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Editors

The Authority of EU Law

Do We Still Believe in It?

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Foreword by Pavel Telička*

Let me offer my warmest congratulations for this special anniversary. The Academy of European Law has been doing an invaluable job for 25 years, and it is a privilege for me, as Vice-President of the European Parliament responsible for ERA, to say that we highly honour its work. Personally, I am witnessing that work every day and I hope that we will be able to intensify this cooperation interaction.

On this special anniversary, I would like to spread some optimism. Two years ago we could read, listen and even debate the gloomiest scenarios for the EU and the European integration. It is not that long ago that, while facing national elections in some of the Member States, we were concerned that the EU could be gradually falling apart, or face what I call a "crawling disintegration". And of course we still face tremendous challenges. Take, for example, the discussion on the rule of law. We all know that the rule of law is the bedrock of our European democracies and that in some of our Member States that very principle is under threat. Let me just say that I believe the EU needs to take a particularly firm stance on this. We cannot allow to back away from the very principles we stand for. And it is also one of the areas where the expertise of ERA can be of real value added for policymakers across Europe.

But let's turn the page to today. Despite all those gloomy predictions, the EU is still around. The elections in a number of Member States give us reason for optimism. In France, the Netherlands or Germany, pro-European forces won the 2017 elections, while the extremes did not perform as well as many would have expected. We no longer use the word "crisis" in every second or third sentence. The worst scenarios have not materialised. Instead, we see an ambitious agenda on reforming the EU. We see progress on issues such as migration, the Digital Single Market or defence policies. Things are moving forward; they are evolving. And we finally have politicians who have the courage to come up with concrete ideas on where and how the EU should move forward. It will not be easy. We need to have political will. We will see national interests at stake and protectionism. But I believe that we will manage, and I think that we will see progress in advancing the regulatory environment. We have no other option than to deliver on some of the challenges where the

* Parliament's representative on ERA's Governing Board. This Foreword is based on Pavel Telička's opening speech at ERA's jubilee congress in Trier, 19 October 2017.

public does expect delivery. And that is where new legislation will come into play. We need to regulate better than we have done so far. We need to know in advance what implications legislation will have. We need to make sure that it really is better regulation. And of course we need to make sure that legislation is applied consistently across Europe. This is another important field where ERA will be of great significance.

Last year, ERA turned 25. We all know that when you are 25, life is far from over. It is the time when you are dynamic, when you have strength, you already have knowledge, you are gaining more experience and you also have the drive. And this is what I would like to wish ERA going into the next 25 years. I am looking forward to our mutual interaction but also further developing personal relationships.

Vice President Pavel Telička
European Parliament
Strasbourg/Brussels

Preface*

On 22 June 1992, three Members of the European Parliament—Horst Langes, Willi Rothley and James Janssen van Raay—the Minister of Justice of Rhineland-Palatinate Peter Caesar, the Lord Mayor of the City of Trier Helmut Schröer and the First Councillor of the Luxembourg Ministry of Justice Charles Elsen signed the document establishing the Foundation *Academy of European Law* (ERA) in Trier. They thus laid the foundation stone for a project which the European Parliament had repeatedly called to be implemented since the late 1980s. With the entry into force of the Single European Act on 1 July 1987 and the extensive legislative programme operated by the Delors Commission to complete the Internal Market by the end of 1992, the importance of European law for practitioners in the legal profession or the judiciary and in business and administration had become ever more obvious.

It was therefore not surprising that the European Court of Justice, led by its late President Ole Due, was one of the first and most enduring supporters of the ERA project. In this sense, Ole Due was no less a founding father of ERA than Jacques Santer, then Prime Minister of the Grand Duchy of Luxembourg, whose country was the first and for a long time only EU Member State to participate in the establishment of ERA, and Peter Schmidhuber, then Member of the European Commission.

Three of these founding fathers took part in the Jubilee Congress of 19–20 October 2017 celebrating the 25th anniversary of ERA, the updated contributions to which are collected in this volume. Our heartfelt thanks go out to them—Jacques Santer, the President of our Board of Trustees; his then collaborator and later Director General of the Council of the EU Charles Elsen; and Horst Langes, Member of the European Parliament from Trier. Peter Caesar and Ole Due passed away a long time ago, but their successors Herbert Mertin and Koen Lenaerts, as well as Trier's Lord Mayor Wolfram Leibe, testified to the continuing solidarity of their institutions with ERA through their presence at the congress and with their ongoing support.

