THE EUROPEAN CONSTITUTION, THE TREATY OF AMSTERDAM, AND THE SEARCH FOR COMMUNITY

Ian Ward*

EUROPE AFTER AMSTERDAM

It will be recalled that the remarkable fact about the bark of the hound of the Baskervilles was its absence.¹ To a certain extent the analogy can be applied to the Amsterdam Treaty.² Whereas much criticism of earlier treaties has concentrated on the fact that there was rather more bark than bite, what is most striking about the Amsterdam Treaty is the fact that there is little of either. The central theme of this article is that, as with the informing silence of Conan Doyle’s hound, the striking absence of ambition in the Amsterdam Treaty unwittingly says much about the present precarious state of European integration.³ Despite widespread acknowledgment that the European Union

---

¹ In The Hound of the Baskervilles, Sherlock Holmes was first struck by the oddity of a “hound” that did not bark. See 2 ARTHUR CONAN DOYLE, THE ANNOTATED SHERLOCK HOLMES 3 (William S. Baring-Gould ed., 1st ed. 1967).


³ According to one author, parts of the treaty can be described as something of a “routine service.” See Sally Langrish, The Treaty of Amsterdam: Selected Highlights, 23 EUR. L. REV. 3, 19 (1998). For a judicious, and generally downbeat, assessment, see Jo Shaw, The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy, 4 EUR. L.J. 63 (1998). He suggests that the final version of the treaty “does lack a clear vision which can be ‘sold’ to citizens of the Member States other than as a rather shoddy set of goods.” Id. at 83.
(EU) remains beset with questions of legitimacy, the constitutional aspirations of the Amsterdam Treaty are, at best, modest. The temper of the Amsterdam Treaty was set by the Reflection Group, which urged the Intergovernmental Conference [IGC] to concentrate its attention on the need to bring the EU up to date as a preparation for enlargement and, accordingly, to “focus on necessary changes” rather than embark “on a complete revision” of the Maastricht Treaty. The IGC readily agreed to shelve proposals for institutional reform pending anticipated enlargement of the EU. The Amsterdam Treaty is generally an effort to “tidy up” the existing terms by renumbering articles, tinkering around the edges of certain provisions, and restructuring clauses and sub-clauses. There was little further advance because, quite simply, no one could agree upon the direction that any advance should take.

This failure evidences a deep and debilitating malaise. A constitution and a constitutional theory that does not take account of the political community that constitutes it can make no claim to legitimacy that is any deeper than that described by a bunch of rules. The treaty framework, after Amsterdam as before, still fails to take the idea of community seriously. Despite this pessimist prognostication, however, there are some amendments that warrant attention. These amendments can, perhaps, provide a sense of direction for the immediate development of European public philosophy. There are three issues of potential interest, each of which in different ways imply that the EU no longer expects to move either in the same direction or at the same pace. First, there is the translation of “variable geometry” into the now statutory concept of “flexibility.” Flexibility is nothing if not a testament to volunteerism.

4 For a general statement of this legitimacy crisis, see J. Weiler, Problems of Legitimacy in Post-1990 Europe, 46 AUSSENWIRTSCHAFT 411 (1991). For a commentary in the wake of the Amsterdam Treaty, see Shaw, supra note 3, at 82-84.


6 For a discussion, see Duff, Supranational Institutions for Postnational Europe, in THE TREATY OF AMSTERDAM xxx-xxxviii (A. Duff ed., 1997).

7 See Consolidated TEU, supra note 2, tit. VII. The actual word “flexibility” enjoyed a rather short shelf-life and was replaced in the final version of the Amsterdam Treaty by the slightly less vacuous phrase “closer cooperation.” See id. The term “variable geometry” had come to describe the process by which some countries, an inner core that would include the likes of Germany, France, and the Benelux countries, would proceed towards further political and economic integration at a somewhat more rapid pace than the other members of the Community. Title VII furnishes a degree of constitutional legitimacy to this process, providing a procedure for a “vanguard group” of member states to pursue closer integration in policy areas defined within the ambit of the first and third pillars. See id. In the Maastricht Treaty, the EU was established upon three “pillars.” The first “pillar” was described by the existing European Community Treaty, the second by a new “pillar” on Common Foreign and Security Policy, and
Second, there is the translation of a number of measures previously in the third pillar into the jurisdiction of the European Community under a new title IV. A third issue, that of the Amsterdam Treaty's reinforcement of the rule of law announced in article 6 of the Treaty on European Union (TEU), is of potentially greater interest for our purposes. The Amsterdam Treaty reaffirms that the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.” These are principles, it confidently announces, “which are common to the Member States.” As was the case at Maastricht, there is no attempt to further define the concepts of liberty, democracy, respect for human rights, or the rule of law. The treaty affirms a “respect” for those rights guaranteed in the European Convention of Human Rights and Fundamental Freedoms but only vests legal authority insofar as these rights chime with “general principles of Community law.” The treaty, it is worth noting, takes the trouble to reaffirm a “respect” for the “national identities” of the member states. While there is little new here, there is a new provision for specific sanctions to be applied against member states adjudged by the council to be in “serious and persistent” breach of these general principles of Community law in article 6(1). Punishment

the third by another new “pillar” relating to Justice and Home Affairs Policy. See id. at tit. II-VI.

Consolidated TEU provides for any member state to veto a proposed flexibility procedure in the first pillar if thought necessary “for important and stated reasons of national policy.” See id. tit. V, art. 23, para. 2. For commentaries on the possible application of flexibility, see Duff, supra note 6, at 185-97; Langrish, supra note 3, at 5-7; Shaw, supra note 3, at 65-81; Amaryllis Verhoeven, How Democratic Need European Union Members Be? Some Thoughts After Amsterdam, 23 EUR. L. REV. 217 (1988).

