

3 ON MYTHS AND MIRACLES: THE EU AND ITS POSSIBLE ACCESSION TO THE ECHR

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3.1 INTRODUCTION

For the last 20 years or so, the European Union (hereinafter ‘EU’) has busily portrayed itself as an entity based on, and cherishing, human rights. Human rights form an integral part of many of the agreements concluded by the Union with third parties. Human rights also rank among the main criteria for admission, as the well-known Copenhagen criteria make clear. And the Court of Justice made worldwide waves a few years ago when it held that global anti-terrorism measures, regardless of their source, needed to live up to the human rights standards prevailing in the EU in order to be implemented in the EU.

Things were not always thus. The EU did not have much of an interest in human rights in its early days. It held as early as 1958 that the compatibility of EU law with national human rights guarantees was outside its remit, and only started a decade later, prompted by the German constitutional court, to pay some attention to human rights. By now, human rights are often mentioned in official documents, and the EU adopted a Charter on Fundamental Rights in 2001, and yet, the EU’s relationship with human rights has always been ambivalent: human rights are good for others and should be binding upon them, but the EU itself has been reluctant to be pinned down. Even the EU’s own Human Rights Charter was conceived, initially, as a non-binding instrument. In short, the EU’s relation with human rights has mostly been instrumental: the EU insists on human rights in its external relations – carrot and stick rolled into one – and makes sure that it keeps its hands free internally.

All this raises the question why the EU should accede to the European Convention on Human Rights (hereinafter ECHR), and what it hopes to achieve by doing so. The expectation is that building the EU on human rights will serve the integration process, and provide the EU with the legitimacy it might otherwise be seen to lack. After all, the Union is in a state of crisis, with, in particular, the financial situation taxing the goodwill of some member states, and the highly visible influx of workers and non-workers into other member states taxing the patience of the citizens of those member states. In other words, the

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EU needs something to hold it together; the earlier integrative stories (the EU as the guarantor of peace and stability; the EU as a common market project) no longer suffice and, not unimportantly, are unable to explain the eastward expansion of the EU. This expansion has its own political rationale, and while this rationale may be widely shared amongst policy elites, it may not sound all that convincing on the street level as the election results in member states such as Finland strongly seem to suggest, as well as Finland's and Holland's attempt to block the inclusion of Bulgaria and Romania into the Schengen system. In this chapter, I will first argue that the EU's emphasis on human rights is inspired by the need of having a story (and in particular a history) to rally around. Human rights are expected to provide the EU with legitimacy, and the story of human rights has become the focal point in succession to two earlier narrative myths. While no doubt a case can be made that the EU enjoys some legitimacy due to its output (many of us realize that we are better off as a result of the EU's existence and its policies), nonetheless output legitimacy alone is vulnerable to fluctuations, if only because output is necessarily mixed:¹ I may benefit from EU membership by being able to take pension rights along when I move from one member state to another, but I might not like to see my hard-earned tax money being used to bail out incompetent Greek or Irish financial sectors, especially not upon realizing that some individuals must have benefitted tremendously from the very processes that helped to cause the crises.

I will subsequently discuss the possible accession of the EU to the ECHR, and briefly sketch the relationship between the two as it has developed until now. This will help to strengthen the core argument of this paper, to which I will return later on: while accession of the EU to the ECHR will undoubtedly be a good thing, not too much should be expected from it. The European Court of Human Rights can be expected to carefully limit its involvement into EU affairs, and on the level of political theory, it seems highly implausible that a focus on human rights alone can legitimize a political enterprise, which otherwise suffers from a legitimacy deficit. Something more is needed than the mere subscription to a set of rights that, truth be told, will have fairly little effect on people's daily lives at any rate.

3.2 ON FOUNDATIONAL AND OTHER MYTHS

Famously, the Italian revolutionary Massimo D'Azeglio quipped, after Italy became a unitary state some 150 years ago, that now that Italy had been made, it was time to make

1 The distinction between input and output legitimacy is usefully elaborated by Scharpf, who suggests that an entity such as the EU needs to live by output legitimacy because it is structurally unable (lacking a *demos*) to generate input legitimacy, *i.e.* the legitimacy that stems from a sense of belonging. See F. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, Oxford. New York, 1999.

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Italians.² The message reveals a painful truth about political communities: they tend not to grow organically, but are based upon deliberate activities – they are ‘imagined communities’, in the classic term coined by the anthropologist Benedict Anderson.³ And while it may be true that the imagination is fired by something pre-communitarian,⁴ nonetheless there can be little doubt that political communities depend, for their identity and cohesion, to some extent on myths, stories, and ‘invented’ traditions.

The EU too has adopted a succession of myths in its attempts to create Europeans, in accordance with political circumstances and needs. While there is nothing wrong with doing so, this nonetheless suggests that the current myth, to the effect that the EU is a union based on enlightenment values of human rights and the like, should not lead to over-inflated expectations: political myths can change almost overnight.

3.2.1 *Bringing Peace to Europe*

The EU has absorbed the lesson that it needs a foundational myth from its early days onwards, and has repeatedly adjusted the stories that have helped justify its existence. The first of these stories owed much to World War II: the EU (then still the three European Communities) was set up to make war unthinkable, especially between France and Germany. This was a powerful story, aided as it was by the symbolism of leading cast members hailing from precisely the European territory that had been moving back and forth between the two contenders: Robert Schuman, a native of Alsace-Lorraine, symbolized the politics of the new Europe, back in the 1950s, and personified the new unity, and a similar symbolism could be read into the pivotal role played by a native of Belgium (Paul-Henri Spaak), itself a relatively young state.

