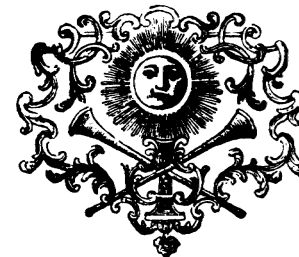


THE FEDERALIST

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



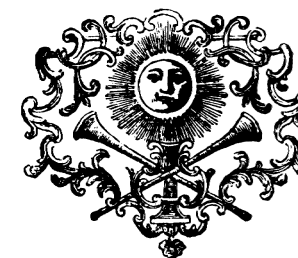
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THE FEDERALIST

a political review

Editor: Giovanni Vigo

The Federalist was founded in 1959 by Mario Albertini together with 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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Sovereignty and the European People

The most complex issues associated with the possible creation of a European federation include the transferring of sovereignty to supra-national level and, above all, the question of whether there exists a European people that could be considered the holder of this new sovereignty. In fact, whenever a European people looks as though it could manifest its presence, it becomes feasible to think in terms of the birth of an out-and-out federal state whose legitimacy will stem from that people; in all other situations, however, the federal state objective can seem quite impossible (or wrong, or even dangerous) precisely because it would take away the sovereignty of the only lawful holders of it, that is the national peoples, in order to create a power not founded on any legitimate consensus.

Connected with these issues, which are nevertheless highly complex and much debated even within the ambit of the traditional doctrine of the state, there is also the question of the role of popular will in the process of European unification. In recent years, an extensive debate has grown up around this topic, stimulated particularly by the French and Dutch rejections of the European constitutional treaty and also, even before this, by the convening of the Convention entrusted with drawing up the text of this new treaty. In fact, many people saw this Convention as a body capable of giving voice to the constituent power of the European people, and thus of transferring sovereignty from the member states to the Union, even against will of the states themselves. For this reason they argued that it was the European people as a whole, rather than the citizens of the single states, that should be called upon to pass judgement, though referendum, on the text of the Treaty establishing a Constitution for Europe.

For anyone wishing to see the creation of a federal Europe, and thus the transformation of the European Union, which is basically a confederal organisation, into a political body equipped with sovereignty and with the capacity to act, it is essential to reflect upon these questions. And this

reflection appears all the more urgent in the light of the difficulties that the European Union today finds itself up against. In fact, the possibility of realising the federal project depends on the support of public opinion, in some states at least, for the process of Europe's unification. However, this faith on the part of the citizens cannot be won unless Europe shows itself to be capable of coming up with concrete responses to the very real dangers, economic and social, to which the citizens feel exposed. Thus, if the crisis that the Union is going through cannot be overcome quickly through the creation of a European political power that can meet the citizens' needs, there is a risk that, faced with a European Union engaged in striving to establish difficult balances between the positions of the various member states rather than in the attempt to assume a role on the international stage, the faith of public opinion will drain away and the popular support essential for achieving the federal objective will cease to exist.

On the other hand, it is essential to underline that only a clear definition of the objective to be reached — the European federation — will make it possible to clear the field of misunderstandings and of ambiguous uses of terms such as people, constituent power, and citizenship, which are often automatically transposed from the national context, in which they evolved, to the European one.

Indeed, because of the hybrid nature of the European Union — the EU is a confederal entity, based on the existence of sovereign member states, but it has a federal vocation (albeit increasingly weak and shared by only a few states) —, terms of great symbolic value have often, in the attempt to get the process of unification moving, been applied to phenomena that do not reflect their true meaning.

Hence the term constitution, which refers to the body of norms crucial to the life and running of a state, i.e. of a political community equipped with sovereignty and with the capacity to set out its own fundamental rules, has been used in reference to a text, the Treaty establishing a Constitution for Europe, which merely regulates the functioning of an organisation that has neither sovereignty nor the character of a state. The same applies to the institution of European citizenship. Citizenship, which binds single individuals by a sense of solidarity that derives from their belonging to the same political community, is a status traditionally associated with rights and obligations (paying taxes and defending the fatherland, for example). European citizenship, however, in the absence of a political power at European level and since the European Union does not exercise the competences that are the cornerstones of sovereignty, is

by definition a flawed citizenship, associated with only a handful of rights established by the Community lawmaker. Finally, to define the Convention as the manifestation or voice of the constituent power of the European people is to fail to recognise that the exercising of constituent power implies a break with the existing rules, and that no norms can regulate constituent power or dictate how it should be exercised; the Convention, by remaining strictly within the mandate conferred on it — which did not call into question the existing power structure — and seeking to do no more than reform the Treaties in force, did not bring about a break of this kind. On the other hand, the very idea of a European people is meaningless in the absence of a political project with which the people can identify (as is the case within the framework of the EU), and if no decision has been taken to create a true political community (which thus remains as a concrete prospect). The fact is that the birth of the European federal people can come about only in conjunction with that of the European federal state. The growing interdependence and the deep integration that Europe has seen in recent decades provide the necessary objective conditions for this birth, but it will take a severe crisis (or the imminent threat of one) and, as a response to it, a solid proposal to create a European federal power, for the citizens of the member states to realise fully that they are the European people and can demonstrate their concrete support for this evolution.

It goes without saying that should the Europeans actually manage to create a federal state, it would be history's first ever example of a supra-national democracy and it would make it possible not only to overcome the present ambiguities, mentioned earlier, but also to give terms such as people, citizenship, and constituent power a richer meaning, more in keeping with the universal nature of the democratic values they express.

A European federation founded on long-established states, like the European ones, would in fact be attributed only those competences (namely, in the fields of foreign policy and defence) that are the most typical expressions of sovereignty and which it would have to have in order to be able to respond to the needs of the citizens that can no longer be met at national level. What we are talking about, in other words, is a European federation founded on several levels of government, each of which would be assigned the competences it is equipped to exercise. In this way, citizenship would no longer be seen as a bond, based on a sense of belonging, with the nation-state alone; instead it would take on a multiple significance, denoting contemporaneous membership of several political communities, from the lowest level to European level. Equally,

the co-existence of several levels of government and thus of various senses of identity and of belonging would show that the concept of people is not based on sameness, ethnic or linguistic, but on the shared belief in a common project and on the sense of being part of a political community capable of expressing universal values.

These topics were discussed at the second international meeting entitled “Building a European Federal State in an Enlarged European Union” held in Pavia on February 26, 2007 and organised by the University of Pavia and the Mario and Valeria Albertini Foundation. The papers we publish in this issue of *The Federalist* do not claim to exhaust these enormously complex topics, but are intended to serve as a starting point for the process of reflection that anyone wishing to fight for the creation of a European political power must inevitably embark on.