In the meantime, the Academy has grown in every respect, not least as a foundation—from one Member State in 1992 to twenty-seven in October 2017, and since,

* The text largely corresponds to the welcome speech addressed by Wolfgang Heusel to the participants of the Jubilee Congress on 19 October 2017.

to our great delight, Belgium joined last, the last missing country was Estonia, which has meanwhile also announced its accession. Represented on ERA's Governing Board, these Member States determine ERA's development and position. A key role was played by the German state of Rhineland-Palatinate, which provided generous and sustainable support whenever this was needed. We would like to express our profound thanks to all of them, the old founders and the present patrons, for whatever they have contributed to the development of our Academy.

It cannot be denied that there were no women among the founding fathers; a reason may have been an underdeveloped consideration for gender policy at that time. Very soon, however, there were great women who had significant impact on the positive development of ERA. We would like to pay tribute to three of them: first Ana Palacio, former chairwoman of the European Parliament's Legal Affairs Committee, chairwoman of the ERA Executive Board and later Spanish Foreign Minister; Diana Wallis, former Vice-President of the European Parliament, Member of ERA's Governing Board and until recently President of the European Law Institute; and Pauliine Koskelo, long-serving President of the Finnish Supreme Court, now judge of the European Court of Human Rights and chairwoman of our Board of Trustees. Diana Wallis and Pauliine Koskelo are among the authors of this commemorative publication.

When ERA was founded 25 years ago, the transformation of the European Communities into the European Union was just about to begin—the Maastricht Treaty only came into force on 1 November 1993. There were twelve Member States and little more than a Common Market policy. The fall of the Iron Curtain had occurred only a few years ago. Nevertheless, or precisely because of this, Europe was steeped in a great sense of optimism. And when we look back at the enormous progress the European Union has made since 1992, the staccato of reform treaties—Maastricht, Amsterdam, Nice, Lisbon as a replacement for the failed Constitutional Treaty; four enlargements from 12 to 28 Member States; the communitisation of judicial cooperation in civil and later even criminal matters; the common asylum policy; the introduction of the single currency; the Charter of Fundamental Rights; the institutional development with Parliament as a proper legislator, albeit with the Commission's continuing monopoly on initiatives, the increasing importance of the comitology procedure and a large number of agencies; and in addition, existential crises in the Schengen area and the Monetary Union with subsequent EU law and intergovernmental measures—it is difficult to keep track of all these breathtaking developments almost all of which have been reflected in EU law and kept ERA busy.

It is hardly surprising that the abundance of these developments has had an impact on compliance, on enforcement and hence on the authority of Union law. It is true that Walter Hallstein's early dictum of the EC as a "community of law" ("*Rechtsgemeinschaft*") continues to be present throughout the legal discourse, and primary law mentions the rule of law as one of the central values on which the Union is founded. Nevertheless, it is by no means certain that we have the same concept of the rule of law in all Member States, against which ever more frequently the principle of democracy is led into battle. And if lastly the perception has been

gaining ground that the Commission, as the "guardian" of Union law, is basing its enforcement policy increasingly on political criteria, of which the effectiveness of the law seems to be just one among many, then at least this perception does not strengthen the authority of Union law.

We have therefore decided to place this challenged authority at the heart of our Jubilee Congress and approached it from various angles. We started with horizontal questions: Professor Joseph Weiler discussed the concept, while President Koen Lenaerts dealt with the Court of Justice's responsibility for the authority of EU law. A panel discussion followed on how the emergence, transparency and quality of legislation affect the authority of the Union law thus created.

The authority of Union law is also occasionally challenged by national supreme or constitutional courts when they at least in principle avail themselves of the right to no longer apply Union law on their territory if according to them the law at stake is not covered by the sovereign rights transferred to the Union. This potential for conflict, which is the consequence of a logically non-solvable tension within a supranational Union of sovereign States, is not only discussed in academic circles but also influences supreme court practice and was the subject of the second panel discussion of the Congress. In this volume, the perspectives of the Danish *Højesteret*, the French *Conseil d'Etat*, the German *Bundesverfassungsgericht*, the highest UK judiciary and the European Court of Justice are presented.

