

Europe: The Case for Statehood

*G. Federico Mancini**

I Introduction

‘In principle’ – writes Jürgen Habermas – ‘the rule of law can exist without the concomitant existence of democracy’, that is to say without political rights empowering the citizen to bring influence to bear on changes of his own status.¹ The model of less than democratic 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. Yet Habermas’ remark seems to apply no less accurately to a polity which, both in its conception and operation, has little that is paternal about it: the polity 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.² The European Community differed from the latter in many respects, by far the most significant of which was the fact that the relationships established between its institutions and its Member States, including their citizens, were subjected to the rule of law. Nevertheless, there were weightier reasons which led both politicians and scholars to deny that the Community possessed a federal character and therefore to number it with other and looser entities: namely, the chiefly economic nature of the competences transferred to it and, even more telling, its substantially undemocratic structure. Indeed, the correlation between federalism and democracy (or, at the least, constitutionalism) is generally deemed to be so necessary³ that most authorities agreed to designate the Soviet Union and certain Latin

* Judge at the Court of Justice of the European Communities. This paper was first presented on 1 November 1997 as my inaugural lecture on being appointed Adjunct Professor at the University of New South Wales, Sydney, Australia. The views expressed in this article are personal and do not in any way reflect the view of the Court.

¹ Habermas, ‘Citizenship and National Identity: Some Reflections on the Future of Europe’ (1992) 12 *Praxis International* 1, at 10. In a not dissimilar context, cf. (OUP 1969) I. Berlin, *Four Essays on Liberty*, at 129 *et seq.*

² Cf. Leben, ‘A propos de la nature juridique des Communautés européennes’ (1991) 14 *Droits* 61, at 63. According to some writers, by contrast, confederations have, in principle, political and defensive objectives. Pliakos, ‘La nature juridique de l’Union européenne’ (1993) 29 *Revue trimestrielle de droit européen* 187, at 209 *et seq.* writes that, while an international organisation implies a pooling of sovereignty by its Member States, their sovereignty remains intact in a confederation.

³ The necessary ‘coincidence’ between federalism and democracy has been convincingly demonstrated by Kimminich, ‘Der Bundesstaat’ in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, I, (C.F. Müller 1987), 1128; but cf. also the eloquent remarks of H. Kelsen, *General Theory of Law and State*, (Harvard UP 1949) p 310 *et seq.* On the relation between federalism and constitutionalism cf. C.J. Friedrich, *Limited Government. A Comparison*, (Prentice Hall 1974), p 54 *et seq.*

American states in some phases of their history as sham federations.⁴ International organisations, by contrast, are supposedly non-democratic, since they reserve central normative power to the body representing the contracting states which, as a rule, exercises it unanimously.⁵ ‘Diplomacy not democracy’ governs their decision-making mechanisms.⁶

The Treaty of Rome is technically still in force; but the case-law of the Court of Justice and a series of constitutional reforms begun in 1976 have deeply affected the scheme established by its authors. As a consequence of ECJ jurisprudence, especially those 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 now so spacious and well-guarded as to pillory for its gratuitous arrogance a sentence uttered in 1974 by Raymond Aron: ‘genuine civil rights do not reach beyond national boundaries.’⁷ 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 machinery – they were clearly prompted by the awareness that the growing range of the Community’s powers had significantly detracted from the sovereignty of national Parliaments, removing ever wider matters from their purview in an incremental process to which national parliamentarians had not consented and over which they had no control.⁸ The legislative monopoly accorded to the body representing the States had therefore to be diluted at 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.⁹

These developments, together with other institutional steps taken in order to ensure the efficiency of the Community (for example, a considerable increase in majority voting within the Council of Ministers) as well as the forthcoming acquisition of monetary sovereignty¹⁰ and, under the frailer label of the European Union, a growing European capacity to assume ‘almost all the core functions of the nation

