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**EUROPE: IS THERE A CASE FOR STATEHOOD?  
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**I. INTRODUCTION**

“In principle,” writes Jürgen Habermas, “the rule of law can exist without the concomitant existence of democracy”; that is, without political rights empowering the citizen to bring influence to bear on changes of his own status.<sup>1</sup> The model of governance which the German philosopher has in mind is probably the British Raj or something akin to it: a “paternalistic authority”, as he puts it.

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1 J Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe” (1992) 12 *Praxis International* 1 at 10. In a not dissimilar context, see I Berlin, *Four Essays on Liberty* (1969), p 129.

Yet Habermas' remark applies no less accurately to a polity which has little paternal about it: the one brought into being in 1957, by the Treaty of Rome.

Treaties, as happened in the case of the German Empire at the end of 1870, may give rise to federal states; but what they usually produce are alliances, leagues, confederations and, when the goals pursued are confined to a specific area, international organisations.<sup>2</sup> The European Community differed from the latter in many respects, by far the weightiest of which was the fact that the relationships between its institutions and its Member States, including their citizens, were subject to the rule of law. Nevertheless, there were stronger reasons which led politicians and scholars to deny that the Community was of a federal nature and thus to number it with the other and looser entities: namely, the chiefly economic competences transferred to it and its substantially undemocratic character. Between federalism and democracy there is a necessary correlation: so necessary, indeed, that most authorities agreed to define the Soviet Union and certain Latin American states in some phases of their history as sham federations. International organisations, by contrast, are avowedly non-democratic, because they reserve central normative power to the body representing the contracting states which, as a rule, exercises it unanimously.<sup>3</sup> "Diplomacy not democracy" governs their decision-making mechanisms.<sup>4</sup>

The Treaty of Rome is technically still in force, but the caselaw of the Court of Justice and, beginning in 1976, a series of constitutional reforms, have deeply affected the scheme established by its authors. As a consequence of the former, especially the judgments which read into the Treaty an open ended charter of fundamental rights, the area covered by the rule of law in the operation of the Community is spacious and well-guarded. So much so, in fact, as to pillory, for its gratuitous arrogance, a sentence uttered as late as 1974 by a famous French political scientist, Raymond Aron: "genuine civil rights do not reach beyond national boundaries".<sup>5</sup> As for the reforms to which I have alluded - the election of the European Parliament by universal suffrage and its modest but increasing involvement in the Community's law making process - they were obviously imposed by the awareness that the growing range of the Community's powers removed from the sovereignty of the national Parliaments, without their consent or control.<sup>6</sup> The legislative monopoly, accorded to the body representing the

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- 2 See C Leben, "A propos de la nature juridique des Communautés européennes" (1991) 14 *Droits* 61 at 63. By contrast, according to some writers, confederations have, in principle, political and defensive objectives. AD Pliakos, "La nature juridique de l'Union européenne" (1993) 29 *Revue trimestrielle de droit européen* 187 at 209; writes that, while an international organisation implies a pooling of sovereignty by its Member States, their sovereignty remains intact in a confederation.
  - 3 Leben, *ibid* at 65; GF Mancini and DT Keeling, "Democracy and the European Court of Justice" (1994) 57 *Modern Law Review* 175; A La Pergola, "L'Unione europea tra il mercato comune e un moderno tipo di confederazione. Osservazioni di un costituzionalista" [1993] *Rivista trimestrale di diritto e procedura civile* 1 at 3.
  - 4 DM Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy*, Inaugural Lecture, University of Utrecht, p 9.
  - 5 R Aron, "Is Multinational Citizenship Possible?" (1974) 4 *Social Research* 638.
  - 6 Mancini and Keeling, note 3 *supra* at 177. A further argument that helped to strengthen the case for direct elections was the Parliament's acquisition of budgetary powers in 1970 and 1975: see J Pinder, *European Community. The Building of a Union* (1991), p 35.

States, had therefore to be diluted at the Community level in ways reminiscent, even if only faintly, of the federal model under which the power to make laws is shared by the States' council and a house representing the people.<sup>7</sup>

These developments are steps forward, taken in order to ensure the efficiency of the Community (such as a considerable increase in majority voting in the Council of Ministers), the forthcoming acquisition of monetary sovereignty,<sup>8</sup> and, under the more frail label of the European Union, the faculty of indenting "almost all the core functions of the nation state".<sup>9</sup> These steps have certainly modified the primitive nature of the polity born in 1957. Today, insisting on defining it as an international organization and describing all that does not fit this definition as "frills and rhetorics"<sup>10</sup> is much like trying to push the toothpaste back into the tube.<sup>11</sup> Those who indulge in such an exercise are either diehard acolytes of the neo-realist school in political science, eager to prove that any further progress on the part of the Union comes up against unsurmountable limits,<sup>12</sup> or professors of international law anxious to keep their grip on a luscious province coveted by constitutional lawyers.<sup>13</sup> But, if this point is indisputable, are constitutional lawyers already entitled to annex and lord over the province they covet? I do not believe so. Albeit responsible for conquering large and important territory, the Maastricht Treaty has not led the Union across the threshold wherein lies the federal state. I shall say more: The nearer the Union moves to statehood, the harder becomes the resistance to the attainment of this goal.