See Consolidated EU Treaty, supra note 3, tit. VI.

The third “pillar” was established at the Maastricht Treaty to provide EU jurisdiction over matters relating to Justice and Home Affairs. See Consolidated TEU, supra note 3, at tit. VI. At Amsterdam, a range of these measures relating to asylum and immigration matters have been brought into the first “pillar,” the community, and so rendered justiciable before the European Court of Justice. See Consolidated EC Treaty, supra note 2, tit. IV. By establishing “flanking measures” that are designed to strengthen the control of external borders, title IV has been careful to balm national sensitivities. See Consolidated EC Treaty, supra note 2, tit. IV, art. 61; see also Langrish, supra note 3, at 7-12.

See Consolidated TEU, supra note 2, art. 6, para. 1.

See id.

See id. art. 6, para. 2.

See id. art. 6, para. 3.

See id. art. 7.
could include the suspension of treaty rights, such as voting in council. Of course, it is the rhetoric that matters. It is very unlikely that a member state will suffer any serious loss of rights. But it is worth noting that the EU was inclined to vest a quasi-judicial context to article F, even if it will almost certainly prove to be vacuous.

Two provisional conclusions may be drawn at this stage. First, the provisions of the Amsterdam Treaty do not promote any further integration that can be seen to detract from the residual authority of nation-states. Second, it must be acknowledged that the provisions of the treaty are not exciting and were never intended to excite. It can only be surmised that such an impoverished aspiration says much about the lack of confidence and direction that presently pervades the EU. At the same time, politics does not stand still; it progresses, or it goes backward. Only time will tell whether the Amsterdam Treaty represents a step forward or a step backward, but the initial prognosis is not encouraging. As always, much will depend upon political events over the intervening years before the next treaty, but it can be suggested that the painfully tentative steps made towards reinforcing the principles contained in article 6 may just represent the most productive means towards reinvigorating the European “project.” It is to this possibility that we will now turn.

CONSTITUTION AND COMMUNITY

The Amsterdam Treaty is not particularly exciting. Certainly, it is hard to see how it might excite the “peoples” of Europe. The reason lies with an impoverished aspiration. The European Community has never really aspired to realize a community—at least not in the sense of a discrete political community that projects itself as anything more than a glorified economic cooperative. Neither, of course, has it aspired to realize a discrete and integral concept of “Europe.” Instead, the so-called European Community has tended to concentrate on the presumed qualities of legal integration including the establishment of a European “constitution,” more particularly, a constitution of the type envisaged by classical liberal democracy. Such a constitution is replete with the associated mythologies of sovereignty and right and

---

16 See id. art. 7, para. 2.
17 A rationale for the sanctions clause lies in the presumed need to provide a deterrence mechanism for new members of the Community who may periodically fall short of the aspirations of article 6.
18 As Deirdre Curtin has emphasized, there is “no option of simply stopping the clock” and returning to the “safety and familiarity” of the old order. Deirdre Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy 62 (1997).
representative democracy, all of which are geared towards legitimizing the free play of free markets. The intellectual and ethical poverty of such a philosophy has attracted increasing criticism from more community-minded scholars such as Michael Sandel and Francis Fukuyama. A market is not a substitute for a political community, and the laws of such a community can never be subsumed by the pretended "laws" of the market. This observation has immediate and obvious pertinence to contemporary European studies.

The stagnation that presently afflicts European integration and that is symbolized in the Amsterdam Treaty, echoes a deeper intellectual crisis in contemporary liberal constitutional theory. The attempt to reinvest liberal constitutionalism has recognized the need to concentrate on the idea of the liberal "community." In other words, a post-modern or post-metaphysical liberalism must revise the classical liberal reliance on the traditional mythologies, including the impoverished culture of rules and rights, and instead recognize that any legal order is contextualized within a constitutional and political morality. According to Ronald Dworkin, the future of liberal political philosophy is dependent upon appreciating this deeper understanding of constitutionalism. Law's "empire" is one secured by a relationship based on integrity, between citizen and polity. This relationship fuses the political, ethical, and narrative experiences of life and in doing so fashions our imaginative "attitude" towards our constitution. "Law's attitude is" ultimately "constructive" for "it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping a right faith with the past." It is finally a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. A constitutional theory that does not contemplate the political community that it regulates can make no claim to legitimacy. Therefore, such a community can be reduced to little more than an assemblage of rules.

19 The author has developed this theme in IAN WARD, THE MARGINS OF EUROPEAN LAW (1996), particularly chapter 1.
21 See RONALD DWORIN, LAW'S EMPIRE 13 189-90 (1986).
22 Id. at 413.
23 See id. at 151-52, 167-75.
A constitution, as the product of this imaginative attitude, is the product of a constructive relationship between law and the evolving political morality of the community. Moreover, such an "attitude" can only be understood in narrative terms. A constitution is an aesthetic entity, an object subjectivized by its reading public. Once the critical concession is made that a constitution is both descriptive and constitutive of a constitutional morality, then we must approach the idea of the political imagination, for all constitutions exist, ultimately, in the political imagination. Dworkin is himself in no doubt that a constitution, ultimately, exists in the imaginative "attitude" of a citizen audience. The kind of liberal constitution envisaged by communitarians such as Michael Sandel is founded upon an appreciation that the political imagination is something fashioned by the narrative formation of political identities. Sandel suggests that the constitution of a liberal community expresses the "narratives by which people make sense of their condition and interpret the common life they share." Accordingly, "political deliberation is not only about competing policies but also about competing interpretations of the character of community, of its purposes and ends." Hence, in a modern liberal democracy it is not a matter of the periodic voting for a range of preselected candidates, the expression of democracy enjoying an intellectual dominion in classical liberalism, but instead about the opportunity to participate in the political discourse that fashions a community and writes its constitution.