The Federalist

The Foundations of European Democracy

CHRISTOPHE CHABROT

Democracy is, without doubt, one of the fundamental questions today facing the European Union. It is a question to which it must, above all, find a credible answer. While it was Robert Schuman, in his speech of May 9th, 1950, who predicted the creation of a European federation, it is we who must give this federation its shape and substance, both legal and political. And the creation of any kind of European federation — European state — must, first of all, deal with the question of democracy.

Starting in 1957, major efforts were made to democratise the European Community, and this has indeed been achieved on a number of levels. The European Parliament is now elected by direct universal suffrage, has extended its powers in the ambit of the codecision procedure, which is very similar to a traditional legislative procedure, and exercises control over the European Commission, being called upon to approve or reject the nominations for President and for the Commissioners, and to monitor the activity of the Commission itself. The role of the European Parliament emerged particularly clearly when the Santer Commission resigned in 1999, for example, and also during the appointment of the Barroso Commission, when the nomination of Buttiglione was rejected.

Similarly, no one can deny the growing importance of the European judiciary and the influence of their pronouncements on the observance of rights, the hierarchy of norms and the protection of freedoms, which are the foundations of any democracy. The European system of law, whose democratic nature was confirmed by the German Constitutional Court with its Solange I, II and III decisions, continues to influence deeply the national bodies of law, above all with regard to the safeguarding of the rights of defence and the independence of the courts.

With regard to transparent decision making, European democracy has made important advances. The Commission, whenever it draws up draft

proposals of acts, launches extensive rounds of consultations, in particular of “civil society”, regularly publishes its findings, reports and studies on the Internet, and every year issues a long, pedagogical account of its activities. The Council, meanwhile, is becoming more and more open, circulating details of its activities, even though its decisions are still taken behind closed doors. At national level — this applies in France at least — increasingly efficient circulation of information about European activities is guaranteed by the government, but also, and above all, by the parliamentary delegations that regularly catalogue the legislative activity of the Union and publish very detailed studies and reports.

The adoption of the European Charter of Human Rights and the undertaking, by the Commission, the Parliament and the Council, to respect this charter in spite of its non-binding character have led to a strengthening of democracy in sectors hitherto untouched by Community law (labour law, the environment, animal welfare, etc.). The improvements proposed in the 2004 Treaty establishing a Constitution for Europe and appearing again in the 2007 “Simplified Treaty” — meetings of the Council have now been opened to the public, for example — have had the dual effect of increasing both the democratic transparency and the accountability of the European institutions. In the same way, in the wake of the important Laeken Declaration there have been calls for a further strengthening of democracy within the EU.

And yet, the more democratic the Union becomes, the more this democracy is called into question. The more powers and electoral legitimacy the Parliament acquires, the more abstention there is at the European polling booths (the abstention rate was 37 per cent in 1979, rising to 54.3 per cent in 2004). The citizens are not reassured by the work of the European Parliament, in spite of its securing several victories over the Commission, and they continue to accuse Brussels bureaucrats of deciding everything without being accountable. The re-emergence of nationalism and the increase in identity-based demands both seem to be condemnations of the European illusion. In short, the prospect of founding a true political, and thus democratic, European state seems to become more remote by the day. Criticism of this kind, targeting false European democracy, was particularly strong during the French referendum campaign of 2005, when the creation of an Ombudsman, of a right of petition and of a participatory European democracy were all denounced as merely palliative measures, incapable of addressing the real democratic issues.

Thus, we are faced with a paradox: the more democracy spreads within the Union, the more it is criticised. This is a fundamental problem,

because how can a European federation possibly be formed in the face of such a lack of faith? And above all, what kind of democracy will be capable of recovering this lost faith? To answer these questions, we have to go right back to the roots of the problem. We must ask ourselves what democracy really is, what it is based on, before moving on to the question of the possible foundations for the establishment of a true democracy at European level.

Democracy Is a Political Idea.

According to its original definition, democracy is a political system that attributes decision-making power to the greatest number of people, to the “demos.” Aristotle contrasts democracy with oligarchy, pointing out that democracy is “the greatest number of the poor that govern,”¹ not a small number of the rich. In his speech at Gettysburg on November 19th, 1863, Lincoln, inspired by Pericles, translated the idea of democracy into modern terms, defining it “government of the people, by the people, for the people;”² this definition also appears in art. 2 of the French Constitution of 1958.

Today, of course, a definition of democracy will include other criteria, in some ways unconnected with the original definition we looked at above. Hence, modern democracy is also based on observance of fundamental rights, on a certain hierarchy of norms, and on the independence of the courts that monitor and control the decisions taken by the popularly elected rulers. Democracy, understood as the principle of the legitimisation of the power by the people (legal state), must be perfected with democratic control of the institutions (rule of law), otherwise it runs the risk of turning into demagoguery.

But it is important not to confuse democracy with democratic functioning. There indeed exist many organisations that are organised in a democratic fashion, in which, in particular, provision is made for the election of their managing bodies (universities, company boards, public institutions), but are not actually part of the concept of democracy. In fact, the concept of democracy is, in essence, linked to the concept of politics. Democracy is a form of political government of a political community.

Confronting the question of democracy within the EU thus means examining the political — or otherwise — nature of this union. The political nature of a democratic organisation depends essentially on two criteria, and these must be clearly understood: first, there has to be a link with a political people or “demos,” which can give a political dimension

to the current democratic power; second, that power must be concerned with the general management of the interests of the State. If these two criteria are not met, if the direction of the group is not based on these two general principles, then the society in question will be democratic only in its *functioning*, and not in its political *essence*. This is the problem that today's Union, in search of an identity, must confront.

Democracy Is Founded on a Political "Demos".

Democracy, broadly speaking, is a system of government that, directly or indirectly, involves a group's members, or most of them, that is to say the "demos" in the decision-making process.

Originally, "demos", in a democracy, had a special meaning, referring to a global unit, to the theoretical union of all the members of the group beyond any distinction that might be based on social or professional criteria, ethnicity, physical traits, economic position, etc. This "demos", then, was the people, which was defined as sovereign, in that it formed the basis of legitimacy and of power. This "demos" can of course fail to embrace the whole of the population, and may thus exclude juveniles, foreigners or, in different historical eras, women, slaves, blacks, the illiterate, the poor, etc. In this sense it differs from the "laos", that is from the people understood in the broadest sense of the word. But even when the "demos" does not include the whole of the population, and leads for example to census-based elections, it is still deemed to represent the whole of the population and to speak on its behalf; in other words, it is regarded as the expression of the whole community, understood as a single entity.³ When, in this way, the "demos" is considered the equivalent of the people in a democracy, the citizens who are members of it are granted rights directly linked to the management of the destiny of the community: the rights to vote and to be elected, the right to fulfil certain public functions, to contribute to the defence of the State, the capacity to act, etc..