⁴ On the Soviet Union, cf. Gitelman, ‘Federalism and Multiculturalism in Socialist Systems’ in D.J. Elazar, (ed.), *Federalism and Political Integration*, (Turtledove 1974), p 157 *et seq.* On Argentina, Brazil, Mexico and Venezuela, cf. J. Carpizo, *Federalismo en Latinoamérica*, (UNAM 1973), p 76 *et seq.* For a general survey of the cases of ‘sham’ federalism cf. also De Vergottini, ‘Stato federale’ in (1990) *Enciclopedia del Diritto*, XLIII, 1990, p 831 *et seq.*

⁵ Leben, *loc cit* n 2, at 65; Mancini and Keeling, ‘Democracy and the European Court of Justice’ (1994) 57 *Modern Law Review* 175 *et seq.*; 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.

⁶ D.M. Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy*, inaugural lecture, University of Utrecht, at 9.

⁷ Aron, ‘Is Multinational Citizenship Possible?’ (1974) 4 *Social Research* 638.

⁸ Mancini and Keeling, *loc cit*, at 177 *et seq.* A further argument that helped to strengthen the case for direct elections was the Parliament’s acquisition of budgetary powers in 1970 and 1975: cf. J. Pinder, *European Community. The Building of a Union*, (OUP 1991), at 35.

⁹ Leben, *loc cit*; La Pergola, *loc cit*, 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’), cf. M. Newman, *Democracy, Sovereignty and the European Union*, (Hurst 1996), at 174 *et seq.*

¹⁰ Which, as Lady Thatcher once remarked, is ‘the core of the core of national sovereignty’: cf. Wallace, ‘Rescue of Retreat? The Nation State in Western Europe, 1945–1993’ (1994) XLII *Political Studies* 52, at 67. According to 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*, (Sage 1996), at 122 *et seq.*, 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.’

state'¹¹ have undoubtedly modified the primitive nature of the polity born in 1957. Today, insisting on defining it as an international organisation and describing all that does not fit well with this definition as 'frills and rhetorics'¹² is much like trying to push the toothpaste back into the tube.¹³ Those who indulge in such an exercise are either die-hard acolytes of the neo-realist school in political science, eager to prove that any further progress on the part of the Union will falter in the face of unsurmountable barriers,¹⁴ or professors of international law anxious to maintain their hold on a luscious province increasingly coveted by constitutional lawyers.¹⁵ However, if this point is indisputable, there is much doubt as to whether constitutional lawyers might without further ado annex and lord over the province which they so covet. I personally believe that their time has yet to come. While the Maastricht Treaty has conquered a large and important territory, it has nevertheless not led the Union across the threshold wherein lies the federal state. I shall say more: it seems to me that the closer the Union moves towards statehood, the greater the resistance to the attainment of this goal becomes.

Two recent examples will support this suggestion. Any upholder of the functionalist philosophy which profoundly informed one of the Community's founding fathers, Jean Monnet, as well as any subscriber to the Madisonian dictum 'federalise their wallets and their hearts and minds will follow,'¹⁶ is given to think that the implementation of monetary union will inevitably so unbalance the system as to require a counterpoise in terms of a genuine and democratically accountable economic government. Yet last June's Amsterdam Treaty fell demonstrably short of this expectation. Its authors decided that the college of the fifteen Finance Ministers (including representatives from countries which will not necessarily join the single currency) will be a sufficient match for the power of a future Central Bank and that the extent of such power does not itself settle the case in favour of granting the European Parliament a greater role. Equally indicative of this hard-nosed attitude, however, was their curt opposition to any enrichment of the stingy catalogue of rights – no more than 'mirrors and beads' for the natives¹⁷ – which Articles 8 to 8e of the Treaty on European Union attached to

¹¹ Wallace, *loc cit*, at 65. Cf, also Schmitter, *loc cit*, 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.'

¹² Cf, Pinder, *loc cit* n 8, at 4.

¹³ Weiler and Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411, at 423.

¹⁴ On the neo-realist school and its belief in the immutable role of the nation state and the unreality of proposals for the transfer of sovereignty to common institutions cf, Pinder, *op cit*, at 203 *et seq.* and Newman, *op cit*, at 17 *et seq.* Cf, also 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.