Two examples will support this suggestion. Any upholder of the functionalist philosophy which informed one of the Community's founding fathers, Jean

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- 7 Leben, note 2 *supra* and La Pergola, note 3 *supra* at 7. For a comprehensive survey of the evolution of the European Parliament up to the Maastricht Treaty, which in the last analysis conferred on it a negative right to block a legislative proposal in ten policy areas (the 'codecision procedure'), see M Newman, *Democracy, Sovereignty and the European Union* (1996), p 174.
- 8 Which, as Lady Thatcher once remarked, is "the core of the core of national sovereignty". See W Wallace, "Rescue or Retreat? The Nation State in Western Europe, 1945-1993" (1994) XLII *Political Studies* 52 at 67. According to PC Schmitter, "Imagining the Future of the Euro-Polity with the Help of New Concepts" in G Marks *et al* (eds), *Governance in the European Union* (1996) at 122; if monetary union is successful: "Member States will have 'pooled' [the right] to pursue any macro-economic policy independent of the other participating Member States."
- 9 Wallace, *ibid* at 65. See also Schmitter, *ibid* at 124: "There is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and in some degree been incorporated within the authoritative purview of the EC/EU."
- 10 See Pinder, note 6 *supra*, p 4.
- 11 JHH Weiler and UR Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass" (1996) 37 *Harvard International Law Journal* 411 at 423.
- 12 On the neorealist school, its belief in the immutable role of the nation state and the unreality of proposals for the transfer of sovereignty to common institutions, see Pinder, note 6 *supra*, p 203 and Newman, note 7 *supra*, p 17. See also HH Koh "Why Do Nations Obey International Law?" (1997) 106 *Yale Law Journal* 2599 at 2615, who devotes a highly sophisticated analysis to the origins, the development and the present decline of this group of scholars.
- 13 For a perfect example of this attitude see A Pellet, "Les fondements juridiques internationaux du droit communautaire" in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (1997) at 193. A similar, albeit less loaded, approach is adopted by T Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations" (1996) 37 *Harvard International Law Journal* 389.

Monnet, any believer in the wisdom of a dictum shared by James Madison, amongst others: “federalise their wallets and their hearts and minds will follow”,<sup>14</sup> is naturally prone to think that the implementation of monetary union will unbalance the system so thoroughly as to require a counterpoise in terms of a genuine and democratically accountable economic government. Yet the Amsterdam Treaty of last June fell short of this expectation. Its authors decided that the college of the fifteen Finance Ministers (some of whom representing countries which shall not join the single currency) will be a sufficient match for the power of the future Central Bank and that the extent of such power does not perforce make a case for granting the Parliament a greater role. Equally indicative of this hard-nosed attitude was their curt opposition to any enrichment of the stingy catalogue of rights - no more than “mirrors and beads” for the natives, as one scholar has aptly put it<sup>15</sup> - which Articles 8 to 8e of the Treaty on European Union attached to Union citizenship. Obviously, an expansion of this status, not unlike an enlargement of the Parliament’s prerogatives, would strengthen European democracy or, more accurately, would contribute to its moving from “liturgy” to “substance”.<sup>16</sup> By the same token, however, it would enfeeble national identities.<sup>17</sup> That is precisely why the negotiators of the Amsterdam Treaty not only shied away from it, but emphasised that Union citizenship may complement, and in no way replaces, Member State nationality.

## II.

In spite of appearances, which suggest that the main issue at stake is the safeguard of national sovereignty, the reasons accounting for the hostility of the powers that be to European statehood are more down to earth than ideological.<sup>18</sup> Old hands identify them in the self-preserving interests of the political and bureaucratic élites in the fifteen states and, in a worthier vein, the awareness of the latter that in the eyes of their constituencies the national community remains the broadest focus for political life and group identity.<sup>19</sup> In recent times, however, the same élites have found an unexpected (and in this case unequivocally ideological) ally in those academic and judicial circles which up

14 Oxford University, Final Honour School of Jurisprudence, *European Community Law Paper* (1980).

15 HUI D’Oliveira, “Union Citizenship: Pie in the Sky?” in A Rosas and E Antola (eds), *A Citizens’ Europe in Search of a New Legal Order* (1995) at 64. For an even harsher judgment see Weiler *et al*, *Certain Rectangular Problems of European Integration*, Political Series, Working Paper at 20: “the Citizenship clause in the TEU is little more than a cynical exercise in public relations”. On the weaknesses and limitations of Articles 8-8e, see generally, S O’Leary, *The Evolving Concept of Community Citizenship* (1996).