In her recent work, Martha Nussbaum has taken the idea that a constitution describes an imagined political morality and has applied it to the pervasive problem of revising classical liberalism in line with the demands of the new world order. According to Nussbaum, the overriding need in contemporary society is to educate world citizens in such a way as to liberate the "mind from the bondage of habit and custom, providing people who can function with sensitivity and alertness as citizens of the whole world." Such sensitivity is

---

24 This inexorable logic has been acknowledged by Dworkin in his more recent work. See RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

25 See DWORKIN, supra note 21, at 189-90, 413; DWORKIN, supra note 24, at 1-18.

26 See SANDEL, supra note 20.

27 Id. at 350-51.

28 See id.

29 See id.


31 Id. at ix, 8-11.
premised upon an appreciation of diversity, which by definition recognizes the intrinsic integrity of each individual. The means by which this sensitivity can be reinvested are by nurturing the "narrative imagination," which means "the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have." It is the ability to identify with others that leads to the ability to identify with a community, both in the sense of communities of selves and of others. Identifying with a community is a democratic imperative, for the "future of democracy" depends upon the critical faculties of an active citizenry that can identify with the aspirations of its political morality.

A critical attitude expresses the truth that there is "more joy in the kind of citizenship that questions than in the kind that simply applauds, more fascination in the study of human beings in all their real variety and complexity than in the zealous pursuit of superficial stereotypes, more genuine love and friendship in the life of questioning and self-government than in submission to authority." It is a vision of democracy far richer and deeper than that lamely presented in the new article 6 of the Amsterdam Treaty.

THE POLITICS OF UTOPIA

A constitution is thus much more than an articulation of legal rights and rules. At one level it is also a document that is descriptive of, and described by, an immediate political morality. Further, it is also a fictive entity, the veracity of which lies entirely upon the strength of its situation within the political imagination of the community that it necessarily seeks to determine. It is sometimes suggested that revisionist liberal theses, such as Nussbaum's or Dworkin's, enjoy an immediately North American intellectual context and are not, accordingly, suited to Europe. Yet the idea of a political community, and a constitutional order as an imaginative and aesthetic expression of this community, is rooted in European political thought. Until the political and theological fragmentation of the sixteenth century, the respublica Christiana of Europe was united by the Thomist sequestration of Aristotle's political

32 Id. at 84-86.
33 Id. at 94-97.
34 Id. at 84. The overarching thesis develops her earlier work where she suggested than an ethical philosophy is constructed by the dialogic interplay of situated moral actors. See MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990).
community. In a specifically English context, it is the kind of political community that can be found in Sir John Fortescue's *The Governance of England*, written in the mid-fifteenth century, or indeed in Richard Hooker's *Of the Laws of Ecclesiastical Polity*, written a century later in an attempt to cast the Elizabethan settlement in terms of a "balanced" Aristotelian polity.

In 1517, Martin Luther pinned his *95 Theses* to the door of Wittenberg cathedral, and suddenly, as Nietzsche famously noted, there was no longer one God, but lots of gods all attached to various godly nations. Before the sixteenth century was out, the northern half of Europe had broken from Rome and was engaged in a series of dynastic squabbles for supremacy that would occupy the next four hundred years. The current attempt to refashion a united European *respublica* must be understood in this broad context. This is a nostalgic attempt to revisit and retrieve the unities of an imagined past, to reach past Nietzsche's prophesy in order to disprove the haunting belief that there is nothing, ultimately, that connects humanity—nothing that is, except humanity itself. The idea of a legally determined European *respublica*, such as the present Community, represents a denial that humanity can ever be enough. In addition to humanity, there must be law, and it is this pivotal belief that has geared the post-war determination to constitutionalize a legalistic Europe.

The threat that Luther posed to the united *respublica* of Europe was fully appreciated by Sir Thomas More. Like his close friends and fellow humanists Erasmus and Colet, More was trapped by a tension between the certainties of the past and the inexorable progress of intellectual challenge. His *Utopia* enacted a desire to work through the alternative histories of Europe, including the regressive history of the medieval and the progressive history of the classical. *Utopia* is a famously elusive text, riddled with ambiguity. There is an optimistic *Utopia*, one that might describe an idealized England or an idealized Europe. But there is also a pessimistic *Utopia*, one that presents an idyll, a rhetorical deceit designed to undercut the notion of human progress.

---


38 See Ward, supra note 19, at 12-13 (discussing Nietzsche's treatment of European history, and his prophesy that the twentieth century would be characterized by various, ultimately futile, attempts to manufacture some sort of pretended uniformity).

39 See generally id. at 3-22.

Whig historiography has long agonized over the possible meanings of *Utopia*. The tension does not need to be resolved; indeed the strength of *Utopia* lies in its refusal to commit to any particular theory of humanity. The dialogic form, most prominent in the first book and common amongst political commentators in the Aristotelian tradition, was employed precisely so as to nourish a dialectic rationality. The audience resolves whether *Utopia* is an ideal or an idyll, for, and this was More’s greatest insight, politics is an aesthetic and imaginative art.\(^{41}\)

The recognition that politics is indeed an imaginative art is not More’s only insight. At the same time, as a necessary consequence, More also recognized that a political community is bound by more than law. Given More’s professional dedication to the service of the common law, Hythloday’s acerbic dismissal of the socially binding force of law is another of the great paradoxes of *Utopia*. Law is a necessary evil, synonymous with an immature society clearly unable to appreciate the immanent rationality of the common good.\(^{42}\) Law does not itself bind a community; rather, it provides a support for communities that are otherwise lacking, to some degree, in political morality. Hythloday is equally dismissive of another political concept that is sometimes suggested to be a means of binding communities, a common market. The first book provides an excoriating critique of communities, which not merely permit but identify themselves with economic exploitation.\(^{43}\) In the absence of an overarching theology, the ethical philosophy of the Utopians is cast in terms of a communitarian utilitarianism. Following the Aristotelian blueprint, the happiness of the Utopian is derived from rationally constructed moral principles founded upon an appreciation that the good of the individual is