In this story, there was no particular need for human rights. Admittedly, the German Constitution had seen fit to guarantee some basic rights, but that, clearly, was attributable to Germany’s recent history. Other than that, peace and stability would be its own guarantee. The message emanating from the Treaty of Rome was clear: economic prosperity will lead to peace and security, in line with the functionalist theory of political integration that had arisen during the war.

Besides, the world at large had already expressed pious hopes with respect to human rights in the form of the Universal Declaration of Human Rights, and it would be redundant for

2 Quoted, in Eric J. Hobsbawm, *Nations and Nationalism since 1780*, Cambridge University Press, 1990, p. 44.

3 See B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, rev. ed, Verso, London 1991.

4 See C. Calhoun, ‘Is it Time to be Post-national?’, in S. May, T. Modood & J. Squires (Eds.), *Ethnicity, Nationalism and Minority Rights*, Cambridge University Press, 2004, pp. 231-256.

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the EU to occupy itself with human rights seeing that this had become the province of the Council of Europe, under whose auspices an ambitious human rights instrument had just been concluded. It was possible, of course, that this European Convention on Human Rights also aimed to stimulate peace in Europe, and thus worked on the theory that peace would presuppose human rights, whereas the EU worked on the theory that economic cooperation, not human rights, would create peace. Either way though, there was no need for the EU to do anything with human rights, and no jurisdiction either, as the Court made clear in the early *Stork* case.⁵

The story of the EU as the harbinger of peace and stability, in the aftermath of World War II, was a powerful story, far more so, initially, than the idea that the European Convention with its emphasis on human rights may engender peace. The Convention had a hard time getting off the ground: it took years for some of the more important parties to ratify,⁶ and it took a long time for some of them to accept the possibility of individual petitions.⁷ The Strasbourg Court did not have all that much to do in its early years, and the Convention seemed to function more as a nice flourish, a sign to the world outside Europe that yes, we have learned some lessons from our very recent past and are now thinking of human rights, then that it was actually changing the hearts and minds of Europeans.

Moreover, it is probably not to be underestimated that the EU, in its conception and in its first decades, was very much a Christian-democrat project, imbued by Christian-democrat ideas. Such ideas may include an element of solidarity, of common responsibilities for social welfare (within a capitalist framework) as well as individual responsibility for one's own behavior, and may owe something to the classic virtue of charity, but Christian-democrat dogma was never too impressed with a militant insistence on individual rights at the expense of others or of the community. This may very well help explain why the EU got off to a flying start, whereas the Council of Europe's attempt to create a human rights framework for Europe took a few decades to pick up pace.

3.2.2 *Bringing Growth to Europe*

But powerful as the story of the EU as the path to peace was, it ran out of steam when new member states acceded, thus breaking up the fruitful German-French axis, and with new generations of Europeans having been born without any living memory of the

5 See Case 1/58, *Stork v. High Authority* [1959] ECR 17: Germany's constitutional rights have nothing to do with market integration, and even measures that would be invalid under German constitutional law may still be valid under EU law.

6 France only ratified in 1974, while Spain and Portugal would only join in the late 1970s.

7 This applied, amongst others, to the UK and Italy, who only accepted individual petition in 1966 and 1971, respectively.

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war. Moreover, the old Christian-democrat coalition had come to be disrupted, with Christian-democracy looking to re-invent itself, and typically doing so as conservative, market-oriented, and with more emphasis on just desserts. By the time the 1980s had come around, it was time for a new unifying myth, more in line with the new political realities of halting economic prosperity, Japan's rise to economic power, and the new-found confidence of a German political class that realized all too well that Germany's industry was propelling the EU. The new EU needed to be able to adapt to Reaganomics and the influence of Milton Friedman's monetarism and Hayek's earlier liberal thought, and needed to come to terms with Margaret Thatcher's demand for a 'juste retour': the UK loudly claimed that it wanted to receive as much from EU funding as it contributed, and this in itself symbolized a new attitude towards European integration.⁸ Hence the focus shifted from the memory of a world war to the functional needs of economic cooperation and providing European companies with a working and large enough home market so as to be able to afford economies of scale: the completion of the internal market by 1992. The new myth held that the EU was falling behind in the global economic struggle; that this was in part the result of the incomplete common market (the 'costs of non-Europe' were considered exceedingly large), and thus project 1992 was born. It needed a treaty amendment to make it stand a chance of success and so, for the first time in more than three decades of European integration, the treaties establishing the three Communities were amended by means of the Single European Act. As Andrew Moravcsik points out, this amounted to a veritable 're-launching' of the European integration process.⁹

In this climate, there still was not all that much to do about human rights. The Court had come to realize that it could go far without actually having its hands tied by suggesting that its human rights approach was inspired by the common constitutional traditions of the member states and the treaties to which all or most of them were parties, without singling out any special treaty, and without boldly proclaiming that the EU would consider itself bound by the European Convention – or any other human rights treaty, for that matter. And in line with the *Zeitgeist* of inspired neo-liberalism, the Court had gradually elevated the fundamental freedoms on which the EU is based to the level of fundamental rights and fundamental freedoms, using the language and aura of human rights to characterize basic tenets of EU law. The freedom of trade,¹⁰ free access to employment¹¹ or the freedom to be self-employed:¹² all these became glorified in language reminiscent of the human rights

