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Editorial

Individuals and Rights – The Sour Grapes

The first wave, in the 1950s and '60s, was all about Community Rights and that new legal order. In the 1970s and '80s it was, *ex nihilo*, Individual Human Rights. And in the 1990s and this last decade it has been Citizenship Rights, destined, according to the European Court of Justice in case after case, to become the 'fundamental' status of European Citizens. (Have you ever wondered, as I have, about the epistemic status of this most recent mantra of the ECJ? Is it a legal realist prediction? A political desideratum? A statement of judicial intent? A revolutionary manifesto – seeing that it flatly contradicts the express provisions of the Treaty which clearly assigns to European Citizenship a mere supplementary or complementary supportive role in the Citizenship arena?) Be that as it may, there can be little argument that *The Individual* and his or her *Rights* are the most common, oft cited, self-celebratory clichés in the vocabulary of European legal discourse. In celebrating the Union's 50th birthday Angela Merkel, speaking for most of us, veritably gushed about Europe's success in positioning *The Individual* in the centre of its construct. And so it has. Likewise, if we look for a currency which is impervious to all market vicissitudes, to derivatives, to toxic bundling, it is the currency of *Rights* – in all three denominations, European, Human and/or Citizenship. It is the ever ready dividend which the Union's Board of Directors is generous in showering on an ever apathetic citizenry (as evidenced by the demoralizing decline in voter turn out for Euro-Parliament elections) and which is evoked whenever a pep-talk is called for.

Given history, it is not surprising why, say, Germany (the initiator of the Charter), German Institutions (e.g. the Constitutional Court of 'So long as' rhetorical fame) and Germans (*viz.* Merkel who has a double reason) are so fond of Rightspeak, whereas, say, the British are more pragmatic and matter-of-fact on the issue. And whilst it is important to remain ever vigilant blah blah blah, the truth is that in Europe *The Individual* does not suffer from a deficit of rights protection – certainly not of human rights protection. The never-ending rhetoric is all too often a mask for a veritable political deficit of individual empowerment in European democracy. *Rights and Circus* may be the apposite motto for the Turn-of-Millennium Europe: smother them with rights – which they don't exactly need – and keep them quiet.

The principal positive effect of the combination of *Rights* and *The Individual* in the European legal order has not been the defence of the individual against some Barbarians intent on abusing his or her human rights. It has, instead, been that unprecedented strengthening of the Rule of Law among the Member States, a signal

achievement worthy of celebration. It occurred in the epoch of the first wave of economic Community rights and the engine for this accidental revolution was the harnessing of judicially enforceable rights to individual self-interest (the ‘Private Attorney General’ model of legal enforcement) coupled with the genius of the Preliminary Reference procedure which put the elevated compliance-pull of domestic courts *vis-à-vis* their own governments at the service of the Union. I say ‘accidental revolution’ since the anecdotal evidence we have would suggest that in transposing an internal Italo-German domestic constitutional arrangement to the Community legal order during the negotiations of the Treaty of Rome no one had anticipated the transformative and revolutionary effect it would have. Unless, that is, the new and exciting generation of European Union legal historians such as the Danish scholar Morten Rasmussen (Google him and his fellow historians’ work – you will be richly rewarded) will prove one wrong on this too.

But all shining moons have a dark side too, and so does the love affair with *The Individual* and *Rights* and it is to be found in the realm of political culture. The Citizenship clause is telling. In bestowing European Citizenship on all Member State nationals it subjects them to all the rights and duties to follow. But when one peruses the list that follows, duties somehow evaporate. European citizenship is a category which comes with rights but no active (or even passive) duties. The Union does indeed place the individual in the centre, but at one and the same time puts into place a political culture which cultivates self-centred individuals.

There is more. It is not simply the corrupting asymmetry of rights without civic duties, but ours is a political culture which, likewise, cultivates a rejection of responsibility both for one’s collective circumstance and a responsibility towards the Other. I am sure that many readers will remonstrate at this point: are we not the Europe of solidarity? *Chez nous*, after all, the scandal of 30 million without health insurance could not happen? The answer is Yes and No. Ours is a peculiar solidarity – Agency Solidarity, solidarity through the disembodied voice of public authority, solidarity through government. It is the prominence of Subsidiarity in our political vocabulary that tells the tale in this case. A laudable concept – Government and governance should presumptively be exercised at the level closest to those affected by it (the stakeholder principle) unless compelling reasons of efficiency and/or externalities justify a higher, more remote, exercise of power. But *nota bene*: the responsibility is always that of some public authority. Our role is dutifully to pay our taxes – I suppose that is a civic duty, though one found in the vilest of dictatorships too, so not one that distinguishes democracies – and expect the appropriate public authority to do the bidding on our behalf. It is a solidarity in which the individual is insulated from its subject. It is a solidarity which allows us to read a report on some violation of rights somewhere over our breakfast coffee and wax indignant about why the government, some government, is not doing something about it. It is a solidarity strangely bereft of the actual personal experience of solidarity. It is a solidarity which equally strangely allows us, at the *individual* level, to abdicate responsibility for and towards its subjects. The low rates of voluntarism and charitable giving in Europe are notorious – and let’s not excuse ourselves with the alibi of high rates of taxes.

