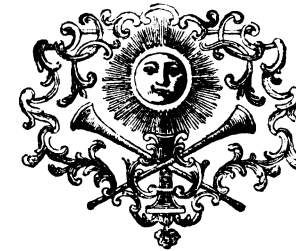


THE FEDERALIST

a political review

To look for a continuation of harmony between a number of independent unconnected sovereignties situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experience of ages.

Hamilton, The Federalist



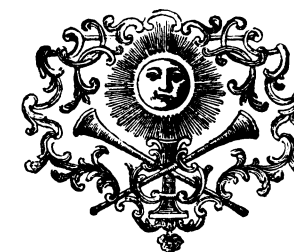
YEAR XXXVII, 1995, NUMBER 3

THE FEDERALIST

a political review

Editor: Mario Albertini

The Federalist was founded in 1959 by a group of members of the Movimento federalista europeo and is now published in English and Italian. The review is based on the principles of federalism, on the rejection of any exclusive concept of the nation and on the hypothesis that the supranational era of the history of mankind has begun. The primary value *The Federalist* aims to serve is peace.



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Europe at the Crossroads

Europe is on the verge of taking vital decisions. The intergovernmental conference's work on revising the Maastricht Treaty will start in the first half of 1996. If the treaty terms are respected, the transition to the third phase of monetary union will take place on 1st January 1999. These two issues can not be dealt with separately, unless the objective of institutional reform is to be thwarted by turning it, as some governments would like, into a mere smoke screen behind which the essentially intergovernmental nature of the current system will remain intact.

If, on the other hand, the Union's institutional reform is conceived of along democratic and federal lines, the European currency must be an integral part of the process. In fact, the foundation of an embryonic European federation means creating decision-making mechanisms that are based on parliamentary control and that are free from the threat of veto. Yet it also means endowing these structures with at least a part of the competences which comprise the essential prerogatives of sovereignty. These competences consist of control over the *purse* and the *sword*, that is to say, control over the currency and the armed forces. It is no coincidence that only once previously during the European unification process have the governments been on the verge of a global reform of Europe's institutions in a federal sense, and that was at the time of the EDC when the question of a European army was raised. Nowadays, while true that the intergovernmental conference may take some steps toward Europe's defence in the framework of the reform of foreign and security policy, it is also true that no decisions in this area which could effect a real transferral of sovereignty are ready to be taken yet. In contrast, the European currency, which is necessary for the functioning of the single market and the stabilisation of the international monetary system, can be achieved in the short term, such that the date of its creation was set by the Maastricht Treaty as 1st January 1999.

On the other hand, a monetary union would be unable to function for more than a brief period without the democratic approval of the Union's

citizens. Moreover, this approval could only be expressed through certain federal-type European institutions. Besides, a single currency requires a common budgetary policy. This currency, whatever German finance minister Waigel's opinion may be, must guarantee a minimum degree of financial re-balancing between the Union's member states and can not be substituted by the permanent convergence of the budgetary policies of the national governments, which is guaranteed only by their goodwill and mechanisms of multilateral control. In any union of states there are always stronger and weaker economies and the imbalance between them inevitably tends to provoke the dissolution of the union itself, unless there is manifested within the framework of the union, and as a result of some common democratic institutions, an effective solidarity based on the awareness of a general interest of the union that is different from the particular interests of the individual states.

It is a fact that the interconnectedness of the targets of democratically reforming the Union's institutions and of achieving the common currency does not mean that these goals must be achieved by a single decision. In fact, it is likely that their realisation will come about through a process. Yet it is important to keep firmly in mind that this will be a single process, and not two different ones, and that any progress in negotiations in the institutional sphere will be linked to progress in the currency sphere and vice versa.

* * *

One fact is anyway certain: that the issue at stake in the decisions which will (or will not) be taken between 1996 and 1998 is *sovereignty*, even if initially limited only to the economic and monetary sphere. This means that these are the most difficult decisions that a group of governments could be asked to take and the respective parliaments to ratify. It would therefore be naive to think that the cornerstone decision of the process, the one that will start the third phase of monetary union, could be the painless and almost automatic result of the adjustment of the economic and financial policy of some of the Union's governments to the convergence parameters established by the Maastricht Treaty. The creation of the European currency threatens important interests. It requires in the short term considerable sacrifices from special interests, albeit within the perspective of a much greater promotion of the general interest in the medium term. It must be added that the mechanism provided for by the Maastricht Treaty for achieving monetary union has a perverse aspect,

since it establishes that the final decision must be preceded by a preparatory period, which has partly already passed, but whose most delicate phase has yet to begin. During this period, the uncertainty surrounding the decision will push the markets to bet, with increasing intensity the closer the final deadline becomes, against the Union's weaker currencies — with the risk that the many years of efforts by the various governments to bring their finances more in line with the convergence parameters will from one moment to the next be completely undone.

For this reason the outcome of the process will depend exclusively on whether a sufficient number of governments reveal a strong *political will* to create Europe. This does not mean questioning the huge importance that the commitment to achieving the convergence parameters will have. Since, under the Maastricht Treaty the governments have chosen the path of convergence, this path must be rigorously followed and the determination of the governments to achieve it must be considered in turn, during the stage of the process leading up to the final decision, as the only real gauge of the sincerity of their political commitment. Any attempt by one or more of the member states to weaken the Maastricht criteria or to delay the planned deadline for the creation of the single currency would have catastrophic consequences, because it would be interpreted by politicians and the markets as a signal of their intention to exit from the process or even to interrupt it. Yet this is not to deny that the effort demanded by the Maastricht Treaty is exceptional, and that the governments of the weaker countries can force it on themselves because it is an effort that is necessary to attain a precise and short-term objective. If this objective disappeared over the horizon, or even just grew more remote, the convergence of Europe's economies could not be guaranteed by the purely voluntary policies of the national governments. On the contrary, precisely monetary union is the only way to ensure the irreversible convergence of the national economies, and denying this would mean to confuse the means with the ends. From this, it follows that when the moment to decide arrives, the creation of the European currency and the necessary institutions to run it will depend exclusively on the existence in some of the governments of the determination to bring the process to conclusion *at all costs* within the schedule set down in the treaty.

This determination will have initially to manifest itself inside the Union's central core, the one which coincides with the group of founding countries (although Italy could be excluded at first, and Austria included). If this happens, it is likely that the other countries, or many of them, will rapidly enter the process, no matter what the procedures in

order to do so will be. Hence, the problem is to determine whether this first core will develop the necessary political will.

* * *

From this viewpoint, the only existing certainty concerns the firm will of Chancellor Kohl to achieve both the European currency and the democratic reform of the Union's institutions without allowing opposing countries to stop the process by resorting to the unanimity rule. However, it can not be forgotten that however firmly rooted the popularity of this great European in his own country, German public opinion is frightened by the idea that through monetary union the German mark will be replaced by a European currency, which it is wrongly believed will be weaker, and that German citizens will be called on to remedy through their own sacrifices the profligacy of others. A not inconsiderable portion of the German political class tries to exploit these fears to electoral ends by asking not only the respect of, but the tightening up of the convergence criteria as a condition for the creation of the single currency, and by alluding to the prospect of delaying the start of the third phase if a sufficient number of countries can not meet these criteria within the allotted time. In fact these politicians desire neither the European currency nor the democratic reform of the Union's institutions and use the tightening of the convergence criteria as a screen behind which to hide their real intentions. They represent a real threat to the Chancellor's policy.

France's position appears far weaker. The French economy absolutely requires the European currency and a majority of French government ministers supports it. Everybody knows that, should the prospect of the European currency become feebler, the French franc would be overwhelmed by speculative pressures. This awareness has pushed Chirac into abruptly altering the definition of his government's priorities in order to privilege the goal of financial austerity rather than the objective of reducing unemployment. Yet, on the one hand, France has an excessive budget deficit and a very high unemployment rate; and on the other, the French political class is firmly bound to the idea of national sovereignty. Therefore, there still exist in France many and powerful political currents which would be prepared to postpone the creation of the common currency (that is, to ditch it) in order to make a more expansive budgetary policy possible, accepting meanwhile the consequences of devaluation; moreover, these currents oppose all plans for federal insti-

tutional reform in the name of defending national sovereignty. In reality many French politicians can not deny the need to democratise the Union's institutions, yet they try to reconcile this need with the maintenance of national sovereignty by claiming that the way to democratise is through a strengthening of the Council (in as much as it is formed of ministers nominated in their respective countries according to democratic procedures) and by extending the control of the national parliaments over European decisions. However, in fact the Union's democratic deficit lies precisely in the excessive power of the national institutions and in the inadequate, when not inexistent, control over European decisions by European citizens through their representatives assembled in the European Parliament.

Faced with these different positions, Italy could play a decisive role. It is close to France because its economy presents similar problems to France's (although of much greater proportions in Italy, at least as far as its budget deficit is concerned). Its presence could therefore secure France from being isolated in a monetary union dominated by Germany. Moreover, contrary to France, Italy has well-established federal traditions which could induce its government to support Chancellor Kohl's positions. Hence, Italy could tip the scales in the negotiations. Yet in order to do this, Italy needs to recuperate its lost credibility by endowing itself with a government that is based, at the European level, on the support of a broad alliance of forces and which demonstrates much greater vigour than the Dini government has so far done in its policy of restructuring the public accounts in order to satisfy the Maastricht criteria on schedule.

* * *

The obstacles along the path to monetary union and the democratic reform of the Union's institutions are therefore formidable and difficult to overcome. In addition, the time available is short. The challenges Europe must face will not wait. These challenges consist of the prospect of including the countries of eastern and southern Europe into the Union, which can not be postponed for more than a few years and which, without a radical strengthening of the Union itself, would transform it into a weak and ephemeral free-trade zone; the functioning of the single market, which requires a European currency and which has already been severely tested by the Italian lira, British pound and Spanish peseta devaluations; the rebirth of nationalisms, which in different ways are alive in all the

Union's countries; the very survival of democratic institutions, which have already and everywhere been put in a state of crisis and which, above all in those countries where they are not based on deeply-rooted traditions, will not be able to survive for long in a political context where the lack of future prospects is increasingly impoverishing politics, transforming it into a sheer power game and causing it to lose sight of the objective of the common good.

The deadlines of the intergovernmental conference and of the beginning of monetary union's third phase will, in the coming years, place Europe at the centre of debate in all the Union's member states, and the forces which support unity are mobilising, albeit for the time being to a largely insufficient degree. If the opportunities provided by the intergovernmental conference and the date of 1st January 1999 should be missed, hope and mobilisation will give way to dejection and scepticism. The nationalistic forces would receive a huge boost. The process of European unification would be interrupted. The work of fifty years would be frustrated.

However, the battle remains open. The process of European unification started in the post-war period and has continued in the following decades because the national states were unable to guarantee on their own the essential conditions for their security and for peaceful and well-ordered civil co-habitation within their own borders. Today this situation has not changed, rather it has progressively worsened. The great and unsolved problems of peace, economic development and employment, and of environmental protection are real and threatening and make Europe even more necessary than before. Nevertheless, it is true that the idea of national sovereignty, in spite of having lost any positive function and any connection to the great political and social values, retains a great force of inertia, which has been accentuated since the end of the cold war and is now everywhere feeding the rebirth of nationalism. It is for this reason that creating a common currency, democratising the Union's institutions, endowing its government with a suitable budget, and starting the process toward the creation of the structures of a common foreign and security policy are extremely difficult tasks. Yet what renders uncertain the outcome of this process is that this difficulty is matched by another, which is that of not deciding, of letting slip, after fifty years of integration have led Europe to the verge of unity, the deadlines of 1996-1999 without having brought closer to a solution any of the problems on which the future of Europe depends.

It can therefore be predicted that we are heading for a sharp confron-

tation between the forces which support unity and those which fuel division. This confrontation will initially be confused, but its terms will become gradually clearer as the debate develops and the contradictions become evident. Public opinion will inevitably be involved. The consequences of a failure of the European enterprise on the daily lives of its citizens will start to be understood. Moreover, already now the perception of the dangers Europe is running has started to spread and is bound continually to increase with the approach of the decisive deadlines. Here and there the embryonic awareness that division brings about the violation of the most elementary democratic rights of citizens is gaining ground. The paradox of Europe, such that where there is the power to decide there is no democracy and where there are democratic institutions the power to decide is lacking, will be felt to be increasingly intolerable. Hence, the task is to convert what today is an intense but unclear feeling of insecurity into a strong demand for Europe.

A phase has begun in which the contribution of a vanguard that is aware, united and determined will be able to have a decisive impact.

The Federalist

Popular Sovereignty and the World Federal People as Its Subject

FRANCESCO ROSSOLILLO

I. Legitimacy

1. *Premise*. 2. *The state and legitimacy*. 3. *Legitimacy as an unfulfilled requirement*. 4. *The state as a two-faced Janus*.

1. *Premise*. Europe and the world are currently experiencing a period of profound transformation. On the one hand, there are ruinous impulses toward the collapse of existing state structures and to the creation, on their ashes, of fragile and artificial entities which claim in their turn the character of states. On the other, there are processes which are heading in the opposite direction, towards the coalescence of different states. Among such processes, that underway in western Europe has arrived at the threshold of federal unification. Old states are disappearing, new states are being born, and the whole process is taking place without any understanding of the historical meaning of the transformations underway. Moreover, there is a confusion of terminology that makes it very difficult for those who feel called to engage themselves politically because they perceive the imminent dangers and the opportunities that risk being lost, to understand what is happening and so to decide what action to take.

The concepts involved in the processes by which states are born and extinguished represent the cornerstones of philosophy of politics and law and, as is true for all the concepts that provide the basis of a whole part of human understanding, they possess the obscurity that is inherent in profound things. These concepts have been at the heart of political and legal debate for centuries, but this does not mean that their opaqueness and contradictory nature are in any way lessened for those seeking to tackle them nowadays. Hence, they need to be approached with the humility that must necessarily derive from an awareness of the insufficiency of one's own cognitive tools. However, these concepts are obstacles that can not be avoided, above all by those people, such as the

federalists, who are committed to a political design whose objective is the foundation of a state.

2. *The state and legitimacy*. The century-old crisis of the idea of the nation, of which the micro-nationalist disturbances that are still devastating ex-Yugoslavia and the ex-Soviet Union are no more than the latest manifestations, as well as the recent crisis of communist ideology, mean that the processes of association and disintegration currently taking place in the world can be interpreted as the search, by the members of human collectivities of varying natures and sizes, for new reasons for living together as citizens of a new state. What is at stake in these processes is the idea of *legitimacy*.

Among the infinite forms in which people organise their political co-habitation, and among the infinite configurations in history and society that power relationships among individuals and among groups assume, the state represents a privileged level, whose specific nature consists precisely of the idea of legitimacy. Legitimacy is a reflection of the awareness by members of a collectivity that there exists, above and beyond the particular interests that oppose each other in civil society, a *common interest*, and that the state is the expression of this interest. Legitimacy represents the basis of the citizens' support (or at least the great majority of citizens) for the state and its institutions, that is, of citizens' acceptance of the bond that unites them in a single community of destiny, of the principles that provide the basis of their co-habitation and of the rules that discipline political struggle. It is precisely thanks to the superior mediation guaranteed by the state that political confrontations do not degenerate into civil war, or even into a factional and chaotic competition of particular interests, but instead are an instrument for civil advancement and social progress.