This is what distinguishes democracy in the highest sense of the word from the various democratic forms that may be assumed by forms of social organisation generally. Thus, while institutions or groups, like universities, members of professional categories or of a church, or the workers in a firm, can be democratically organised, there exists no such thing as a university people, a medical people, a Catholic-Muslim-Orthodox people, or a people of workers. The very concept of people refers to a community considered as a whole unit, above and beyond the

interests and particularities of each of its members; it does not refer to a specific group within the global community, defined by particular professional, religious or social characteristics. It is because it has a relationship with the people, and thus with the holder of sovereignty, that democracy assumes the political character that distinguishes it from democracy understood as a mere method of decision making.

This political character is precisely what is currently lacking in European democracy, as is shown by many aspects of the Treaties on which the Union is based. First of all, in a legal sense, the members of the EU are, in fact, not people, not potential citizens, but rather the states that signed the Treaties on which the Community and the Union are based. Legally, then, the European Union, being an international organisation, albeit *sui generis*, is a body of states, not of individuals. Individuals are, at most, only the Union's indirect beneficiaries, for whom the member states have established certain rights and duties. And since the European Union is a union of states, this means that there exists no European society of individuals that can serve as the basis for the building of a political entity.

It is possible to find, in the Treaties, very occasional references to individuals, but these are certainly not enough to allow them to be thought of as true citizens, in the political sense of the word. Article 2 of the Treaty establishing the European Community endorses the general principle of equality of the sexes, article 13 prohibits any form of discrimination on the basis of race, sex, religion, age, disability or sexual orientation, and article 14 establishes the principle of the free movement of "people." But these rights and duties apply both to European citizens and to foreigners, and thus do not refer in any way to the concept of the political community.

It is true that the second part of the Treaty establishing the European Community is devoted to the question of "citizenship" of the Union and affirms that "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby." But at this point a rather pessimistic consideration has to be advanced. This citizenship "of the Union" is, first of all, mentioned only in the Treaty establishing "the Community," and thus does not seem, from a legal point of view, to extend to the more political second and third pillars. Furthermore, it has to be underlined that these "European citizens" are not defined as members of the Union (as we have seen, it is the states that are the members of the Union), as founders of the Union, or even as the subjects from which the Treaties originate. In reality, they are merely the *recipients* of the provisions contained in the Treaties. Clearly, then, we are poles apart

from the concept of citizenship in a political sense, according to which the citizen is the founder of the political community, part of the original holder of sovereignty, and the very source of the power and the policies that are conducted in his name (and certainly not the mere holder of rights graciously granted him from on high). It must also be pointed out that possession of citizenship of a member state, the criteria for which are still decided by the national authorities,⁴ is the only requisite one needs to fulfil in order to have European citizenship, according to article 17 of the TEC. This means that people not in possession of civil rights in their own countries (such as minors or prisoners stripped of their rights) can, theoretically, be considered European citizens. This difference shows clearly that European citizenship is not designed to be citizenship in a political sense.

Certainly, the rights granted to European citizens are rather limited: they are, basically, the right to vote and the right to run as a candidate in the elections of the European Parliament (which, moreover, cannot even be considered to represent the European holder of sovereignty). These elections are thus nothing more than an instrument for choosing the members of a technical body that is allowed to play a partial role in the decision-making process only thanks to the benevolent and gradual agreement of the member states that took this decision at a European Council meeting in 1976. The other rights held by the European citizens are equally limited. The right of a European citizen to vote and to run as a candidate in municipal elections held in his or her member state of residence, for example, has no real, theoretical justification, given that these local authorities are not connected in any way with the working of the Union. Included in the 1994 Directive, this right was simply introduced as a corollary of the rights of free movement and establishment. But the directive fails to explain why it is not extended to other local elections. Similarly, most of the rights held by the citizens are also held by other foreigners resident in the European Community: the right to petition,⁵ the right to lodge a complaint with the European Ombudsman,⁶ the right to freedom of movement.⁷ Conversely, the right of establishment in another Union member state, which article 43 assigns only to citizens of European member states, and thus to European citizens, is not expressly cited among the rights that derive from the status of European citizenship itself, even though it is traditionally counted as one of them.

Otherwise, the Treaty establishing the European Community tends to view individuals in a variety of capacities: as consumers who enjoy certain rights, as entrepreneurs or employees subject to certain obligations,

as lobbyists, and as workers who must not be subjected to discrimination. And accordingly, they can expect to encounter many differences of treatment, which depend on their geographical position (for example, on whether they are inside or outside the Schengen area, or on whether or not they come from regions that benefit from structural funds) or on the professional category to which they belong (one may think, for example, of the subsidies granted to farmers). In short, there is no such thing as a true citizen of the European Union in the political sense. Individuals are, rather, viewed in their specificity, and even in those instances in which they are not considered purely in specific terms, it is never from a political perspective. European citizenship amounts only to an undefined catalogue of rights that have no connection with membership of a proper political community. As stated in the European Charter of Fundamental Rights adopted in Nice in December 2000, the Union “places the individual at the heart of its activities, by establishing the citizenship of the Union.” The citizen is thus just a person who merely benefits from the action of the public powers, not the holder of sovereignty that gives legitimacy to the holder of power and guides its actions. Once again, what we encounter in the activities of the Union is the absence of a political dimension.

Democracy Implies a Political Authority.

Politics is a concept that rests on another generalisation, and it is this: that which concerns the global management of the interests of the group, or holder of sovereignty, that is to say that which concerns the general running of the community, is by definition political. This does not mean that decisions cannot be taken which regard only a section of the whole community, such as pensioners, motorists, homosexuals etc.. Such decisions can be taken, but they are, nevertheless, decisions taken in the general interest, and the general interest not only concerns society as a whole (defence of the territory, citizenship etc.), but can also concern just a small number of individuals, when the matters in question are ones that affect the life of the community (marriage, succession, professional codes etc.). It is the era, the social context, and the political choices of the holder of sovereignty that make it possible to establish what the general interest is, and that allow the legislator, on behalf of the holder of sovereignty, to intervene and regulate these sectors. Similarly, it is the nature of the group that determines the nature of the general interest at stake and of the authorities that are called upon to define it: the main car park in the

city of Pavia is, of course, a matter relevant only to motorists in the city of Pavia and one that is within the competence of the local authorities, whereas the organisation of the Italian judicial system is a matter of national interest that implies the political intervention of the legislator. In both instances, it is the interest of the group in question that allows decisions to be taken that apply to everyone, decisions that are political in nature in one case, but not in the other.

This link between political nature and the general interest has many consequences. The general interest, considered at its highest level, is what, first and foremost, prompts the authorities to intervene in matters crucial to the life of the community, the most important matters, leaving it to the administrators to deal with the less important or more sectorial questions. Second, the authorities entrusted with the management of this general interest must enjoy a certain freedom of choice. They must have the legal capacity to determine freely what is in the common interest and what is not. In other words, they must have the *kompetenz-kompetenz* beloved of German doctrine, that is to say, the competence to determine the sphere of their own competences. In the framework of these competences, they must then be free to make the choices needed to manage the general interest itself.