On the second day, three parallel working sessions discussed the specific challenges to the authority of EU law in three special areas—Internal Market law in the context of the economic crisis, the law of Monetary Union in the context of the Euro crisis and the respect for the rule of law in times of attacks on judicial independence in and outside the EU. In the Internal Market, the reliability and enforcement of Union law is certainly a necessity for citizens and businesses, but also for the authority of the law itself. Monetary Union, on the other hand, is a prime example of an incomplete Union in which the shortcomings of the Union's regulatory approach exacerbate the crisis, hamper the enforcement of inadequate Union law and undermine its authority, and this alongside the similarly insufficient Schengen acquis, which is lacking a consistent migration and refugee law concept and hence another example of an incomplete Union. Finally, attacks on the rule of law put at risk a cornerstone of Union law itself.

The congress programme culminated in a panel discussion which asked about the connection between the legitimacy crisis of the European project and the authority of European Union law, and which examined the possible effect of different models for the Union's further development on this legitimacy: was Brexit, for example, just a special British problem or rather the expression of a general malaise caused by a too far-pushed integration ignoring the opinions and reservations of citizens? Is the "ever closer union" still the right model to follow or do different objectives need to be set?

The congress programme was developed with the support of a twelve-member preparatory committee of the ERA Board of Trustees, most of whom delivered their own contributions to the congress programme. In addition, ERA offered participants a unique exhibition of contemporary art with works of artists from 31 European

countries, an initiative of our long-serving board member Catherine Kessedjian. We would like to thank all participants, speakers, panellists and chairmen and all contributors to this publication once again for their selfless willingness to participate.

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Part I
The authority of European law

The authority of European law: Do we still believe in it?

Joseph H. H. Weiler

1 The concept of "authority"

It is to the credit of the prestigious Academy of European Law in Trier that it did not use the occasion of its 25th Anniversary to serve up the usual bland meal typical of these occasions, extoling yet again the wonders of European law, but instead provocatively called into question the Authority of European Law and invited a sober reflection of such. It would not have done so had there not been a pervasive feeling that indeed this authority is under stress.

The term "authority" in this context is hopelessly underspecified. There are, thus, no respectable social science metrics to gauge such and one is reduced to impressions, intuitions and sporadic markers. "Compliance Pull" by principal stakeholders is one such marker, and the most crucial stakeholder, the lynch pin of the EU legal order, would be domestic courts. The simple fact is that national governments of democratic States find it much easier to defy decisions of international tribunals such as the ICJ (think Iran hostages or Nicaragua) or the WTO Appellate Body (think Beef Hormones, Bananas, Internet Gambling) than it is to defy rulings of their very own courts. Faithful application by domestic courts of ECJ rulings is the best guarantee for their authority within the EU. Take that away and that authority is called into question with a cascading and contagious effect on other branches of government. Non-faithful compliance by domestic courts also has a potentially deleterious effect on the European Court itself, where the fear that its decisions might not be followed could introduce a 'jurist's prudence' affecting its very own decision making.

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The recent slew of defiant national courts, among them some of the most prestigious in the Union, is thus extremely worrying and probably more than any other indicator set the alarm bells ringing. It can be the *Panzer* style action of the German Constitutional Court in refusing to honor an arrest warrant from another Member State in defiance of the clear jurisprudence of the ECJ, or the much more elegant action of the Italian Constitutional Court in the *Taricco* case[1] though even there the iron fist was barely hidden within the velvet glove, to give but two recent examples. One does not need a full-scale and widespread rebellion to cause significant damage.

But compliance pull, important and crucial as it may be, sharp as it may be in the Schmittian sense, is not the only indicator of a shift, albeit subtle, in the perception of the authority of European Law. There is also an inchoate, ineffable hard to pin down dimension for which the marker might be "respect" rather than "compliance". The interesting stakeholders here are not just national courts but the broader interpretative community and even the public at large. The Law of Gravity of the law is the social and political gravitas which attach to its rule and role in society. When the statement "It's the Law!" no longer engenders the reverence and respect commensurate with its majesty as the bulwark of our civilization, then the rule of the law is undermined at its most foundational level. In the deepest sense the authority of the law depends on such.