To the extent that it is the seat of legitimacy, the foundation of civil co-habitation and the framework in which the common interest is realised, the state represents the supreme guarantee of respect for the law. It is an entity that is not legitimised by any higher political order, but which itself legitimises all other political structures.

There are two classical conceptions of the state which, for opposite reasons, do not recognise the crucial role of the idea of legitimacy and, as a result, lose sight of the specifically distinctive characteristic of the phenomenon they are analysing and its privileged position in the interwoven complex of social and political relationships.

The first, which is common to the Marxist tradition and to a large part

of political science, regards the state as the pure overarching manifestation of a mode of production and of the social stratification deriving from it, or as one of the multiple configurations, which are not intrinsically different from all the others, that power relationships among people or among the groups into which people are organised can assume. Both of these approaches, therefore, consider the *constitution* of the state as being deprived of autonomy, just as the discipline that studies it is deprived of autonomy. In this perspective, the content of the constitution has nothing to do with the common interest, but mirrors absolutely the relationships of force among the classes or power groups which attempt to further their own particular interests in civil society against those of the other classes or power groups.¹

The second classical conception of the state is that of legal positivism, which had its foremost advocate in Kelsen. According to this approach the state, rather than reducing itself to pure fact as was the case in the conception outlined above, is reduced to pure law, that is, to a system of de-personalised norms which, on the one hand, provide the foundation of the legality of the internal legal order on the basis of relationships of a purely logical nature, and on the other, are founded on norms of a higher order (those of international law), in a pyramid that has its apex in that sort of mysterious divinity which is the *Grundnorm*, or fundamental law.

But in reality the state can neither be reduced to a set of power or production relationships, nor to a system of de-personalised norms. The state consists of more than either of these things, and *legitimacy* is the specific property that distinguishes it. The concept of legitimacy must not be misunderstood as the pure reflection of power, which is imposed only to the extent that it exists, nor is it to be confused with *legality*, which is simply the conformity of a fact with a norm or of a norm with a higher norm. On the contrary, legitimacy expresses the need to identify the source from which the embryonic fusion of fact and norm, of power and the law is realised.²

It is precisely in the idea of legitimacy that the distinction between the material and formal constitution of a state is based. The formal constitution is a set of norms that are distinguished from the rest of the legal order only in as much as they require a more rigorous procedure for being approved, modified or repealed. The material constitution is instead the set of principles, norms and institutions in which is expressed the legitimacy of the state. Their description normally represents an integral part of the formal constitution but their existence is independent of it; moreover, the formal constitution can also not exist, as is the case in Great Britain.

3. *Legitimacy as an unfulfilled requirement.* The idea of the common interest, in as much as it represents an abstract and formal requirement for guaranteeing social peace by basing relationships among people on observance of the law, is tied to the state as such, and is independent of the actual forms it assumes in time and space. Yet, as seen in the course of history, the need to make facts and norms coincide absolutely proves impossible to fulfil. In fact, *in history*, legitimacy is always only partial. It is quite true that even the most barbaric of states represents enormous progress regarding the implementation of the law compared to the generalised violence of the *state of nature* (which is not in any sense a philosophical invention, but a real possibility of which history, including contemporary history, provides tragic examples).³ Yet it is equally true that the legitimacy of all the historical manifestations of the state has always been called into question, and will continue to be so in the future. This happens because power and the law, which are fused (or should be fused) in legitimacy are terms that are at the same time inseparable and contradictory. The idea of legitimacy, as is the case for all the concepts that make up the ultimate foundations of understanding both in the natural world and in the human one, is in fact a circular concept in as much as it is the expression of the two contradictory requirements of founding the law on fact, and of founding fact on the law. Moreover, one of the problems which has occupied western political thought for centuries is that of the unresolved tension between the imperative of guaranteeing the legal basis of co-habitation through the overwhelming power of a sovereign *legibus solutus*, and the need to restrict possible arbitrary acts by the sovereign through obliging him to observe higher legal norms (natural law or Bodin's *lois du royaume*).

However, the requirement is not suppressed solely because it can not be satisfied. The power of the state, if it is to be maintained, must present itself as legitimate. This explains why, between the ideal which can not be achieved, and the reality whose distance from the ideal can not be exposed, there is inserted a *myth*: this myth, like all myths, contains an element of truth mixed up with the mystification, but the amount of mystification is the greater the larger the distance that separates the reality from the ideal. For this reason, legitimacy, alongside its formal and hence a-historical aspect, contains a variable element in as much as it is introduced into a real historical situation; and the history of the state is the history of the continuing emergence of new forms of legitimacy, that is, of ideological formulas on the strength of which the state attempts periodically to justify its existence and to create the basis for the loyalty of its citizens.

4. *The state as a two-faced Janus.* The innate contradiction in the idea of legitimacy is displayed with maximum clarity in the sphere of international relations. Since the state is in fact the foundation of the law, and since no international state exists, the relationships between states are removed from the law and thus based on force. It is true that in specific historical circumstances, in the framework of a common area of civilisation, *systems* of states have been formed that have created in practice a barrier to violence, based on the recognition by each state involved of the legitimacy of the others and of their capacity to undertake commitments and respect the commitments undertaken.⁴ It is equally true, and this will become clearer below, that the world is currently witnessing the dawn of an awareness of a form of universal citizenship, whose institutional reference point is the United Nations and which represents the basis of the attempts underway to establish a reasonably stable world order. Yet there remains the fact that the effectiveness of *international law*, which is the expression of these embryonic forms of the recognition of a common interest above and beyond the borders of states, and which moreover possesses great symbolic importance as the emblem of a need, is an insubstantial reality and one that lacks certainty. Furthermore, the existence of the state remains the divide between peace and war, and between law and anarchy, with the effect that the rule of force continues to be, as it has always been, the only law which, in the final instance, regulates relations between states.

The state is therefore both the guarantor of peace and respect for the law on its inside, and the agent of violence in relationships with other states. Moreover, these two contradictory aspects of the state are not independent from each other, since the capacity of the state to defend itself from external threats through the use of violence is the condition *sine qua non* of its capacity to impose the rule of law in relationships among its own citizens. On the other hand, the exercise, or the threat of the exercise, of violence by the state externally necessarily compromises the certainty of legal relationships internally, since the two spheres can not be isolated. As a result, the state can achieve internally a sphere of legality only at the cost of tolerating and often promoting a sphere of relationships, both in international relations and internally, that is removed from the control of the law. Only by paying this price has mankind been able to proceed until present times on the long, tormented and incomplete journey toward the overcoming of the state of nature. However, the contradiction that derives from this, weighs the state down with an ambiguity that renders all its historical manifestations essentially unstable.

II. The Constituent Power and Sovereignty

1. *Their primary natures.* 2. *The primacy of politics.*

1. *Their primary natures.* If the state is always partially illegitimate, and if its partial illegitimacy provides the momentum for its evolution in history, it is necessary that one of the terms of the contradiction inherent in legitimacy acquire, in certain critical moments of the life of the state, an independent existence, that it comes to oppose the state in the concrete forms which it assumes in history and become the agent of its transformation, that is, of the creation of a new form of legitimacy and a new material constitution. The objective of one term of the contradiction thus becoming independent must be the refounding of that complex of norms and institutions which in the normal life of the state is underscored by the *general consensus*: but, while this latter is, as Hauriou says⁵, based on habit, and hence passive, the agent that transforms legitimacy must be *active*, that is, it must be based on an act of *will*. Hence, the *general will* must be manifested when the foundations of the material constitution of a state are transformed or when a new state is created.

The expression of the general will has from time to time been used synonymously in political language and in the history of political thought with the exercise of the *constituent power* or of *sovereignty*. These two terms have different origins and have been used historically in different contexts. The idea of a constituent power was born during the French revolution and belongs to the tradition of democratic thought to the extent to which, above and beyond certain ambiguities, it is employed, in political language and by political philosophers, almost exclusively to refer to the people or to their representatives. The idea of sovereignty, on the other hand, emerged during the 16th century in the work of Bodin, at the same time as the birth of the modern state in the form of absolute monarchy, and it referred to the need to assert the primary nature of the state (or the authority of the monarch which was its visible expression) and its independence from all other legal orders. It was adopted at the time by the political power as an instrument through which to bring an end to the religious conflicts that were provoking bloody wars in Europe, and in order to justify and reinforce the primacy of the monarchy over all other forms of civil and religious authority. In this way, the concept of sovereignty made it possible to overcome the precariousness that had characterised the middle ages, when feudal relationships and the unclear demarcation between the roles of civil and ecclesiastical institutions, by

preventing that the question of legitimacy be posed with clarity, had gravely hindered the peaceful evolution of civil society.

Moreover, the semantic spheres of the two terms are broadly overlapping, since both denote a power that provides the basis of the law in as much as it is not bound by any law that is imposed by a superior power, and hence is able to decide in situations of emergency, that is, of institutional crisis.⁶ In both cases the problem of searching for their title-holder is resolved by identifying a subject which is aroused during exceptional historical circumstances and which places itself outside the material constitution of the state (which is *legibus solutus*) in order to be able to transform it by imposing a previously non-existent legitimacy, or imposing a legitimacy different from that which existed previously.

The vital significance of these terms tends to be obscured by the recurring attempt to "constitutionalise" both the constituent power and sovereignty. With regard to the constituent power this is achieved by reducing the exercise of constituent power to the normal procedure of constitutional revision. In this way the constituent power is brought back within the sphere of the preceding constitutional order, of which the process of revision does nothing more than apply a norm. Constituent power implies instead, whatever the forms through which it is activated may take, a *break* from the formal continuity of the state order. The subject which exercises the constituent power does not in fact limit itself to modifying norms that are constitutional only in a formal sense but that de facto have a secondary importance, and to that extent can be altered while respecting the letter and spirit of the current constitution; rather, it transforms the historical content of legitimacy, and hence can not derive its own legitimacy from conformity to the preceding order (even if in some cases a substantial break can co-exist with formal continuity).⁷

The same problem is raised for sovereignty, intended as the power to decide in the last resort. Also in this case, the task is understanding whether the decision-maker of last resort is a subject that exists within or without the framework of the constitution. Moreover, also here the attempt to constitutionalise sovereignty is made by some jurists, and by certain democratic constitutions, through explicitly attributing to a constitutional body the power to declare, in exceptional situations of institutional crisis, a state of emergency and of suspending constitutional safeguards in order to restore legality. Yet even in this case the true holder of sovereignty escapes any regulatory effort on the part of the preceding order. The truth is that no constitution can coherently set down procedures for overcoming its own crisis. In reality, every constitution consid-

ers its own foundations of legitimacy as permanent and unchangeable. Moreover, the possibility of overcoming a situation of institutional difficulty *by virtue* of a constitutional disposition presupposes the existence of a framework of substantial normality, and hence that the crisis does not involve the system in its entirety and does not call into question the foundations of its legitimacy; in other words, that it is not a real crisis. In support of this affirmation it is possible to recall that, for as long as the situation remains within the bounds of the constitution, the power of suspending constitutional safeguards must be subjected to precise limits, and that the observance of these limits must be controlled and imposed by other constitutional organs, which renders the problem of identifying, *within the bounds of the constitution*, the decision-maker of last resort a circular process. In reality, when the problem of sovereignty is actually posed, since the crisis of the institutions involves the system in its entirety and its foundations of legitimacy, the decision-maker of last resort can not be found except *outside of the constitution*, and its power can not be exercised on the basis of a law, but rather represents a fact that establishes a new law.⁸

2. *The primacy of politics.* The above necessarily leads to the conclusion that, even if power and law coincide in the abstract idea of legitimacy, in the course of history the foundation (or refounding) of a state is an eminently political act, and it is politics which founds the law and not vice versa, even if the form of politics concerned is not the mere battle for power, but has within itself the seeds of a legal order in as much as it aims at the common good: *revolutionary politics*. This initial evidence must lead us to the conclusion that the constituent power can never be exercised by the judiciary, whose task is that of applying the current laws and not that of establishing the principles of a new legal order. In the history of the United States, which has nevertheless been profoundly marked by the decisions of the Supreme Court, these decisions have never undermined the fundamental principles of the constitution, so much so that it seems reasonable to argue that, since the foundation of the federation, the US has experienced only three real constituent moments, during which the foundations of civil co-habitation were radically called into question: the war of secession, the "New Deal" and the great civil rights' battles of the 1960s. The Supreme Court has undoubtedly exercised a fundamental role throughout the entire history of the Union: but this role has always been carried out within the framework of a constitutional order whose foundations, despite the

continuous flow of events and above and beyond the incessant transformation of the political and social balance, have remained, between one constituent event and the next, unaltered. This is not to deny the fact that in certain circumstances of the profound crisis of power, politics can make use of judges for affirming, even if in perverse ways, its primacy. On such occasions, the appearance of the prevalence of the rule of law over politics is deceptive, and hides the profoundly degenerative phenomenon of the politicisation of the law, and of the judges' consent not to exercise their function with rigour and impartiality.⁹

III. The Subject of the Constituent Power

1. *The people.* 2. *The people in the constitution and the people prior to and above the constitution.* 3. *The people and the state.* 4. *The exercise of constituent power does not conform to any predetermined pattern.* 5. *Constituent power and democracy.*

1. *The people.* The identity between power and the law which is inherent to the concept of legitimacy, and the simultaneous impossibility of uniting these two entities in an empirical subject, represent the nature of the contradiction which has conditioned, in the history of political thought, the search for the holder of constituent power, or of the "sovereign." The prerogative of sovereignty, to take the term which has the longer history, has been attributed over the years to two successive entities: God and the people. Yet God is *absconditus*, and must be represented on earth by a human being, who possesses all the defects of earthly things. Thus, the legitimacy of divine origin does not lessen the contradiction by making fact coincide with principle, since the fact is the earthly representative of God, with earthly limitations and insufficiencies, and the principle is God in his invisibility. Moreover, with the secularisation of authority brought about by the modern state and by the French revolution, the divine legitimisation of power has lost its credibility, and the only possible foundation of legitimacy remaining is that based on the people. The idea of the people achieves the connection between fact and principle, since hypothetically the people desire their own interest, and their interest is the general interest; in turn, the pursuit of the general interest is the principle which legitimises the exercise of power. Therefore the people are the judge of last resort as concerns the adequacy of how power is exercised. It is for this reason that Rousseau was able to state that the general will, when it is really achieved, can not be

mistaken.¹⁰

Identifying the people as the sole holder of sovereignty apparently conflicts with the fact that at the origin of the idea of sovereignty lies the figure of the absolute monarch, whose affirmation coincided with the birth of the modern state. Yet in reality the figure of the absolute monarch (where it was asserted, and hence with the exception of Great Britain) has signalled historically the birth of the people (even though in an as yet embryonic and unconscious form), in as much as, by overcoming the confusion and the conflict of the legitimacies (and thus the absence of a real legitimacy) that were characteristic of the middle ages and of the period of the wars of religion, and by imposing a sole legitimacy in the name of the monarch's divine right, it both created and expressed for the first time a community of destiny among the monarch's subjects, who were united by loyalty toward a single secular authority, of which they represented the real foundation of power. In this way, actual substance was given to the concept of the general interest and that of the common good.¹¹ Moreover, it should not be forgotten that absolute monarchy prospered in France, where it was born, for as long as it enjoyed a popular consensus based on combating the feudal resistance of the nobility; and it fell when the monarchy's interest in its own survival diverged from the general interest.