8 See J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge University Press, 2009, p. 129.

9 See A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Cornell University Press, Ithaca NY, 1998, pp. 314-378.

10 See Case 240/83, *ADBHU* [1985] ECR 531, para. 9.

11 See Case 222/86, *Heylens* [1987] ECR 4097, para. 14.

12 See Case C-55/94, *Gebhard* [1995] ECR I-4165, paras 35-37.

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discourse, designated as ‘fundamental rights’ or ‘fundamental freedoms’. But the Court stopped short of actually proclaiming that the EU would respect any specific set of human rights, and the political authorities did nothing of the sort either. Typically, project 1992 and the Single European Act (hereinafter ‘SEA’) did not even mention human rights, with the exception of a routine consideration listed in the SEAs preamble.

3.2.3 *Bringing Human Rights to Europe*

While there is little doubt that the 1992 project was, measured in its own terms, quite a success, its foundational myth lasted for a much shorter period of time than its predecessor as, highly unexpectedly, the division of the continent came to an end when the USSR fell apart and the Berlin Wall came tumbling down. This provided the EU with the historical opportunity to encompass many of Eastern Europe’s states and encompass vast tracts of the continent. In order to achieve this, yet another foundational myth was needed: project 1992 rapidly moved to the background, and was replaced – or rather, complemented – by yet a new story: that of the historical opportunity to bring communism to a complete end and adopt the nations of Eastern Europe into the embrace of the western world. Hence, the new foundational myth had to sing the praises of the western world, and of Western Europe in particular: how else could Poles, Hungarians or Estonians be persuaded to help fund French farmers? The Treaty was amended yet again, a mere five years after the previous amendment, and in Maastricht the curious, somewhat hasty edifice of the EU, with its three pillars and common roof, was created.¹³

The new EU of the Maastricht Treaty somewhat hesitantly referred to itself as a Union based on the values of western liberalism, and started to posit itself as the logical heir of the enlightened European tradition. This would quickly be strengthened and given some flesh (not too much though, as befits any good foundational myth) at the Copenhagen summit of 1993, where the EU depicted itself as a Union based on human rights (including minority protection), on the rule of law, on democracy and on the market economy.¹⁴ Here then the two new myths came together: the reference to the market keeps economic liberalism at ease, and the rule of law, democracy and human rights provide the political framework, aided by the Court’s earlier inspired move to re-conceptualize some of the market-related freedoms as fundamental rights.

13 Memorably characterized by Curtin as a Union of ‘bits and pieces’. See D. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, 30 *Common Market Law Review*, 1993, pp. 17-69.

14 The Copenhagen criteria have since become the standard list of requirements for accession, and can be found, e.g., at <http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm> (last accessed 31 October 2011).

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This now would become the new mantra: it would be laid down, in one form or another, in agreements with third parties (from the so-called Europe agreements paving the way to membership, to the Cotonou agreement with a large number of developing nations). It would repeatedly be invoked in discussions on the admission of new member states. It would serve as a political justification for suspending trade relations with an imploding Yugoslavia, as the Court made clear in *Racke*.¹⁵ It would lead to the adoption of an initially non-binding Charter on Fundamental Rights. In order to show how seriously the EU was taking itself, the myth was invoked and arguably strengthened by the suspension of Austria following the rise to power of a right-wing political party in that member state, and the idea of the EU being a Union of Values came to be embedded in the aborted draft treaty establishing a constitution for Europe and its nominal successor, the Lisbon Treaty. The very same myth would be at the heart of the greatest legal controversy prevailing before the European Court of Justice (hereinafter 'ECJ') since the days of *Van Gend, Loos* and *Costa v. ENEL* in the early 1960s: in *Kadi*, the Court invoked Europe's unique values as the ultimate justification for disobeying the Security Council.¹⁶ The message was clear, and oh so loud: the EU is based on certain values, and anyone who does not share these values, or acts in defiance of these values, better think again. As far as foundational myths go, the EU could hardly have chosen a more attractive one, if only because by the early 1990s, it seemed that human rights, democracy and the rule of law had grown into the world's leading ideology. History had come an end, as Francis Fukuyama famously proclaimed,¹⁷ and human rights had become the values of choice for a Godless age, as someone would poignantly put it a few years later.¹⁸

And yet, the EU's new foundational myth is strained or, if you will, ambivalent. One element of tension, perhaps the most glaring, is the reference in the Copenhagen criteria to the market economy. This may have functioned as a nod to the previous myth, the neo-liberal 1992 project, but seems rather out of place in an enumeration otherwise emphasizing human rights, democracy and the rule of law. That is not to say there is no connection whatsoever: it is perhaps no coincidence that among later thinkers, it was precisely Hayek who was among the first to give flesh to the idea of the Rule of Law: any set of rules that contribute to economic freedom.¹⁹

15 See Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.

16 See Case C-402/05 P, *Kadi v. Council and Commission* [2008] ECR I-6351. In turn, a possible international legal justification for doing so is provided by A. Tzanakopoulos, *Disobeying the Security Council: Counter-measures against Wrongful Sanctions*, Oxford University Press 2011.