These conditions, just set out, are not respected at European level, and this makes it impossible for the European Union to pursue any political ambitions and renders futile any efforts to create a true democracy. These limitations emerge clearly in three areas: in the competences attributed the European authorities, in the separation of the powers responsible for the management of these competences, and in the freedom to act within these sectors.

With regard to the first aspect, the European Community was initially conceived of as an economic-type organisation, be it within the coal and steel sector, the atomic energy sector, or the sector of trade generally. The political objective of creating a European federation is well concealed behind the various forms of economic interdependence established in the sectors of agriculture, fishing, transport, and competition. Gradual advances in the latter part of the twentieth century, which have extended the European institutions' sphere of intervention to sectors that concern the Union's collective future (the environment, public health, education) and to politically sensitive issues (immigration, currency) must be looked upon favourably. In 1992, the Community ceased to be purely "economic" and acquired the potential to become a political entity. But the enlargement of Europe to embrace states that do not share this objective

jeopardises this process, with the risk that the Union could be reduced to the status of a large financial or commercial organisation. After all, "the Europe of projects," which was put forward as a way out of the crisis triggered by the French and Dutch rejection of the Constitutional Treaty, by proposing actions and setting targets in specific sectors (aeronautics, transport, European patents, the fight against terrorism, etc.), firmly places the idea of a non-political Europe on the table, not that of a society that shares a common destiny.

The European Union created in 1992 has tried to extend the field of Europe's competences to more clearly political areas, such as the judicial, police, military and diplomatic spheres. But this extension of competences, still tentative, has remained outside the ambit of the European Community, where there has been more integration and real transfers of sovereignty. This resistance on the part of the states returned to the fore at the time of the drawing up of the 2004 Treaty, and it stops the Union from dealing directly with the most important common political problems, even though, in view of the new security demands the public powers are now advancing, there is a possibility that this situation could change.

As regards the second aspect, the separation of powers, is it possible that a "return of politics" at European level and the new common project proposed by French president Sarkozy can reverse this trend? For this to happen, changes would have to be made to the very organisation of the Community. Because, in fact, when the functional division of roles was worked out in 1957 no reference at all was made to the classic separation of powers that is the basis of political democracy. It is true that international organisations are not founded on a holder of sovereignty, and that they are not required to respect modern constitutional criteria. But if it wants to become a political entity, the European Union will have to put a stop to its current practice of entrusting both legislative and executive power to the same organs, without drawing clear distinctions between the various norms.

Indeed, one cannot talk of the separation of legislative and executive powers at European level. It is always the Council and the Parliament that issue not only the basic regulations and directives (the equivalent of laws at national level) but also the implementing regulations and directives (which are like the administrative regulations in the national setting). Furthermore, they are also the ones that take the decisions directed at individuals, whereas at national level these decisions are taken by the administrative authorities. The entry into force of the 1986 Single European Act made it possible for the Commission to be invested with the

power to implement acts, but only when this power is conferred on it by the Council and only under the direct supervision of committees appointed by the Council. In this way, the executive power remains in the hands of the Council (article 202 TCE).

Articles I-33 to I-37 of the 2004 Constitutional Treaty made a complex distinction between general norms that fall within the competence of the legislative power (laws and framework laws) and non-legislative implementing norms, European and national (regulations, decisions, delegated regulations and implementing regulations). But this distinction still allowed the legislative authorities, the Parliament and the Council, to adopt simple implementing acts, and the power of the Commission to adopt such acts was still exercised subject to the revocable delegation of that power by the legislative authorities. Political organisation has to be simple if it is to be clearly understood by the citizens, and the complex system just described does not meet this need. To achieve political clarity, which underpins the principle of the accountability of our rulers, it thus seems necessary to go back to a more classic scheme of hierarchy of norms and separation of legislative and executive powers, drawing inspiration from the experience of the federal states.

A quite different problem is the attempt to lay afresh the foundations of the whole constitutional theory of the separation of powers, which, after all, no longer reflects the way power is exercised. From this perspective, it might be feasible to distinguish between four different powers: a “consultative power” which would be responsible for gathering social consensus, a “normative power” which would establish the general and implementing norms, a “power of dispute” which could oppose the issuing of norms, and a “power of control” made up of judges responsible for overseeing the correct application of the law in the hierarchy-of-norms framework. In this way, depending on the level of integration wanted, the legislative power would be assigned to national representatives and the power of dispute to the representatives of the Union, or vice versa, in the framework of new legitimate organs still to be invented. However, this paper is not the place to pursue these reflections in any greater depth.

The last problem to consider concerns the freedom of action of the established authorities. The concept of politics indeed implies that the legitimate powers be free to govern according to their own choices, which are sanctioned by the holder of sovereignty. Consequently, they must enjoy real freedom of action to set up their programmes and pursue their aims. It is this freedom that is the essence of the political contest between

parties, with their different visions of government, and which allows the citizens to make choices about their society through truly meaningful elections.

Instead, in the present European Union, any expression of political will comes up against restrictively interpreted frameworks and procedures, which limit this freedom. The monetary policy pursued by the European Central Bank is an excellent example of this: according to the terms laid out in article 4 of the Treaty of Rome, the ECB’s monetary policy must have a sole objective, to keep prices stable, and it must not, for example, be conducted with a view to boosting consumption or employment levels. In the same way, monetary policy must fulfil the very precise criteria set forth in Title VII of the Treaty establishing the European Community, criteria that leave the competent authorities with very little room for manoeuvre. Similar restrictions can be observed in the fields of agricultural and fiscal policy.

Hence, the fact that the Europeans can elect their own Euro MPs is of relatively little importance; indeed, the political avenues open to these representatives of the member states are relatively meaningless, too, since any real expression of political will is bound to clash with dogmas and principles institutionalised by the Treaties, which are no longer up for discussion. These stifling constraints are preventing a truly political concept of European power from evolving. But it must be recalled that these are constraints that were imposed by the states that signed the Treaties, which feared that the Union’s institutions might become too political. The question of a European political power is thus directly linked to that of whether the states can accept the creation of a new, coexistent centre of power.

In short, it is true to say that a genuinely political conception of democracy has yet to be realised at European level. But since every problem has a solution, what we must do now is draw attention to the conditions that must be in place before a real and credible European democracy can be established.

The Conditions for a True European Democracy.

Is it conceivable that the EU’s future development might stem from the same things that underpinned the founding of its single member states? Put another way, must the building of European integration in the twenty-first century take as its model the processes by which the states of the past were established? It would appear not. Today’s post-modern

society, the change in the global scenario after the end of the Cold War, the new modes of production and marketing, and thus of socialisation, and the affirmation of the fundamental rights of individuals and groups, all point instead towards the emergence of a more flexible society, a society more respectful of people and groups and less authoritarian. Most important of all, European integration today is pursued in the absence of a clearly identified common enemy, and without the use of military force by one power against another, making it an almost unique experience in the whole history of state building. In these conditions, it is certainly hard to imagine that it might be possible to impose an unequivocal idea of the European Union. Instead, the approach to the building of Europe is now one based not on imposition, but on negotiation among equals and on the voluntary relinquishing of national competences, with the risks implicit in this. It is thus a process that cannot be compared to the creation and constitutional organisation of the modern states.