16 La Pergola, note 3 *supra* at 7.

17 For a clear-sighted analysis of this contradiction see G de Búrca, “The Quest for Legitimacy in the European Union” (1996) 16 *Oxford Journal of Legal Studies* 349 at 359.

18 See the eloquent examples which Newman, note 7 *supra*, p 2, draws from the attitudes of the opponents of Norway’s accession to the EU and of the Eurosceptics in the House of Commons’ debate on Britain’s contribution to the EU budget. In both cases, which took place in 1994, the slogans and the political priorities involved were quite different.

19 Wallace, note 8 *supra* at 55.

until a few years ago drummed and fided for a speedy political integration of Europe. As a member myself of both kinds of circles, I am particularly interested in what motivates them; you will therefore comprehend, or so I hope, my intention to devote the central part of this inaugural address to an investigation of the causes of their disenchantment and to a critical appraisal of its expressions.

To this effect, a premise is indispensable. The new mood pervading many of the courthouses and the law faculties of Europe (but also some of their offshoots transplanted in America) is far from singleminded. In simplifying a scenery which, since we deal with intellectuals, teems with details and nuances; two streams of thought are discernible which are not only unlike one another, but also at odds with each other on most qualifying points. One of them has come to the conclusion that "the safest ... option is simply to retreat to what we are familiar with, the nation state" and that any notion of democracy beyond this horizon is "at best sheer Utopianism, at worst downright dangerous".<sup>20</sup> The other one, in the words of its most prestigious spokesman, Professor Joseph Weiler of Harvard, is opposed to a "statal Europe albeit of a federal kind"<sup>21</sup> because such a polity would assemble and perpetuate all that is "excluding" - namely hindering outsiders from entrance, refusing them participation - in the history and the practice of the European nation states. It would thus betray the promises implicit in the vision of a merely supranational Europe. In this respect, the Maastricht Treaty, "having appropriated the deepest symbols of statehood (citizenship, foreign policy, defence) was a deception".<sup>22</sup>

As anyone can see, it is almost impossible to encounter two more contradictory views. Yet I submit that they have a common origin; namely, *the inability to think of statehood other than in terms of the nation state*. Of course, in trying to prove this point, time will force me to proceed by means of little more than inklings and headlines. I hope I will be excused for this too.

### III.

Let me begin with the school of thought according to which any attempt to strengthen the democratic dimension of the European Union is either illusory or will be susceptible to jeopardising the roots of democracy where they are at their deepest and firmest - the nation state. Although traces of this opinion can be detected in various legal and political cultures,<sup>23</sup> Germany is its native land and the decision delivered by the German Constitutional Court on the compatibility

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20 Curtin, note 4 *supra*, p 13.

21 JHH Weiler, "Europe After Maastricht - Do the New Clothes Have an Emperor?" *Harvard Jean Monnet Working Paper* (1995) at 13.

22 *Ibid* at 20; Curtin, note 4 *supra*, p 16, referring succinctly to Europe as the first 'post-modern', that is fragmentary and fluid, polity, seems to share, given the positive connotation usually attached to 'post-modern', at least some aspects of Weiler's position.

23 See, in Italy, GE Rusconi, "La cittadinanza europea non crea il 'popolo europeo'" *Il Mulino* 5/96 at 831.

of the Maastricht Treaty with the German Basic Law<sup>24</sup> is its best-known, if not subtlest, expression. The section of this judgment relevant for our discussion can be easily summarised: The principle of democracy, as enshrined in Article 20 of the Basic Law, requires that the execution of sovereign rights derive from the “people of the State” (*Staatsvolk*), the forming of whose political will postulates the existence of a public opinion as can only be created by a free exchange of ideas and an ongoing interaction of social forces and interests. At this stage, such conditions exist only within the nation state where the people may express and affect what concerns it “on a relatively homogeneous basis, spiritually, socially and politically”.

I shall now draw, more than on the judgment, but also on the many writings, (some by Justices of the German Court), which it has stimulated. In Europe, the thickening economic and social intercourse<sup>25</sup> brought about by forty years of integration has yielded some fruits in terms of social cohesion; but the distance between those fruits and what is needed for an authentic democratic interaction is still huge. As Grimm J points out, neither a European public nor a European political discourse are detectable,<sup>26</sup> and the biggest obstacle to their development, the factor dooming to failure any attempt at Europeanising the social substructure on which the functioning of a political system and the performance of a parliament are contingent, is the absence of a common language. To be sure, multilingual states - Belgium, Switzerland, Finland - exist; but they have five to ten million inhabitants and two or three languages, while the figures in the European Union are 370 million and eleven, respectively. Europe’s democratic deficit - as we somewhat piously call the inability of the Union to ferry itself beyond the rites and the catchwords of democracy - is therefore *inborn* and cannot realistically be removed in a timeframe other than geological or, in any case, epochal.<sup>27</sup>

Reforms, such as stopping the ‘formidable gaps’ still existing in the legislative powers of the Parliament<sup>28</sup> or subordinating to its assent the validity of any amendment to the Treaties, would therefore not be sufficient for this purpose. In fact, as shortcuts often are, they might be fraught with risks. Since at present - and this is the gist of the argument - there is no European people, the assembly in Strasbourg is not a popular representative body. Hence, promoting it to the rank of an authentic legislature would not offset the loosening of the ties between the

24 Judgment of 12 October 1993, *Entscheidungen des Bundesverfassungsrecht* (BVerfG) Vol 89 155-213. For an English version of this judgment see [1994] *Common Market Law Reports* 57.