¹⁵ For a perfect example of this attitude cf, Pellet, 'Les fondements juridiques internationaux du droit communautaire' in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, (Kluwer 1997), 193 *et seq.*. A similar, albeit less loaded, approach is adopted by Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389.

¹⁶ Oxford University, Final Honour School of Jurisprudence, European Community Law Paper, 1980.

¹⁷ 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*, (Sage 1995), 58, at 64. For an even harsher judgment see Weiler *et al.*, *Certain Rectangular Problems of European Integration*, Vol. I, Political Series, Working Paper W-24, 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 cf, generally, S. O'Leary, *The Evolving Concept of Community Citizenship*, (Kluwer 1996).

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 transformation from 'liturgy' to 'substance'.¹⁸ By the same token, however, it would enfeeble *national* identities;¹⁹ this, or a residual clinging to the concept of nationhood, seems to be precisely the reason why the negotiators of the Amsterdam Treaty not only shied away from it, but even emphasised that Union citizenship may complement but in no way replaces Member State nationality.

II States and Nations

In spite of appearances, which suggest that the main issue at stake is the safeguarding of national sovereignty, the reasons accounting for the hostility of the powers that be to European statehood are in essence more down-to-earth than ideological.²⁰ 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.²¹ 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 only a few years ago drummed and fified for the speedy political integration of Europe. Being myself a member of both circles, I am particularly interested in exactly what motivates these views and will seek to identify their underlying causes.

To this end, a premise is indispensable. The new mood which pervades many of the courthouses and the law faculties of Europe (but also some of their offshoots in America) is far from homogeneous. These are intellectual worlds and accordingly the discursive scenery is host to a myriad of details and nuances. With a touch of simplification, however, two streams of thought may be discerned which are not only unlike one another, but also at odds with each other on most qualifying points. The first has thus concluded 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'.²² The second, in the words of its most prestigious spokesman, Professor Joseph Weiler, is opposed to a 'statal Europe albeit of a federal kind'²³ because such a polity would assemble and

¹⁸ La Pergola, *loc cit* n 5, at 7.

¹⁹ For a clear-sighted analysis of this contradiction cf, de Búrca, 'The Quest for Legitimacy in the European Union' (1996) 16 *Oxford Journal of Legal Studies* 349, at 359. According to Lenaerts and De Smijter, 'The Question of Democratic Representation' in J. Winter, D. Curtin, A. Kellermann and B. De Witte (eds), *Reforming the Treaty on European Union: the Legal Debate*, (Kluwer 1996), 173 at 177, the fear that, in the long run, Union citizenship could lead to a shift of social loyalty from the national to the supranational level was the immediate incentive for the Edinburgh Decision of December 1992.

²⁰ See the eloquent examples which Newman, *op cit* n 9, at 2 *et seq.* 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.

²¹ Wallace, *loc cit* n 10, at 55 *et seq.*

²² This description of the first stream of thought is from Curtin, *op cit*, at 13.

²³ Weiler, 'Europe After Maastricht – Do the New Clothes Have an Emperor?' *Harvard Jean Monnet Working Paper* 12/95, at 13.

perpetuate all that is 'excluding' – namely, hindering outsiders from entrance and refusing them participation – in both the history and the practice of the European nation states, and would thus betray the promises implicit in the vision of a merely supranational, rather than statal, Europe. In this respect, the Maastricht Treaty, 'having appropriated the deepest symbols of statehood (citizenship, foreign policy, defence) was a deception.'²⁴

On a first reading, it would seem readily apparent that these views are nothing if not highly contradictory. However, I intend in the next two paragraphs to delve deeper and argue that, differences apart, both theses stem from a common root: the inability to conceive of statehood in any terms other than *nation* statehood, or, in a nutshell, to divorce the state from the nation.

III The Hidden Ethnos?