2. *The people in the constitution and the people prior to and above the constitution.* An important contribution to defining the people as the holder of constituent power (and hence of sovereignty) was given by Carl Schmitt, when he distinguished between *the people in the constitution* and *the people prior to and above the constitution*.¹² The people in the constitution is the totality of a state's citizen-electors, who, as a whole, comprise an organ of the state;¹³ this organ fulfils a function assigned to it through constitutionally-defined procedures (elections, referendums, popular initiatives). Yet it is not in this sense that the people is the holder of the constituent power, precisely because in this quality the people is not *established* by a pre-existing legal order, but rather *establishes* itself the essential forms by which power is organised, to which the constitutional document (or certain ordinary laws and established practice, as in Great Britain) gives a legal form. The people prior to and above the constitution is the "nation" of Sieyès, who wrote in *Qu'est-ce que le Tiers-Etat?*: "The nation exists before all else, it is the origin of everything. Its will is always legal, it is the law itself."¹⁴ "The national will ... has no other requirement than that of its reality in order to be always legal, it is the origin of all

legality. Not only is the nation not subject to any constitution, it *can not* be subject, it *must* not be so, which is the same as saying that it is not.”¹⁵

The holder of the constituent power is therefore the people prior to and above the constitution. In order to clarify with an example the difference between the two subjects, it is enough to consider those cases of profound change to the constitutional order of European states during the 19th and early 20th centuries, represented by the enlargement of the vote first to all male citizens and then to women. Decisions of this type, even if they were implemented through ordinary laws, and hence without any formal break of juridical continuity, can not in fact be interpreted as anything other than the exercise on the part of the people of its constituent power. Yet these were acts of will whose subject was not the electorate as defined in the preceding order (that is, prior to the enlargement of the suffrage), but an entity which expressed itself in the name of the *new* electorate. All the great extensions of the suffrage in the history of the democratic states have been the climax of battles in which those excluded have been in the vanguard (in addition to the more advanced part of the social categories which already enjoyed the right to vote), and in which therefore the sovereign people was represented also by those individuals that the preceding order did not recognise as being among its members.

3. *The people and the state.* If these considerations are correct, it is possible to conclude that the expression “the people in the constitution” is itself misleading, since the organ which elects assemblies or decides referendums is in fact more correctly described by the term “electoral body” or by other similar expressions which clearly highlight the fact that it represents an institution among others, however essential it may be in democratic regimes. In reality, the people is only manifested prior to and above the constitution. Its activity is intermittent and in normal periods (those which Hauriou would call “of slow movement”)¹⁶ it “hides”, so to speak, within the institutions it has created during the previous constituent period and which it now supports through a habitual consensus. Hence, it is not represented only by the elected assemblies, but by the *totality* of the organs, rules and procedures in which the current constitution is articulated. Furthermore, the point needs to be made that in all democratic regimes, some of these organs, rules and procedures possess the specific function of guaranteeing the fundamental rights of citizens *against* arbitrary acts that can arise out of the behaviour of the majority of the electoral body and of the organs that represent this majority.¹⁷

There remains the fact that if, during the constituent phases, the

people ceases to identify itself with the existing institutions, it nevertheless identifies with an institutional project, so that it is impossible to think of a “popular” entity that exists independently from the way in which it is organised or plans to organise itself. The act of will through which, according to Kant’s expression, “the multitude becomes the people”¹⁸ (or becomes so once again after a crisis of legitimacy) is therefore always also a constituent act. Every *pactum unionis* is always also a *pactum constitutionis*. The people therefore is identified with the state, and the history of the people is the history of the state. Yet this is only a prospective identification, and hence in reality the difference between the two terms in political language can not be suppressed. The difference is rooted in the distance separating the idea of the people, which is that of self-government, from the empirical people, which fulfils this role only in part and hence does not overcome the division that exists between those that govern and those that are governed. In order to exist, the people requires the imposition of the power of man over man. The state is the organisation of this power, and precisely in this respect it is the guarantee against the abuse of power, and hence of that degree of self-government that the factual people is capable of expressing.

4. *The exercise of constituent power does not conform to any predetermined pattern.* From the primary nature of the people prior to and above the constitution derives the fact that there exists no predetermined procedure through which the people should exercise its own constituent power. Referring once again to Sieyès: “... a nation is independent of all structures; and, by whatever method it chooses to do so, it is sufficient for its will to be made plain in order for any positive law to lose all validity in its regard”¹⁹ This is not to deny that constituent power must necessarily be manifested in certain stages of the process through determined procedures, but rather to stress that these procedures are themselves the expression of the completely autonomous exercise of constituent power, and hence they do not constrain its manifestation in any way. It is therefore arbitrary to maintain that there nevertheless exists a particular form through which the general will expresses itself naturally, such as the constituent assembly or referendums. The outcome of any election for a constituent assembly and of any referendum, as is the case for any other popular consultation, depends on a great number of factors: on the composition of the electoral body, on how the referendum question is formulated, on the intensity of the debate preceding the vote, on the degree of participation by electors and their awareness of what is at stake;

so that in general the result of a popular consultation needs to be considered as not necessarily the result of a real manifestation of *will*, but can in fact be none other than the expression of a passive and stage-managed consensus. The general will can be correctly expressed by decisions taken by a restricted number of actors, or even by one alone, if supported by the active and conscious involvement of the people, just as it can be completely falsified by a referendum or election which is manipulated, or held in an unsuitable moment.

It is likewise in this perspective that it should be stressed that the decisive stage of the exercise of the constituent power does not necessarily coincide with the drawing up and approval of a constitutional document in a formal sense, even though these operations represent events in the *constituent process* in a broad sense. At times in fact these operations are effected when the new legitimacy has already been imposed by a revolutionary act which has changed the previous balance of power and established the outlines of a new institutional order. In such cases, the phase of the drawing up of a formal constitution, which can take place even much later on, as happened during the early years of the Italian republic, represents nothing more than the execution of a sort of explicit or implicit mandate, which derives its binding effectiveness from the act through which the general will was expressed. In other circumstances the conclusive demonstration of the popular will happens *after* the drawing up of the document, as was the case for the American constitution of 1787, whose decisive stage in the constituent process was the ratification by the states. In yet other circumstances, a constitutional text may be used as an instrument in the struggle to impose a new legitimacy (as happened for the draft treaty approved by the European parliament on 14th February 1984, as a result of Spinelli's initiative, but not adopted by the governments of the Community).

5. *Constituent power and democracy.* The constituent power, or popular sovereignty, are therefore essentially different from the expression of the suffrage which is the basis of democracy. It is certainly true that in a historically mature situation the exercise of the people's constituent power (or popular sovereignty) can not lead to anything other than a democratic regime, and that therefore today the people's constituent power (or popular sovereignty) is the basis of the legitimacy of democratic regimes (even if it is possible in particular situations to hypothesise emergency, and hence temporary, solutions that are not formally democratic; and even if there nevertheless exist manifestations

of democracy that are so profoundly different from each other that the passage from one to the other, as for example from national to international democracy, presupposes a real revolutionary change, and hence the exercise of constituent power). There remains the fact that the people's constituent power and democracy are distinct, since all democratic regimes are *constituted* regimes; hence it is wrong to consider the result of a particular election, whose subject is the *electoral body* as defined by the constitution and the electoral law (and not the *people*), and in which there are normally expressed only personal preferences and special interests, as a manifestation of the general will, to the extent that this is above criticism since *it can not be mistaken*.

It is worth remembering in this regard that Rousseau's thought normally receives a one-sided interpretation, in as much as he is held to make the generic affirmation that legislative activity as a whole is the expression of the general will. Certainly Rousseau's thinking was ambiguous: in certain contexts he attributed to the *sovereign* (which corresponds to the people prior to and above the constitution) the task of *making the laws*, and to the *people* (which corresponds to the people in the constitution, or to the electoral body) the task of *governing*. Yet there are passages in the *Social Contract* in which he identifies the object of the general will expressed by the sovereign with the rules that dictate the great regulatory principles of co-habitation in every independent human community, and the government with the ordinary legislation (aside from the activity of a specifically executive and administrative nature), such that it is true that the exercise of the general will can give rise, according to Rousseau, to democratic regimes, but also to monarchical or aristocratic ones. In the last chapter of the second book of the *Social Contract*, in particular, Rousseau divided laws into four categories: the *political* or *fundamental* laws, the civil laws, the penal laws and the customary laws. Of these, it is in the political or fundamental laws that is manifested, "the action of the entire [political] body to the degree that it acts on itself, that is, the relationship of everything to everything else, or of the sovereign with respect to the state." "Among these different classes", he concludes, "the political laws, which represent the form of the government, are the only ones to which I refer."

None of the above means that democracy and the general will are two entirely different things. On the contrary they coincide *at the extreme*, even if they are differentiated *in history*. And the root of their diversity lies in the fact that men and women in history are not fully rational beings. They are not motivated day-to-day by the ideal of promoting the common

good, and hence are unable to create forms of self-government in which all decisions are taken unanimously. For this reason they *require a constitution* which safeguards the general interest, which guarantees every citizen the enjoyment of fundamental rights and impedes the majority from oppressing the minority, even by limiting the power of those institutions which most specifically reflect the democratic consensus. Moreover, the general will is manifested only when the issue of changing the basic principles that provide the basis of the constitution is raised, that is, the actual conception of the common good. Yet in a perfect and ideal society people *would not need a constitution* since the protection of rights, which it is the constitution's task to ensure, would be guaranteed for all by the sole fact of participating in the daily process of the formation of a will which, having as its specific and unchanging goal the realisation of the common good, would always be unanimous and therefore general. This represents the ideal point of arrival of the constitutional history of mankind; and though it is unachievable, it does nevertheless give a sense to the entire process.

It is in these two levels of reflection, that concerning the model and that concerning historical reality, wherein lies the cause of the ambiguity in Rousseau's thought. In certain contexts, Rousseau refused to recognise the infinite distance that separates the theoretical model of a people's assembly deliberating unanimously from the forms in which this has been attempted in history (even though he remained firmly convinced that the model could nevertheless only be achieved in small states); while in other contexts he was forced to come to terms with real situations, and hence to recognise that the general will manifests itself exclusively in the moment of the creation of the *political laws*, that is of constitutions.

IV. The People as a Process. The National Peoples.

1. *The contradiction between the idea of the people and its actual manifestations.* 2. *The people as a process.* 3. *The need to identify the point of arrival of the process of realising the idea of the people.* 4. *The formation of the national peoples.* 5. *National sovereignty and the nation as its subject.*

1. *The contradiction between the idea of the people and its actual manifestations.* The idea of the people is problematic and apparently contradictory. This aspect of its nature derives from the fact that the general will has not visibly emerged from the events through which the

states have been formed and transformed in the past. In fact, it is impossible in these events to attribute to a "popular" entity unanimous acts of volition that represent its manifestation. In reality states have historically been created and transformed by the action of minorities. This fact raises the question whether the attribution to the people as being the holder of the constituent power is correct.

Three conceivable ways out of this impasse can be hypothesised. The first is "realistic", and consists simply of dropping the idea of the people as the basis of legitimacy. The reference to the people as the holder of the constituent power is, in this perspective, purely ideological and serves simply as a justification for the power struggles of the elites, out of whose confrontation the forms of the state are created and modified.²⁰ In this perspective, there is no basis for the legitimacy of a constitution aside from the force imposing it, which means that the issue of legitimacy is a false problem and that all regimes, from the most civil and democratic to the most barbarous and totalitarian, are neither legitimate nor illegitimate, but simply exist in fact.

This response is unacceptable. It is true that the people is an entity whose defining features are difficult to establish. Yet this is not sufficient for considering the idea of the people as pure mystification. The very irrepressibility of the need to legitimise power and the forms of its exercise demonstrates that power can not be based on the pure fact of its existence. In addition, the fact that certain collective bodies have never existed in history as entities that fully match their ideal, and that are capable of expressing a strong and unanimous will, is not an argument for denying their existence. It is therefore true that up until now the people has been *in part* a fiction: but it has been a fiction only in part, if it is true that, in order to guarantee its survival, the power has had to rely from its very beginnings on this fiction, in the various forms it has taken. Likewise, it is true that at certain historical turning-points, this imperfect and ill-defined entity has erupted onto the flow of events by upsetting the existing balance of power in the name of universal values, and thereby signalling the fundamental landmark developments in the process of human emancipation. The people therefore *is* a reality, even if it is a reality whose nature is difficult to summarise in a formula, and as such it lends itself to ideological abuse.

The second path out of the impasse that can be hypothesised consists of the theory according to which the people is an organism; this organism does not consist of the totality of the individuals that comprise it, but possesses an autonomous capacity to will through the *organs* that are

charged with carrying out its functions. This theory, which appears above all where the idea of the people has been identified with that of the nation,²¹ completely empties the idea of the people of all substance, precisely in as much as it reduces it completely to the action of its organs, and transforms it, as the preceding one does (even if, differently from that one, in a non-explicit way) into a pure ideology which has the sole function of conferring legitimacy on the action of institutions which in practice do not represent the people as a whole, but only particular power groups.

2. *The people as a process.* It remains to explore a third way out of the impasse, which will allow us to continue to see in the people not a pure and simple myth, but a real agent in history to the extent that it is composed of real individuals. This involves starting from the presupposition that the profound meaning of the idea of the people can not be understood except with regard to its development over time. Today there exists a widespread sense of unease with regard to the mechanisms of democracy, which arises from the fact that they produce decisions in a limited time horizon that take account only of the short-term interests of the electorate, or rather of a part of it, and not also of their long-term interests, or, even less, of the interests of those not yet born and who will nevertheless be subjected to the future effects of these decisions. This unease is symptomatic of the need to attribute constitutional worth to new rules of co-habitation and of founding the state's legitimacy on new values, though without contradicting the rules and values handed down to us from history. Faced with some of the most serious of the world's current problems, such as those of safeguarding the environment and of conserving resources, the need to give voice to a people capable of interpreting a general will which embodies also the virtual one of future generations, and which would be capable of assuming responsibility for the long-term consequences of their decisions, therefore emerges with clarity: a people more profound, which is immersed in the long-term, and which would find in the memory of the past the moral and cultural resources necessary for ensuring solidarity between the present generations and those that will come after them.

It is in this perspective that it is possible to perceive the solution of a problem which was intensely debated in the course of the French revolution: whether the general will possesses the power to oblige itself. The debate contrasted the awareness that the general will had within itself the criterion of its own legitimacy, and hence could not be bound by

previous laws, with the need not to reduce the general will to the expression of the irrational moods of public opinion, interpreted by fickle and irresponsible assemblies. For this reason, some of the numerous constitutions approved during the years of the revolution declared that they could not be revised for various, specified lengths of time, and at the very least made constitutional revision particularly difficult: yet this did not prevent them from being rapidly done away with by the next revolutionary wave, in contempt of the clauses that had decreed their immutability.²² This contradiction demonstrates that the object of the debate was a false problem. The fact is that the general will is both uncoercible and the creator of results destined to last through time. As has been seen, it is not identified with the formal act of elaborating a constitutional document. The lasting character of a constitutional order can not be imposed by a law, but rests on the affirmation in the people's conscience of new values and on the generalised acceptance of new rules, which are the result of an entire *revolutionary process* in which, above and beyond the contradictory formulations produced by the tumultuous and confused succession of events, the profound people, expressing a strong and unanimous will, irreversibly transforms the foundations of civil co-habitation. It is in this way that, independent of the ephemeral nature of the documents which in that period rapidly followed on one from the other, the French revolution left a permanent mark on constitutional history, which has become the common patrimony of mankind and without which there would not have come into existence the democratic constitutions of modern times. The general will then, to the extent that it acts only during the great turning-points of the history of mankind's emancipation, modifies itself *de facto* only after a long evolution has made the very bases of a constitutional order inadequate for responding to the needs of civil life and has posed the premises for a new formulation of the social pact that is destined in its turn to last for a long time.