25 JHH Weiler, “Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision” (1995) 1 *European Law Journal* 219 at 229.

26 D Grimm, “Does Europe Need a Constitution?” (1995) 1 *European Law Journal* 282 at 295

27 These adjectives have been used, ironically but quite correctly in my opinion, by Weiler, “Does Europe Need a Constitution? ...” note 25 *supra* at 227. More warily, Grimm J, *ibid*, uses expressions such as ‘as yet’, ‘for the time being’ and so forth.

28 See Weiler *et al*, “Certain Rectangular Problems of European Integration”, note 15 *supra* at 6. As pointed out by Corbett, “Representing the People” in A Duff *et al* (eds), *Maastricht and Beyond. Building the European Union* (1995), p 207 at 223, even in the areas of Community law making where the codecision procedure applies, the onus in adopting a measure will normally be in obtaining a qualified majority (and sometimes unanimity) in Council rather than a simple majority in Parliament.

citizens of the fifteen states and their parliaments which such an enterprise would necessarily entail.<sup>29</sup> The upshot of these remarks is plain and Grimm J states it with remarkable candour: Democracy in its plenitude can only be achieved in a national framework and, if this be the case, “converting the European Union into a federal state is not a desirable goal”.<sup>30</sup>

The authors of the Maastricht judgment and their fellow travellers in German constitutional law certainly do not lack sagacity. They are aware that the *Staatsvolk*, which they regard as the only basis for democratic authority and legitimate law making, might be understood in the light of the elements defining the notion of *Volk* as forged by the Romantic movement at the beginning of last century (first and foremost *Blut und Boden*, common blood and common soil) and they spare no efforts in trying to avoid this risk. The emphasis which they lay on the necessity of a political discourse and the conditions that make it possible, such as a widespread system of communications or the existence of ‘mediatory’ agencies (political parties, institutes of learning, interest groups of all sorts),<sup>31</sup> speaks loudly for their intention to strip the *Staatsvolk* of any organic connotation and present it as *demos* - a mundane community of political animals endowed with interests as often divergent as convergent.

Yet, as a host of scholars with Weiler in the van<sup>32</sup> have clearly seen, this endeavour fails. The most eloquent evidence of such failure is provided by the academic works of the very jurist who wrote the German constitutional decision, Kirchhof J,<sup>33</sup> but scrutinising those works is not necessary. A crucial passage of the decision itself - the “spiritual, social and political homogeneity” which must characterise the people of the state - and the inordinate importance which a scholar as accomplished and level headed as Grimm J attaches to the necessity of a common language (wasn’t language the “primeval social link” according to the greatest German Romanticist, Johann Gottfried von Herder?) prove that behind the *demos* hides, irreducible, the *Volk*. Democracy is possible in the Member States because an organic, ethnically homogeneous construct renders them socially coherent. It is not possible in Europe, with the consequence of making its conversion into a state inadvisable, because that construct and the ensuing cohesion are absent. When dealing with some of the premises of German public law, one is sometimes reminded of the Cheshire cat: The body, beginning with the end of the tail, has vanished, but the grin remains.

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29 See Grimm, note 26 *supra* at 296.

30 Grimm, *ibid* at 297.

31 See primarily Grimm, note 26 *supra* at 294, and the authors quoted therein at notes 33 and 39.

32 See BO Bryde, “Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie” (1994) 5 *Staatswissenschaften und Staatspraxis* 305 at 309; C Joerges, “Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration” (1996) 2 *European Law Journal* 105 at 115; M Zuleeg, “The European Constitution under Constitutional Constraints: the German Scenario” (1997) 22 *European Law Review* 19 at 28. Most of the criticisms made by these commentators are taken up by a Resolution adopted in plenary session by the European Parliament with an overwhelming majority on 2 October 1997. The Resolution incorporates a report drafted by Deputy Siegbert Alber, who has since become an Advocate General at the European Court of Justice, on the relationships between international law, Community law and the constitutional law of the Member States.

33 See, in particular, Justice Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, VII, para VII. Weiler quotes abundantly from this and other writings of Justice Kirchhof.