17 See F. Fukuyama, *The End of History and the Last Man*, The Free Press, New York, 1992.

18 See F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*, Penguin, London 2000.

19 See F.A. Hayek, *The Road to Serfdom*, Routledge, London 2001 [1944]. This then provoked authors of more social-democratic ilk to either provide the Rule of Law with different flesh or, as Oakeshott did, expose it as the political notion it really is. See M. Oakeshott, 'The Rule of Law', in M. Oakeshott, *On History and other Essays*, Liberty Fund, Indianapolis, 1999, pp. 129-178.

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But to think of the market economy in the same breath as human rights, democracy and the rule of law is really only plausible in this Hayekian, ordo-liberal philosophy. Therewith it is precisely the reference to the market economy that exposes the foundational myth as a political project, for while people of goodwill may consider human rights, democracy and the rule of law as neutral and somehow beyond politics, the same does not apply, and cannot apply, to the market economy.

The further strain on the EU's holy trinity is that human rights, democracy and the rule of law are not, actually, above politics either. The EU favours some human rights (civil and political) over others (economic and social). It may stimulate 'low intensity democracy' (the democracy that insist that people vote every now and then in secret ballots)²⁰ across the globe, but can barely be called democratic itself. And the rule of law is about as a contested a political concept as any.²¹

In other words, Europe's new foundational myth is a myth without much contents, and such contents as it has (the market ideology) are too controversial and, still, too thin to serve as a rallying point. The earlier ones had real-life counterpoints. The early EU could indeed plausibly posit itself as a response to the scourge of war. The EU of project 1992, for all its limits, could indeed plausibly point to the rise of Japan ('The land of the rising yen') and the Asian tigers, as well as the US service industry, as challenges that needed to be met and could be met, possibly, by a neo-liberal focus. But the EU founded on human rights, democracy and the rule of law (with or without the market) is too bland, too non-committal and, in an important sense, too dishonest. For by re-writing European history as a history of political progress, the authors have deleted large chunks that did not fit the narrative.

Documents emanating from European summit meetings often refer to Europe's values, and none more so perhaps than the Laeken Declaration of 2001, which posits Europe as the continent of human values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions.²²

In doing so, 'Laeken' taps into widely held and plausible views. Aristotle, Descartes and Kant were Europeans, after all. Tocqueville may have written about the democracy in America, but the first polities employing something approximating democracy came from Europe: from the Greek polis to the Magna Carta, and later from the French Revolution to the suffragettes. Even the word democracy, originating as it does in Greek, hails from

20 I owe the term to S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, Oxford University Press, 2000.

21 For a fine discussion, see B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004.

22 The Laeken Declaration is available at <http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf> (last accessed 31 October 2011).

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Europe, as do notions of the *Rechtsstaat* or, a bit more hesitantly perhaps, the Rule of Law. Through rose-tinted glasses, the history of Europe is a history of continued political progress, from Greece via Rome through the admittedly somewhat darker Middle Ages to the Renaissance and Enlightenment, taking some pride in the invention of the modern international organization and the solidification of human rights, democracy and the rule of law through the path-breaking European Convention on Human Rights which, as luck would have it, cements all three ideas.

The above is all, of course, fairly accurate: the individual elements of the narrative are all justifiable. The story as a whole though shows a few gigantic holes and could just as easily be swapped for a less salutary version. If Europe is indeed the birthplace of human rights, democracy and the rule of law, it is also the birthplace of colonialism, slavery and slave trade, nationalism and genocide. These, moreover, are not remnants from centuries ago, but still occurred within living memory and, in one form or another, may still be witnessed today. Slave trade may have been outlawed, but has resurfaced as human trafficking. Colonialism may have formally ended, but informally lives on in trading systems, restricted immigration, political conditionality and, more generally, fuzzy ideas about the West being involved in a mission to civilize the Islamic world, if necessary by force. Nationalism can be seen in the confused politics of all sorts of right-wing and populist groups, from the peroxide-headed PVV in formerly liberal Holland to the True Finns in formerly solidarist Finland. And Srebrenica took place not all that long ago. Europe's recent history has been informed, so a renowned historian argues rather cogently, by a struggle for power between democrats and autocrats (fascists and communists), and the circumstance that for the time being the democrats seem to have the upper hand is by no means a guarantee that this will continue and, importantly, cannot be used to blot out those autocratic tendencies that are so prevalent in Europe, and that keep raising their ugly head.²³ In short, the picture of Europe as the one traditionally liberal refuge in the world is not all that convincing, coming as it does at the price of historical accuracy.

Europe's claim to be based on the values of human rights, democracy and the rule of law is eventually a rather empty claim, more impressive in its rhetorical quality and the persistence with which it has been formulated than in actual application. It is not that Europe is doing so much worse than others; it may even be doing better than most. It is, rather, that the claim is without solid foundations, and difficult to substantiate as a rallying point.