The people then, as the holder of constituent power (or of sovereignty), does not correspond to any fickle multitude which is vulnerable to the passing spell of demagogy, but manifests itself in the *long term*, that is, in the acts of collective volition that are matured over a long time, and which represent the fundamental landmark developments in the process of human emancipation. This means that the people can not be simply identified as the subject of *all* the processes that give rise to the implementation of a constitution in a formal sense, whatever form it may take. This therefore involves identifying, at least in the broad outlines, the conditions in which an institutional transformation really depicts the exercise

of constituent power, or of sovereignty, and for this reason has the people as its subject, and should not instead be interpreted as only the formally constitutional expression of an ephemeral movement of public opinion, or even as the pathological expression of a phase in the process of dissolving a community of destiny.

For this reason the people in history must be thought of primarily as a *project*, that is, as an entity that while certainly being imperfect, nevertheless contains within itself the idea of its own complete fulfilment. That means, in the first place, that the idea of the people is an unavoidable *need*, which founds the existence of the modern state. But a need does not bring about of itself the necessity of its own realisation. It is therefore necessary to develop this idea further, and define the people as a reality which exists from the beginning of history in a virtual way, and which over the years progressively unfolds the defining characteristics that are inherent in its concept. It is only through this approach that, faced with historical changes of various natures, it is possible to establish when we are, and when we are not, dealing with the entity "the people", which is the holder of the constituent power, or of sovereignty, and thereby to avoid identifying the exercise of the constituent power or sovereignty with historic transformation *tout court*, so that the people can be employed as a pretext for justifying all forms of wickedness in the name of a general will which, being only virtual, possesses a fundamentally ambiguous meaning.

If we seek to avoid falling once again into the positivism that legitimises everything that exists on the sole basis of the fact that it exists, it becomes essential to distinguish between the different forms of what exists, and to identify the facts which are intrinsically foundations of legitimacy. Moreover, in this attempt it is necessary once more to guard against the temptation of trying to exit from the impasse by affirming that the founders of legitimacy are only the facts, that is, the acts of will, that adapt themselves to a superior norm, and thereby to rely once more on a legal order as the foundation of fact, thus leaving the question unresolved. Overcoming this contradiction requires demonstrating that the people is neither a pure fact which founds a new legitimacy through the expression of an arbitrary will, nor a subject deprived of autonomy which limits itself to recognising a superior legitimacy that exists outside of itself: rather, it is a fact which is *simultaneously* a principle of legitimacy, and whose self-realisation in history is the process of realising the full legitimacy of power, that is, of the ultimate coincidence between law and politics.

The concept of the people as a project must therefore be honed into

that of the people as a *process*. And history must be thought of as not already representing the progression from birth to growth and death of a plurality of peoples, intended as distinct individualities endowed with their own natural and unconscious reality, but instead as the development of a single idea, which starts from an embryonic stage in which it manifests itself in multiple forms, but always as an unsatisfied need, until it reaches an ideal final stage in which it is realised as the full and permanent expression of the general will. This evidently does not alter the fact that the forms that the idea assumes during the different stages of its evolution, scanned by the moments when the constituent power is exercised, acquire their own autonomous, even if imperfect and imprecise, physiognomy which makes it inevitable in certain contexts that the term "peoples" will be used in the plural.

3. *The need to identify the point of arrival of the process of realising the idea of the people.* The preliminary criterion which enables us to discriminate between historical changes which really give rise to a new legitimacy and the meaningless convulsions that are produced in the degenerative phases of the evolution of civil co-habitation, can not be anything other than the approach toward the achievement of the conditions for the full expression of the general will. However, in order to attribute an effective interpretative value to this criterion it is necessary to try and define more precisely what the general will comprises.

In order that the expression of the general will be held to be authentic, it must fulfil the requirements of autonomy, unanimity and universality. These features are rooted in the concept of practical reason itself, and each one can be considered only in the presence of the other two, since what is rational is at the same time the expression of the autonomy of the individual conscience and objective fact, whose reality imposes its logic on everyone. Thus, the general will postulates the existence of a human community that is perfectly rational and transparent, and as such infinitely distant from all forms of actual human community, whose manifestations of will can not avoid being perverted by inertia, misrepresentation of the truth and violence. However, it remains true that history makes sense only to the extent that it is the path, even if it is a path without end, along which men and women progressively overcome the structural obstacles that are placed in the way of achieving the ideal of the general will.

There are three structural obstacles. The first consists of the dominion of man over man, and of the inequalities bound up with the social division

of labour, which makes any autonomous manifestation of will impossible, in as much as this is possible only in conditions of freedom from oppression and need. The second is the centralisation of the state, which forces people to formulate and express their needs and wishes through mass bureaucratic organisations such as the political parties and trade unions, which can reach political decisions only by means of the impersonal mechanism of the counting of votes, and the prevalence of the majority over the minority.

An important step toward realising the conditions that will make autonomous and unanimous manifestations of the collective will possible, is therefore the development of a social context within which is realised an advanced degree of political liberty, the equality of material opportunities, and a federal institutional context, in which the process of forming the political will begins at the level of the local community (where direct and personal dialogue and hence the elaboration of an opinion and of a will that is really shared by all is possible), and from there rises, through a long series of intermediate levels, to the largest territorial levels.

The third obstacle is the division of mankind into sovereign nations. A will, even unanimous, that is expressed only by the people of a state, and that is different from that of the peoples of other states, is by definition a particular will and pursues a particular interest (which in reality is the interest of nobody, as the history of so many devastating wars acclaimed by public opinion demonstrates). Yet this is not the whole point. An entire historiographical tradition has studied the profound conditioning exercised on political relationships and on the constitutional structure of a state by its position within the international context.²³ Hence, a constituent act in the framework of a single state is not simply not the expression of a will that is really general, but it is not even, except partially, the expression of a will *tout court*, if it is accepted that a will presupposes the liberty of a people to decide its own destiny, removed and separate from any external conditioning.

4. *The formation of the national peoples.* It is possible at this juncture to try to outline, on the basis of the criterion of approaching the realisation of the conditions for the full expression of the general will, the direction in which the idea of the people has evolved in history. The idea of the people is as old as the state itself, and certainly it is clearly visible, even if in embryonic forms, in ancient Greece and Rome. As regards the modern world the material conditions for its existence were created, as

mentioned above, by the absolute monarchies of the 16th and 17th centuries. Yet it would seem proper to place the start of its conscious history in the American and French revolutions and in the Enlightenment, which provided the cultural basis of both. The French revolution in particular marked the beginning of the historical phase of the birth of the national peoples, characterised by the tumultuous process of the formation of different social classes, of class conflict, and of its overcoming in the framework of more advanced political and social orders. During the 19th century in western Europe, every new class which assumed an active role in productive processes, and which claimed a corresponding role in the wielding of political power, presented itself as a universal class, and as such represented a new and more advanced vision of the idea of the people. Having reached power, however, these new classes were subsequently to manage it, at least partly, in their own particular interests. Yet, acting in this way, the new classes promoted an awareness on the part of the subordinate levels of society, which, in the preceding period had led an inert existence and had passively supported what at that time had been the revolutionary class, of their own role in the productive process and of their responsibilities in the political process, and pushed them to claim the right to participate in the wielding of power in the name of the universal values of liberty, equality and social justice.

It needs to be stressed that the great revolutions of the 19th century, that marked the decisive episodes of this process, were at the same time manifestations of the constituent power of a people in-the-making that, by changing its own identity, changed the form of the state from that of the absolute state of the ancien régime into that of the contemporary welfare state. In so doing, the people brought the forms of European civil co-habitation closer to the model of self-government. With the emancipation of the proletariat and the birth of the welfare state, it is possible to declare concluded, at least in western Europe, the period of the formation of the national peoples (even if this formation is nevertheless incomplete, both due to the persistence of discrimination on the basis of non-class criteria, and because the representative mechanisms of the unitary national state, on the one hand, and the preponderance of physical work during a person's life-time, on the other, continue to make a real political will the monopoly of a restricted minority). Yet fascism and the two world wars caused the emergence of a tragic issue, which in the preceding era had remained hidden from the collective conscience of Europeans and from culture itself, and which has prevented the idea of the people from advancing further towards its realisation: that of the identification of the

idea of the people with that of the nation.

5. *National sovereignty and the nation as its subject.* From the time of the French revolution, the nation and national sovereignty have been the ideological instruments through which it has been attempted to conciliate the idea of popular sovereignty with the existence of a multiplicity of states, that is, of peoples, sovereigns. Above and beyond its specific content, which has made it the ideology of a type of state with a precise historic and geographic collocation,²⁴ the idea of the nation is, more generally, the corruption of the idea of the people. This corruption has been determined by the fact that the idea of the people has until now been embodied in history by a plurality of subjects. In this way the very idea of the general interest is corrupted, since although it finds in the nation-state the only framework within which it is possible from time to time to realise the general interest, to the extent that it is historically possible to do so, this nation-based concept of the general interest breaks down in international relations into a conflict between particular interests. This contradiction is apparent in the national sentiment, or patriotism, in which the sacrifice of the particular interest of citizens in the name of the common good is inseparably bound up with the pursuit of the particular interest of their own nation to the detriment of the interests of other nations, and with complete contempt for the common good of humanity.

In turn, the idea of sovereignty is corrupted when applied to the nation, since the recognition of the existence of various decision-makers of last resort represents the negation of the concept of a decision-maker of last resort itself. International law tries to escape this contradiction by asserting the *right of non-interference*, which establishes the illegitimacy of any form of interference by a nation-state in the internal affairs of another on the basis of the sovereignty of all nation-states with regard to their own national territory. The right of non-interference is based on the idea of *independence*, that is, on the presupposition that a number of "political societies", to use Austin's terminology,²⁵ can live alongside one another so long as they are prepared to renounce any mutual interference and act as separate and self-sufficient worlds, without having any conflicts between one another and enjoying full autonomy regarding their internal decisions. In reality, however, independence is a pure fiction. The world is in fact interdependent, and it is certainly not an abstract norm of international law which will be able to suppress the evident reality of disputes among nations. Such disputes, if they call into question vital interests, can not be resolved through the application of

legal rules but, once the method of negotiations has failed, only through the instrument of war, which remains in this way the only real decision-maker of last resort.

Thus, in this context sovereignty does not present itself as the manifestation of mankind's will to self-emancipation expressed at its highest level of autonomy, as happens in the contexts in which it is identified with the constituent power; rather, sovereignty represents the power to *make war*. In this way sovereignty denies its most profound *raison d'être*, that of guaranteeing social peace by imposing a legitimate power that is accepted by everyone.

These contradictions reflect on the very idea of the nation and highlight its intrinsic ambiguity. In international relations, the nations, as the representatives of particular interests, present themselves as distinct *individuals*, and hence they lend themselves to being thought of as *organisms*, composed in turn not of individuals but of organs, and whose will is not that of their citizens, but that of *their organs*, that is, of the repositories of power. Moreover, this corresponds to the fact that in international relations the decisions through which national sovereignty is manifested must be taken with rapidity and often prepared in secret. They therefore can not be the result of a tumultuous and confused decision-making process, such as those which characterise constituent periods, even if often they must be maintained by means of manipulating popular support. The nation then (as a specific entity, that is, to the extent that it is considered to be something different from the people) is not a real entity, capable of a will, but a fictitious one, which serves only as an ideological justification for the decisions of the established authority.

It is hence no coincidence that in the French constitutional tradition the theory of national sovereignty, which nevertheless in the initial phases of the revolution and in the reflections of Enlightenment thinkers was identified with popular sovereignty, came progressively to be opposed to it in as much as the nation was not conceived of as an ensemble of individuals, but as an abstract collective entity which acts only through the institutions that represent it. Yet this means that the nation identifies itself absolutely with the state; and sovereignty, with regard to the nation, ceases to be a prerogative of the people which it exercises *against* the existing state, and which is manifested only in special moments of historical evolution (which happens when it is intended as the constituent power), but becomes instead an intrinsic, and permanently active element of the nation-state.²⁶ It should be recalled in this regard, for the sake of clarity, that also the people is identified *at the extreme* with the state, but

that for the people this identification is never absolute since it is an entity in-the-making, which tends at all times to differentiate itself from the forms of the organisation of its own existence that it periodically assumes. It is in the people's nature as a process that lies its capacity to will through acts of real volition, at least by some of the individuals comprising it who are removed from the restriction of any form of organic relationship. This, moreover, can not be founded on anything other than a superior power, one that is free from being called into question in any way at all. Therefore, the people is the real holder of sovereignty, while the nation is an abstract entity which functions only as an ideological justification for a power structure that has absolutely nothing to do with the general will.

The opposition between the idea of the people and that of the nation reflects that, already highlighted, between the nature of the state in internal relations and in international relations. Moreover, the ambiguous nature of the idea of the nation has remained partially latent, so as to make the terms "nation" and "people" seem synonymous (for example in Sieyès) as long as the intensity of relationships between the European states was not so strong as to condition, albeit only partially, their capacity to promote increasingly advanced forms of civil co-habitation. Yet when fascism and the two world wars fundamentally denied, in the name of the nation, the great values of liberty, democracy and social justice, the idea of the nation lost historically in Europe its characteristic as the foundation of legitimacy, even if, in the absence of alternative principles, it has continued, in the spasms of its death throes, to condition people's behaviour. Moreover, it has continued to condition behaviour with a virulence equal to the degree to which it has become incompatible with the conditions for carrying forward the process of emancipating the human race.²⁷

V. European Unification. The European Federal People.

1. *The process of European unification.* 2. *The nature of the European constituent process.* 3. *The European federal people.* 4. *The indivisibility of sovereignty.* 5. *Institutions and the self-awareness of the people in-the-making.* 6. *Federation and confederation.*

1. *The process of European unification.* With the crisis of the idea of the nation, which reached its peak at the end of the Second World War, the idea of the people entered the next phase of its history: that identified

with the process of European unification. The start and evolution of this phase posed the problem of where the European constituent power would reside. This is a problem which at first sight would seem to admit of only one alternative: that between *the European people* (which in as much as it is a single subject will be able to found the federation only through a unilateral act of constituent will) and *the European peoples* (whose will to unite in a federation would have to be expressed through a *covenant*). The uncertain language of many pro-European politicians, and also of many federalists, on this point is a sign that a sufficient degree of clarity has not yet been reached regarding this issue.