#### IV.

Disproving the propositions thus recapitulated or, if you prefer, exorcising the grin, is not a daunting task (provided, of course, one does not appeal to half truths such as the existence of a common European culture dating back to the Middle Ages and recently revamped by the Erasmus student exchange programme and the postgraduate institutes in Florence and Bruges). True enough, “large numbers of young people across Europe treat their Continent, rather than their country, as the space within which they expect to move” (and, why not, to find a partner); no less true, “a certain diffusion of loyalties, a certain expansion of horizons from the national to the European ... are evident both among élites and, more faintly, among mass publics”.<sup>34</sup> But, to draw from these developments the conclusion that Europe has already acquired ‘a sense of shared identity and collective self’ is an exercise in self deception.<sup>35</sup> On this score Kirchhof and Grimm are right. They are wrong, by contrast, in not seeing that a European state composed of a plurality of nations and yet founded on a *demos*, deriving its legitimacy not from descent but from consent and its chances of survival not from primordial but from civic loyalties, is conceivable. They are wrong in refusing such a prospect for a simple, empirical reason: the existence and survival of several polities corresponding to the model I have sketched. And let me add that ignoring this fundamental objection or cursorily ridding itself of it is, for German scholarship, an alarming signal of parochialism.

Let us pass over the United States and Australia whose multiethnic character is (as yet) not reflected on the level of language and strongly tempered by the cultural hegemony of one group, the descendants of the first colonists. Let us dwell instead on Belgium and Canada. As a consequence of the ethnic revival which torments our age and has grating overtones in their case, both federations are wobbly, though not necessarily doomed to dismemberment. In any event, both are democracies as impeccable as can be in this imperfect world. Their systems of communications, however, are no longer common and their ‘mediatory’ agencies - parties, trade unions, universities - have split, fully in Belgium, partly in Canada, along language lines. Actually, the linguistic provisions applying to large areas of either country have one basic object: precluding the ethnic group for the benefit of which they have been enacted from using the language of the other. Thus the Charter of the French language in Québec and various decrees of the Flemish Community impose penalties; the former on the employers who fire, downgrade and transfer their employees for

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34 Wallace, note 8 *supra* at 55 and 59.

35 Weiler, “Does Europe Need a Constitution? ...” note 25 *supra* at 239. See also Newman, note 7 *supra*, p 151: “It seems probable that the majority of the population in the majority of Member States retain a far stronger sense of common citizenship within the ‘nation-state’ than with the EU as a whole. If this is so, it is hardly surprising since states have far greater power over people’s lives than the EU.”

speaking only French, the latter on those who do not confine themselves to Dutch when offering jobs.<sup>36</sup>

The history of my own country suggests another case in point, although from a different angle. The unification of Italy between 1859 and 1861 was the result of work by political and intellectual élites aided and abetted by two powerful nation states: France and Britain. Claiming, as our primary schoolbooks sometimes do, that the *Risorgimento* sprang from popular demand and involved popular participation is a pious untruth. In any case, at a time when tens if not hundreds of mutually unintelligible vernaculars peppered the Italian countryside, it was not possible to speak of a collective Italian self. Indeed, so distinct were the dialects used in the peninsula that when, on what would today be regarded as a fact finding mission, the then Minister for Foreign Affairs, Emilio Visconti Venosta, visited the Mezzogiorno on horseback, he was thought by the peasants to be an Englishman on his grand tour simply because the language tripping from his tongue was the cultivated Italian which the ruling classes learnt in their homes and exclusive schools. Nonetheless, while never acquiring a more than wavering national identity, Italy consolidated and has lived on as a State for over one hundred and thirty years, of which the last fifty have been under a fully democratic form of government.

The most spectacular among the cases which should prompt the German constitutional lawyers into some hard thinking, if only they were less inward looking, are undoubtedly those of South Africa, since 1994, and India, since 1947. The South African population is composed of eight black ethnic groups, a large number of 'coloureds', two Asian communities and two white 'tribes', as they are sometimes called, while the official languages of the Republic are eleven. In India, which has 2.5 times more inhabitants than the European Union, the ethnic groups are countless, the religions with more than three million followers are six, the regional languages are fifteen, while the official language of the State, Hindi, is spoken by 38 per cent of the population and only four persons out of one hundred can read English, the language of the influential newspapers.

In such circumstances, a number of other divisive or debilitating factors should be added: the memories of apartheid, the still vital caste system, the sharp antagonism between Zulus and Xhosas or Hindus, Sikhs and Muslims, illiteracy rates ranging from 39 to 49 per cent. How then, do Kirchhof and Grimm explain the kind of political governance adopted and kept alive - in India for as long as the *Bundesrepublik* - by the two countries? Where is the spiritual and social homogeneity which should make it possible? Where are the conditions of the rich exchange of ideas from which alone a full-blown public opinion can be expected to spring and prosper? Yet, however huge may be the obstacles put in their way and weak the values and the understanding of rights and duties shared by the citizens, the democracies of South Africa and India have

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36 S Mancini, *Minoranze autoctone e stato tra composizione dei conflitti e secessione* (1996), pp 97, 135.

survived all sorts of challenges and seem ready to enter the coming millennium with a not unreasonable degree of self-assurance.<sup>37</sup>