In this respect too there are no hard social science indicators for such respect. But when the law maker itself shirks its rule by extra-Treaty devices because the Treaty itself would not allow such (as happened in the financial crisis) or when in the heroic attempts to avoid Brexit concessions were made (on free movement of workers) which no respectable lawyer would argue were consistent with the Treaty—we have markers for such expedient erosion in the gravitas of "The Law". The same has been true in the reactions of this Member State or that to the Migration saga or in the stretching of fiscal disciplines to give but two well-known examples.

And when one turns to public opinion notably as manifest in social media, these are no longer drips from a breached dyke but more like a torrent. It is of no help to brand that as manifestations of "populism". The problem with populism is that it is very popular. And when a phenomenon—disrespect of and towards EU law becomes popular, is no longer a phenomenon of the lunatic fringe but affects what have become mainstream parties in some cases in government, in other cases realistic contenders, see Austria, Italy, Poland, Hungary in the first group, and France, the Netherlands, Finland, Denmark in the second, one can both understand and justify the provocative choice of the Academy of European Law in Trier on its anniversary.

Last but not least is our own little puddle called academia. For decades and decades the academic literature on EU law in general and the European Court(s) more specifically was largely adulatory, the *Amen* Corner of Luxembourg in the Church of European Integration displaying both (well earned) respect and loyalty.

[1] Cases C-105/14 *Taricco and Others*, ECLI:EU:C:2015:555, and C-42/17, *M.A.S and MB (Taricco II)*, ECLI:EU:C:2017:936.

Where critique existed it was mostly of a technical nature and normative critique, when it existed, often took the form, endearingly, of critiquing the ECJ when it strayed from its own orthodoxies. And there are some spectacular examples of reactions to more robust critique which treated such as heresy. Why Hjalte Rasmussen was not invited back to teach at the College of Europe in Bruges remains a matter of controversy.

This is certainly no longer the case and has not been such for at least a decade or more. Even a cursory visit to the blogosphere attests to a different culture of commentary, yes, a whole lot less deferential and somewhat less respectful, where most decisions of note by the ECJ are subject to searching critical analysis and the dice are left to fall wherever they do.

2 Reasons for the current stress on the authority of EU law

What explains this stress, and I would not put it at more than this, on the authority of European Law? There is one principal reason and then a second ancillary one.

The principal reason is the dramatic decline in the enthusiasm for and at times commitment to, the European Union. Brexit, I am fairly sure, will remain an aberrational exception. Even the most Eurosceptic polities *de jour* Hungary, Poland, Italy, Austria and others have no appetite for leaving. They are too smart for that. But the degree to which there is a moral and social commitment to what the EU historically stood for, an engine of prosperity and civility and above all a community of shared values has taken a major hit in a large number of Member States. Make no light of this. Savigny himself quite early on alerted to the inextricable link between the cultural and moral identity of a polity and the integrity of its law.

The second explanation, ancillary, rests with the operation of the law itself, independent of the polity within which it is situated. In Europe, the central legal axis is the relationship between the European Court—principally through the ingenious mechanism of the Preliminary References and Rulings—and national jurisdictions. When this axis, this communicative channel comes under stress, there is, too, a risk to the authority of European Law.

3 Material welfare and the authority of EU law

Let me turn first, then, to an explanation to the declining sorts of the European Union in the eyes of its principal stakeholders, its very citizens, as the primary explanation in the decline in the authority of European Law.

The most common explanation endlessly given for the turn in the fortune of European integration in the eyes of its citizenry is material, indeed materialistic.

The economic crisis, the growing cleavage in prosperity between North and South and within Member States between rich and poor, all called into question (even if unjustly…) the ability of the Union, of the Single Market, of the Euro, to guarantee stability, growth and economic justice promised from the very inception of the process of European Integration.

From the Treaty of Rome:

ARTICLE 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN ECONOMIC COMMUNITY.

ARTICLE 2

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, *a continuous and balanced expansion*, *an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.* (Emphasis added).

This was the original primordial promise, interestingly, materialist, indeed, in passing, you will not find a word on democracy and human rights, let alone more transcendent human values.

Little have we learnt from history that material promise is a fickle basis on which to achieve a transformation of the soul, a loyalty to a vision greater than the difficulty of the moment.