Perhaps, most fatal is the claim relating to democracy. While all of the EU's member states are, nominally, democracies, the idea of democracy is not a strong one in situations where the prime minister also owns a number of mass media, as in Italy, or is connected to the world's largest media mogul, as is the case with the UK's Prime Minister. More problematic

23 See M. Mazower, *Dark Continent: Europe's Twentieth Century*, Penguin, London, 1998.

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though is that European elections are still nationally based; that despite European citizenship, migrant workers still are not allowed to vote in domestic elections (other than municipal elections), and that, as a practical matter, no one seems to care about the European Parliament: voter turnout is embarrassingly low. And when the electorate does something unwanted (vote for a populist like Jörg Haider, say), Europe's political elite is up in arms and decides to suspend Austria. Combine all this with the efforts to manipulate Europe's people to approve of the various amendments to the EU treaties (how often have the Irish been sent back to the polls?), and the picture emerges of a hopelessly inadequate democracy, where the main task of the electorate is not check the behavior of political elites but, rather, to provide those elites with legitimacy. Not surprisingly, this has proved to be less than successful: even the ill-fated 1980s attempts to stimulate a European identity by organizing sports events and a Europe-wide lottery were better conceived.²⁴

Ironically perhaps, it may be the very same neo-liberalism accounting for Europe's market success that is to blame for its democratic problems. If schoolchildren are being taught, from a young age on, that competition is the only value that matters and that all they should care about is their own performance (backed up, in yet another irony, by human rights discourse), small wonder that they never develop a democratic sensitivity.

Be that as it may, there is a risk in trying to create anything on the basis of values, as values tend to be highly fluid. A value, properly speaking, is a political position, instrumental in everyday life. Thus, one can be pro-life or pro-choice, as the result of careful or not so careful deliberations. One can be against torture, or be in favour of torture in limited circumstances. One can be against the death penalty, or allow for its use in certain cases. The point is that values, being little else than political opinions, can and do change. German citizens in the early 1930s probably felt that reporting their neighbours to the authorities would be wrong; by the late 1930s, many felt it was right. Values here offered no protection, so much so that Hannah Arendt could, in a telling phrase, speak of the 'bargain sale' of values (*Ausverkauf der Werte*).²⁵ Hence, values cannot offer a very stable basis for imagined communities, and it is surely no coincidence that whenever communities are imagined, they are usually imagined around ideas of ethnicity, religion, race, language or history, but not around values.

24 These were to be found in the Adonnino reports of 1985. See A People's Europe: Reports from the *ad hoc* Committee, *Bulletin of the European Communities*, Supplement 7/85, proposed at 26 and 22, respectively.

25 Arendt also pointed out that values tend to be instrumental: something has value in relation to something else, as its etymological connection to exchange-value already suggests. See H. Arendt, 'The Crisis in Culture: Its Social and Political Significance', reproduced in H. Arendt, *Between Past and Future*, Penguin, London 1968, pp. 197-226, p. 204. Useful on this point is E. Meade, 'The Commodification of Values', in L. May & J. Kohn (Eds.), *Hannah Arendt Twenty Years Later*, MIT Press, Cambridge, MA, 1996, pp. 107-126.

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This applies also to the most sophisticated attempt to do so: constitutional patriotism. Even its fiercest proponents realize that this Habermasian attempt to have people rally around precisely such things as human rights and democracy is, as the phrase goes 'normatively dependent': it cannot stand on its own, but needs a thicker political project to collaborate with.²⁶

3.3 RESPECTING THE ECHR?

As mentioned, the story of human rights and the EU is not an unqualified story of progress and optimism. Having first dismissed human rights as outside the competences of the EU in the 1950s, towards the end of the 1960s the EU, or rather its judicial institution, started to respond to stirrings in the German Constitutional Court that really, the EU could not afford to legislate in violation of basic human rights as guaranteed in the German Constitution. As a result, the ECJ started to pay some attention to human rights, carefully suggesting not so much that the EU would be legally bound to apply any particular set of human rights standards, but rather that it would draw inspiration from the constitutions of its Member States and the various treaties to which its Member States are parties.

Over the years, many have suggested that instead of thus paying lip-service to human rights without making a really firm, legally binding, commitment, perhaps the EU should consider joining the ECHR.²⁷ After all, the ECHR represents a modern and recognizably Western set of standards (no fuzzy and expensive social rights here), and all the EU's Member States are parties to it. Yet, in 1996, the ECJ still found that it lacked the constitutional structure for doing so, arousing the suspicion, according to some, that it might not be all that interested really, if only to protect its own role as the sole guardian of legality within the EU. Surely, a court that was quick to find the EU to possess implied powers to engage in a lot of different external activities could have found an implied power to join a human rights regime, especially considering that the exportation of human rights by the EU was already well established. As a result, the charge of hypocrisy or dual standards was often heard, and not unreasonably so.²⁸

The ill-fated Treaty establishing a Constitution finally urged the EU to make a firm commitment in the form of acceding to the ECHR: if the EU previously lacked the competence,

26 For an excellent discussion, see J.W. Müller, *Constitutional Patriotism*, Princeton University Press, 2007.

27 The best legal study of the relationship between the EU and the ECHR remains R. Lawson, *Het EVRM en de Europese Gemeenschappen*, Kluwer, Deventer 1999.

28 Note also that discussions on the constitutionalization of the EU, starting with Stein's classic piece, tend not to refer to any systematic human rights commitment: the EU is portrayed as functionally constitutional rather than substantively constitutional, with notions such as direct effect, implied powers and supremacy. See E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 75, 1981, pp. 1-27.

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the Treaty establishing a Constitution would provide it. With this Treaty being defeated, the relevant clause now is Article 6, paragraph 2 of the Treaty on European Union (hereinafter TEU): “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the competences as defined in the treaties”.