## V.

Let us then revert to Europe. Why couldn't a European state, which would of course rely on material and social conditions incomparably more favourable than those of South Africa and India, attain a level of democracy higher and denser than the latter? Stripped of its comparative dimension, this question should be addressed also to Professor Weiler who is similarly convinced - although, as we have seen, for very different reasons - that a statal Europe is not a desirable goal. He says in the key passage of one of his recent essays:

It would be more than ironic if a polity set up as a means to counter the excesses of statism ended up by coming round full circle and transforming itself into a (super)state. It would be equally ironic if the ethos which rejected the boundary abuse of the Nation-State gave birth to a polity with the same potential for abuse.<sup>38</sup>

The first of these hypotheses strikes me as unrealistic. There is in Weiler a deeply-rooted and, as far as I am concerned, entirely justified conviction that our political world is still dominated by the ethics of sovereignty and might.<sup>39</sup> I do not believe that it reaches so far as to lead him to include in the notion of "excesses of statism" the accepted monopoly of violence within the boundaries and the willingness to use violence against outsiders attacking those boundaries, which are the irreducible minimum of the concept of state.<sup>40</sup> I think rather that what worries Weiler is the possible recourse by the authorities of a statal Europe to more or less coercive pressures aimed at imposing a single or hegemonic culture, such as a tendentious teaching of history in the schools and a brazen fostering of a specific language for example - in other words, a replica of the policies which a number of nation states bedevilled by one or more untamed ethnic minorities have adopted and still adopt with a view to creating a new, all-encompassing identity; a *homo americanus, gallicus, hispanicus* and so forth.<sup>41</sup>

As for me, my unassuming guess is that such policies, originating as they do from the high handedness or the anxieties of an ethnic majority (the WASPs, the speakers of the *langue d'oil*, the Castilians), would be simply unthinkable in a European Union endowed with statehood. At most, its authorities might, in the footsteps of the present day European Commission, launch campaigns designed to instil and fortify what Professor Habermas calls the citizens' 'constitutional patriotism', namely the only feeling of belonging which an identity as frigid as the European one can be expected to engender. Anything more than that in the

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37 On the tremendous economic and social progress made by India in the last few years (India is now the sixth largest world economy) see the dossier "L'Inde aussi s'est éveillée", *Le Monde-Economie*, 17 June 1997.

38 Weiler, "Does Europe Need a Constitution? ..." note 25 *supra* at 248. Newman, note 7 *supra*, p 210, seems to go even further when he writes that: "it is not clear that regional supranational entities would necessarily be any less expansionist than the nation-states that they replaced".

39 On this attitude see Newman, note 7 *supra*, p 10.

40 Wallace, note 8 *supra* at 62.

41 S Mancini, note 36 *supra*, p 26.

direction of integration or assimilation, if it really were attempted, would be repelled by antibodies which history has rendered all too effective.<sup>42</sup>

Weiler is not only short on realism. If my interpretation of his formula is correct, he is also unable, much like his German antagonists, to conceive of a state not rooted in, and coinciding with, a nation. And even more revealing of this inability is his assumption that a statal Europe would have the same potential of boundary abuse as the nation states of old. Why on earth the *same* potential if the only possible basis of a statal Europe would be a *demos* relying on a mere bond of civic loyalty? José Ortega y Gasset, the philosopher, wrote that Isabel of Castilia and Fernando of Aragon joined body, soul and forces in order "to flood the planet with the energies" of the new Spanish nation.<sup>43</sup> Flood the planet Spain actually did, as soon as the *Reconquista* was completed, as did England and France after the accession of Elizabeth and Napoleon, or Germany after the proclamation of Empire. But how could Europe do so, considering that its energies would not draw their sap from nationhood and would coalesce not as a result of a stirring event, but in the course of a slow, laborious and desperately matter of fact process of convergence on the part of its Member States?

A state, of course, but also the merely supranational entity which Weiler seems to prefer, has boundaries which include and exclude, that is divide, friends from foes; as Carl Schmitt claimed, certainly 'us' from 'them'. Allow me to make one more unassuming guess: In the case of a European state, this dichotomy would take shape primarily in the areas of trade and movement of persons. This would not necessarily be in forms more rigid or 'excluding' than they do at present.<sup>44</sup> In particular, as far as immigration is concerned, a central authority empowered to distribute refugees and asylum seekers over the whole territory of the Union would probably be able to host more of them and, at the same time, to mitigate conflicts which are turning nasty in all the Member States. As for a single foreign policy and its obvious companion - a united defence apparatus - I would, though not an expert, welcome them as a blessing. One does not need to remember how responsible the conflicting interests and historical memories of the Member States have been for the mismanagement of the crisis which led to the dissolution of Yugoslavia and to the civil war that ravaged Bosnia. In a more recent context, suffice it to imagine how many horrors Rwanda, Burundi and the Congo could have been spared if the Union, and not one or other of its states with post imperial interests in mind, had had the power to promote serious humanitarian action under the aegis of the United Nations.