\(^{42}\) See More, supra note 40, at 90-92, 106-07. Of course, there is an immediate ambiguity in that the ideal described by the traveller Hythloday is immediately countered by the skepticism of the fictive “Thomas More.” A world devoid of laws, the latter comments in reply, would be anarchy. The relative authority of the two views is intimately bound up with the alternatives of ideal and idyll that, as we have already noted, are essentially irresolvable. See Quentin Skinner, *Sir Thomas More’s “Utopia” and the Language of Renaissance Humanism, in The Languages of Political Theory in Early Modern Europe* 123, 141-44 (Anthony Pagden ed., 1987).

\(^{43}\) See More, supra note 40, at 44-50, 65-70. More’s immediate concerns centered on the effect of rack-renting and enclosures, “malignant growths” which militated against a lost sense of common good.
determined by the good of the community. A humanistic idea of a political community is one that seeks deeper moral and aesthetic qualities than those found merely in law or money. The prophecy of *Utopia*, whether or not it be optimistic or pessimistic, is the one that was to find its later echo in Nietzsche. More prophecized that a Europe that abandoned a proper understanding of political morality and that merely transferred its affinities from a theological god to a legal or monetary one, would never realize its ambition to reforge a common *respublica*.

The sixteenth century reformation is instructive for a second related reason, for, as More suspected and feared, its ultimate success was premised upon a revolution in political identity. The English Reformation was ensured because the seismic events in constitutional history, such as the 1533 Act in Restraint of Appeals, were complemented by an aesthetic revolution. This revolution was one that transformed the aesthetics of the Mass—the one event symbolizing a unity of political theology—and evangelized the theological revolution. The ultimate success of the Elizabethan settlement was founded, not upon law, but upon an imagined sense of participation and belonging. The late sixteenth century man and woman did indeed envisage themselves as “living in pages of the Bible.” The reformation was their reformation, effected by them, for them, and for their children. In terms of zeal, commitment, and faith, the much-vaunted “reformation” of late twentieth century pales by comparison.

The absence of a comparable European zeal is critical, and the collateral effect is the all too familiar problem of identity. It might be suggested that the modern European is now too sophisticated to be so easily taken in as his or her sixteenth century forbears. But such is the argument of complacency that perhaps justifies half-hearted attempts to establish European orchestras, hymns, and flags, but seems unwilling to reach out and effect an image of genuine political or social identity. The potential to be gulled by mythological affinities transcends historical progress. The putative European is out there, but he or she needs to feel a sense of belonging, a sense of being part of an

---

44 The extent to which the Utopians seem content without theology, most particularly Christian theology, has caused much comment. It is an ambiguity necessary to any attempt to revisit an idealized Aristotelian community. See Bradshaw, *supra* note 41, at 7-14; WRIGHT, *supra* note 41, at 107-33.

45 For discussion of the critical aesthetic components of the reformation, see PATRICK COLLINSON, THE BIRTHPANGS OF PROTESTANT ENGLAND (1988). See also EAMON DUFFY, THE STRIPPING OF THE ALTARS: TRADITIONAL RELIGION IN ENGLAND, C.1400-1580 (1992) (arguing that the Reformation was an unnecessary occurrence to the average Englishman).
irresistible progress. Europe does not enjoy a natural political existence. Indeed, the opposite is now true. Europe is determined by its nation-states, and if this alignment is to be tempered in the cause of an alternative European identity, then Europe is going to have to do something of seismic proportions, something comparable to that engineered by the reformation ideologues of the sixteenth century. European integration will not just happen, for there is, despite the optimistic prognostications of the end of history ideologues, nothing certain in life except death and taxes.\footnote{Even commentators most readily associated with the neo-Hegelian thesis are inclined to agree that the market represents no sort of substitute for a cohesive public philosophy. See \textit{Fukuyama}, supra note 20, particularly part five.}

\textbf{THE SEARCH FOR A PUBLIC PHILOSOPHY}

John Kenneth Galbraith suggested that, in place of theological principle, the aspiration of modern society is described by consumerism; the credit card has replaced the cross. While there is certainly much wisdom in this insight, it can also be suggested, without imposing contradiction, that the allure of money alone will not suffice for the forging of a European identity. Nation-states make money, and the consumer society, like any other, is centered in local communities. People shop down the road. This, as Galbraith suggests, is the fallacy that lies behind radical liberal assertions that the global free market will necessarily preserve political liberties. The free market has nothing to do with political liberty, because a market that does not ensure universal rights of access is free only to those who can afford to engage it. Markets are never politically neutral, and they can never provide a means for evading the deeper questions of what public philosophy can best reflect the political morality of a community. Rather, the political ideology that complements the idea of a free market merely constitutes a necessarily secondary and impoverished supplement.\footnote{See \textit{John Galbraith, The Good Society: The Humane Agenda} (1996). For a discussion of the exclusivity that attaches to a market that does not provide rights of access, see \textit{Roberto Unger, The Critical Legal Studies Movement} (1986). For a recent debunking of the myth that global markets are either free or value neutral, see Philip Alston, \textit{The Myopia of the Handmaidens: International Lawyers and Globalization}, 8 EUR. J. INT’L L. 435 (1997).}

Europe needs to offer something more than a free market. It needs to offer something of deeper moral principle. Ultimately, Europe needs a public philosophy. This argument has been most recently articulated by Jürgen...
Habermas, who has concentrated on the desirability of promoting public spaces for dialogic participation. However, I want to suggest an alternative that necessarily presents a more immediately ethical alternative and also situates itself within the humanist tradition articulated by More. Two hundred and eighty years after the composition of *Utopia*, in *The Metaphysics of Morals*, Immanuel Kant suggested that any public philosophy must be centered upon the capacity of the rational moral individual and the appreciation of his or her situation within a rationally constructed political community. Europe in search of a public philosophy could do no better than turn to Kant's *Metaphysics*. Although Kantian legal scholarship has tended to concentrate on a formalistic determination of right, as articulated in the first part of the *Metaphysics*, the idea of right constitutes only part of a Kantian public philosophy.