This is a curious clause, for various reasons. First, the imperative ‘shall’ seems out of place, as the EU alone cannot decide the issue. Any application to accede must be made possible under the ECHR itself, and it took an amendment of the ECHR to make it feasible: Protocol 14 provides, in its Article 17, that the EU ‘may accede’ to the ECHR. Protocol 14 entered into force in June 2010, with the result that the amended ECHR now allows for accession by the EU in Article 59, paragraph 2. This is, however, the beginning of the analysis rather than the end. As the explanatory report to Protocol 14 suggests, EU accession will either warrant further amendments of the Convention, or will warrant an accession treaty with the EU.²⁹ This, in turn, raises the issue of the proper treaty partner: the Explanatory report suggests, plausibly, that such a treaty must be concluded with all existing parties to the Convention which, in effect, will give each and every single one of them a veto and, therewith, a nice amount of political capital to play with.

Alternatively, perhaps the accession treaty could be concluded with the Council of Europe, but it is doubtful whether this organization possesses the required competence. The Statute provides the Council of Europe only with the competence, it seems, to conclude a headquarters agreement with France.³⁰ In addition, the collective parties to the Convention lack the legal personality to conclude an accession treaty as a single party, and the Convention lacks a proper accession procedure. None of this will prove problematic if all parties to the Convention are keen on getting the EU on board, and one could argue that the provision allowing the EU to accede suggests such a keen interest. Nonetheless, the legal state of affairs provides quite an opportunity for political gamesmanship.

The second reason why the provision of Article 6, paragraph 2 TEU is curious is its closing sentence, according to which accession “shall not affect the competences as defined in the treaties”. The background idea is clear enough: the EU is based on a delicate division of powers between the whole (the EU) and its parts: the member states. This balance is subject to constant development, negotiation and re-negotiation. These are eminently political processes, and should not occur by accident. Yet, it cannot be excluded that such accidents may take place: e.g. the European Court of Human Rights (hereinafter ECtHR) may hold a member state responsible for a matter within EU competence or, at least, shared or supplementary competence – its decision in *Behrami* and *Saramati*

29 The report is available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>> (last accessed 31 October 2011); see specially paras 101-102.

30 See Art. 40 Statute Council of Europe.

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demonstrated that attribution is not always self-evident.³¹ Or, to revert to the classic *SPUC v. Grogan* scenario,³² it is not impossible that in deciding on abortion (typically, so far, a member state competence), the ECtHR comes to say something of finality regarding the free movement of services, or that a decision of the ECtHR on French or Greek refugee practices may interfere with the EU's migration policy. At times also the relationship between the four freedoms and human rights may come under the spotlight, and while the case law of the ECJ tends to posit the four freedoms as the basic rule and human rights as possible justifications for exceptions,³³ it is not impossible that the ECtHR may reach the opposite conclusion, and such a finding may reflect on the division of competences. As these (hypothetical, and possibly somewhat belaboured) examples suggest, the actor most likely to intervene in the division of powers within the EU would be the ECtHR – yet the ECtHR cannot be bound by the injunction of Article 6 TEU.

An issue that was of major importance for the ECJ in 1996 was its own role as sole guardian of EU legality: Opinion 2/94 suggested that in order to discuss the compatibility of the ECHR with EU law, there was a need to select some formula concerning the relationship between the ECJ and the ECtHR. The Court's message was clear enough: for accession to be acceptable, the ECtHR must somehow be made compatible with the EU law provisions on the Court's jurisdiction.³⁴

It is possible that the ECtHR's attitude in the intervening years has persuaded the ECJ that it does not have all that much to fear from Strasbourg: the wide latitude the ECtHR gave to the EU in *Bosphorus* suggests that the ECtHR is not likely to step on the toes of the ECJ³⁵; but whether the ECJ will accept a position of formal supremacy of the ECtHR is doubtful. And if that is the case, one may already legitimately start to wonder what good accession by the EU will do: if the ECJ will continue to have the latitude enjoyed under *Bosphorus*, then the EU might as well not accede: as long as the ECtHR refuses to exercise real scrutiny, one may as well depend on the court of public opinion and dispense with the window-dressing.

3.4 HUMAN RIGHTS AS FOUNDATIONAL MYTH?

That is not to say that accession will not do any good. From some perspective, no doubt, it will be useful, both for the EU itself and for those within its jurisdiction, for the EU to

31 See decision of 2 May 2007 in Joined Cases *Behrami & Behrami v. France* (Appl. No. 71412/01) and *Saramati v. France and Others* (Appl. No. 78166/01).

32 See Case C-159/90, *Society for the Protection of Unborn Children v. Stephen Grogan and Others* [1991] ECR I-4685.

33 See, e.g., Case C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659, and Case C-36/02, *Omega Spielhallen v. Oberbürgermeisterin Bonn* [2004] ECR I-9609.

34 See Opinion 2/94 (*ECHR*) [1996] ECR I-1759, esp. para. 20.

35 See decision of 30 June 2005 in Case *Bosphorus v. Ireland* (Appl. No. 45036/98).

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accede to the ECHR. The simple reason for this is that some commitment is, usually, better than none at all or, colloquially, if it will not do much good, it will not do much harm either. The political costs for the EU are low, if not entirely non-existent. It would lose some of the leeway it now has, but gain some credibility in its foreign affairs, with charges of 'double standards' or 'hypocrisy' being less likely if the EU can demonstrate that it too is bound by external human rights standards. And this will be all the more useful given the EU's attempt to posit itself as a global power and, to some extent, as the humane counterpart to a bullying US.