Europe was not the first region to experience such a problem. It had already been posed in the early stages of the constitutional existence of the United States. While the founding fathers (and with particular energy, Hamilton) based their struggle on the conviction that there existed a *single* people of the United States (a conviction expressed in the preamble of the American constitution, which begins with the phrase, "We, the People of the United States"), those committed to defending the rights of the states (whose most rigorous theoretical expression was to be found in the writings of John Calhoun in the early decades of the 19th century) argued that *the peoples* of the individual states were the subjects entitled to exercise the constituent power.²⁸

2. *The nature of the European constituent process.* In reality the problem is much more complex. Just as the national peoples were progressively created through the formation and assimilation of different social classes, so, with the overcoming of the national dimension, the European people is being progressively created and the national peoples are simultaneously dissolving. The error that ultimately proved Calhoun's viewpoint wrong, and which, later on, was to prove Carl Schmitt's perspective wrong, was precisely that of not seeing the nature of the people as a process, but rather considering the peoples to be distinct individuals, that, while certainly being created, evolving and dying, nevertheless maintain a precise and permanent identity over the course of their existence. If, instead, constitutional history is conceived of as the succession of different manifestations of what remains a single entity in-the-making, the birth of a federal state (and this is particularly evident in the case of European unification) becomes identified with the progressive transformation of a series of national peoples into a single federal people (both being practical manifestations of the idea of the people *tout court*). It is therefore arbitrary to contrast the argument that there

currently exists only one European people as the sole holder of constituent power to the argument that there exist only national peoples, such that the European federation can only be created by a covenant among their representatives. In reality, we are faced with a European people *in-the-making* and with national peoples *in dissolution*, and with the fact that the European constituent process will be the result of a joint manifestation of will by the former and the latter. The creation of the European federation will be not solely the fruit of the expression of the constituent will by a new subject, nor that of the terms of a contract among pre-existing subjects, but that of a complex act which will contain both these aspects, and whose result will be a document that will have both the characteristics of a constitution and those of a treaty.²⁹

The fact that the European federation, if and when it is established, will not immediately be the expression of the constituent will of a completely formed entity, but that of two imperfect entities (one because it is in the process of being created, the other because it is in the process of being dissolved) is therefore explained by the theory of the people as a process. The people prior to and above the constitution, which is the holder of constituent power, is always an entity *in flux*, which assumes successively different forms over the course of its evolution, but which in the crucial periods of its evolution (those of the passage from one form to another) can manifest itself simultaneously in both forms. The establishment of a new constitutional equilibrium does not therefore stop the process of creating the people, even if in periods of *slow movement* its evolution is unconscious. From this derives the fact that every manifestation of the constituent power is not limited to expressing the fundamental characteristics of the physiognomy of the people that was its subject, which have in fact already been fully defined, but modifies and completes these characteristics, so that every phase in the development of the idea of the people paradoxically reaches its highest degree of realisation only when, having expressed its constituent will through the definition of new rules of civil co-habitation, it regains a purely virtual existence, which is manifested through *the habitual consensus*. Massimo d'Azeglio's phrase, "Italy is made, now we must make Italians" was forcing the point, since the making of Italy nevertheless required the existence of an Italian people *in-the-making* and that this people express an act of will: yet it is beyond doubt that for the process of creating the Italian people to be able to continue until the entity designed with this expression had been completely realised, it was necessary for it to be able to express itself through a suitable institutional framework.

3. *The European federal people.* In similar fashion, the European people will complete the process of its formation only after the European federation has been created. Moreover, its formation will coincide with the disappearance of the national peoples. This latter point is an affirmation that may raise questions within federalist culture itself, whose established conventions include the knowledge that the foundation of the European federation, though depriving the nations of their absolute sovereignty, will not suppress them, but will *overcome* them (hence will simultaneously negate and preserve them). Yet this apparent difficulty is resolved by introducing the notion of the "federal people."³⁰ The reference to the "European federal people" means that the foundation of the European federation will contribute to completing the physiognomy of *a single people*, united in a single community of destiny; but that this will be a pluralistic people, whose distinctive characteristic will be the multiple loyalties of its citizens, who will have as terms of reference both the common membership of the federation and that of the states from whose union the federation will be created; as well as that to successively smaller communities, which will re-emerge thanks to the overcoming of the exclusive nature of national loyalty. In the history of the idea of the people, the process of European unification will therefore mark the transition from the form of the national people to that of the federal people.³¹

The potential unity of the European federal people is confirmed even nowadays in the fact, which can hardly be refuted, that if it is true that the national peoples still maintain a residual existence in as much as they are involved in the European constituent process, they can no longer be considered as the repositories of constituent power at the national level. The fact is that the only revolution now possible in all European states is that of the overcoming of the national dimension within a European federal framework.

4. *The indivisibility of sovereignty.* The process of European unification, intended as the succession of events which will climax in the foundation of a European federal state in place of a number of nation-states, refers to the idea of sovereignty: both in its internal sense (as constituent power) and in its external one (as the national sovereignty to be overcome through the creation of the federal state). Moreover, it brings about the emergence of a characteristic of sovereignty, in both senses of the word, which is relevant both for defining the nature of the federal state as the process' s point of arrival and for identifying how it can be founded:

namely, its *indivisibility*, which derives from its being the power to take decisions legitimately in the last resort. It is in fact evident that if, for the same territory, more than one subject is entitled to exercise the power of deciding legitimately in the last resort, none of these subjects is able legitimately to impose its decisions on the others, and anarchy would result.

Moreover, the indivisibility of sovereignty derives from the very fact that its title-holder is the people, and that in turn the people is indivisible, in as much as there is no entity above it, and in as much as it represents a single community of destiny (even if, as we have seen, it can be a pluralistic subject that, although maintaining its unity, is capable in the exercise of its constituent power of endowing itself with and — in periods of slow movement — of sustaining with its habitual consensus an institutional organisation based on different independent and co-ordinated government levels).

All these considerations lead to the conclusion that the idea, which is current also within federalist culture, that the federal state implements a *division of sovereignty* among the levels into which the government is articulated is mistaken and needs to be corrected. The federal state realises the division of *power* and *competences* among the various levels of the government, but not sovereignty, whose sole holder remains the people.

The principle of sovereignty's indivisibility also provides a criterion for choosing between the constituent and functionalist methods as the underlying option that will shape the strategy behind the struggle for the European federation. If sovereignty were divisible, it would be possible to make Europe by degrees through the progressive transfer of sovereignty from the nation-states to a supernational entity which would be destined to come into being through a continuous process, without crises and without political shocks. Yet, if sovereignty is indivisible, this can not happen: it must belong entirely to the nation-states or entirely to the federation; this means that the process can not avoid going through a constituent moment, or better still period, in which its transfer from the former to the latter will be realised. This is the moment, or the period, when the European federal people will become aware of itself as a new historical subject and will substitute the national peoples, who currently represent the foundations of an obsolete legitimacy.

The acceptance of the constituent method does not however mean denying the historic need of a gradual process through which to arrive at the constituent phase; rather, it means only being aware that the land-

marks on the march toward this goal do not of themselves involve cessions of sovereignty. Nor, on the other hand, does it mean arguing that the transfer of sovereignty should necessarily be brought about in an instantaneous revolutionary blaze. The constituent phase will undoubtedly last a certain amount of time;³² and in its course, as has been seen, the tenure of constituent power may be divided between two different expressions of the idea of the people in its evolutionary process. Yet its specific nature is comprised of the fact that it is a phase of *acute crisis* or *rapid movement*, which will transform the bases of Hauriou's concept of habitual consensus. The crisis will involve both the institutional order and the principles that found the legitimacy of the state, and it will not be resolved into a new, relatively stable equilibrium until the transfer of sovereignty has been achieved and the unity of its holder has been re-established.

5. *Institutions and the self-awareness of the people in-the-making.* In any event it is misleading to consider the creation of the federation as coinciding with a specific institutional change. If the holder of sovereignty is the people, every transfer of sovereignty coincides with the people assuming a new way to exist in history. Now, it is a matter of fact that the people manifests itself in history to the extent that it exercises its constituent power, and that the exercise of the constituent power is *also* the creation of new institutions. Yet it is likewise true that in many great revolutions of the past (and also in the process of European unification) the greater part of the process of institutional change was achieved by the old order in an attempt to accommodate the pressures produced by the new forces being generated in the grassroots of civil society, and to channel these forces into forms that were compatible with the power balance between the existing forces. Moreover, in other revolutions, the new order imposed itself by taking possession of the previous regime's institutions, which initially remained unchanged, and only subsequently created their own (this is once again the case of the resistance movement in Italy). It will therefore be impossible to establish the precise moment which will mark the passage from the old order to the new one for as long as we remain prisoners of a single institutional perspective. In reality, the essential turning-point will be reached when the people found the new legitimacy by gaining an awareness of themselves in their new form, and become the agent by which the process of institutional change is carried forward. As regards the European unification process, this moment corresponds to the occurrence of a *shift of the framework of political*

struggle from the nations to Europe, and this is more a political than an institutional change.³³

6. *Federation and confederation.* The European Community, or Union, is an institutional structure without precedent in the history of unions among states, and many argue that it definitively overcomes the difference between federations and confederations.³⁴ Now, if we accept, on the one hand, the principle of sovereignty's indivisibility and, on the other, that the transfer of sovereignty does not necessarily coincide with a specific institutional transformation, then this conclusion must be rejected. In reality the European Union, though possessing some federal-type institutional characteristics, remains a confederation since the European federal people, while being in-the-making, has not yet gained an awareness of itself and hence has not yet brought about the birth of a European legitimacy. Moreover, even to the extent that it possesses federal institutional characteristics, and so can already be considered from a certain point of view to be an institutional hybrid, the Union is essentially unstable and hence destined either to consolidate itself as a real federation or to collapse back into a confederation, or even into anarchy. Therefore, while it is one thing to recognise that historical and social reality, as nature, does not proceed by leaps and bounds and therefore always presents transitional forms that do not perfectly match the ideal-types by which it is normally interpreted, it is quite another to elevate these transitional forms to the status of the ideal-types themselves.

VI. The Crisis of National Sovereignty. The World Federal People.

1. *Interdependence and the crisis of national sovereignty.* 2. *The world federal people.* 3. *The people in history.* 4. *The expansion of federalism.* 5. *Popular sovereignty.*

1. *Interdependence and the crisis of national sovereignty.* The European unification process marks the beginning of the federalist phase of world history. It not only calls into question the national sovereignty of the countries immediately involved in the process, but the very concept of national sovereignty itself. Certainly, the world's division into states, which is the basis of national sovereignty, has always represented the negation of the general will and hence of the idea of the people. Yet in the

past, the lesser intensity of interdependence at the world level often rendered states relatively free from the conditioning of international politics, and allowed a considerable degree of autonomy with regard to the conduct of their internal politics. In this way the general interest of mankind tended to approximate to the sum of the interests of the peoples that comprised it, and the idea of national sovereignty retained a great deal of credibility in as much as the nation was able to appear as the framework in which the general will was formed and expressed.³⁵ Yet nowadays interdependence at the world level has become very powerful, and is being intensified at an accelerating pace. As a result, the specific nature of the national interests and their incompatibility with the general interest of humanity is becoming increasingly evident. This is undermining the very foundations of the legitimacy of the state intended as an exclusive political community, and the idea of national sovereignty is itself being called into question. Clear testimony of this development is provided, on the one hand, by the growing need (if unsatisfied) of an active and effective UN presence in the crisis hot spots which are multiplying with remarkable speed in the post-cold war world; and, on the other, by the increasingly frequent creation, outside Europe, of regional groupings of states.³⁶

Until now the real issue of overcoming sovereignty, that is, the affirmation of federalism, has been posed in explicit terms only in Europe. Europe is therefore the laboratory in which humanity is trying to elaborate *the* institutional answer to the crisis of sovereignty. Yet the specific nature of the constituent experience which we are living through in Europe highlights its incomplete nature, and how it is simply a stage, however decisive, in a wider process that will transcend it. The specific nature of Europe's constituent process lies in the fact that the European federation will not possess a different legitimacy from the purely negative one derived from the overcoming of the national legitimacy: a legitimacy that is profoundly contradictory in as much as the European federal people, however large or small it is destined to be, will nevertheless always be a people among other peoples, and will for this very reason retain a national connotation.

Moreover, the contradictory element inherent in the legitimacy of the future European federal state finds substantial confirmation from the significant fact that the future geographical range of the European federation seems today to be for the most part undefined.

2. *The world federal people.* However, this means that the real subject

of the general will (that is, the people which fits its idea) is a people comprised of free and equal men and women and articulated across a range of differently-sized autonomous communities, that will embrace in a single community of destiny the whole of mankind: the *world federal people*. This people will in turn, as it takes shape, and hence with the necessary contribution of the regional peoples that will precede it historically, become the holder of the world constituent power, that is, of the power of founding the *cosmopolitical federation*. It will be possible within a world federation, in turn articulated across a succession of co-ordinated government levels, and at the base of which is to be found the autonomous local community as the real and only political and social context of the full realisation of people's potential, of the bringing about of a dialogue among citizens in the perspective of defining the common good and of the unanimous expression of the will to pursue it, to create the premises for the full manifestation of the general will and in this way to consider the constitutional history of the human race as being launched towards its conclusion. Moreover, the distinction between the people in the constitution and the people prior to and above the constitution will tend to be rendered obsolete.

This distinction in reality is founded on the fact that the real nature of the historic peoples, like their definition of themselves in the various constitutions, does not correspond to the idea of the people as the world federal people. And the constituent moments of history are those in which the world federal people, from an abstract idea, *takes form* such as to bridge the gap between the empirical peoples and the fulfilled idea of the people through the expression, however imperfect, of the general will. Human history can therefore be read as the history of the formation of the world federal people, the historical peoples representing only the intermediate steps in the process of its creation, which, in the ideal moment of its complete realisation, will no longer need a constitution since it will give voice to the general will in the spontaneity of its daily expression.

3. *The people in history*. It goes without saying that the world federation will be born imperfect, and that the identification of the world federal people with the people as an idea of reason can not be anything other than approximate. Yet identifying the world federal people as the ideal arrival point of the process permits us nevertheless to clarify further the definition of the criterion for the correct use of the term "people", and by association those of "constituent power" and "sovereignty". The use of the word "people" will be justified (however embryonic the reality that

it depicts) when it indicates an entity which begins to gain an awareness of the need to govern the increased interdependence in a region of the world by pulling down the political and social barriers that exist among men and women and enlarging the orbit of state solidarity. Likewise the use of the expression "constituent power" (or "sovereignty" in its internal sense) will be justified whenever a collective act of will produces a political and institutional transformation that marks a step forward toward the objective of the world federation.

Similarly, it will be legitimate to talk of the creation of national *peoples* as the subjects of the process which, by means of some great institutional changes, brought about the integration of the social classes in France and Great Britain and the national unifications of Italy and Germany in the course of the 19th century. Moreover, it will also be legitimate to identify the people as the subject of the struggles of colonial liberation, in which the issue at stake was the imposition on the world of the recognition of the existence of historical entities that had never been united to the "mother country", but instead were only oppressed and denied a free existence by it: and hence the extension of interdependence among peoples by admitting entire communities, that previously were excluded, into the world circuit of international relations, commerce and communications. In this way, it will finally be legitimate to talk of the European people as the protagonist of a process that represents the first step toward world federal unification. On the contrary, it will be illegitimate to use this same term in the contexts in which it serves only to justify oppression or foment secessionist drives. Typical in this regard (at least in the majority of contexts) is the formula of "the right of peoples to self-determination" which, to the extent that it serves as an instrument for the disintegration of state solidarity, destroys the very meaning of the term people, depriving it of all its capacity to denote a definite subject.