Here is Moses offering his Article 2 to the Children of Israel after their travails in bondage, subjugation and horror (all males to be thrown into the Nile) not unlike the bondage suffered by Europe in the decades preceding the noble promise of Monnet and his associates:

> He swore to your fathers to give you, a land flowing with milk and honey … EX. XIII:5

And yet when material hardship strikes, the results are similar to contemporary reactions when GDP dips and unemployment rises:

> Then the whole congregation of the children of Israel complained against Moses and Aaron in the wilderness.[3] And the children of Israel said to them, "Oh, that we had died by the hand of the Lord in the land of Egypt, when we sat by the pots of meat *and* when we ate bread to the full! For you have brought us out into this wilderness to kill this whole assembly with hunger. (Ex. XVI:3).

Loyalty and solidarity built on material promise alone are precarious and contingent on fulfillment of that promise failure of which saw both the collapse of loyalty evident in the rapid growth of Euroscepticism and of solidarity evident in notorious statements such as that by the Dutch Chair of the Eurogroup referring to the European South and commenting

> [You] can't spend [your] money on liquor and women and then ask for help

or Merkel

> It is also about not being able to retire earlier in countries such as Greece, Spain, Portugal than in Germany, instead everyone should try a little bit to make the same efforts – that is

> important … We can't have a common currency where some get lots of vacation time and others very little… we cannot simply show solidarity and say these countries should simply continue as before… Yes Germany will help but Germany will only help when the others try. And that must be clear…

Not surprisingly the suggestion that southern Europeans are having a nice time on the beach while the Germans are working hard for their bailouts did not go down too well:

> "This is the purest colonialism," Portuguese trade union chief Manuel Carvalho da Silva said. He blasted Merkel for showing "no solidarity" and supporting a system where "the rich continue to live at the expense of the poorest countries in a disastrous system of exploitation".[2]

So much for material-based solidarity.

Be that as it may, when the European Construct has historically placed so much emphasis on Land of Milk and Honey promises, and has placed at the center the law of the market as the instrument to guarantee such prosperity, it should not surprise us that with the (temporary) collapse of prosperity, the authority of the law which was put in place to guarantee such should also take a knock.

4 Values and the authority of EU law

But Europe has not only been a Union of markets. It has also had a robust discourse of values. And it is usually the non-material, the spiritual, which help people see their way through material hardship without losing faith in the Promised Land and without betraying their values such as solidarity with others. And yet even beyond the widespread 'populist' surge in so many countries (I prefer to refer to such as the Revolt of the Masses, giving it the dignity of the association with Ortega y Gasset even if dissociating myself from the atavistic, xenophobic and illiberal manifestations) there has been a widespread souring with the European Construct.

Why has the 'value asset' of Europe turned out to be so fragile? Unable to counteract the stem which the materialist collapse brought about?

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[2] Statistics published by the Organisation for Economic Co-operation and Development (OECD)—a club of the richest 34 states looking at employment and economics figures—show that, in reality, Germans retire earlier than their southern European counterparts. The average "effective retirement age" shows that in 2009, German men retired when they were 61.8 years old, the same as Spaniards and slightly earlier than Greeks (61.9), but Portuguese stayed on until they were 67. Greek women, meanwhile, retire a few months earlier than their German counterparts: at 59.6 years compared to 60.5 years. But Spanish and Portuguese women still work longer, for another 3 years on average. Southerners also have a similar amount of holidays to those in Germany. According to German law, workers can have at least 20 holidays a year, but these vary from state to state and can go up to 30 days. Greek workers are also entitled to 20 days of vacation and once they have worked for more than 10 years, they get another 5 days on top. Portuguese workers go on holiday for 22 days and Spaniards for 21.

5 Two ostensibly conflicting sets of values

Let me start with Poland. When coming to Poland one sometimes gets the impression of visiting a State with two nations. The societal cleavage is painfully deep even to the outside observer such as myself. I have only witnessed similar emotional charge when in situations such as Catalonia, or Scotland, or Belgium. But in Poland we are not dealing with Catalans and Castilians, with Walloons and Flemings, with Scots and English. Yet here we are dealing with Poles and Poles. What divides the two Polish "nations" are values and emotions. What it means, or should mean to be Polish, what kind of country, as reflected in the values it privileges, should Poland be.