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42 See K Reif, "Cultural Convergence and Cultural Diversity as Factors in European Identity", quoted by Newman, note 7 *supra*, p 207: "Any conceivable 'European Political Union' would be ... a multinational and multilingual political system ... it would not be transformed into a one-nation-state aimed at homogenizing societies and cultures."

43 J Ortega y Gasset, *España invertebrada. Bosquejo de Algunos Pensamientos Historicos*, Revista de Occidente en Alianza Editorial (7th ed, 1996), p 41.

44 For the 'bleak record' of the Community institutions in dealing with would-be migrants and refugees even after the establishment of the 'Third Pillar' in the Maastricht Treaty, see Newman, note 7 *supra*, p 163.

## VI.

A European federal State capable of steering clear of the excesses and the abuses which have studded the history of its constituent units is, in short, conceivable. If - a big if - the force of circumstances were to kindle the necessary political will, it could even be feasible.<sup>45</sup> But how desirable is it? So far I have not squarely faced this question. I shall do so now, in concluding my speech. If, as promised by the Treaties of Rome, Maastricht and now Amsterdam, the march towards an ever closer union between the peoples of Europe is to continue and if, in the course of this march, the peoples of Europe are to preserve the constellation of values informing their ways of life, then Europe needs statehood.

The federalists of the thirties and forties - the Marquis of Lothian, Lionel Robbins, Altiero Spinelli, François Bondy - raised a number of arguments in favour of this proposition, many of which are still topical. Of course, they could not predict the most topical one, namely the threat which the denationalization of the economy, especially of the financial markets and of industrial production itself, would pose at the end of the century to Europe's employment policies and social security schemes.<sup>46</sup> It has almost become commonplace that, under the thrust of international competition, our countries are faced with a dramatic choice: either retaining the generous entitlements resulting from the welfare state and accepting permanently high unemployment, or upgrading the indices of deregulation to the sole arbiters of profit as well as virtue and condemning to marginalisation their least skilled and least educated, in short, their most vulnerable citizens.

Do not read in these remarks the reflection of a hostile attitude vis à vis globalisation. I am aware of its benefits and I find it extraordinary that in the European left even respected scholars like Eric Hobsbawm should regret the impossibility of having recourse to protectionism as a means to counter its social effects.<sup>47</sup> Those effects cannot be denied, however, nor is it possible to ignore that they tend to undermine the loyalty of large segments of the population. How else could one explain such highly visible developments as the revival of extreme right wing populism (Le Pen, Haider), the rampant egotism of most interest groups and the burgeoning of identity politics and xenophobia on the ruins of the old ideologies?<sup>48</sup> Forced, with their backs to the wall, by a world economy which they cannot control, some of our nation states are at a loss to manage, without resorting to coercion, the aftermaths of the upheaval which globalisation has brought about. A European state, by contrast, were it only

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45 Schmitter, note 8 *supra*, suspects instead that an integrated Europe will move increasingly in the direction of a multi layered government, without clear lines of demarcated jurisdiction and identity, for which he coins the term 'condominio'.

46 J Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" (1995) 1 *European Law Journal* 303 at 304.

47 E Hobsbawm, *Age of Extremes. The Short Twentieth Century 1914-1991* (1995), pp 572-4.

48 Régis Debray has brilliantly telescoped the relation between globalisation and the upsurge of identity politics with the phrase: "les objets se mondialisent, les sujets se tribalisent"; see S Mancini, note 36 *supra*, p 4.

because of the broader vision and the single mindedness which it could bring to the exercise of Europe's vast economic power, would probably be able to affect the global market. Our social contract would still have to be restyled, but its core values might thus be salvaged with the possible result of toning down the loyalty crises entailed at present by their impairment.<sup>49</sup>

Forceful as this argument is, however, it is not the most cogent one which can be advanced in support of statehood for Europe. It is in fact based on the social rights of the European citizens, while something even more precious is at stake: their political rights; in one word, democracy. Some data will cast light on the magnitude of this problem both in quantitative and qualitative terms. The prediction usually attributed to Jacques Delors that, by the year 2000, 80 per cent of the economic and social regulation applicable in the Member States will originate in Brussels is probably spurious<sup>50</sup> and surely exaggerated. Nevertheless, according to a study by the Conseil d'Etat, of the 2981 legal measures which came into force in France in 1991, 1564, that is almost 53 per cent, emanated from the Community's capital.<sup>51</sup> A more recent statistic shows that 30 per cent of the legislation produced in the Netherlands is composed of provisions implementing Community directives.<sup>52</sup> On the other hand, it is true that the members of the body which enacts those directives (the Council of Ministers) and the more important regulations possess a proper legitimacy, having been elected to their national Parliaments or deriving their mandate from them; but, as everyone knows, they often confine themselves to rubber stamping behind closed doors drafts prepared by an ambassadorial college (Coreper) and, at a lower level, by numberless, faceless and unaccountable committees of national experts.<sup>53</sup>

## VII.

So, that is the situation. Today's European Union *presupposes democracy* as a heritage of values and institutions shared by its Member States in all of which the representatives of the people control the action of the executive branch;<sup>54</sup> *but it is not itself democratic*. Indeed, the Union is doomed never to be truly democratic as long as not only its foreign and security policies, which are openly

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49 See also O'Leary, note 15 *supra*, p 314, who suggests that to proceed, even at this stage of integration, without deepening the social legitimacy of the Community would be a grave error.