A Homogeneity and Political Communication

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 likely to jeopardise the roots of democracy where they are at their deepest and firmest – the nation state. Although traces of this opinion can be detected within various legal and political cultures,²⁵ Germany is its native land and the decision delivered by the German Constitutional Court on the compatibility of the Maastricht Treaty with German Basic Law²⁶ is its best-known, if not subtlest, expression. The section of this judgment relevant to our discussion can be easily summarised: the principle of democracy, as enshrined in Article 20 of the Basic Law, requires that each and every execution of sovereign rights derives directly from the 'people of the State' (*Staatsvolk*), the framing of whose political will postulates the existence of a form of public opinion which can only be created through the free exchange of ideas and an ongoing process of interaction between social forces and interests. Today, such conditions exist only within the nation state where the people may express and have an influence on what concerns them 'on a relatively homogeneous basis, spiritually, socially and politically.'

In Europe – here I shall draw less upon the judgment and more upon the many comments, some by Justices of the German Court, which it has stimulated – the 'thickening economic and social intercourse'²⁷ brought about by forty years of integration has certainly yielded a limited harvest in terms of social cohesion; but the discrepancy between this intercourse and the degree of communication which is required for an authentic democratic discourse is still large. As Justice Grimm points out, neither a European public nor a European political debate are detectable;²⁸ and the biggest obstacle to their development, the factor which dooms to failure any attempt to Europeanise the social substructure on which the functioning of a political

²⁴ *Ibid.*, at 20; Curtin, *op cit* n 6, at 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.

²⁵ Cf, in Italy, Rusconi, "La cittadinanza europea non crea il 'popolo europeo'" *Il Mulino* 5/96, at 831 *et seq.*

²⁶ Judgment of October 12, 1993, *Entscheidungen des Bundesverfassungsgericht (BVerfG)* Vol.89 155–213. For an English version of this judgment cf, [1994] *Common Market Law Reports* 57.

²⁷ Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219, at 229.

²⁸ Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282, at 295.

system and the performance of a parliament are contingent, is the absence of a common language. Certainly, multilingual states – Belgium, Switzerland, Finland – do 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 within a timeframe which is other than geological or, at the very least, epochal.²⁹

Reforms aiming to stop the 'formidable gaps' which still exist in the legislative powers of the Parliament³⁰ or seeking to require its assent to Treaty amendments, would therefore have little impact on the democracy deficit. In fact, as is often the way with institutional shortcuts, they might even be fraught with risks. Since there is now – and this is the gist of the argument – no European people, the assembly in Strasbourg is by definition not a popular representative body. Accordingly, promoting it to a fully-fledged legislature would not be an adequate balance for the loosening of the ties between the citizens of the fifteen states and their parliaments which such an enterprise would necessarily entail.³¹ The upshot of these remarks is plain and Justice Grimm states it with remarkable candour: democracy in its plenitude can only be achieved within a national framework and, if this be the case, 'converting the European Union into a federal state is not a desirable goal.'³²

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 used to define the notion of *Volk* by the Romantic movement dominant at the beginning of the last century (a 'natural whole' having an origin and a destiny of its own) and they consequently spare no efforts in trying to avoid this risk. The emphasis which they place on the indispensable nature of a political discourse and the conditions that make it possible – that is to say a widespread and elaborate communications system or the existence of 'mediatory' agencies (political parties, institutes of learning, interest groups of all sorts)³³ clearly reflects their intention to strip the *Staatsvolk* of any organic connotation and present it as a *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 vanguard³⁴ have seen, this endeavour fails. The most eloquent evidence of such failure is provided by the academic works of

²⁹ These adjectives have been used, ironically but quite correctly in my opinion, by Weiler, 'Does Europe Need a Constitution? . . . ' *loc cit* n 27, at 227. More warily, Justice Grimm uses expressions such as 'as yet', 'for the time being' etc.

³⁰ See Weiler *et al.*, 'Certain Rectangular Problems of European Integration', *op cit* n 17, at 6. As Corbett has pointed out, 'Representing the People' in A. Duff, *et al.* (eds.), *Maastricht and Beyond. Building the European Union*, (Routledge 1994), 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.