4. *The expansion of federalism*. The crisis of national sovereignty, united to the acceleration of the historical process, induces the thought that the spread of federalism (once this has established itself in Europe) will acquire such speed as to suppress, at least for long historical periods, the contrast between periods of slow and rapid movement in the evolution of Europe's constitutional order. The example (though imperfect) of the continuous enlargement of the European Community suggests that once a core of states united by federal-type links is created in Europe, this core will experience such rapid growth that it will be unable to acquire a definitive institutional structure in any of the stages of its enlargement

process before the next stage gets underway. The history of federalism would in this way become a sort of permanent falling forwards toward ever more advanced equilibriums, which are destined not to be consolidated, at least prior to the formation of a small number of great continent-wide federal blocks. These, in turn, once settled in a new balance, would become the protagonists of the final phase of the process: the construction of the world federation.

5. *Popular sovereignty*. Sovereignty is the prerogative that distinguishes the state from all other forms of power organisation, and along with the state the people that is dialectically identified with it. To deny this statement would be to lose sight of the basis of civil co-habitation. Hence, to affirm that the federalist phase of world history is the flip-side of the process in which the crisis of national sovereignty is unfolding is to affirm that the start of the federalist phase of world history will bring about the crisis of the state itself, in as much as it is the agent of violence in international relations. The evolution of this crisis will coincide with the progressive gaining of self-awareness of the world federal people in-the-making through the formation of regional federations, and its resolution will be the foundation of the cosmopolitical federation. Yet this, by making of the human race the first and only independent political society in history, will not abolish sovereignty as such, rather it will make it approximate more closely than ever before to the realisation of its idea through substituting the temporary and ambiguous reality of national sovereignty with the accomplished one of *popular sovereignty*. This will be the foundation of a state that, in its turn, will approximate more than ever before to the realisation of its own idea, freeing itself from its violent side and assuming as its sole mission the pursuit of the common good of humanity.³⁷

NOTES

¹ See the fine essay by Konrad Hesse, *Die normative Kraft der Verfassung*, Tübingen, J.C.B. Mohr (Paul Siebeck), 1959, in which however the foundation of the constitution's autonomy is identified as an act of will (*Wille zur Verfassung*). In this way, the specific nature of the constituent power is neglected, as is the difference, which will be dealt with in more detail below, between its exercise and the habitual consensus which characterises the stable phases of the states' constitutional evolution.

² See Carl Schmitt, *Die Diktatur*, 1922, consulted in the fifth edition, published in 1989 (Berlin, Duncker & Humblot); *Legalität und Legitimität*, 1932, consulted in the fourth edition, published in 1988 (Berlin, Duncker & Humblot).

³ It goes without saying that no form of human co-habitation is possible without institutions. Even in situations such as exist in Lebanon, Bosnia, Somalia and Ruanda, there have existed, and there continue to exist, forms of organised civil life. Yet these are embryonic and precarious forms, which are unable to guarantee that security which only the state can provide, and without which no human community can find a sufficient degree of freedom to develop, which is the pre-condition for the expression of all the values of social life.

⁴ This is the theme which Carl Schmitt dealt with in *Der Nomos de Erde*, Berlin, Duncker & Humblot, 1955.

⁵ Maurice Hauriou, *Précis de Droit Constitutionnel*, Paris, 1929, pp. 23 ff. and 94 ff.

⁶ See Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre der Souveränität*, published for the first time in 1922 and consulted in the fifth edition of 1990 (Berlin, Duncker & Humblot).

⁷ See Carl Schmitt, *Verfassungslehre*, Berlin, 1928, p. 75 ff. In the same work (p. 89) Schmitt, referring to W. Burckhardt, notes that if the foundation of a constitution's legitimacy were to depend on the fact that it was approved in line with the procedures provided for by the previous constitution, then there would exist no legitimate constitutions since, by going back in time through the genealogy of successive constitutions, we would sooner or later inevitably arrive at an illegitimate constitution, which would, according to this logic, transmit its own illegitimacy to all its successors.

⁸ This problem, even if posed in the different, and in my opinion misleading, context of an analysis of the difference between "delegated dictatorship" and "sovereign dictatorship" represents the focus of Carl Schmitt's essay *Die Diktatur*, op. cit.

⁹ The terms of the problem with regard to the politicisation of justice have been illustrated with great effectiveness by Carl Schmitt in *Der Hüter der Verfassung*, published for the first time in 1931 and consulted in the third edition of 1985 (Berlin, Duncker & Humblot, p. 12. ff.).

¹⁰ *Social Contract*, book II chapter III.

¹¹ As Ranke wrote in his great work, *Deutsche Geschichte im Zeitalter der Reformation*: "What does the natural need of men to have a prince consist of, if not that the variety of their aspirations be unified and find an equilibrium in an individual conscience; that a *single* will be also the general will, that the diversity of needs ripen in a single breast, giving rise to a decision capable of overcoming contradictions? Herein lies also the mystery of power: it comes to use all its resources only in the moment when all forces spontaneously obey the command." (pp. 459-60, Vol. I of the collection *Ranke's Meisterwerke*, Munich and Lipsia, Duncker & Humblot, 1914).

¹² *Verfassungslehre*, op. cit., p. 238. ff.

¹³ A classic treatment of the electorate as an organ of the state can be found in R. Carré de Malberg, *Contribution à la théorie générale de l'Etat*, Paris, Librairie de la Société du Recueil Sirey, 1922, p. 332 ff.

¹⁴ Chapter V.

¹⁵ *Ibid.*

¹⁶ Op. cit., p. 71 ff.

¹⁷ The customary consensus concerns as much the *regime*, that is, the collection of institutions that express the great value judgements of civil co-habitation in a determined spatial framework, as the *community*, that is, the actual spatial framework within which civil co-habitation takes place, and which in turn is by no means neutral with respect to these

values. This consensus continues to exist even when it is not manifested in concrete acts of will, but it can be re-activated when the principles that establish the legitimacy of cohabitation are called into question. In such cases there exists a *crisis of regime*, or, when the crisis spreads as far as calling into question the entire political framework, a *crisis of community*. Both scenarios can have no other conclusion than the opening up of a new constituent phase, in which the people as the subject of the general will once again sets itself apart from an institutional order which has in fact ceased to exist; the alternative is a long period of political disorder and civil degeneration.

For an emphasis on the constitutional significance of the *community* as the spatial dimension of the state, as distinct from the *regime*, see Mario Albertini, "La politique de la minorité du MFE", in *Le Fédéraliste*, 1962 (IV), p. 257 ff.; "La stratégie de la lutte pour l'Europe (Rapport présenté à l'XI Congrès du MFE)", *Ibid.*, 1966 (VIII), p. 154 ff. As regards the virtual permanence of the people's constituent power, aside from its concrete expressions, see Carl Schmitt, *Verfassungslehre*, op. cit., pp. 91-3. See also E.-W. Böckenförde, "Die verfassungsgebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts", in *Staat, Verfassung, Demokratie*, Frankfurt a.M., Suhrkamp, 1991, p. 90 ff., where however the author, moved by a concern to discipline the exercise of the people's constituent power, which he considers to be one of its permanent prerogatives, tends to attribute this task to the constitution and hence to transform the people's constituent power into a constituted power.

¹⁸ This is one of Kant's expressions from *Pace perpetua* (first definitive article).

¹⁹ Op. cit., chapter V.

²⁰ See for example Pietro Giuseppe Grasso's entry "Potere Costituente", in the *Enciclopedia del Diritto*, Vol. XXXIV, Milan, Giuffrè, 1985.

²¹ The classic expositions of the *organic* theory of the people, or more properly of the nation, in a constitutional law perspective can be found in A. Esmein-Néard (*Eléments de droit constitutionnel français et comparé*, Paris, 1909, p. 225 ff.) and in Carré de Malberg (op. cit., p. 167 ff.).

²² The constitution voted by the Convention on 26th June 1793 stretched as far as to decree its own absolute immutability. Through an irony of history it did not even last long enough to enter into effect. On constituent issues during the course of the French revolution, Egon Zweig's work remains essential reading: *Die Lehre vom Pouvoir Constituant*, Tübingen, J.C.B. Mohr (Paul Siebeck), 1909.

²³ See above all the classic formulation by Otto Hintze, "Staatenbildung und Verfassungsentwicklung" (1902), now in *Staat und Verfassung*, Göttingen, Vandenhoeck & Ruprecht, 1970, p. 34 ff.

²⁴ The theory of the nation as the ideology of a type of state was formulated for the first time by Mario Albertini, *Lo Stato nazionale*, Milan, Giuffrè, 1960.

²⁵ Austin (*Lectures on Jurisprudence*, 1861, consulted in the VII edition, London, John Murray, 1911, p. 219 ff.) in reality conceives of sovereignty not as a prerogative of the people, and not even of the nation, but as a relationship in which subjects are dependent on a person or an institution which is the real possessor of sovereignty. This is not to deny that sovereignty can be expressed only within the framework of an "independent political society", even if, according to Austin, it is important to recognise, that "the part truly independent... is not the society, but the sovereign portion of the society", which "must not be habitually obedient to a determinate person or body" (p. 221). There remains the fact that the concepts of sovereignty and the independence of the "political society" in which sovereignty is manifested can not be decoupled.

²⁶ See for example the conclusions reached by Carré de Malberg when he deals with the problem of national sovereignty (op. cit., p. 166): "... Rousseau does not perceive the real

juridical nature of the state when he poses as a general thesis and as an absolute principle that sovereignty resides, initially, in the citizens...". "Only the state has the characteristic of being sovereign and there exists no sovereignty in the state prior to that of the state itself. As regards the citizens, the truth is that they find in the state's constitution the original source of the powers which they can be called on to exercise in the name of participating in the state sovereignty...". See also Dominique Turpin, *Droit Constitutionnel*, Paris, PUF, p. 157 ff.

²⁷ The reflections of Carl Schmitt, one of this century's greatest constitutionalists, have been fundamentally corrupted by the substitution of the idea of the nation for that of the people. "Nation and people", Schmitt writes (*Verfassungslehre*, para. 8), "are often held to be synonyms. Nevertheless, the term nation is more pregnant and less ambiguous. It depicts the people as a unity that is capable of political action, endowed with an awareness of its specific political nature and of the will to exist politically, while the people which does not exist as the nation is a human group bound by some form of ethnic or cultural affinity, but not necessarily a political one. The doctrine of the people's constituent power presupposes the conscious will to exist politically, that is, a nation." In this way, Schmitt is forced to attribute the constituent power to an entity which is by definition opposed to other nations and which can not exist beyond its own territorial boundaries. As a result, Schmitt, who nevertheless repeatedly and with considerable effort stresses that the exercise of the constituent power is an act of will, does not grasp the crucial meaning of Rousseau's concept of the *general will*, which is intrinsically incompatible with the specific political nature of the nation. It is possible to argue, on the basis of Schmitt's theory, that Hitler's seizure of power can not but be interpreted as the German nation's exercise of the constituent power. This limitation explains his compromises with the Nazi regime.

²⁸ This is one of the dominant themes in John Calhoun's constitutional thinking and propagandist activity (see in particular, *A Discourse on the Constitution and Government*, published posthumously in New York between 1851-1856 in *Works of John Calhoun*, edited by Richard K. Cralle, and now available in *Union and Liberty. The Political Philosophy of John Calhoun*, edited by Ross M. Lence, Indianapolis, Liberty Fund, 1992. See especially p. 186 ff.). Reading Calhoun's work is of great interest because he was motivated by the concern that the hegemony exercised by the northern states over the southern ones would bring about the collapse of the Union, whose survival he was committed to defend. This lay at the heart of his insistence on employing the procedures of constitutional revision rather than a recourse to the Supreme Court as the means to settle disputes among the states, and between the states and the federal power. As far as Calhoun was concerned, the constitutional revision procedure was a form of refounding the federal pact on the occasion of which sovereignty would have returned to the peoples of the states, who were its original possessors, without infringing the 1787 Constitution. In this way, Calhoun's positions suffered from a fundamental contradiction, since his attempt to reconcile the survival of the federation with that of the sovereignty of the member states was itself contradictory. Moreover, the revision procedure prescribed by the American Constitution provides for a qualified-majority vote by the member states' legislative assemblies, to be preceded or followed by a decision of the United States Congress. Therefore this procedure, to the extent to which it functions, that is, that decisions are taken which the dissenting minority is forced to accept, is clearly incompatible with affirming the survival of the member states' sovereignty; moreover, this holds true for all constitutional revision procedures in federal states. In fact, a federation's member states can regain their sovereignty only through the traumatic and unconstitutional act of secession. In the different context of the European unification process, and hence with regard to a situation of transition, an outlook similar to Calhoun's inspired the 12th October 1993 sentence of

the German Constitutional Court, which gave its opinion on the constitutionality of the Maastricht Treaty. "The German Federal Republic", it stated, "is..., even after the entrance into effect of the Treaty of Union, the member of an association of states (*Staatenverbund*) whose common power derives from the member states and which has binding effect in the German jurisdictional sphere (*Hoheitsbereich*) exclusively in the perspective of applying its norms, which emanate from the German authority (*kraft des deutschen Rechtsanwendungsbefehls*). Germany is one of the 'Masters of the Treaty' (*Herren des Vertrages*'), which have motivated their subscription to the Treaty of Union, stipulated 'for an unspecified length of time' (Art. Q), by their willingness to be a member of this Union for a long period of time, but which in the final instance are able to revoke their membership through an act of the opposite intent". The basis of this conclusion rests on the fact that, "The Treaty of Union founds... an association of states which have as their goal the realisation of an ever closer union of the peoples of Europe organised into different states (Art. A), and not a single state based on a European people (*Staatsvolk*).

²⁹ It goes without saying that this passage has already been prefigured, on the occasion of the founding of the United States and the Helvetic Confederation in its current form, but that in the case of Europe it assumes the character of the start of a process which is destined to go beyond its original sphere, and which therefore does not run the risk, as happened in the US and Switzerland, of halting itself, once again transforming the federal people into a national people.

³⁰ Moreover, it should not be forgotten that, just as the European constituent process, as indeed is the case for all constituent processes, is not bound to a set procedure, so the European people in-the-making and the national peoples in dissolution are not necessarily represented by specific institutions. It is in this context that Albertini's theory of the *occasional decision centre*, or *occasional leadership* as the essential moment of the European unification process can be understood. According to Albertini's theory ("La fondazione dello Stato europea. Esame e documentazione del tentativo intrapreso da De Gasperi nel 1951 e prospettive attuali", in *Il Federalista*, 1977 (XIX), p. 5 ff.; "La Comunità europea, evoluzione federale o involuzione diplomatica?", *ibid.*, 1979 (XXI), p. 163 ff.) the great turning-points of the European unification process have been achieved when the European people in-the-making was able to recognise itself in great national leaders who, in certain crucial periods, have taken over the reins of the process. This consideration will be all the more valid for the constituent phase proper. The point which needs underlining is that, in this case, the European people is represented, aside from the active minorities made up of the federalist movements and (not always however) Europe's institutions, also by personalities who have committed themselves to the political struggle in the national framework and who have come into contact with the European people only after they have reached the highest levels of responsibility in this political framework.