And yet, democracy, in the political sense of the word, must not be excluded at European level purely on the pretext that European democracy could never be the same as state democracy. If a relationship of trust is to be created, or re-created, between the Union and its inhabitants, and if Europe and its rulers are to enter into a political pact with each other, then provision must be made for a few concrete changes to the way the institutions operate and to the way the Treaties are drawn up. But only the acknowledgement of a genuinely political authority underpinning the Union can lead to the creation of a true democracy, a democracy in the noblest sense of the word, and this is essential in order to win the citizens' support for the project. In this regard, there are various hypotheses that can be advanced.

Re-defining the Competences.

Every organisation is designed to pursue its own objectives, taking into account its history and the external factors that may influence it. In 1951, the desire to establish a form of economic interdependence among the historically warring European states led to the creation of a European organisation designed to regulate competition in the key coal and steel industries, a move that was inspired by the International Steel Agreement of 1926. This first, material, objective thus led to the establishment of a European institution, called the High Authority, that had far more powers than the current Commission enjoys. The second objective was more political and it led to the creation of a parliament that, technically, has no

place in an organisation like this: not having any real power, it cannot be the representative of any people. But its existence has made it possible to lay the foundations for a future political evolution. The creation of the ECSC, followed by the EEC and the EAEC (Euratom), thus fulfilled two main objectives, and the horizontal and vertical division of the competences reflects the complexity of the situation in post-war Europe. These bodies were not designed according to the classic concept of the separation of powers, but according to a much more functional approach that sought to achieve a new balance between the powers and the counter-powers: the body that establishes and defends the interests of the states, the Council, does not have any power of legislative initiative; on the other hand, the Commission, which does have this power, is more geared towards defending more ambitious and unifying Community interests, but it does not have ultimate decision-making power.

Today, then, the question that must be asked is whether this functional and symbolic separation of powers and competences should be maintained in a 27-, 29- or 30-member Europe that wants to behave like a state, or whether instead it should be improved or thought out anew. It all depends on what kind of Europe one wants to create. A European Union that is nothing more than a large common market, or a purely economic Europe, does not demand much in the way of a democratic process and can happily settle for the presence a group of experts controlled by the stakeholders, be these consumers or users. A union in the scientific field demands funding, first of all, and the creation of research networks linked with the sector's most innovative enterprises. A union in the field of industry, on the other hand, can easily be based on simple agreements between states and major industrial concerns, like the EADS, without implying the need for a democratic process. In these cases, the Parliament can merely act as an observer, without having to demand real powers or real legitimacy.

But a political union needs real, democratic guarantees, particularly as regards the exercising of competences and the division of roles between the federation and the federation's member states, and between the different European institutions in question. Of course, before a political entity can be built, its nature must be clearly established; this is the first condition. To this end, it is becoming more and more urgent for the Communities and the Union to merge into a single organisation, a move that would still allow provision to be made for different procedures in different sectors — this is what already happens with the three pillars of the Union, and is what was foreseen by the 2004 Treaty. Without such

a move, people would be faced with a new construct as complex as the current Union and European Communities, and how might they be made to accept it?

Second—this is certainly another condition—an anomaly which has existed since 1957 must be rectified. In all federal states, the most important competences, those that concern society as a whole, are assigned to the federation, while the more sector-based policies are entrusted to the lower levels of government. Hence, education, territorial planning and health, for example, are the responsibility of the cantons in Switzerland and of the *Länder* in Germany, whereas currency, citizenship, fundamental freedoms and justice are all matters dealt with at federal level. In the European Union, the situation is the reverse: sector-based policies, such as those relating to farming, fishing and transport, are managed at European level, while defence, justice, and diplomacy continue to be handled by the nation-states. Clearly, no “European people” or any other kind of political “demos” can be created on the basis of European agricultural production quotas and driving licences; Europe can become political only through its exercising of political competences and of a truly general and clearly affirmed interest.⁸ In assuming responsibility for these political questions, the Union will have to be supported by a genuine political democracy, to compensate for the transfer of sovereignty from the member states to the Union.

Clearly, it is not easy for the states that are party to the Treaties to delegate these political competences and strip themselves of most of their power, and it is thus predictable that they should attempt to slow down the growth of democracy prompted by this transfer of competences to European level. But there can be no underestimating the huge force that would be unleashed by the incorporation of the more political second and third pillars into the Treaty on European Union, with the medium-term objective of creating, for example, a European army or single diplomatic corps. The next treaty that may be defined truly unifying will be one bold enough to bring about this change in scope and it will necessarily usher in a genuine democracy, a source of legitimisation and control.

As another step forward towards democracy, the European authorities, as already underlined, need to be able to make decisions without being excessively conditioned by the restrictions contained in the Treaties, which deny them the faculty to choose. The 2004 Treaty did not make any changes to the third part, which covers Community competences, as the Giscard Convention had not been instructed to simplify this part. But it is becoming increasingly difficult to build a political entity on the basis

of a “constitution” comprising 448 articles as well as several dozen declarations and protocols, and whose annexes, for example, even go so far as to specify singly the products affected by Council decisions in the agricultural sphere (pork fat, beetroot sugar, cocoa, vinegar, hemp etc.). The current EC Treaty, with its 314 articles and various attachments, is no more reassuring.

What is needed, therefore, is a drastic slimming down operation. In actual fact, the essential provisions on the division of competences are contained in five articles, from 2 to 6. These articles certainly need to be completed, but there is not much that needs to be added to them. If it could be established which sectors are the exclusive competence of the Union and which belong to the area of shared competences, and if general guidelines could be set out on the exercising of the competences themselves, then the institutions would be given room to exercise a measure of flexibility in their decision making; this, in turn, would allow the emergence of broad political orientations, from progressivism to conservatism, from right to left, a development that would surely favour the growth of democracy.

Furthermore, the power of control over the Commission ought to be reviewed. In fact, according to article 201 of the TEC, the direct control exercised by the Parliament over the Commission refers only to the latter’s “activities,” that is, to its good use of public money and correct management of the Community budget. The Parliament can, of course, also set up Committees of Inquiry (article 193 TEC) and put questions to the Commission, orally or in writing (article 197), but these measures of control do not imply any accountability of the Commission. It must also be underlined that no provision is made for similar procedures within the Council. The Council can monitor the Commission through committees, set up precisely in order to control the exercising of the implementing powers it has conferred on the Commission, but it is still a limited form of control. What is lacking is a truly political-type control, such as the no-confidence motion typical of all parliamentary regimes.