But now comes the crux. This is not an instance of Polish exceptionalism. It is a pan-European phenomenon, manifesting itself with different levels of intensity. Think of Brexit. The British, a proud nation, which (alongside Poland!) was the one European State which 'never surrendered' in WW II, and yet now finds itself split down the middle with a cleavage far deeper than the normal politics of Left and Right. The British, too, are divided by values and emotions regarding what it means, or should mean to be British. Make no mistake, what drove Brexit was not primarily an economic calculous but an identitarian one.

And then take a look at the fault lines that have ruptured in other European countries in a major way: Italy, and Austria, and Germany, and France to name but some of the most clamorous and visible instances. There are always local conditions, the day to day weather changes, but the overall climatic charts are very similar: an emotionally charged split about values and identity. The value crisis is European, not Polish, or British or Italian.

What are the European Values and where is the split?

The thesis I invite you to consider is simple enough. There are in fact two sets of values which underlie the crisis. One set, a very important one, an indispensable set, is the habitual often reiterated "holy trinity" of Democratic Governance, Human Rights and the Rule of Law. These values are reiterated again and again, as defining the common European value asset. They do, make no mistake.

But there is, I argue, a second set of values which are dear to the heart of Europeans, except that they have been not only depressed and repressed, but in some deep way, wrongly in my view, come to be seen as illegitimate, the unspeakable "unholy trinity". The second set consists of the following: Patriotism, the bedrock, as I shall argue, of healthy republican democracy; the celebration of uniqueness both individual and collective, which I shall argue below is but an expression of the fundamental value of human dignity; and the value of duty and responsibility, individual and collective, as the other side of our commitment to rights and entitlements. There are large segments of our European populations, which, while committed to democracy, human rights and the rule of law, hearken for a vindication of the second Trinity as well. And Europe has not merely disregarded these, but in a fatal historical misstep regarded them as contrary to the values of the Union.

The value crisis manifests itself, thus, in two interconnected ways: First the feeling of a 'value disenfranchisement' for those segments of our population which hold the second set dear, a disenfranchisement, they resent. In part we are witnessing, as mentioned above, a latter day, 'Revolt of the Masses' of which Ortega y Gasset wrote about a century ago. The second manifestation is far worse and destructive. It is the erroneous belief, increasingly widespread, that the two value trinities are oppositional, that they force a choice. The high tempers and ferocious emotions now splitting Poles is an expression of this oppositional concept of the two sets of values. And this is at the heart, the tragic feature, of the overall pan-European value crisis.

6 Democracy, human rights and the rule of law: An inextricable triad

Though we list Democratic Governance, Human Rights and the Rule of Law as three distinct values, I have used the metaphor of the Trinity advisedly. They are three but at the same time one. You cannot have one without the other and it is their unity which defines our post fascist and post Communist polities. Hitler was brought to power through democratic elections and until his death was hugely popular giving expression to the will of the vast majority of Germans. And I assure you that in the murder of six million Poles, Jewish Poles and Christian Poles in equal measure, the rule of law was scrupulously observed. The murderers were not acting on a whim, or in defiance of legal order, but executing such. And yet it was the most horrendous violation and disregard of human rights, in the modern annals of history. I could add heaps of other examples. We have come to reject a notion of democracy which simply gives expression to the will of the majority if that is not tempered with respect for fundamental rights of the minority and enforced by a judiciary constituted in accordance with the rule of law. A judiciary which is at the whim of either legislature or executive branch destroys not only its independence and hence credibility but also the principle of separation of powers fundamental for democratic governance. We reject a notion of Rule of Law, if that rule is not on the one hand an expression of democratic governance and at the same time able to oppose the majoritarian principle in protecting inviolable fundamental rights. If one compromises the rule of law in order better to give expression to majoritarian impulses, one is compromising democracy itself. To accept such should not be something imposed by Europe, something accepted as a price for membership in the Union.

I believe there is widespread commitment, in Europe and among Europeans to this Tritinity of values, the common value asset of the European Union.

7 Active citizenship, clientelism and the sense of rights and duties

What then of the other set of values? We need here to focus on Western Europe (the "Old" Europe) not because they are intrinsically more important, but because the value asset of the European Union were shaped by their experience.

To understand the story of the second set of values we have to go back in history and to three processes which begin after WW II and are reactions to such, processes which have progressed over the last six decades and which are now producing their sour grapes and are at the root of the value clash and value crisis in which Europe finds itself now.