In the Kantian conception, a right is immanent to the rational moral self, a concept determined in *The Groundwork for a Metaphysics of Morals*. However, the Kantian self exists within political communities, as Kant acknowledged most forcefully in his discussion of the *sensus communis* in sections twenty-one and forty of the *Critique of Judgement*. He further noted that such communities are constituted by the imagined affinity of the dialogically engaged subjects. The “doctrine of right” is thus only one component of a metaphysics of morals. Any rationally constructed community is also grounded upon the complementary “doctrine of virtue,” which is the subject of the second part of the *Metaphysics*. Legal and political theorists have tended to neglect the second “doctrine.” This is a mistake because the liberal community, for Kant, is as dependent on this doctrine as it is upon an established idea of right. The “doctrine of virtue” describes internally

---


generated duties necessary for the constructive participation of the rational actor in a political community. Incipient ideas of democracy are founded upon these duties, just as the political concept of freedom is founded upon the idea of immanent moral right. Furthermore, where right provides a means to a political end, virtue describes that end as the harmonious relation of individual and community bound by a common appreciation of a common good. It is, ultimately, a concept of political responsibility for the democratic engagement of free individuals in constructing a common public philosophy.\(^5\)

The concepts listed in article 6 of the Amsterdam Treaty owe their intellectual genesis to Kant’s *Metaphysics*. However, their mere statement is itself inadequate. Democracy, liberty, respect for human rights, and the rule of law must come to mean something. Accordingly, in a Kantian thesis, none of these ideas have political meaning outside of their application. They are means to be applied to the ends of humanity. Democracy can be good or bad, as can forms of liberty or rights.\(^5\)\(^4\) Article 6 can provide no reassurance here. It does not even acknowledge the conceptual distinction between form and substance. It is here that the timidity of the Amsterdam IGC is once again pertinent. The refusal of the Community and its Court of Justice to “take human rights seriously” will not be remedied by the single stroke of a legislator’s pen. This is a critical matter for the continuing failure with regard to human rights is intimately related to the equally striking failures of democracy.\(^5\)\(^5\) The “democratic deficit,” understood in terms of inadequate mechanisms of representative government, is not the issue. It is the absence of an appreciation that there are alternative, wholly more suitable, forms of democracy that could be promoted in Europe that matters. It is beyond the scope of this article to discuss such forms in depth, but it is pertinent to note the extensive academic commentary delving into theories of participatory

\(^{53}\) See *Kant*, *supra* note 52, at 181-97. For a discussion of the political capacity of the second “doctrine,” see *Ward, supra* note 52, at 32-35.


\(^{55}\) For the original, and telling, commentary on human rights in the Community, see Jason Coppel & Aidan O’Neill, *The European Court of Justice: Taking Rights Seriously*?, 12 LEGAL STUD. 227-45 (1992). For the suggestion that the Amsterdam Treaty perpetuates an impoverished attitude towards democratic rights in particular, see Verhoeven, *supra* note 8, at 217-33.
democracy, both in the geo-political context of regional government and the social contexts of workplaces and so forth.56

A deep theory of human rights, one that recognizes the integral quality of Kant's second "doctrine," requires more than an enacted or acknowledged bill of legal rights. Such bills are themselves resonant with the minimalism that characterizes liberal legalism. Locke praised the Bill of Rights of 1689 precisely because it preserved his ability to exploit the semi-feudal serfs who worked his Somerset estates. While the serfs might enjoy formal equality, Locke readily acknowledged that in terms of political reality, his rights were entirely distinct from theirs.57 A right is itself quite useless, but an applied right is a very different thing.58 An alternative post-Kantian idea of human rights recognizes that a "respect" for others is both a civic responsibility as well as a legal right.59 Human rights do not begin and end in a court room, although they barely do even that in the EU.60 Rather, they are the constructs of a properly invested public philosophy that is itself founded on a mature appreciation that an individual, though an end in herself, is defined by the community that she, in turn, defines. Politics is about identity, and individuals identify first and foremost with their immediate communities. This does not mean that they identify with only one community. Indeed, we all identify at different levels with all kinds of community. But we enjoy no meaningful political existence, as Kant appreciated, without these affinities.

56 For a recent discussion of the possibilities within the sphere of social policy, see Lammy Betten, The Democratic Deficit of Participatory Democracy in Community Social Policy, 23 EUR. L. REV. 20-36 (1998).
58 See generally Mark Tushnet, An Essay on Rights, 62 TEX. L. REV. 1363 (1984) (arguing that the liberal theory of rights forms a major part of the cultural capital that capitalism's culture has given us).
60 Judge Federico Mancini recently suggested that the evolution of a human rights "jurisprudence" is now so great and human rights so "spacious and well-guarded" by the Court that it is impossible to believe that civil rights can only exist at a national level. See G. Federico Mancini, Europe: The Case for Statehood, 4 EUR. L. J. 30 (1998). It is a statement that presumes much. It implies for a start that such rights either can only be protected at a Community level or are best protected at this level. It also implies a sense of completion. Human rights, it seems, have been largely secured. This view is as debatable as it is complacent. It also redefines human rights as those rights recognized by judges, which is at best an impoverished view.
A European public philosophy can be established only by investing the Community with a genuine sense of "community." This does not necessarily mean diminishing the authority of nation-states, their sovereignty or their legal jurisdiction. Community and affinity are not quantifiably discrete; there is plenty to go around. But at the same time, it does mean that the Community must deal with its citizens, not just its nation-states. The "solidarity" which the EU proudly proclaims in article 2 of the Consolidated EC Treaty must be one between citizens, not just "member states." It must in short allow participation. As one of Kant's most articulate twentieth century disciples Hannah Arendt observed, people only feel a part of polity that they feel that they have played a role in constructing. It is a conclusion that chimes with that reached by another of Kant's contemporary disciples, John Rawls, whose controversial movement from a theory of justice to a practice of political liberalism has been determined by the need to establish firm principles of government in a liberal community. The idea of an "overlapping consensus" describes the practical relation of dialogically engaged citizens, sharing a loose political morality that recognizes the overarching principle of the common good without predetermining any necessary comprehensive ethical theory.