It is true that the Commission does not enjoy real, autonomous decision-making power. But, on the other hand, it is the only institution, or almost the only institution, to have powers that allow it to propose acts and to accept parliamentary amendments⁹, and as a result it is able to influence directly the policies carried out at European level. Similarly, through recourse to rulings, permits and the procedures that it is able to institute in its capacity as guardian of the Treaties, it can conduct its own strategy on competition. But these actions are not really part of the

“activities” of the Commission that are subject to Parliamentary control. Furthermore, if control of the Commission’s implementing powers remains within the framework of comitology, then this means that it is required to answer for its actions only before teams of experts and not before people elected by the European citizens, and this is something that only adds to the sense of political unaccountability.

Basically, the essential condition, which must be the basis for all the reforms needed to bring about a genuine state of democracy, is the ordaining of a true political “demos,” a sovereign body, a figure that today is embodied neither by the member states nor by the “citizens of the Union.”

In Search of a European Holder of Sovereignty.

European citizenship might sound like a major step forwards, but from a legal point of view it is meaningless. Above all, it is based on a lie, and as such could undermine the Europeans’ faith in the institutions and in the Treaties: citizenship is normally conferred by a state on those that are the source of its very legitimacy. The European Union is not a state and, as a result, it is not entitled to confer citizenship on anyone. It is not a state because there exists no European holder of sovereignty that can give it this status. The citizenship it confers is thus a second-rate citizenship, which cannot be the basis of true political democracy.

It is surely not a lack of imagination that explains this failure to recognise a European holder of sovereignty as the foundation for the building a democratic concept of the Union. On the contrary, there are, in this regard, a number of possible hypotheses that could be taken into consideration, and these can be divided into two groups according to whether it is a single or a multiple holder of sovereignty that we have in mind.

As regards the first of these options, the European holder of sovereignty could be envisaged in two different ways. First of all, we might consider the existence of a single “European people” resulting from a merging together of the peoples of all the member states. This would be a contrivance analogous to the famous “We the people of the United States” which, during the Philadelphia Convention of 1787, in the absence of any basis in reality or any mandate, marked the birth of the people of the United States. It would also echo the creation of the French people in 1789, a time when France was strongly divided into a number of nations and populations (Bretons, Basques, Alsatians, etc.), with

vastly differing legal orders, which the monarchy was unable to unite.¹⁰ It would thus mean affirming the existence of a European people united on the basis of the Europeans’ common principles (Enlightenment, Christianity, science and democracy, literature and philosophy etc.) and their centuries of shared history, in both peace and war.

However, we should not allow ourselves to be deceived by this idea. We no longer live in an age in which a central, military power can force men, through forms of violence, internally and externally, to merge into a single whole against their will. Nor are we any longer in a situation in which war and a common enemy can create the conditions for the formation of a new unity, as Schiller noted at the time of the Thirty Years War in the seventeenth century. Just like nuclear fusion, the fusion of men requires a considerable force of energy in order to overcome resistance, and inevitably leads to the thousands of deaths, as the European states discovered when they were founded, particularly France during the Reign of Terror in 1793. Today, a renewed tendency to retreat into our own particular identity and a certain mistrust of the Union seem to be strengthening the nations’ reluctance to unite, even symbolically, in a single European people, and the European project of unification through peace makes it inconceivable that their incorporation might come about through the exercising of military force. The idea of a single European people, which clashes too much with the multiple European identities, must therefore be discarded, certainly for the moment.

Another, easier solution might be found in the concept of nation. In this case, the sovereign entity would be the “European nation,” embracing the different peoples and individuals that make up the member states. Again, it is an idea that was used in France during the Revolution of 1789 as a means of realising French unification without resorting to the idea of the people, which some felt to be politically dangerous. The building of the modern states was a process by which the “nation,” originally a linguistic community, also became the theoretical and political entity capable of uniting people above and beyond geographical and temporal considerations, and the holder of sovereignty. It is thus a concept that should allow the creation of a sense of European unity while at the same time respecting the diversity of the member states’ peoples and nations. Indeed, the European nation, understood as a political idea, linked essentially to the exercising of the right to vote and to stand for election and the possibility of fulfilling public functions at federal level, would not cancel out the nations’ different historical and cultural identities; it would simply be a new nation to be added to the existing ones; it would not be

setting out to replace them. The multi-ethnic nation is a concept familiar to many federal states, like Canada and the former Yugoslavia.

Advanced and elucidated in public speeches and by influential artists, gradually assimilated as the policies of the Union's states have converged, and used by judges claiming to reach decisions "in the name of the European nation," this idea could therefore appear destined to take root over time. Its full affirmation and official establishment would coincide with the adopting of a future federal constitution and its profile would be raised by the convening of a constituent assembly made up of individuals elected by and/or representing civil society in all the states wishing to be part of this new European federation and assigned the task of drawing up its founding text. In a more philosophical vein, this European nation could then be likened to a "community of European patriots" on the basis of Habermas's idea of "constitutional patriotism."

But many Europeans could find the idea of a single or unitary holder of sovereignty deeply disturbing, even within this more flexible European nation framework. Others would doubtless argue that the building of Europe itself reflects an idea of pluralism, a diversity that its holder of sovereignty must reflect; and this is a point of view that opens up other possibilities.

Alternatively, then, we might consider the hypothesis of a multiple or multipolar holder of sovereignty. The types that can be envisaged are, essentially, three. It could be a holder of sovereignty made up of "European citizens:" abandoning all reference to their unity or unification in a political whole, such as the people or nation, the holder of sovereignty in whose name the federal constitution would be adopted and the judgments passed could simply be all the European citizens. Of course, it would first be necessary to overcome the currently vague notion of European citizenship. The European citizens would be the real source of political legitimacy and all powers would originate from them. This would make them active participants either in the adoption of the constitution by their representatives or, more feasibly, in a referendum ratifying the final constitutional text, organised at European level and without any differentiation between the states in the counting of the votes.

The advantage of this solution is that it would reduce the European holder of sovereignty to a purely political idea, that of citizenship, which would be expressed purely in the context of elections and access to public functions. Being restricted to the public sphere in this way, this holder of sovereignty would not compete with national cultures, would not throw into question peoples' identities, and would not generate fear by impos-

ing unity. Of course, it presents a theoretical and chronological problem that would have to be solved: normally it is only a state that can confer citizenship, but here the situation is reversed: the citizens would be the ones establishing the state, and the state obviously could not create citizens without first coming into existence itself. One solution to this might be to deem European citizenship (as it is currently formulated) "confirmed" by all the states and thus an authentic power with the capacity to adopt a constitution, or alternatively, through a legal contrivance, it could be declared that the states and the citizens come into being contemporaneously upon the adoption of the federal constitution, and that they thus create each other. This problem need not be an obstacle; after all, our old European nations had much more complex legal problems to solve.