³¹ We owe the notion of the "federal people" to Mario Albertini ("L'Europe des Etats, l'Europe du Marché commun et l'Europe du Peuple fédéral européen", in *Le Fédéraliste*, 1962 (IV), p. 187 ff.; "Vers une théorie positive du fédéralisme", *ibid.*, 1963 (V), p. 251 ff.) Prior to the precise formulation of this concept, the awareness that the institutions of a federal state can survive only if they are supported by a pluralistic people had been expressed by writers such as A.V. Dicey, *The Law of the Constitution*, eighth edition 1914, consulted in the edition published by Liberty Classics, Indianapolis, 1982, pp. 75-6, and K.C. Wheare, *Federal Government*, Oxford, O.U.P., fourth edition 1963, p. 35 ff.

³² The duration element of constitutional change was highlighted by Mario Albertini's theory of "constitutional gradualism". See in particular, "La Comunità europea, evoluzione federale o involuzione diplomatica?", *op. cit.* In the European unification process, constitutional gradualism, a theory Albertini elaborated with regard to the direct election of the

European Parliament in the absence of a European state, is further evidenced by the fact that two moments of undoubtable constitutional significance, such as the monetary union and the democratic and federal reform of institutions are currently being presented in political debate as two distinct objectives. In fact it is beyond doubt that, from a theoretical point of view, the single currency is the expression of a sovereign European power, and hence presupposes the realisation of political union, in as much as it will be the ideal moment for sovereignty to be transferred. Yet often in history, to use Aristotle's terms, what comes *first by nature*, comes *last by generation*: this form of interrelation does not therefore necessarily mean that the two things must come into existence at the same time, or that political union must precede monetary union. It is on the contrary probable that monetary union, which seems to be easier to achieve, will precede political union and, precisely because the single currency will otherwise be inherently unstable, it will accelerate the birth of political union. If this happens, monetary union will anyhow be an essential moment in the transfer of sovereignty from the nations to Europe, and will highlight the gradualistic nature of this transfer.

³³ This is a concept that frequently re-appears in Mario Albertini's reflections. See for example, "Le problème monétaire et le problème politique européen", in *Le Fédéraliste*, 1972 (XIV), p. 77 ff.

³⁴ See among others Arnim von Bogdandy, "L'Unione sovranazionale come forma di potere politico", in *Teoria Politica*, X, n. 1, 1994, pp. 133-151.

³⁵ "The proper purpose or end of a sovereign political government, or the purpose or end for which it ought to exist, is the greatest possible advancement of human happiness: Though, if it would duly accomplish its proper purpose or end, or advance as far as possible the weal or good of mankind, it commonly must labour directly and particularly to advance as far as is possible the weal of its own community. The good of the universal society formed by mankind, is the aggregate good of the particular societies into which mankind is divided: just as the happiness of any of those societies is the aggregate happiness of its single or individual members. Though, then the weal of mankind is the proper object of a government, or though the test of its conduct is the principle of general utility, it commonly ought to consult directly and particularly the weal of the particular community which the Deity has committed to its rule. If it truly adjust its conduct to the principle of general utility, it commonly will aim immediately at the particular and more precise, rather than the general and less determinate end." (John Austin, *op. cit.*, pp. 290-91).

³⁶ This tendency has been reflected in the development of international law. When wars still had a relatively slight impact on civil co-habitation, the mutual recognition of the European states as sovereign subjects gave rise to the concept of the *justus hostis*. This term meant that an enemy in war was not a criminal, and that war was not the punishment of a crime, but instead the only recourse available in the last resort to states which regarded one another as sovereign to resolve their disputes. This imposed on armies at war the observance of certain rules, which expressed a form of respect for an enemy whose prerogative of legitimacy was recognised. The concept of *justus hostis* disappeared from the language of international law in the era of the First World War. In its place was affirmed the idea of outlawing war altogether (the Kellogg pact), while simultaneously the concept of a "just war" re-surfaced, which later constituted the juridical and philosophical foundation implicit in the Nuremberg trials, and which has been used, in our times, by certain lawyers and political scientists to justify the American intervention under the aegis of the UN during the Gulf War and, more recently, the rearmament of Bosnia. Neither concept will possess a logical and systematic justification for as long as national sovereignty remains the foundation of international relations. Their appearance (or re-appearance in the case of the *bellum justum*) is however an extremely important symptom of the spread of the still unclear

perception of the new nature of war in the context of the 20th century, which is becoming increasingly accentuated as the decades pass. People are becoming aware of the fact that interdependence at the world level, the destructive power of modern arms and the vast distances which their carriers can operate over, have de facto transformed the whole of humanity into a single community of destiny and hence every war into a civil war. War therefore becomes a criminal violation of the rules that discipline co-habitation at the global level, which must be prevented and for which, when prevention is not possible, the guilty party (the aggressor) must be identified and punished. These manifestly contradictory requirements pose the problem of creating a world government that, by imposing a global legal order, would achieve the effective conditions for abolishing war and for transforming those elements of violence which will still continue in relations among men into internal violence, which as such can be pursued through the offices of the law. For a wide-ranging analysis of this subject, even if not in an explicitly global perspective, see Carl Schmitt, *Der Nomos der Erde*, op. cit. A more recent symptom of the same need is contained in the notion of the *right of humanitarian interference* which has become increasingly common in recent times (even if for the moment only in relations between the Western democracies and some Third World regimes). This is a notion which denies the principle of non-interference, and as such directly calls into question the idea of national sovereignty, of which the non-interference principle represents an essential aspect.

³⁷ See in this regard Umberto Serafini's fine reflections in, "Sovranità popolare e federalismo", in *Comuni d'Europa*, n. 6, giugno 1991.

Notes

CITIZENSHIP IN THE EUROPEAN UNION

The concept of citizenship of the Union has a long pedigree. The Treaty of Rome (1957) talked of an "ever closer union among the peoples of Europe." The key idea that underpins the gradual development of popular legitimacy for European integration is enshrined in Article 6 of the Treaty which *outlaws discrimination on the grounds of nationality*. Over the years this objective of the European Community has begun to be realised, and "European citizenship" has featured widely at least as a rhetorical device.

The process of economic integration and legal harmonisation has gone hand in hand with a gradual democratisation of the common institutions. Notable in this regard were the first direct elections by universal suffrage to the European Parliament in 1979. In the 1980s efforts were made to stimulate the notion of "a people's Europe", and several cultural projects, including the promotion of exchange between students and scholars, were launched by the Commission. Member state passports were given a common format and colour. More important, inevitably, was the wider public benefit of economic integration, and, in particular, *the establishment of the ambitious programme to create a single market by the end of 1992 based on four freedoms of movement for goods, services, capital and also people*. The combined effect of both EC primary legislation and judgments of the Court of Justice has been to make it possible for *most people* — workers, their families and students — to settle anywhere they like within the Union and to enjoy comparable social, economic and civic rights to natives.

Article 8 of the Treaty of Maastricht (1992) formally establishes citizenship of the Union for everyone holding the nationality of a member state. When the Treaty is fully implemented, EU citizens will enjoy rights

and duties under the Treaty, which include the right to vote and stand in municipal and European Parliamentary elections wherever they live, common diplomatic and consular protection, and the right to petition the European Parliament and to appeal to its Ombudsman. The Treaty also enables the citizenship provisions to be developed by the Council acting unanimously on a proposal of the Commission (with the Parliament merely consulted).¹

In addition, Maastricht prescribed that the Community should be run according to the federalist principle of subsidiarity — in other words, that action should only be taken at the EC level in areas of shared competence (ie. most areas) where there are implications for more than one member state, where the scale of action is proportionate to that of the problem and where the results achieved corporately will be better than those that would otherwise be achieved unilaterally.² Subsidiarity was, rightly, taken to imply a tendency to decentralisation — a view that was reinforced by the preamble which declared that *decisions in the Union should be taken "as close as possible to the citizen."*³

The Council of Europe.

The great achievement of the Council of Europe is to have established civil liberty first in Western Europe and, latterly, in Central Europe. This was the effect of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its later Protocols. Unlike the European Union, the ECHR affects not just nationals of member states but all people, including foreigners, within its jurisdiction.

The ECHR is international law, under the jurisdiction of the European Court at Strasbourg, and therefore differs from EC law, whose arbiter, the Court of Justice at Luxembourg, has a federal supremacy over member state law. In so far as the EU member states are concerned, however, the two traditions of the Council of Europe and the European Community are closely associated. The Treaty of Maastricht recognised the ECHR as forming the "general principles of Community law,"⁴ and the work of the Court of Justice has always been informed by the European Convention. In the Intergovernmental Conference due to begin in 1996 there will be proposals for the European Community itself to sign up to the ECHR, on the grounds that justice and fair play are dispatched more directly and speedily by the Court of Justice at Luxembourg than by the European Court of Human Rights at Strasbourg.

Civil rights in Europe have grown incrementally, with the EC and the

Council of Europe working in parallel.⁵ The main effect of the Council is to set human rights standards and to extend those rights to a wider category of people than nationals of EU member states; the main effect of the EU is to enforce the direct and uniform application of the rule of law.

Neither jurisdiction, however, is without exceptions and derogations. For example, the EC's general employment rights do not apply to the civil services of the member states; freedom to own property under the terms of the ECHR is restricted by five EU member states; EC law on freedom to exercise a profession is impeded by restrictions in no less than eight member states; and so on.⁶ Although there are moves towards agreeing a common visa policy with regard to third countries, the European Union itself is far from being a passport union. Examples of free travel areas within the Union are limited and imperfect — for example, between the UK and Ireland, and, now, within a hard core of the member states of the non-EU Schengen Agreement. Above all, each member state still has different rules about immigration, asylum, deportation and extradition. The right to acquire nationality and to be deprived of it firmly remains the unilateral decision of the individual states. Virtually the only civil duties which are fully portable between one member state and another are the obligation to obey the law and pay taxes.

Cooperation in Justice and Home Affairs.

The Treaty of Maastricht built into the Union a "third pillar" to cover cooperation in the field of justice and interior affairs, in which the following are regarded as matters of "common interest": asylum, immigration, drug trafficking, international fraud, judicial cooperation in both civil and criminal matters, and customs and police cooperation.⁷ These sensitive issues are dealt with behind closed doors by intergovernmental methods, and they largely escape both parliamentary scrutiny and judicial review. The ambitious presumption behind the third pillar is that it will be possible for member state governments to agree unanimously on the equitable sharing of burdens and on mutual reliance on one another's diverse regimes of "law and order."

Progress in cooperation has been tortuously slow. "Europol" has been blocked by a disagreement about judicial control; the Convention on the Crossing of External Borders is blocked by the question of Gibraltar. The Schengen Agreement is an unsatisfactory compromise, only partially operational, which might end up pleasing nobody but dividing the Union.

At the 1996 IGC there is a very strong case for bringing the whole third pillar, which (unlike the second pillar on Common Foreign and Security Policy) involves legislation, under the auspices of the European Community institutions. Then the development of a genuine free travel area across the whole territory of the Union could be made a reality.⁸

Social Policy.

The social dimension of EU citizenship is more widely accepted than its civil aspects. Over the years, a number of important essential standards have been set down in EC directives to advance gender equality and to protect across the Union the health and safety of workers and their dependents. It was clearly recognised in the single market programme that measures were needed to prevent "social dumping." Latterly, however, the tendency towards liberalisation and competition in the European economies, combined with demographic trends, have led to measures designed to ensure labour market flexibility. It is now clear that the "cradle to grave" welfare state with which Western Europe has been comfortably familiar since about 1950 will not be replicated at the level of the European Union. The emphasis has switched away from social policy at both EU and national levels. The forthcoming transition to Stage Three of Economic and Monetary Union forces member state governments to tackle structural unemployment at home and to prepare national industry for the rigours of European and global competition. EMU also requires under-developed and peripheral regions of the Union to use to the full their comparative advantage in terms of unit labour costs. As mobility of labour throughout the Union is a relatively insignificant factor, there is unlikely to be much significant concerted pressure for the abolition of wage differentials within the EU.⁹

Nevertheless, it is to be hoped that the regulatory framework will soon be put in place to enable the European citizen of the future to settle wherever he or she wishes in the Union with a truly portable pension, health and social insurance and even mortgage.

What Next for the European Citizen?

In this brief discussion of the current state of European citizenship, we have noted that there is unlikely to be much development at the EU level of the social dimension of citizenship. We have also observed that, in the interests of enhanced civil liberty, there is much need for progress at the

institutional and legal level to improve the way in which the European Union deals with citizenship issues such as immigration. The signs are, however, that the IGC of 1996 will be unsuccessful in incorporating Justice and Home Affairs within the European Community Treaty, with the result that the Commission's role will continue to be very weak, and the Court of Justice and the European Parliament will continue to be almost totally excluded. The IGC will also fail to respond positively to the proposals of the Spanish government and the European Parliament, among others, to write into the Treaty a Charter of the European Citizen or Bill of Rights.

It is not immediately clear, therefore, where the evolution of European Union citizenship will now take us. The skeletal European Citizen of Maastricht might well remain as a ghost in the cupboard to haunt us. Are there other ways to put flesh on the bones?

The Federal Trust, among many others, has suggested that electoral reform of the European Parliament is a crucial next step in building popular legitimation for the Union — especially if the uniform electoral procedure has a strong regional foundation at the bottom and some supranational, EU-level list at the top. This, we argue, would encourage the development of genuine European political parties with the ability to articulate the anxieties and aspirations of the European citizen.

A growing number of politicians seem to be enthusiastic for more referenda, either at the national or at the EU level, in order to legitimate constitutional reform of the Union. Others have suggested that the next President of the Commission should be directly elected by universal suffrage.

Pressures for decentralisation within the Union, especially inside the big, old, centralised states, continue to grow and should, therefore, be encouraged to do so firmly within the perspective of the European dimension — especially in places, such as Northern Ireland and Gibraltar, where national citizenship is contested. The method of appointment of the Committee of the Regions should be changed to elevate the autonomous role of regional and local authorities.

The European Commission itself appears to place more emphasis on information, education and culture as fruitful areas for the development of European citizenship. The birth of the information society in Europe, indeed, raises many questions about the role of the citizen in the European public space. Contemporary Europe will be a knowledge-based political society, with access to information, distance learning and entertainment of such a vast scope that it is difficult to envisage and encapsulate. The

information technology revolution will transform the way our children learn, shop, receive services such as healthcare, enjoy themselves, and do their business and politics. The medium of the broadband superhighway will change the way people regard themselves and communicate with one another.¹⁰ Already, the relatively old-fashioned and slow Internet has created a new, global and interdependent community of "cyberspace" — certainly very different from Athens in 4th Century BC, but a real community nevertheless.

In a more traditional mode, Robert Toulemon of the French section of TEPSA (Trans-european Policy Studies Association) makes the bold proposal for the establishment of a voluntary *Service Civique Européen* for young people.¹¹

In that the Maastricht Treaty opened up an enhanced role for the Community in education and culture, intelligent ideas in the field of civic education for European citizenship are badly needed.¹² The Federal Trust is engaged in just such a project in the perspective of the next European Parliamentary elections in 1999.

In many European countries the imminent millenium festivities are inducing ambitious and imaginative cultural projects concerning the citizen.

It is in this rich context that the new Europe must soon go forward to achieve a federal constitutional settlement of states and peoples so that the citizens know how they are governed, by whom and from where.