The challenge, then, is clear. Further, European integration depends not just on law. Perhaps it does not depend on law at all. Rather, it depends upon investing a public philosophy, one that enjoys a political dynamic and an intellectual vigor comparable to that articulated by the sixteenth century reformers or the eighteenth century philosophers. Sadly, there is little in the Amsterdam Treaty to suggest that this is a challenge that Europe is at all inclined to take up, or indeed capable of so doing. Article 6 exists to tease, suggesting that there might be a political morality "common to the Member

---

61 The notion that European identity, somehow miraculously achieved by means of an enhanced idea of European citizenship, would necessarily "enfeeble national identities" is somewhat arcane. Yet it still attracts its supporters. See Mancini, supra note 60, at 31. For the idea that political identities are always multiple and fluid, see ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE (1991); Michael Reisman, Designing and Managing the Future of the State, 8 EUR. J. INT'L L. 409, 418-19 (1997) (discussing the idea of multiple affinities in the context of international order).
62 Consolidated EC Treaty, supra note 2, art. 2.
64 See generally RAWLS, supra note 59. The concentration on procedures of democracy and participation bears striking similarities with Habermas' recent commentaries on the situation in contemporary Europe. See Habermas, supra note 48, at 125.
States" but declining to say anything more.\textsuperscript{65} Europe seems to lack confidence and a willingness to flesh out, articulate this common morality and having done so, make it mean something that can matter in the lives of real people, not just lawyers. What it lacks, ultimately, is anything approaching the kind of intellectual depth or vigor that characterized either the reformation or enlightenment revolutions. Ironically, given the anxieties that European integration has caused, placed in the context of the last two millennia of European history, what is most striking about the current European project is its half-heartedness.\textsuperscript{66} It is a community that seems almost too discrete and too shy to transform its dreams into reality. The European "saints" identified by Alan Milward, the likes of Monnet, Schumann, and Spaak are, after all, pretend saints; they are saints without a theology, a faith, or indeed much of a congregation.\textsuperscript{67} None of them thought to describe a European Community that was founded on any conception of human or civil rights, or anything indeed, much greater than a free trade area. Until the crippling absence of a proper substantive public philosophy is remedied, no amount of treaties, of laws, or of rhetorical flights of fancy will make an iota of difference to the lives of the overwhelming number of ordinary European citizens. More importantly, there will be no such thing as a European "community."

\textbf{THE NATION-STATE AND THE LIMITS OF LEGAL INTEGRATION}

Of course, perhaps this prognosis is wrong. Perhaps the new Europe does not need a public philosophy or even a political morality. Maybe a market is enough. The politics of pragmatism militates against any such ideality, against images of sainthood, against imagined utopias. The age of utopias is supposed to be past, and European legal academics are not to be distracted by such whimsies. Yet, there is a certain ambiguity here for the idea of a united, politically integrated Europe is precisely such a utopia.\textsuperscript{68} Treaties, even rather

\textsuperscript{65} See Consolidated TEU, \textit{supra} note 2, art. 6.
\textsuperscript{66} For a related critique, see Philip Allott, \textit{The European Community Is Not the True European Community}, 100 \textit{Yale L.J.} 2485 (1991).
\textsuperscript{67} See \textsc{Alan S. Milward, The European Rescue of the Nation-State} 334-35 (1993).
\textsuperscript{68} See Serge Sur, \textit{The State between Fragmentation and Globalization}, 8 \textit{Eur. J. Int’l L.} 421, 426 (1997) (suggesting that the European Community is the one example of a transnational order actually entrenching itself as an alternative to the classical model of the nation-state. It is, he suggests, the one utopia that is more than a dream). More would have shuddered at such a curious distinction, but the point is well taken.
dull ones such as Amsterdam, describe aspirations and imagined futures that are intended to excite sufficient interest that they can attract at least a provisional acceptance. Integration is, by definition, an on-going process, suggesting that things can, indeed, only get better. The image and the rhetoric are absolutely critical, for there is, in reality, little else. This, ultimately, was the irreducible tension that More appreciated. Any political vision is an ideality, as well as an ideal. It is in part a product of the imagination, a rhetorical feint, but in part also, an aspiration for the possible reconstitution of society.

An imagined united Europe has been with us for 2,500 years, from Plato to Augustine to Aquinas to More. It has continued through the likes of Hegel and Kant and the utopias of the Enlightenment, to the rather darker variants projected by Nietzsche, Orwell, and Trotsky. In *The Open Society and Its Enemies*, Karl Popper warned against the over-reliance upon utopias. Central to his thesis was the assertion that, while the modern ideologist might pretend to scoff at such naivety, the intellectual inheritance of Plato, Hegel, and Marx lived on, deeply ingrained in the intellectual psyche of European modernism. Post-modernity, as Jean-Francois Lyotard warned, must remain vigilant against any utopia and its pretended “metanarrative”—the mythology that history describes a necessary progress towards the attainment of some imagined ideal. Yet, as Lyotard fully appreciated, the dismissal of “metanarratives” is grounded in Kant’s critique of metaphysics. Respect for the integrity of each individual as an end in herself demands a rejection of any alternative comprehensive theory. The *Metaphysics of Morals* describes a utopia in which there are no utopias.