³¹ Cf, Grimm, *loc cit*, at 296.

³² *Ibid.*, at 297.

³³ Cf, primarily Grimm, *loc cit* n 28, at 294 *et seq.*, and the authors he quotes in notes 33 and 39.

³⁴ Cf, 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 *et seq.*; M. Zuleeg, 'The European Constitution under Constitutional Constraints: the German

the selfsame jurist who wrote the German constitutional decision, Justice Kirchhof.³⁵ It is not necessary, however, to scrutinise these works in detail. 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 Justice Grimm 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 hiding behind the *demos* lies, irreducibly, the metaphysical concept of *Volk* enjoying an ‘eternal existence’ that Savigny theorised in 1840, Gierke revamped at the end of the century and Carl Schmitt rendered sinister in 1927.³⁶ Democracy is possible in the Member States because an organic, ethnically homogeneous construction renders them socially coherent; it is not possible in Europe, with the consequence of making its conversion into a state inadvisable, because Europe lacks ethnic uniformity and is therefore denied cohesion. When dealing with some of the premises of German public law, one is at times reminded of the Cheshire cat: the body, beginning with the end of the tail, has vanished, but the grin remains.

B Democracy and Multicultural Societies

Disproving these propositions or, one might say, exorcising the grin, is not a daunting task; provided, of course, that one resists the temptation to appeal to half-truths such as the existence of a common European culture dating back to the Middle Ages and recently given new life 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.’³⁷ However, 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.³⁸ On this score, Kirchhof and Grimm are right. They are wrong, however, in not seeing that a European state composed of a plurality of nations and yet founded on a *demos*, deriving its legitimacy from consent rather than descent and its chances of survival from civic rather than primordial loyalties is indeed conceivable. They are wrong in rejecting such a prospect for a simple, empirical reason: the existence and

Scenario’ (1997) 22 *European Law Review* 19, at 28 *et seq.* Most of the criticisms made by these and other 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.

³⁵ Cf, in particular, his *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, *op cit*, VII, para. VII. Weiler quotes abundantly from this and other writings of Justice Kirchhof.

³⁶ Cf, Dubber, ‘The German Jury and the Metaphysical *Volk*: From Romantic Idealism to Nazi Ideology’ (1995) 43 *American Journal of Comparative Law* 227, at 248, 259. The author notes that this concept retains, sometimes with overtones reminiscent of its Nazi version, a considerable pull in several areas of contemporary German law and jurisprudence, at 267–271.

³⁷ Wallace, *loc cit*, at 55 and 59.

³⁸ Weiler, “Does Europe Need a Constitution? . . .”, *loc cit* n 27, at 239. Cf, also Newman, *op cit* n 9, at 151: ‘It seems probable that the majority of the population in the majority of Member States retains 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.’

survival of several polities corresponding to the model which I have outlined. I would like to add that ignoring this fundamental objection or cursorily ridding oneself of it is, for German scholarship, an alarming signal of parochialism.

Let us pass over the United States and Australia whose multi-ethnic characters are (as yet) not reflected at the level of language and are anyhow 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 communications systems, however, are no longer common and their 'mediatory' agencies – parties, trade unions, universities – have split, fully in Belgium, partly in Canada, along language lines. Indeed, it might be argued that the linguistic provisions applying to large areas of either country have one basic object: precluding the ethnic group for the benefit of whom they have been enacted from using or even learning the language of the other. Thus the Charter of the French language in Québec and various decrees of the Flemish Community impose deterring penalties, the former on the employers who fire, downgrade and transfer their employees for speaking only French, the latter on those who do not confine themselves to Dutch when offering jobs.³⁹

The history of my own country provides us with a more positive example, although from a different angle. The unification of Italy between 1859 and 1861 was the result of the work of thin political and intellectual élites aided and abetted by two powerful nation states, France and Britain. The claim, sometimes to be found in our primary-school textbooks, 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, two eminent Milanese intellectuals, Emilio and Giovanni Visconti Venosta, visited the *Mezzogiorno* on horseback, they were thought by passing peasants to be Englishmen on their grand tour simply because the language tripping from their tongues was the cultivated Italian which the ruling classes learnt in their homes and exclusive schools.⁴⁰ Nonetheless, while it never acquired a more than wavering national identity, Italy consolidated and has lived on as a State for over one hundred and thirty years, the last fifty of which have been under a fully democratic form of government.