Monnet famously preached *Nous ne coalisons pas des Etats, nous unissons des hommes*. One would think, and many still do, that the culture of *The Individual and Rights* is the perfect legal expression of that aphorism. Turns out that the opposite is true. Self-interested individuals armed with judicially enforceable rights help explain the remarkable success of the Union in coalescing states and radically changing the depth and seriousness of their mutual legal commitments. It also explains the oft abject failure of the noble socio-human dimension of the Monnet motto. Examples? Overcome the collective amnesia and recall the genocide in Bosnia, against a religious minority, for the second time in the heart of Europe. What excuse do we plead this time round for that display of solidarity? Or consider the solidarity expressed in the atavistic and ugly reaction to the 'hordes' of migrant workers from the East following the recent Enlargement.

But it is the recent Greek saga which provides the most sorrowful illustration, the veritable sour grapes, of a political culture besotted with *The Individual* and with *Rights*. First we have a display of monumental individual tax evasion and free riding. The individual was certainly at the centre there. And a labour market in which connection to friends and family is the typical key for employment in a bloated public service. And entitlements which make even the Swedes blush. Then, when the free lunch comes to an end, broad and violent protests begin, employing, of course, the language of rights and their unfair denial – the unfair denial of the right to a pension at over 90 per cent of one's full salary. You kill your mother and father and then you plead – Mercy, I'm an orphan. And, as for responsibility for the crisis, this is laid with everyone except one's self. Speculators, Wall Street and the Americans (often used today the way 'the Jews' were used yesteryear for all manner of financial irregularity), 'Anglo-Saxon market culture', but above all it is 'them', The Government, which is responsible. One's own government. This is what happens, in its birth place, when democracy is associated predominantly with rights, and not with civic duty and responsibility. When one cannot internalize that in democracy, them is actually us. In a culture which always assigns responsibility to others, this reaction was predictable. Predictably demoralizing.

The Greek crisis also provided a nice lesson in solidarity towards the periphery. Governments acted with responsibility, but at the individual level – read *Bild*. Make no mistake – I single out Greece and Germany only because the saga played itself in sharpest relief in these two states and societies, but the sentiments and pathologies were widespread, are widespread.

Curious business European Integration *Rights* and all: *Nous coalisons des Etats, nous n'unissons pas des hommes*.

In this Issue

Four very different articles flesh out this second issue of our 21st volume. First is an article by Christopher Macleod on Crimes against Humanity. The Editors believe that our readers will enjoy this valuable philosophical account of the subject. Next is a detailed article by Marco Dani entitled, 'Remedying European Legal Pluralism: The

FIAMM and *Fedon* Litigation and the Judicial Protection of International Trade Bystanders'. Our third article by Monica Hakimi, 'State Bystander Responsibility', provides a fresh take on a much-discussed topic – offering a new generalized framework for conceptualizing the responsibilities of states for protecting persons from third party abuses. We have published several articles on this theme and will continue to do so for some time. It reflects our belief that we are in the midst of an important shift in the concept of State Responsibility. A shift from primarily negative to positive obligations, from State Responsibility to the Responsibility of States. Neither state practice, nor the theoretical and conceptual contours of this shift have been sorted out. But EJIL is one place where the 'basic science' is taking shape. Hakimi's paper suggests, *inter alia*, an important analogy between state bystander responsibility and our expectation that states respond to gender-based private acts of violence, an analogy we consider pertinent and illuminating. Last, we have an article by Santiago Villalpando which tackles the ever-important question of how we might conceive of an 'international community' and its status under international law.

International governance is another of our commitments rooted in the belief that it provides a more potent tool both analytically to understand and normatively to critique a host of international phenomena. Under this iteration of our occasional series, Critical Review of International Governance, we include pieces by colleagues in Ethiopia, China and Malaysia. First is a piece by Dereje Zeleke Mekonnen on the Nile Basin Cooperative Framework Agreement negotiations and the adoption of a 'Water Security' paradigm. Second is an article by Kong Lingjie on data protection and transborder data flow in the European and global context. Last, we have a piece by Gurdial Singh Nijar entitled, 'Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects'. We expect that you will find each piece both unique and also valuable to broader discussions on international governance.

Book Reviewing and Academic Freedom

My deep thanks for the hundreds of letters of support and indignation. All letters of support, including the many we received from editors of learned journals, have been translated into French and will be submitted to the Court. The Trial takes place on 25 June. I will report to our readers on EJILtalk.org.

The Last Page

In 'The Last Page', *EJIL*'s reminder that there is more to life than law, you will find a poem by Jake Marmer, entitled 'When an Immigrant'.

JHHW
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