Alternatively, the European holder of sovereignty could be comprised of two parts and include both the states and the citizens. This hypothesis is hinted at in article I-1 of the 2004 Treaty, which points out that the "constitution" reflects "the will of the citizens and States of Europe." And to an extent this corresponds to reality. Adoption of the text of this treaty represents, in fact, the convergence of a dual will: the will of the states that have drawn up and adopted the final draft of the treaty and that of the citizens of the various states which have ratified it, either indirectly through their parliamentary representatives, or directly through a referendum. Since, in international law, sovereignty belongs to the states, there would be nothing strange in acknowledging this fact openly in the European constituent process, tempering the affirmation with reference to the interior holder of sovereignty, i.e., the citizens of these states. After all, all federal systems have a dual legislative system: a chamber elected by the citizens and a chamber that represents the states. It would be enough to extend this classic concept to the constitutional legislator. If this were done, the will of this dual holder of sovereignty could find its expression in a federal pact to be drawn up by the states' representatives and adopted (through the passing of a law or through a referendum) by the citizens of the states that wish to be part of the new federation. The latter option would probably be preferable as it would strengthen the democratic legitimacy of this solemn decision.

It is a fascinating idea, but it is also one that is legally flawed and, from a practical point of view, dangerous. This is because the adoption of the text of the treaty is placed in the hands of citizens who are in fact true holders of sovereignty, because, here, they are to be understood as "citizens of the states" (not as "citizens of the Union," who do not exist). In this way, the established powers (the states), or more precisely the

national governments, are placed on the same level as the constituent power (the people/the citizens). The whole significance of the constitutional process lies in the fact that it is meant to give the people the power to oppose the powers of the states. A constitution, ultimately, is a text drawn up by a creator in order to limit the capacity to harm of the entity it has created. To put the created entity and the creator on an equal footing is to run the risk of undermining centuries of democratic endeavour, unless, of course, the citizens are given real guarantees that they will have the last word, and thus the certainty that state projects cannot be imposed on them without their consent. Provision should be made, for example, for the adoption of the text by referendum, or subject to a three-fifths majority in the national parliaments, which would surmount the simple majority which supports the governments that drew up the text.

As a further possibility, constitutional science could make provision for a holder of sovereignty comprised of “the European peoples” or even “the European nations” of those states that support the federal project. Classical theory argues that there can only be one holder of sovereignty, which clearly cannot be reconciled with the plurality of the European peoples. But this whole question could be reviewed. There is no reason why, in the twenty-first century, constitutional concepts should not be updated, as they were two hundred years ago in the USA and in France, thereby opening up the way for the holder of sovereignty to be interpreted in a new way. Yet even were we to stay within the traditional canons, the singleness of the holder of sovereignty need not necessarily be sought in a unitary framework (*the* people), but could instead be found in the sum of the peoples that have agreed to be part of the new federal entity, which, on joining it, would form a single sovereign unit. The European holder of sovereignty would thus be the sum of the national holders of sovereignty of the member states that have opted to join the proposed union. Justice delivered “in the name of the European peoples (or of the European nations)” or a constitution that opens with the words “We, peoples of Europe (or We, nations of Europe)” would not undermine the foundations of democracy. A further advantage of this hypothetical solution is that it would create a unit without imposing it; it would promote a Europe that respects the national identities, a Europe that is not just “united *in* diversity,” but rather “united *by* diversity.” In this framework, it would be possible not only to convene a European constituent assembly made up of the representatives of the peoples of the states wanting to be part of the federal project, entrusting it with the task of drafting its constitution, for ratification, but also to limit the participation of the peoples to the final

stage of the ratification process, where it could take the form of a solemn vote of approval, direct or indirect, conducted according to procedures that would guarantee the validity of the support give.¹¹

At this point there remains one question: how can we determine which of these many potential holders of sovereignty might form the basis of a European democracy equal to the challenges inherent in the proposed political project?

In truth, this is a question that need not even arise. According to classical theory, the constituent power, to be legitimate, must be the expression of the holder of sovereignty. The holder of sovereignty must thus be identified before the constituent power is, and the constituent power will, in turn, be the one to determine the ruling powers. But if we look closely, this is not what actually happens: it is always the victorious constituent power, the one which prevailed in the struggle with the other political forces claiming the right to draw up the founding text, which, subsequently, legitimises its own power in the name of a holder of sovereignty evoked for the purpose. We can, in fact, imagine, in a society, different holders of sovereignty (God and His representatives, the King, an elite, the people, the nation, etc.) all struggling to seize power and to found a political system that legitimises this power (theocracy, monarchy, aristocracy, democracy etc.). The one ultimately acknowledged as the holder of sovereignty is the one corresponding to the political force that has managed to win power, be it through a coup d'état or through the natural evolution of the institutions. France, England, the United States in 1787, Italy and Spain — the list goes on — have all experienced revolutions of this kind, which made it possible to replace one holder of sovereignty with another; which removed the holders of power and replaced them with those that had been excluded by the previous regime and that demanded, to strengthen their claims, a new legitimacy in the name of a new holder of sovereignty, for which they spoke. It is the constituent power that creates the holder of sovereignty, not the other way round.

All prior and theoretical reflection aside, therefore, it is the promoters of the federalism of tomorrow that will have to select the holder of sovereignty that suits them best, on the basis of their own origins and of the setting in which their federation will be created. Spurred on by the legitimacy of this sovereign that, in this way, they will have created, it will become possible for them to invent something different from a traditional federation, to create, in accordance with the logic of a European Community *sui generis*, a “European republic” as yet to be defined in legal terms

NOTES

¹ *Politics*, III-8, 1279 b 19.

² Commemorating a famous battle waged in this Pennsylvania town during the American Civil War, he declared: "that we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

³ According to Siéyès, even when they are denied the right to vote, "passive" citizens are still citizens, holders of other civil rights, such as the right to fulfil public functions, for example.

⁴ European Court of Justice, 12th September 2006, case C-300/04, *Eman and Sevinger*.

⁵ Article 21 attributes the right to petition to citizens, but article 194 extends it to "any natural or legal person residing in or having its registered office in a Member State" of the Community.

⁶ Again, a right established by article 21 of the TEC, but extended by article 195 to "any natural or legal person residing in or having its registered office in a Member State" of the Community.

⁷ A freedom proclaimed by article 18 of the TEC, but extended by article 39 to all "workers" and to all those regularly granted admittance to the Schengen area.

⁸ Following the example of the Treaty establishing the European Community, which, in article 155, talks of "projects of common interest" in the area of trans-European networks, the European Court of Justice has, on certain occasions, recognised that some policies are linked to "objectives of general interest pursued by the Community," in relation to the environment for example (European Court of Justice, 7 February 1985, case 240/83, *Association de défense des brûleurs d'huiles usagées*). But as yet no legal provision has been made for any assumption of responsibility, by the Union's institutions, for the general interest of the Community, in spite of what it says in article 213 of the TEC ("The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.")