But the most spectacular among the cases which might have prompted German constitutional lawyers to engage in some hard thinking if they had been 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

³⁹ S. Mancini, *Minoranze autoctone e stato tra composizione dei conflitti e secessione*, (Giuffrè 1996), 97 and 135.

⁴⁰ Cf. T. De Mauro, *Storia linguistica dell'Italia unita*, 3rd ed., (Laterza 1995), 43. The author has calculated that in the years following the unification of Italy, outside of Tuscany and Rome where Italian was spoken, as it were, by definition, only 160,000 in over 20 million individuals could be defined as Italophones. For further information cf. chapter 2 of De Mauro's remarkable book, 15 *et seq.*

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% of the population and only four persons in every hundred can read English, the language of the influential newspapers.

Given such circumstances – and indeed a number of other divisive or debilitating factors might be added to them (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 %) – how do Kirchhof and Grimm explain the form 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 preconditions of a rich exchange of ideas supposedly vital for the birth and prospering of full-blown public opinion? Yet, however huge the obstacles put in their way may be and however weak the values and the understanding of rights and duties shared by the citizens are, the democracies of South Africa and India have survived all manner of challenges and seem ready to enter the coming millennium with a not unreasonable degree of self-assurance.⁴¹

IV The Exclusionary Demos?

Let us then revert to Europe. Why couldn't a European state, which would of course be based upon material and social conditions incomparably more favourable than those present within South Africa and India, attain a level of democracy higher and denser than the latter? Stripped of its comparative dimension, this question should also be addressed 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. 'It would be more than ironic' – he says in the key passage of one of his recent essays – '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.'⁴²

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;⁴³ but 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.⁴⁴ 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, the brazen fostering of a specific language etc. – or, in other words, a replica of the policies which a number of those unitary (but also

⁴¹ On the tremendous economic and social progress made by India in the last few years (India is now the sixth largest world economy) cf. the dossier "L'Inde aussi s'est éveillée," *Le Monde-Economie*, 17 June, 1997.

⁴² Weiler, "Does Europe Need a Constitution? . . ." *loc cit* n 27, at 248. Newman, *op cit*, at 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.'

⁴³ On this attitude see Newman, *op cit* n 27, at 10 *et seq.*

⁴⁴ Wallace, *op cit* n 10, at 62.

federal) nation states which are bedevilled by one or more untamed ethnic minorities have adopted and continue to adopt with a view to creating an overarching and all-encompassing identity, a *homo americanus*, *gallicus*, *hispanicus* and so forth.⁴⁵

As for myself, my unassuming guess is that such policies, originating as they do from the assertiveness or the anxieties of an ethnic majority (the Wasps, the speakers of the *langue d'oïl*, the Castilians), would be simply unthinkable in a European Union endowed with statehood. At most, its authorities might, following in the footsteps of the present-day European Commission, launch campaigns designed to instil and fortify what Professor Habermas calls the citizens' 'constitutional patriotism', that is the only feeling of belonging which an identity as loose and frigid as the European one can be expected to engender. Any brasher step than this in the direction of integration or assimilation, if it were really to be attempted, would be repelled by those antibodies which history has rendered all too effective.⁴⁶

