maier among others, has 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.

Shocking? 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 Members 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 like the place that citizens would go to express those fears and concerns.

In the face of all this it seems to me rather plausible that a huge part of the legitimating and mobilizing force of Europe derived from its Messianic vision for, after all, results and outcomes would take years and even decades to materialize and operate as legitimating agents.

But that very fact must be part of the explanation of the decline in European legitimacy and mobilizing pull which is so obvious in the current circumstance. It is part of the phenomenology of political Messianism. It always collapses – in part because of its success. The European construct is decidedly a victim of its spectacular success in the realms of prosperity and peace where the Promised Land has already been entered. Just as Paradise becomes such only when it is Lost, it is the Promise, that which one does not have, which makes the Land alluring. And once the Land has been entered, reality never matches the dream. The emblematic manifestation of this is the difference between the 868 inspiring words of the Schuman dream and the 154,183 very real words of the (defunct) European Constitution. 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.

III

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 to be ratified in the French Parliament in May 1954 and the project was abandoned.

My contention is that this 'childhood' trauma has had profound effects, not just material but principally political and cultural. It became part of European faith that defence, 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. It has bred amazing pathologies, not least wasteful replications of the defence 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. 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 Defence and Security, etc. etc.

Worst of all, it developed a whole new rationalization – the Civilian Power – in a laughable 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.

IV

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 culture.

In this issue

We begin this issue with a symposium, curated (!) and introduced by Nehal Bhuta, a member of the *EJIL* Scientific Advisory Board, presenting and then commenting on an article by Jeremy Waldron 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' Four commentators, Alexander Somek, Thomas Poole, David Dyzenhaus and Samantha Besson, engage in a discussion on Jeremy Waldron's main claim which he develops further in his response: that the issue of applicability of the Rule of Law in the sphere of international law must be assessed in relation to two correlated propositions (1) the 'true' subjects of international law and beneficiaries of the Rule of Law are individuals, whereas (2) states must be considered as agencies of the international legal system. Both Waldron and some of the distinguished commentators in this symposium might not be on the reading list of many of our readers. The renewed interest by general legal philosophy in matters international and in international law is to be welcomed and *EJIL* is happy to be at the forefront.

We are always open to suggestions from our readers and authors who would like to propose interesting symposia and serve as 'curators'.

In our occasional series, *The European Tradition in International Law*, it is the heritage of the late French international lawyer, René-Jean Dupuy, that is analysed. Pierre-Marie Dupuy (a founder of *EJIL*) opens with a vibrant portrait of his father's intellectual legacy in counterpoint with that of another giant of international law, his friend Wolfgang Friedmann. Alix Toublanc, Evelyne Lagrange and Julien Cantegreil,

representing the French new international scholarship, then explore René-Jean's Dupuy's contribution to the shaping of contemporary international law and an understanding of its challenges.

In this issue we feature one central article: Steven Ratner's important piece concerning the International Committee of the Red Cross' strategies to foster compliance with the laws of war. It is part of a new interest in, and approach to, the question of compliance, an instance of which in the field of human rights we noted in an article by Ryan Goodman some time ago. Ratner's article repays careful study.

In this issue's *EJIL: Debate!* Susan Marks and Steven Wheatley return to the challenges posed by the ideal of democratic legitimacy as applied to contemporary global governance through international law. Jean d'Aspremont, in his reply to Susan Marks, cannot but reassert the troubled and troubling democratic credentials of international law.

Take note of the Review Essay by Michael Waibel, reviewing six different books which have as their common objective the demystification of treaty interpretation: Carlos Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms*; Richard Gardiner, *Treaty Interpretation*; Robert Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public*; Ulf Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*; and Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*.

Our hope is to privilege this form of Review Essay covering different books (in different languages!) and encourage interested reviewers to write to our Book Review Editor to discuss future such projects.

Impressions – Karl Doehring RIP

Karl Doehring, the distinguished German international lawyer, passed away on 24 March in Heidelberg. I got to know him years ago, at the beginning of my career, when I spent a semester as a Humboldt Fellow at the Max Planck in Heidelberg. It was an interesting experience. The highlight of the week was the famous *Referentenbesprechung* which confirmed, in part at least, some of our fast-held caricatures of Germany. It was impressively, enviably, oh so serious. That's what academic discourse should be, week in week out. It was also impressively, laughably, hierarchical. The order of intervention was as rigid as an invitation list to a ball in the court of Louis XIV. I was young, and worse, foreign and, worse still with poor German – the lowest in the pecking order. It was a bit familiar – as the fifth child among six, one is trained to fight for one's place at the table. You would think that I would not even be a blip on the Doehring radar. Quite the opposite: he took a surprising interest in me and we had many (a combative) conversation. He seemed to like sparring with me. It was flattering. He took me seriously. He was genuinely interested in what I had to say. I was to learn that throughout his academic career he took a similar interest in younger scholars. He was very conservative – which required courage in the politically correct

milieu of international lawyers. I respected him for that too. I was fascinated by his military career during World War II. He talked about it openly and naturally. He had nothing to hide.

It turns out that in this issue we may be publishing the last thing that Karl Doehring wrote. In our book review section we are starting an occasional new rubric, *Impressions*. With *Impressions*, as the name indicates, we wish to provide a forum for a more personal, historical-contextual approach to book reviewing. We have asked some of our older, possibly wiser, scholars of public international law to revisit a book which very much influenced their thinking, a book that indeed made a lasting impression on them. Rather than presenting a critical assessment of the book, our reviewers will be asked to offer personal reflections on the impact a book has had on their own thinking as well as its past and continued relevance for public international law scholarship.

Karl Doehring opens this series writing on Georg Dahm's *Völkerrecht*. Dahm's book is everything that Doehring says about it, which goes to show that even a disgusting human being, as Dahm turned out to be during the Nazi period, can produce a first-class book. History is full of such. But Karl Doehring (and his family) who faced the same temptations and seductions which Dahm faced, and resisted them, is proof that even in the most difficult of times, one can acquit oneself with honour and dignity.

Roaming Charges

If you are holding *EJIL* in your hands, you will not be able to miss *Roaming Charges: Berlin*. After all, when is the last time you found two full-size colour photographs in a learned journal? *Roaming Charges*, like the poem on our *Last Page*, is to be a new feature of *EJIL* aimed at enhancing that 'book experience' – a moment of reflection as well as aesthetic pleasure disconnected from any specific research interest and the usual cerebral activity of reading a learned article. It will feature different locales or scenes from around the world, which, in their way, have something to say – without words – about our present condition. 'Roaming', 'Charges', and those irritating 'Roaming Charges' – the title of this feature was chosen because of the multiple and at times conflicting meanings, feelings and associations the words, jointly and severally, evoke, and which we hope to capture in our choice of photographs. Take a moment – enjoy, reflect. If you are online, pause before the next click.

The Last Page

We conclude with a poem, *Midas*, by Laura Coyne.

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