The Amsterdam Treaty, like all the treaties that periodically revisit and attempt to describe the imagined utopia of the new Europe, must be understood within this particular intellectual tradition. This tradition includes the balance of ideal and idyll, of aspiration and skepticism. Politics rarely pursues

---


70 See KARL RAIMUND POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 398-99 (1950) (noting that modern intellectuals try to minimize the uncertain ties of social change by providing a nationalist overlay to history).


72 See KANT, supra note 49, at 36-37 (arguing there is a single practical moral system that connects all human duties of virtue by one principle).
pursues a consistent aspiration and never does so at a consistent pace. The history of European legal integration, as any history, is one of fits and starts. There can be little doubt that Amsterdam represents something of a "fit"; indeed, given the obvious trepidation that can be read into its limited aspirations, it can be fairly said to be a catatonic one. Indeed, it may be that future historians will see the Amsterdam Treaty as the pivotal event in the rise and fall of the late twentieth century European vision, the diplomatic event that signaled the turn from integration to controlled disintegration. Only time, and a multitude of as yet unknown political contingencies, will tell.

If not a treaty of controlled disintegration, Amsterdam certainly represents an ordered retreat from any idealized notion of a federal Europe. At the same time, the treaty represents a consolidation of the idea of a Europe of nation-states. As yet, there remains no viable alternative vision. The nation-state remains the essential political unit in contemporary international law and order, while the much-vaunted march of globalization represents less of a threat than a reassurance. As Alan Milward has suggested, in the immediate context of post-war Europe, the "common market" of the European Community was created in order to secure the economic rescue of the nation-state. The Community does not possess the capacity to dislodge this authority, and neither, given its impoverished political morality, should it seek to do so. It has been suggested that the EU described in the Amsterdam Treaty, the EU of "flexible" friends, confirms a new orthodoxy. This orthodoxy recognizes that integration can only go so far as the nation-states wish it, and, in the absence of anything other than the most superficial democratic imperatives at Community level, this is entirely proper.

The idea that the nation-state is somehow a threat to the ideal of a new Europe is dependent upon a mentality entirely committed to an alternative, indeed utopian, vision of a homogenous Europe of citizens willing and able to abandon all received images of political identity and affinity. The most concerted attempts to suggest an alternative political ordering have been

---

74 For a persuasive presentation of this thesis, see Reisman, supra note 61, at 409-20. But cf. Sur, supra note 68, at 421-34. It should be noted that Sur, while generally disagreeing with Reisman's prophesy that the nation-state is here to stay, recognizes that the relevant language is one of transformation of the state rather than dissolution.
75 See MILWARD, supra note 67.
76 See Dashwood, supra note 73, at 213, 216.
couchèd in terms of federalism. The allurement of the federal state is easy to understand. At first blush, a federal Europe seems to suggest the possibility of a legally defined collection of nation-states with limited sovereignty, or to use contemporary parlance, mutually “pooled.” But such an aspiration is dependent, not just upon belief in a particular constitutional fiction of pooled sovereignty, but on a legalistic adherence to the notion that sovereignty actually determines a modern nation-state and that the dispersal of sovereignty somehow diminishes that nation-state. It is for this reason that legal theorists such as Neil MacCormick can suggest that the European Community takes us “beyond sovereignty.” Indeed, it does take us beyond sovereignty, but only in the sense that it takes us beyond the fictive notion of unitary sovereignty. In terms of exercising real power, there are always limits, limits defined and imposed by the political imagination. Such was Machiavelli’s great insight, and it was one readily appreciated by Thomas More.

The idea of politics “beyond” sovereignty does not of itself, then, represent any sort of immediate threat to the nation-state. But it can take us towards a sense of community that is not dependant upon arcane concepts of classical liberal constitutionalism. The notion that there is such a thing as unitary sovereignty is a fiction. As Michel Foucault emphasized, what matters is power, and it is the efficient dispersal of power that defines the successful modern state. Modern polities are managed not governed, and Europe is no exception. Indeed, the Amsterdam Treaty is further evidence that what matters in today’s Europe is not principle or ideology but management. The reinvestment of a European public philosophy will not entail a diminution of nation-state sovereignty, but it can usefully militate against the recidivist temptations of the more xenophobic forms of nationalism. Only once such xenophobic fictions have been purged can nation-states be purged of their exclusionary tendencies. Nations “without nationalism,” as Julia Kristeva has

77 See, e.g., ERNEST WISTRICH, THE UNITED STATES OF EUROPE (1994).
79 For a perceptive treatment of this issue, see NICCOLO MACHIAVELLI, DISCOURSES (Bernard Crick ed. & Leslie Walker trans., Viking 1985) (1531). For a comment on the increasingly mythic idea of sovereignty, see Reisman, supra note 61, at 415.
80 See Anne-Marie Slaughter, The Real New World Order, 76 FOREIGN AFF. 183-84 (1997).
81 See Michel Foucault, Governmentality, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY (Graham Burchell et al. eds., 1991).
82 Shaw rightly suggests that the treaty represents a further shift from principle to management. See Shaw, supra note 3, at 67-68, 85; Weiler, supra note 54, at 54-55.
persuasively argued, represent an ideal that is as realizable as the idyll of a world without nation-states is not.  