But Weiler is not only short on realism. If my interpretation of his formula is correct, he is also strangely 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 for boundary abuse as the nation states of old. Why on earth the *same* potential if the *only possible* basis for a statal Europe would be a *demos* relying merely on the bond of civic loyalty? José Ortega y Gasset wrote that Isabel of Castile and Fernando of Aragon joined body, soul and forces in order 'to flood the planet with the energies' of the new Spanish nation.⁴⁷ 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 any emotional form of 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 – and boundaries include and exclude, that is to say they divide if not always friends from foes, as Carl Schmitt claimed, then certainly 'us' from 'them.' At this point, however, I will make one more unassuming guess. In the case of a European state, the 'us-them' polarity would primarily take shape in the areas of free trade and movement of persons – and not necessarily in forms more rigid or 'excluding' than at present.⁴⁸ 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 in a position to host more rather than fewer

⁴⁵ S. Mancini, *op cit* n 39, at 26 *et seq.*

⁴⁶ Cf. Reif, "Cultural Convergence and Cultural Diversity as Factors in European Identity," quoted by Newman, *op cit* n 9, at 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.' These sensible remarks should dispel C. Gamberale's fear that 'the abstract construction of fortress Europe . . . [could be transformed] into a concrete new ethnic Europe': cf. 'National Identities and Citizenship in the European Union' (1995) 1 *European Public Law* 633, at 659.

⁴⁷ J. Ortega y Gasset, *Revista de Occidente*, 7th ed., (Alianza Editorial, 1996), at 41.

⁴⁸ 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, cf. Newman, *op cit* n 9, at 163 *et seq.*

of them and, at the same time, to intervene to mitigate those conflicts which are currently flaring up in all the Member States. As for a single foreign policy and its obvious bedfellow, a united defence apparatus, I, though no expert, would welcome them as a blessing. One need not recall how much the conflicting interests and historical memories of the Member States contributed to the mismanagement of the crisis which led to the dissolution of Yugoslavia and to the civil war that ravaged Bosnia. It suffices, in a more recent context, to imagine how many horrors Rwanda, Burundi and the Congo might 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 effective humanitarian action under the aegis of the United Nations.

V A Federal Europe

A European federal State capable of steering clear of the excesses and the abuses which have marked the history of its constituent units is in short conceivable. If – and this is a big if – the force of circumstances were to kindle the necessary political will, it could even be feasible.⁴⁹ But how desirable is it? So far I have not faced this question squarely. I shall do so now: 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 those well-tested institutions and procedures which only statehood can provide.

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 issue, namely the threat which a denationalisation 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.⁵⁰ It has become almost a commonplace to state that, under the thrust of international competition, our countries are faced with a dramatic choice: either to retain the generous entitlements resulting from the welfare state and thus to accept a permanently high level of unemployment, or to speed up deregulation and 'corporate rightsizing',⁵¹ leaving profit as the sole arbiter of virtue and so marginalising the least skilled and least educated or the most vulnerable of our citizens.

These remarks should not be taken as a reflection of a hostile attitude on my part towards globalisation. I am aware of its benefits and I find it extraordinary that within the European left even respected scholars such as Eric Hobsbawm voice regret that we no longer have recourse to protectionism as a means to counter its social effects.⁵² Those effects cannot be denied, however, nor is it possible to ignore the fact that they do tend to undermine the loyalty of large segments of the population. How else, indeed, might one explain such highly visible developments as the revival of extreme

⁴⁹ Schmitter, *loc cit* n 10, 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.'

⁵⁰ Habermas, 'Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'' (1995) 1 *European Law Journal* 303, at 304.

⁵¹ Cf, R. Hughes, *Culture of Complaint. The Fraying of America*, (OUP 1993), 27.