50 JHH Weiler, "The European Union Belongs to its Citizens" (1997) 22 *European Law Review* at 151.

51 Etudes et documents, Rapport Public No 44, Conseil d'État, 1992.

52 For an interesting comparison of the legislative output of the Council of Ministers and the German Bundestag and Bundesrat between 1958 and 1993, see D Rometsch and W Wessels, "The Commission and the Council of Ministers" in G Edwards and D Spence (eds), *The European Commission* (1994) at 212.

53 Mancini and Keeling, note 3 *supra* at 190. According to W Wessels, "The EC Council: the Community's Decisionmaking Center" in RO Keohane and S Hoffmann (eds), *The New European Community. Decisionmaking and Institutional Change* (1991), p 133 at 140: "[i]n a rough estimation, 80 per cent of the Council's acts are decided on a professional bureaucratic basis. Some documents ... can even pass the Council without a political debate".

54 La Pergola, note 3 *supra* at 19.

carried out on an intergovernmental basis, but the very management of its supranational core - the single market - are entrusted, with or without a circumscribed control by the European Parliament, to diplomatic round tables. In other words, democracy will elude Europe as long as its constitution includes rules and legitimises practices moulded on those of the international community.

All this looks sombre enough; but a further consideration makes it appear even gloomier. As evidenced by the figures which I have just quoted, the application of such rules and practices also threatens to reinforce the governments' predominance over domestic parliaments and therefore to infect the constitutions of the Member States; that is the very democracy *presupposed* by the Union.<sup>55</sup> This very serious danger is actually regarded with growing anxiety even by many who want the Union to remain what it is. The remedies which they offer, however, are either ineffectual or disruptive. Thus, a tighter control exercised by the national parliaments on the legislative process in Brussels by means of rigid guidelines imposed on the respective governments would restrict the bargaining power of the latter, consigning them, whenever decisions are taken by a majority vote, to a splendid but sterile isolation.<sup>56</sup> As for nationwide referenda, the Danish experience in 1992-1993 has shown that, if their outcome is negative, they may have such ruinous consequences as to force the Union and the State concerned to sidestep the popular will by working out some fudged compromise. Finally, the testing by Member State courts of Community provisions against the values enshrined in their constitutions risks effacing the major conquests of integration: supremacy of European law and its corollaries, undistorted competition and equal treatment for all Union citizens.

The truth is that the problem of democracy cannot be tackled at a national level. It must be confronted where it was engendered, in the very fabric of the Union, and it may only be solved by ridding the Union of the last - but still how powerful! - vestige of its original constitution: the essentially international nature grafted onto its policy making machinery. In 1941, Clement Attlee uttered five words of glorious political folly which were soon forgotten and were destined never to be repeated in England or elsewhere: "Europe," he said, "must federate or perish." The following decades proved him patently wrong. Europe opted for a set-up verging on the confederal and this choice did not prevent it from making the idea of war unthinkable within its boundaries and from becoming economically prosperous. Unless I am entirely mistaken, however, Attlee's folly sounds much like wisdom today. While yielding its crop, the confederal set-up has given rise to contradictions which grow in direct proportion to the growth of the Union's powers and which only a leap towards federalism can hope to overcome. The alternative, I am afraid, is a withering of the worthiest reasons which justify Europe's role as a protagonist in world

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55 A particular aspect of this infection is revealed by the fact that Member State governments use the Union as a scapegoat. To borrow from Schmitter, note 8 *supra* at 150: "[s]ending intractable issues abroad to Brussels and blaming it for the need to implement unpopular policies at home has become a standard feature of European politics".

56 For a perceptive discussion of this state of affairs see Newman, note 7 *supra*, p 191.

affairs - its democratic integrity and hence its right to preach democracy to those who do not practise it.

Of course, as Karl Marx put it, no tailor can hope to try his breeches on history. Hard as it is to visualise it, the Union might after all evolve into a democratic entity without becoming a federal state, even as minimal a state as I would expect and like it to be. In such a case, the youngest members of my audience, if they ever happen to remember this lecture, will perhaps think that in 1997 the University of New South Wales made a bad appointment. The appointee, by contrast, wherever he may find himself in that far-off future, will rejoice. Democracy is the end. States, as we have known them, are but means. Achieving a stateless democracy has been one of humankind's most recurrent and noblest dreams. How could the miracle of its coming true be felt as a discomfiture?