Similarly, there is no need for a European public philosophy to set its sights upon the destruction of the nation-state. Such a destruction is neither practical nor desirable. Even the most committed federalist has been unable to provide an alternative European model that is not itself dependent upon some sort of statist model. Advocates of deeper political integration, such as Federico Mancini, advance models that apply the basic constructs of the nation-state and then reshape them in order to produce a European “state.” It is for this reason that lawyers in particular, and Mancini is again a fine example, steeped in a belief that any community must be determined by law, assume that a European polity must be likewise so determined. But the central concepts of modern liberal legalism, as we have already noted, are geared to the idea of the discrete nation-state and make little sense outside that context. The concentration on liberal legalistic integration in the Community is not hereby condemned per se. But the idea that greater legal integration can itself effect a sense of enhanced identity and affinity between citizen and Community is futile. Liberal legalism was designed to provide the fictive legitimacy that the early modern nation-state desired. The cosmopolitan Europe that Kant envisaged in *Perpetual Peace* was, it should be admitted, fashioned by principles of liberal legalism.  

A liberal, legal European state can be only a pale reflection of the real thing. As we repeatedly have noted, the failure of Amsterdam is, ultimately, the expression of a continuing failure of the political imagination, and there is

---

84 See generally Wistrich, *supra* note 77.  
85 See Mancini, *supra* note 60, at 29-42.  
86 See Verhoeven, *supra* note 8, at 217-34.  
88 As Weiler has noted, with supportive commentary, “European statehood seems to many a ‘weak idea, at best irrelevant to the real problems of Europe, at worst a recipe for aggravating them.’” See Weiler, *supra* note 54, at 43.
no more impoverished a model than that of a federal European state. Moreover, in real terms, federalism does not offer any sort of alternative to the nation-state. Federal polities, like the United States or Germany, are at least as dependent upon imagined notions of nationalism, ethnicity and community as are unitary states such as France or the United Kingdom. Only a resolutely legalistic psyche, one that can convince itself that constitutional niceties alone define the nature of a political community, can think otherwise. Nation-states are the reality of modern international and domestic politics, and as the German Constitutional Court revealed in its Maastricht judgment, no amount of legalistic fiddling is itself going to change this salutary fact.\(^8^9\) The limited constitutional aspiration of the Amsterdam Treaty is a testament to this reality. Once again, rather than seeking to destroy the nation-state and then merely hoping to replace it with a pale reflection, an aspiration as futile and impoverished as it is impracticable, the far greater need is to think of ways in which a European Community, finally vested with a discrete public philosophy, can complement the reality of a Europe of nation-states.

The limited constitutional aspiration of the Amsterdam Treaty is a testament to this reality. Once again, rather than seeking to destroy the nation-state and then merely hoping to replace it with a pale reflection, an aspiration as futile and impoverished as it is impracticable, the far greater need is to think of ways in which a European Community, finally vested with a discrete public philosophy, can complement the reality of a Europe of nation-states.

The conclusion is unavoidable. Further political integration in Europe is not dependent upon constitutional revolution or any pretended struggle for sovereignty or perceived threat to or from the nation-states. Accordingly, neither is further integration dependant upon law. The thought that it might be dependent upon law has remained its greatest weakness. The European Community and EU are hamstrung by an over-reliance on law and, more peculiarly, by a particular obsession with observing all the mythical tropes of liberal legalism. The sign of a strong community, as More appreciated, is the absence of law.\(^9^0\) Liberal legalism has invested much intellectual energy in the notion that a modern society is founded upon its laws and the wisdom of its legislators and lawyers. It has been able to do so because, as an ideology, it has presumed the existence of nation-states. These nation-states, in turn, have been founded upon an imagined commonality between its constituent communities and citizens.\(^9^1\) Europe enjoys no such commonality. Indeed, as Jacques Derrida has suggested repeatedly, the idea of modern Europe is precisely the reverse, a geo-politics of nation-states, each of whose legitimacy


\(^{9^0}\) See MORE, supra note 40, at 90-92, 106-07.

\(^{9^1}\) For an interesting discussion of these ideas, see ELIE KEDOURIE, NATIONALISM 56-66 (1996).
is founded upon the establishment of some sort of imagined cultural and political peculiarity.\footnote{\textit{See Jacques Derrida, The Other Heading: Reflections on Today’s Europe} (1992).}

The logic is inexorable. If Europe does wish to refashion itself into something other than a Europe of nation-states, then it first must detach itself from the pervasive intellectual authority of liberal legalism. A European public philosophy cannot hope to challenge the fictive constitutional affinities that describe the relations between nation-states and citizens. It never will be as democratic, at least in the representative sense. Its rule of law will never enjoy the immediate impact that is enjoyed by national judiciaries. Freedom in Europe will mean nothing if citizens are not free in their nation-states. But Europe can reinvest in an alternative sense of community, one that is not embedded in mythical nationalist fictions, one that does not thereby need to identify, persecute and exclude others, one that does not find itself invested with judicial authority in the new title IIIa. Such a sense, as we have already noted, can be achieved only by turning to the fundamental principles of political morality set in the \textit{Metaphysics of Morals}; Europe must be a community defined by mutual respect for the integrity of each individual.

It is the rhetoric of liberal legalism that directs our attention to concepts such as sovereignty, citizenship, and rights. Much critical discussion of European public law has concentrated on precisely these ideas in an effort to reinvest their integrity in the new European order.\footnote{For a recent discussion, see Joseph Weiler, \textit{The Constitution of Europe} (1999).} The importance of such endeavors should not be diminished too readily. But at the same time, they should not be allowed to blur the important truth that the European constitution, like any constitution, is about far more than legal rules and jurisprudential concepts. A polity can develop only so far by such means, and the EU has, at Amsterdam, reached the point where such a limitation is starkly apparent. If Europe is to progress towards integration rather than regress towards disintegration, then it now must turn its attention to the hitherto neglected questions of its conspicuously impoverished political morality. Article 6 must become something more than a rhetorical feint.