Yet, it is doubtful whether accession to the ECHR can do what the EU seems to hope or expect it to do, namely to provide it with a new foundational myth to justify the existence of the EU and help raise its input legitimacy. The problem is that reliance on human rights, in particular on the type of civil and political rights enshrined in the Convention, is unsuitable for this purpose and, as historians suggest, always has been: people just do not rally around civil liberties. These are indispensable, to be sure, and a *sine qua non* for governance in the 21st century, but are not the sort of political project that engenders political loyalties and allegiances. This is so for, by and large, three reasons.

First, when it comes to human rights, the EU is a relative newcomer. It is fitting, of course, that to the extent that it exercises public power, the EU's public power should be held to scrutiny.³⁶ There is no particular reason why EU activities should not be tested against accountability standards, and by the same token, there is no reason why human rights should not be included amongst those standards. That said though, it is undeniable that in many, perhaps most member states of the EU, fundamental human rights protection is more settled and more solidly anchored than in the EU *qua* polity. Ironically, the ambivalent attitude of the EU towards human rights has resulted in it losing valuable time: had the EU taken human rights more seriously from the beginning, or at least from the time of the *Solange* challenge, its human rights record would have been far more convincing than the wishy-washy strategy it opted for, even with respect to its own Charter on Fundamental Rights: useful, but not binding until recently. As so often, having one's cake and eating it too (in this case, having the benefits of a human rights instrument without actually being bound) turned out to be ill-advised. So while it is welcome that EU acts will be scrutinized and to have the EU accede to the ECHR, to the (limited) extent that civil liberties generate political loyalties these have, to a large extent, already been generated by the member states, and as long as member state protection is more serious and runs deeper than the protection offered by the EU, there is little reason to expect people to change their allegiances and loyalties.

³⁶ See e.g., C. Harlow, *Accountability in the European Union*, Oxford University Press, 2002; M. Bovens, D. Curtin & P. 't Hart (Eds.), *The Real World of EU Accountability: What Deficit?*, Oxford University Press, 2010.

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There is, incidentally, a fairly plausible counter-argument conceivable, and it goes something like this. With globalization, the latitude for purely national politics (and for international relations between states, as traditionally conceived) is rapidly diminishing. Globalization demands new sites for the conduct of politics, and the EU may well be such a new site.³⁷ If so, then acceding to the ECHR would not so much eat up political capital currently enjoyed by the EU's member states, but represent an indispensable step to organize the EU as such a new site for politics – and get it recognized as a legitimate site, for without human rights protection, legitimacy might be hard to come by. This, however, posits human rights and the other Copenhagen criteria as necessary, but not yet sufficient conditions, and it may not overcome the second and third reasons why accession may not be all that helpful.

The second reason why not too much must be expected from ECHR accession resides in the circumstances that, ironically perhaps given the ambition to rally around the ECHR, civil and political rights tend to foster individualism and perhaps even selfishness rather than the sense of solidarity that the EU so craves for. This is hardly a novel point: Michael Sandel already pointed out some three decades ago that an insistence on individual rights may lead to what he called the 'republic of the unencumbered self': the creation of rights tends to stimulate selfishness in public affairs.³⁸ If I have a right to enjoy my property, then it should not be expropriated, even for the greater good. If I have a right to express myself freely, then considerations such as politeness or propriety shall not necessarily stop me. In short, the standard critique of rights, as accepted both by conservatives (who use it to combat social and economic rights) and by progressives (who use it to combat civil and political rights) is that rights, whatever their use in individual cases, do not tend to foster a spirit of solidarity. They do not engender a community of fate; instead, they tend to contribute to alienation: each man is an island in the full enjoyment of his rights. The sobering net result is this: the EU cannot expect anyone to rally around the idea that the EU now too guarantees freedom of expression, or the right to property.

Third, the EU and the ECHR are built on radically different political theologies. The EU's foundational story, in the aftermath of World War II, was that peace would result from economic cooperation and prosperity: prosperous nations do not go to war, at least not with each other, because they have no incentive to. The preamble to the Treaty establishing the European Economic Community (hereinafter EEC Treaty), not by accident, revolved around 'economic and social progress', and stipulated that by 'pooling their resources' the member states could stimulate peace and liberty. This mindset has been a constant presence, and is still left untouched in the TFEU, the latest incarnation of the EEC Treaty. It

37 See generally, U. Beck, *Nachrichten aus der Weltinnenpolitik*, Suhrkamp, Berlin 2010.

38 See M. Sandel, 'The Procedural Republic and the Unencumbered Self', 12 *Political Theory*, 1984, pp. 81-96.

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is only the TEU which refers to human rights, and even then does so in the person of the member states: the preamble confirms the member states' attachment to human rights, democracy and the rule of law, not that of the EU itself. Moreover, the preamble of even the most recent TEU, as amended at Lisbon, does not posit any idea about human rights and their relationship to peace and justice. It celebrates human rights as part of a European tradition and draws inspiration from the "cultural, religious and humanist inheritance of Europe", but there is no record of any idea of what human rights are for. While this may be interpreted, benignly, as a radical dismissal of the instrumentality of human rights (human rights thus have value in and of themselves), it may also be seen as a thoughtless reference akin to those promised by of marketing people who cast everything in terms of human rights: according to marketeers, we may have a human right to such things as a nice kitchen, or to a decent cup of coffee in the morning. Such references are meaningless because, first, we still need to pay for those nice kitchens or decent cups of coffee, and second (and more seriously), by utilizing the human rights language for such trivialities, they strip it of all meaning.