The First Process. For reasons that are quite understandable, the very word "patriotism" became "unprintable" after the War notably in Western Europe. Fascist regimes (among others), by abusing the word and the concept, had "burned" it from collective consciousness. And in many ways this has been a positive thing. But we also pay a high price for having banished this word—and the sentiment it expresses—from our psycho-political vocabulary. Since patriotism also has a noble side: the discipline of love, the duty to take care of one's homeland and people, of accepting our civic responsibility toward the collective. In reality, true patriotism is the opposite of Fascism: "We do not belong to the State, it's the State that belongs to us." This kind of patriotism is an integral part, indeed an essential part of the republican form of democracy. And importantly, people yearn for it and feel abused and disenfranchised when any expression of patriotism is branded as illegitimate and in conflict with shared European values.

Today, we may call ourselves the Italian or French "Republic," but our democracies are no longer truly republican. There's the State, there's the government, and then there's "us".

We are like shareholders of an enterprise. If the directorate of the enterprise called "the Republic" does not produce political and material dividends, we change managers with a vote during a meeting of shareholders called "elections." If there is anything that does not work in our society, we go to the "directors"—as we do, for example, when our internet connection isn't working: "We paid (our taxes), and look at the terrible service they're giving us…" The State is always the one responsible. Never us. It's a clientelistic democracy that not only takes away our responsibility toward our society, toward our country, but also removes responsibility from our very human condition. There is nothing "Non European" in a healthy sense of patriotism; to acknowledge such is not only politically prudent because it has become self-evident that there is this wide spread yearning for such, but because of its inherent value and importance to healthy republican democracy. And yet the only time it is allowed is during international soccer competitions.

The second process which helps to explain what happened to Europe comes, once again, as a reaction to the War, and is paradoxical. We've accepted, as noted above, both at the national and international levels, a serious and irreversible obligation rooted in our Constitutions to protect the fundamental rights of individuals,

even against the political tyranny of the majority. At a more general level, our political-juridical vocabulary has become a discussion of rights. The rights of, say, an Italian citizen are protected by Italian courts, and, above all, by the Italian Constitutional Court. But also by the Court of Justice of the EU in Luxembourg, and—again—by the European Court of Human Rights in Strasbourg. It's enough to make your head spin. And this is true, blessedly so, throughout the Union. Just think about how common it has become, in the political discourse of today, to speak more and more about "rights." It's enormously important. One would and should never want to live in a country in which fundamental rights are not effectively defended and that cannot be done without a truly independent judiciary. For typically rights are posited against the whims of those who govern. But here too—as with the banishment of patriotism—we pay a dear price for our rights discourse excesses. Actually, we pay two prices.

First and foremost, the noble culture of rights does indeed put the individual at the center, but little by little, almost without realizing it, it turns him or her into a self-centered individual. Atomized and at times anti-social. It is never "what can I do for society, for the State, for the Union (!) but what are my entitlements from them". No where is this clearer in the original definition of European Citizenship:

1. Citizenship of the Union is hereby established.
   Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty *and shall be subject to the duties imposed thereby*. (Emphasis added)

Take out your magnifying glass and seek for those duties. It is the blueprint, inadvertent of course, to non-republican democracy, to democracy of rights with no duties and responsibilities—apart I suppose from not breaking the law or paying taxes.

And the second effect of this "culture of rights"—which is a framework all Europeans have in common—is a kind of flattening of political and cultural specificity, of one's own unique national identity. The much vaunted Constitutional Patriotism underlies our commonality as Europeans. It flattens our uniqueness as Italians and French, as Latvians and Poles. Yet Europe is defined as United in Diversity.

The notion of human dignity—the fact that we have all been created in the image of God—contains, at one and the same time, two facets. On the one hand, it means that we are all equal in our fundamental human dignity and worth: rich and poor, Italians and Germans, men and woman, citizens and foreigners. My essential dignity is compromised and violated when I am considered less worthy than someone else.

On the other hand, recognizing human dignity means accepting that each of us is an entire universe, distinct and different from any other person. Think of yourself: In the entire history of human existence there was never anyone who lived who was quite the same as you are. We are not birds in flock. Our essential dignity is equally compromised and violated when I am treated as fungible with anyone else even if