Andrew Duff

NOTES

¹ For a fuller examination of the Treaty of Maastricht, see Andrew Duff, John Pinder and Roy Pryce (eds), *Maastricht and Beyond: building the European Union*, London, Routledge for the Federal Trust, 1994.

² Article 3b.

³ Article A.

⁴ Article F.

⁵ See for example, the Council's 1992 Convention on the Participation of Foreigners in Public Life at Local Level.

⁶ For a full analysis of the then 12 members states of the EU, see J.P. Gardner (ed.), *Hallmarks of Citizenship: a Green Paper*, London, The Institute for Citizenship Studies and the British Institute of International and Comparative Law, 1994.

⁷ Article K.1.

⁸ See the Federal Trust Papers No.1, *State of the Union*, London, Federal Trust, February and June 1995, respectively.

⁹ For the further development of this discussion, see Federal Trust Paper No.2, *Towards the Single Currency*, London, Federal Trust, May 1995.

¹⁰ See a forthcoming Federal Trust Report, *Network Europe and the Information Society*, London, Federal Trust, July 1995.

¹¹ *Project for a European civilian service. Objectives.* To develop the European spirit and a sense of belonging to Europe among young people. To provide some examples of real European achievements which involve the general public. *Methods and procedures.* Freely-concluded conventions among the states under the aegis of the European Union. These conventions may initially be drawn up among a limited number of countries and subsequently among all the Union's member states or candidates for entry. Each country will appoint a ministry to negotiate the conventions and take part in their administration. The European Union will take part in the financing and administration of the project. *Contents.* Voluntary civilian service which will be open to young people of both sexes. The minimum period of service may alter from country to country. The service will take place within a multinational team, if possible outside the home country. Participants will receive a modest salary. The service will facilitate the learning of a foreign language. Participants will be exempted from military service in their own countries, where this is obligatory. *Options.* Five options will be offered to the young volunteers: a) social and humanitarian option (deprived inner-city areas, assistance to young people in difficulty, work in countries stricken by catastrophe or war); b) environmental option (work useful for the rural and urban environments); c) public heritage option (restoration workshops and the recuperation of monuments and historical sites); d) central and eastern Europe option (activities of general interest in the countries of central and eastern Europe); e) development option (co-operation activities for the development of the countries of the South of the world). *Training.* Training will be entrusted to non-governmental organisations or associations which establish a convention with the Community. This will ensure, in agreement with the home state, the payment of training courses, to be carried out by recognised professionals.

¹² See especially Article 126.

Interventions *

GLOBAL GOVERNANCE AND GLOBAL CITIZENSHIP

Periodic reflections on questions of mandate, policy, priorities and management are necessary and vital parts of any *bona fide*, democratic social movement.

This task is no less difficult now, in 1995, the fiftieth anniversary of the United Nations, because of the tremendous political and social transformations which world society is undergoing. As active participants in internationalist social movements and membership organizations, we face not only the challenge of interpreting and understanding current events in a rapidly changing, fluid political environment. We are challenged, I believe as individuals. Globalization, the "New World Order", renewing the United Nations: these are not just trendy buzzwords, abstract political issues, "out there" to be addressed by national governments. We are affected, each of us, in a very personal way, as citizens.

And so, while tackling the problems of United Nations reform and global governance, I'd like to do so in a way which will hopefully stimulate some thought and dialogue about the individual, the citizen in the emerging global community, and about the role of citizen-based organizations.

What is this notion of "global governance," and its conceptual fellow traveller, "globalization?" Both are relatively new additions to our popular political lexicon.

Governance, we would assume, refers to some sort of system for organizing people's political affairs, a manner of taking and implementing political decisions. But have we in fact reached a stage of human

*This heading includes interventions which the editorial board believes readers will find interesting, but which not necessarily reflect the board's views.

history when there is a need, and the necessary preconditions, for governance on a global scale?

According to a high level international panel of statesmen and experts, the answer to that question is "yes." Earlier this year, a volume entitled "Our Global Neighbourhood" was published, with considerable fanfare, on the eve of celebratory activities commemorating the 50th anniversary of the United Nations. This work is the Report of the Commission on Global Governance, co-chaired by Ingvar Carlsson, Prime Minister of Sweden, and Shridath Ramphal, former Secretary-General of the Commonwealth.

The membership of the Commission includes many of the same people who produced the North-South Report (chaired by Willy Brandt) on development issues, the report of the Nyerere Commission which discussed South-South cooperation, the Palme Commission report, on disarmament and international security issues, and the report of the Brundtland Commission on environment and development issues. These are individuals associated with progressive, internationalist, slightly left-of-center political perspectives. Most members of the Global Governance Commission are now or have in the past been senior officials in a national government or international organization. The Commission was funded by contributions from foundations and national governments.

The formula for the work of these types of international panels is a successful one. The panel of "experts" includes a regionally representative group each with a fairly impressive political track record. A series of hearings around the world not only provides testimony for the Commission — a menu of old, new and recycled ideas — but helps build a constituency for the Commission's report. The release of the report, in major capitals around the world is a major campaign in its own right.

But what really determines the success or otherwise of these panel reports is the political judgment underlying their message. Are the ideas they propose ripe? Do they resonate with people around the world, especially academics and non-governmental organizations who are critical to their popularization? We can look back to the Palme Commission report and commend their judgment; their proposals, framed around the notion of common security made a qualitative difference in political discourse on disarmament, arms control and international security issues. Similarly the Brundtland Commission anticipated a world-wide constituency which was ready to elevate and embrace a series of ideas wrapped in the concept of sustainable development.

So, is the world ready for global governance? Well, maybe.

We should acknowledge of course that global governance is a big idea. The other international commission reports alluded to earlier focused on a set of sectoral issues, such as international development, environment and development, or arms control and international security. When we talk about governance, we are talking about the international system *per se*.

However, the bigness of the topic and breadth of discourse on governance issues may be entirely appropriate for the times we live in. After all, the world has changed, immensely, in recent years.

Global governance has become a preoccupation in the 1990's — the post-Cold War years. Some have labelled this the end of history. While that may be misleading, there seems little doubt that we are at the dawn of a new era.

In the first half of this century two horrific World Wars were fought, bringing about the end of the colonial era and the defeat of fascism. Now the decades-long Cold War has rendered capitalism triumphant and communism in decline. We can be thankful that the transition away from communism has been accomplished, *so far* (for this is a story still unfolding) with so little bloodshed.

But there are other notable characteristics of this transformative period of history in which we live.

One is the growing world-wide acceptance of the principles of market economics. Even states which are still under communist or authoritarian style governments are scrambling to adapt their economies to free market models. The growth of free-market economics is not restricted to national economic policies. Countries everywhere are under pressure to loosen restrictions to cross-border trade and participate in regional and global free trade regimes. The recent creation of the World Trade Organization, with a dispute settlement machinery which is much more binding than its predecessor the GATT, is tremendously significant in this regard. And international regulatory bodies such as the Bank for International Settlements and International Monetary Fund now exert tremendous influence. All of this has led to tremendous growth in the ability of large corporations to operate transnationally.

The lack of adequate political regulation of this growing global economy is a point I'd like to return to shortly.

Accompanying and reinforcing the globalization of economic life is a wide array of technological changes which are changing the course not only of global politics, but also everyday life for us all. We are all familiar with the extent to which satellites, computer technologies, air travel, the

mass media, the so-called information highways etc. have made us interdependent. The pace of these changes is quickening. I really shouldn't dwell on them, for, not only is the extent of our interdependence fairly evident; to discuss it at length would only serve to remind us all of computer software we've yet to learn; E-mail unanswered. These days, one almost needs a post-graduate degree to read the TV Guide. The global village has arrived.

Another major trend or characteristic of the post-Cold War era is the growing acceptance of democracy as the ideal form of governance. One recent estimate suggested that 60 percent of the world's governments are democracies. Democracy provides the political environment within which the protection of the fundamental rights of citizens is best safeguarded.

And as we survey the major events of the 20th century, let us recall not only two massively destructive World Wars, and four decades of the Cold War. Human affairs have, on balance, become more civilized. This is due in no small part to the growing force of a body of universal human rights law. Universally accepted human rights norms help buttress national democracies, particularly in states where democratic institutions and traditions are not yet as robust as we would wish them to be.

A few years ago, when UN Secretary-General Boutros Boutros-Ghali published *An Agenda for Peace*, he spoke of the need for post-conflict peace-building. One year later he reviewed progress (or lack thereof) toward the implementation of his *Agenda for Peace* proposals and he said: "Peace-building requires strengthening those institutions that do most to consolidate a sense of well-being between peoples. It is increasingly clear that the fundamental elements are to be found in democracy and development. Democracies almost never fight each other. Democratization supports the cause of peace. Peace in turn is a prerequisite to development. So democracy is essential if development is to be sustained over time. And without development there can be no democracy. Societies that lack basic well-being tend to fall into conflict. So three great priorities are interlocked." That democracy could be spoken of in this way by a Secretary-General of the United Nations, and its desirability as a form of governance be accepted as self-evident, is really quite remarkable.

Taken together, the growth of democracy, the global marketplace, communications and technology-driven interdependence, and doubtless other factors I have not mentioned do indeed appear to be establishing the necessary pre-conditions for governance on a global scale.

Specifically, I would identify those preconditions as: 1) a common base of values (democratic principles, universal rights, the rule of law, market economics); and 2) a sense of sharing a defined political space, a feeling of community (in this instance, the global community).

And this leads us to what is perhaps the pre-eminent problem of global governance. For, though we may all of us accept globalization as a fact of life; and we may agree that there is a shared political space, a set of global problems in the world which are beyond the capacity of nations to resolve and require a new order of international cooperation; the fact of the matter is that our institutions are woefully inadequate to the task. We cannot hope to provide adequate governance in the 21st century with 1940s vintage political institutions.

This brings us therefore to the question of reform of the United Nations.

In this regard, I'd like to highlight a few ideas which seem particularly and actionable at this stage in history. But I won't drone on for too long with an exhaustive laundry list of legalisms and UN reform proposals. For one thing, there is no single best road to travel. Progress will be necessarily gradual; each reform will open up new possibilities and require subsequent reforms to other parts of the system.

Let me first suggest a couple of guidelines. Firstly, as a matter of strategy, I believe that the path of least political resistance lies in creating new bodies, or additions to existing institutions, rather than trying to reconfigure or reform what is already in place. The lamentable, but predictable lack of progress on Security Council reform demonstrates this general point.

Secondly, I believe that we must as a matter of priority, focus on proposals which elevate the status of the individual in world affairs. We cannot continue with an international system based solely on the sovereignty of the nation state. Globalization is inexorably drawing away from states many of the political levers for the exercise of governance. Political power is being pooled transnationally. But transnational power is not democratically accountable.

This is why I believe it is vital that citizen organizations become actively involved in issues of global governance. It is our democratic rights as citizens which are being devalued when, for example, a crowd of yuppie currency speculators have more impact on Canadian monetary policy than the parliamentarians we elect. You're not going to hear too many resounding calls for democracy at the transnational level from academic/bureaucratic élites of national governments. We must insist on

it. It is our citizenship, our global citizenship, which is at stake.

We are going to get global governance, whether we like it or not. The vital question is whether that governance is eventually going to be democratically accountable, or whether the political decisions affecting our lives, yours and mine, will be made by un-elected, unaccountable officials whose first loyalty is to national governments and transnational élites, not people.

Every community needs a government. I believe that the global community needs global government, global democracy.

To some, the notion of global government is either utopian, or scary, or both. To me it's just common sense. Frankly, what I find offensive is the present order which segregates the world into competing nation states. This offends our common humanity.

Global government only seems utopian to those who wish to denigrate it out of hand. When you think of global government, its desirability and how it may come about, it is essential to think of it as an evolutionary process. One can't simply take the present-day anarchic and chaotic international order and overlay the institutions of world government. It's not going to happen that way.

So, let me conclude by suggesting a few UN reform ideas which seem to be practical steps toward the goal of elevating the legal status of the individual in world affairs.

Firstly, an International Criminal Court. This is one of the more promising reform ideas now under consideration at the UN. The idea here is to create an international court which would have the power to try individuals for crimes against humanity as well as some other of the most grievous breaches of international law.

When war breaks out and the United Nations takes action to restore international peace and security, there are three options at its disposal: diplomacy, economic sanctions and, if these fail, the use of military force. As we have seen in Iraq, and more recently in Haiti, UN sanctions can punish individual citizens of a country for crimes committed by the nation's leaders.

Creation of an International Criminal Court would help change this situation by making individuals, including national leaders, accountable for violations of some of the worst offences under international law. Unlike the International Court of Justice in The Hague, which exists to hear cases between states, an International Criminal Court would try individuals for violations of the law.

Ad hoc tribunals, to try persons accused of genocide in Bosnia and

Rwanda, are already up and running. The success of these ad hoc tribunals has paved the way for the UN to create a permanent Criminal Court.

Last year, the UN's International Law Commission completed work on a *Draft Statute for an International Criminal Court*. The proposal will be debated again at this year's session of the UN General Assembly. Canada and a number of other middle powers want to establish a treaty-making conference to bring the Criminal Court into being. The U.S. and a few of the large powers would like to delay the proposal for further study. The Criminal Court may need to come into being, by treaty, with participation of not all UN member states (as is the case with the International Court of Justice).

Secondly, we might consider establishing a Parliamentary Assembly at the UN. The model here is the European Parliament.

A consultative body of UN parliamentarians, established under Article 22 of the Charter and selected from among national parliaments, could be created fairly easily and inexpensively. Although its powers would at the outset be quite limited, it would nevertheless strengthen the UN system in a number of ways: a) it would increase public and political support for the work of the UN; b) it would provide citizens with a degree of representation at the UN; a voice for "We the Peoples" in addition to that of governments; the first glimmer of democratic legitimacy among the world's institutions of global governance; c) by its existence it would reinforce the idea that there is a global polity, a wide array of international issues which require a strengthened UN; d) it would serve as a body to represent the global common interest, rather than the interests of nation-states; e) it would strengthen the General Assembly vis-à-vis other UN organs; f) it would reinforce and strengthen the work of NGOs working on global issues at the UN and in national capitals; g) it would reinforce the trend toward democratic governance in nations around the world; h) it would provide a new source of ideas and political activity in support of solutions to international problems; it would also act as a lever on governments to further reform the UN.

If a body such as the CSCE can justify having a parliamentary assembly surely there is a plausible case for a UN parliamentary assembly.

There are other UN reform proposals which we could discuss. As UN reform becomes more topical and relevant, there is active international debate around ideas such as: Security Council reform; the role of NGOs in the work of the UN; measures (like reforming ECOSOC, or creating an Economic Security Council) to bring international decision-making

on economic issues within the ambit of the UN system; and new mandates for the now-moribund Trusteeship Council. I hope we can also get into some of the questions surrounding peacekeeping in the question period.

My priority here has been to focus on a few ideas which elevate the individual in world affairs. It is time for us all to re-think, at the personal, national and global level our concepts of citizenship. I believe that people everywhere are increasingly acknowledging that the horizons of community have broadened; they not only accept, but welcome their growing responsibilities as global citizens. If this continues, there is hope that the new world order will be founded on a stable foundation of generosity and tolerance of our neighbours around the globe.

Fergus Watt

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