The EU started life as an economic interest club and, in essence, still is an economic alliance. It may be an economic alliance with a number of additional tasks, but those are all reducible to the basic sentiment of creating peace through prosperity. The EU's activities in the fields of environmental protection or, indeed, even human rights, are all adjuncts to the basic idea of the EU as an economic alliance of European states. And where the EU refers to human rights, it does so without an underlying idea and, lest we forget, in the part that until Lisbon was deliberately kept far away from 'the Community method'.

The ECHR, by contrast, is based on the idea that peace depends not so much on prosperity, but on civil liberties. Justice and peace, so the preamble proclaims, depend on the observance of human rights, nothing less. Here, human rights are thought instrumental to the achievement of peace and justice. The underlying philosophy, therewith, is radically different from that underlying the EU.

The fact that the philosophies underlying the EU and the ECHR may be radically different does not automatically render them incompatible, and liberal theorists have spent a good deal of energy over the last two decades trying to present a unified, or at least harmonized, rendition of human rights and the market beyond the Hayekian equation of the two, or of democracy and capitalism, often invoking (as does the EU) the spirit of Kant.³⁹ Thus far though, none of these has been considered very successful.

And perhaps most damaging to the EU's project is that the causality may well lie in the reverse position: since capitalism and the market tend to destroy other allegiances (nation,

39 See e.g., J. Rawls, *The Law of Peoples*, Harvard University Press, Cambridge MA 1999. Much of this kind of approach builds on I. Kant, *Zum ewigen Frieden: ein philosophischer Entwurf*, Reclam, Stuttgart 1984 [1795].

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class, ethnic group, religious affiliation), they are themselves in need of being propped up, instead of providing people with allegiances. Some have remarked that, as a result, capitalism still needs the nation-state,⁴⁰ even within a globalized frame, and by the same token, capitalism may be well-advised not to throw out religion, class and ethnicity with the liberal market-oriented bathwater.

3.5 TO CONCLUDE

Ironically, then, the problem would seem to be that the two stories the EU wishes to tap into in order to bolster its populations' allegiance and therewith its own legitimacy may both be counterproductive. Human rights and the market alike, both stimulate the very sort of alienation and individualization that are difficult to reconcile with a veritable sense of society and solidarity. The market, reified in the EU since the 'costs of non-Europe' were identified in the early 1980s, does so by making all compete against all, by creating winners and losers, and by pitting each and everyone against each other. Human rights, figuring so prominently since the early 1990s, alienate more subtly, by making people demanding and by making them abdicate any sense of social responsibility: the rights-oriented citizen cares little about her neighbours, let alone about people in faraway places. The drafters of the Universal Declaration (again largely steeped in more communitarian traditions) realized as much when they closed the Universal Declaration with a handful of solidarity clauses, ranging from the right to be part of a community to the right to live in a decent social order, and reminding everyone that rights came with duties and could not be seen as absolutes justifying domination over others.

As noted, there are decent reasons why the EU should accede to the ECHR, provided only that the legal and political problems of accession can be overcome – much will depend on the attitude of the current parties to the ECHR. Perhaps the main reason, pragmatically speaking, is that only a firm and binding human rights commitment can prevent the charge of 'double standards' from being levied against the EU.

But if the EU is looking at accession to the ECHR in order to create a new legitimating narrative for itself and therewith bolster the integration project, it will be disappointed. The market and human rights, capitalism and democracy, are not the most natural of partners, and it is at the very least arguable that the EU needs a 'thicker', more substantively oriented self-justification than either the anodyne market or the near-empty vessels of human rights may ever be expected to provide.

It is perhaps a great irony that the one truly European invention that could have stimulated such a thicker conception of what Europe stands for, and therewith could have provided

⁴⁰ See Mazower 1998, p. 409.

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the EU with a useful focal point to boost its legitimacy, has become anathema. Now that on the national level the welfare state has been effectively dismantled, the EU could have come to occupy the void and really posit itself as a worthwhile project, perhaps even a viable alternative for its member states.⁴¹ Then again, given that those same member states end up deciding the course for Europe,⁴² such was perhaps never likely, and that in itself already suggests that not too much should be expected from acceding to the ECHR: accession involves little cost, and thus can also, in the language of the market, not be expected to yield immense benefits.

More generally, the structural problem, as Michael Walzer once explained, is that a rallying project meeting with large-scale approval can only be a thin one, whereas what the EU needs, arguably, is a thicker project. Yet, in Walzer's words, "with thickness comes qualification, compromise, complexity, and disagreement."⁴³ In this light, perhaps an appeal to a relatively thin image involving human rights, the market, democracy and the Rule of Law is the best an expanded EU can strive for, and if that is the case, accession to the European Convention may well be a useful idea. But no miracles should be expected.

41 It has been observed, however, that the welfare state has come to depend to an uncomfortable extent on the labour of often undocumented migrants, which creates its own legitimacy issues and, ironically perhaps, comes with serious human rights concerns. See Beck 2010, p. 41.

42 I have argued elsewhere that the EU has ceased to be a federalist project since the heady days of the Maastricht Treaty, and has been firmly (re-)appropriated by its member states. See J. Klabbbers & P. Leino, 'Death by Constitution? The Draft Treaty Establishing a Constitution for Europe', 4 *German Law Journal*, 2003, pp. 1293-1305.

43 See Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame University Press, Notre Dame, IN, 1994, p. 6.