⁵² E. Hobsbawm, *Age of Extremes. The Short Twentieth Century 1914 – 1991*, (Michael Joseph 1994), at 572–574.

right-wing populism, the rampant egotism of most interest groups and the burgeoning of identity politics and xenophobia (Le Pen, Haider, Bossi, Kjærsgård, Hagen), disquieting movements built upon the ruins of the old ideologies?⁵³ 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 the aftermaths of the upheaval which globalisation has brought about without resorting to coercion. A European state, by contrast, were it only 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 influence 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 which seem to have arisen by virtue of their impairment.⁵⁴

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 or, 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% of the economic and social regulation applicable in the Member States will originate in Brussels is probably spurious⁵⁵ 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%, emanated from the Community's capital,⁵⁶ while a more recent statistic shows that 30% of the legislation produced in the Netherlands is composed of provisions implementing Community directives.⁵⁷ On the other hand, it is true that the members of the body (the Council of Ministers) which enacts those directives 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, in most cases behind closed doors, drafts prepared by an ambassadorial college (COREPER) and, at a lower level, by numberless,⁵⁸ faceless and unaccountable committees of senior national experts.⁵⁹

⁵³ 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'; cf. S. Mancini, *op cit*, at 4.

⁵⁴ Cf. also O'Leary, *op cit*, at 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.

⁵⁵ Weiler, 'The European Union Belongs to its Citizens' (1997) 22 *European Law Review*, at 151.

⁵⁶ Conseil d'État, Rapport Public 1992, Etudes et documents, no. 44.

⁵⁷ For an interesting comparison of the legislative output of the Council of Ministers and the German Bundestag and Bundesrat between 1958 and 1993 cf. Rometsch and Wessels, 'The Commission and the Council of Ministers' in G. Edwards and D. Spence, (eds.), *The European Commission*, (Cartermill 1997), at 212.

⁵⁸ According to F. Hayes-Renshaw and H. Wallace, *The Council of Ministers*, (MacMillan 1997), 97: 'The exact dimensions of the base of the Council hierarchy is one of the EU's great unsolved mysteries. Hardly anyone knows how many working groups exist at any one time.'

⁵⁹ Mancini and Keeling, *loc cit*, at 190. According to Wessels, 'The EC Council: the Community's Decisionmaking Center' in R.O. Keohane, and S. Hoffmann, (eds.), *The New European Community. Decisionmaking and Institutional Change*, (Westview 1991), 133, at 140: '[i]n a rough estimation, 80% of the Council's acts are decided on a professional bureaucratic basis. Some documents . . . can even pass the Council without a political debate.' Hayes-Renshaw and Wallace estimate that 'in practice [the] committees are the last actual arbiters in Council negotiations of roughly 70% of the legislative output,' *op cit* n 58, at 15. It is interesting to note that, although obviously aware of this state of affairs, national governments have done little if anything to improve it. According to Lodge, 'Transparency and Legitimacy' (1994) 32 *Journal of Common Market Studies* 343, some of them prefer to lay the blame on

VI Conclusion

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;⁶⁰ 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 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 form of government 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.⁶¹ This very serious danger is even regarded with growing anxiety by the many who wish 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.⁶² As for nation-wide 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 runs the risk of undermining the major advances made during the integration process: namely, supremacy of European law and its corollaries, undistorted competition and equal treatment for all Union citizens.⁶³

The truth is therefore that the problem of democracy cannot be tackled at 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

the Commission, depicting it as an autocratic and distant Eurocracy which dictates policy to the Member States and ignores the public's desire for openness.

⁶⁰ La Pergola, *loc cit* n 5, at 19.

⁶¹ 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, *loc cit* n 10, 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.'

⁶² For a perceptive discussion of this state of affairs cf. Newman, *op cit* n 9, at 191 *et seq.*

⁶³ On this danger, which has been smouldering throughout the whole history of Community law and which became red-hot in 1993, see the remarkable article by Boom, 'The European Union after the Maastricht Decision: Will Germany be the 'Virginia of Europe'?' (1995) 43 *American Journal of Comparative Law* 177.

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 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 may be to visualise, the Union might after all evolve into a democratic entity without becoming a federal state, even as minimal and open a state as it could possibly be in a world order which is light-years distant from Kant's vision. If this were to happen, I would certainly not be vexed; in fact, I would rejoice. Democracy is the end, states, as we have known them, are but means. Achieving a stateless democracy has been one of mankind's most recurrent and noblest dreams. How could the miracle of its coming true be felt as a discomfiture?