⁹ According to article 250, the Council can amend a proposal from the Commission only by unanimity while according to article 251 it can accept parliamentary amendments rejected by the Commission provided this is, again, by unanimity. Unanimity is now becoming increasingly difficult to achieve, and this considerably strengthens the powers of the Commission, whose opinion it is becoming more and more difficult to get round.

¹⁰ See Alexis de Tocqueville, *L'Ancien Régime et la Révolution*, Paris, 1856. Some authors maintain that the French Revolution (1789) originated from the need to unify the country in a great movement that the monarchy was incapable of creating.

¹¹ For more on these different hypotheses, see Christophe Chabrot, "The Project for a Political Europe in the Wake of the 2005 French Referendum", in *The Federalist*, XLVIII (2006), pp. 158 onwards.

The Nation-State: A Thing of the Past European Peoples and States in the 21st Century

ERICH RÖPER

The sovereignty of the European people and of the European state, in the twenty-first century, is an issue closely bound up with the nation-state, which, the successor of the sovereign crowned rulers, has been the cause of so much war and hate. It is thus necessary to think of ways in which, as the precondition for uniting Europe, the concept of the nation-state can be overcome. First, it is important to emphasise the unique nature of European unification, which is a process quite unlike the founding of any other state in the world, centralised or federal. Second, consideration must be given to the legal and political position of the member states, which are still the "masters" of the Treaties. Finally, as a consequence of these considerations, it is necessary to highlight the need to get rid of the nation-state, relegating it to nothing more than a short-lived construction of the past.

People must realise that the nation-state cannot solve their problems, internal or in relation to the other states of the world. The governments of Europe's member states must realise that only united can they solve the problems of the twenty-first century, rising to the environmental, economic and social challenges that lie before them. There is still a long way to go, as we see, for example, from the current Airbus problems. As long as the people continue to rely on their own governments, it will be possible to build Europe only according to the method of Monnet, in other words, to trust that, to use an expression of Karl Marx's, quantity will some day turn into a new quality.¹

I

There is no state anywhere in the world whose creation was the result of a peaceful unification process; even the "fortunate Austrian Empire" (*bella gerunt alii, tu felix Austria nube*), which for a long time even ruled

Lombardy and Pavia, fought numerous battles. And yet it is states, products of warfare, that form the basis of international law. There is no state that is homogeneous, that shares a common language, culture and history, and yet every state's population is deemed a nation, its organisation a nation-state. There is no state that possesses the component that is crucial to any community of destiny: solidarity among its inhabitants. Instead, prosperous regions are deeply resentful of regions considered to be full of "social parasites" (as we see in Belgium, Germany and Italy for example); separatist regions are eroding seemingly consolidated "nation-states" (a phenomenon seen in Spain and the United Kingdom for example). Even the world's largest states (China and India) are conglomerates of disparate areas, trying to overcome their multitude of dialects (China) and languages (India) by means of an artificial language (Mandarin) or a foreign language (English). And no state's constitution was obtained through a referendum, always having been worked out by the elites.² In those rare instances in which a constitution did favour the people, like the Constitution of Weimar of 1919, it did not work because of the opposition mounted by the elites.

The nation-state, even had it ever existed in the form of a common destiny shared by all its subjects, is on its way out: obsolete. The road ahead leads to Europe, to the world's third largest political entity, which, through its unification process, is creating something entirely new. Europe has no dominant member state, like Prussia in nineteenth-century Germany; it has no obligatory national language, like France or Italy do; no homogeneity founded on a history of warfare, like Great Britain. Europe's population focuses on social solidarity as the foundation for an evolving common destiny, which will be the driving force behind an unprecedented nation-building process, whose dynamics set it apart from the concept of the nation-state of the past two centuries.

II

There is a profusion of literature on the European people. In Germany, the Federal Constitutional Court's decision of 22.3.1995 on the Maastricht Treaty even hinged on the concept.³ Taking a narrow view, criticised by J.H.H. Weiler as "state *über alles*," the Court defined the unifying Europe simply as an association of states, insisting that, quite apart from state territory and state powers, there was no European "demos": no European people, based on a European nation, to legitimise European democracy and statehood.⁴ Such was, and still is, the idea of the nation-state.

According to the traditional view, the certainty of being part of a European nation is supposed to ensure the European population's collective identity and sense of unity. But we are not talking Ernest Renan's "daily plebiscite" here.⁵ By pursuing the aim of internal homogeneity, it is claimed, all the members of the community would inevitably acquire a certain similarity. In the nation-states of the nineteenth century, this kind of collective and territorial identification was accomplished through war, expulsion, suppression, exclusion and also by building up ideas about the enemy. Federal states, too, supported the fact or assumption that a political nation will create its own state. In reality, however, it has always been dominant states that have driven the process of unification, through their language, often their religion, and/or their social system. The European Union, on the other hand, although often vilified as a "superstate," is not following this path. No matter what its unity will look like, united Europe, unlike all existing states and in contrast to the nation-state, will not have a dominant member, a dominant culture or a dominant language. Unity in diversity will be its distinguishing feature. Let us take a look at the situation in Germany: the millions of German flags that were flown during the last football World Cup Finals — some of which still flutter from houses and cars to this day — seem to support the view that now, 60 years after the end of the Second World War, Germany has reached a state of national normality. Of course, the hoisting and waving of flags is not uncommon in other countries. But what does it signify? Do the flag-wavers share a collective sentiment, and if so, to what does this sentiment refer? According to an Emnid poll, 18 per cent of Germans said that their flying of the flag was an exceptional behaviour prompted only by the excitement of the World Cup, 11 per cent said it was the first time they had ever done it, while 62 per cent would never consider doing it at all; finally, a mere 6 per cent said that they fly the flag on October 3, which is Germany's National Day.

At a symposium of leading trade associations held in Berlin in June 2006, German interior minister Wolfgang Schäuble spoke of the sense of unity and belonging that is central to the membership of any state. The German term *Staatsangehörigkeit* (state affiliation), adopted in 1871, is particularly accurate and illuminating, not so much because of its juridical correctness, but because it reflects the gradual nature of the process by which the states of the German Empire were unified. Other states refer to the *citizen* or *citoyen* of the state. In the USA, it is not only schoolchildren who regularly pledge allegiance to the flag, and thus to their state.

In an interview on July 21, 2006, Volker Kauder, head of the CDU/CSU parliamentary group, emphasised the concept of Germany as a community of destiny, which applicants for citizenship should be required to recognise and identify with.⁶ Referring to aspects of Germany's past and the challenges the country faces in the future, he steered clear of emotive issues, speaking positively of Germany's integration into Europe and of the preamble of the EU constitutional treaty, which states that the European peoples are determined to forge a common destiny. According to Kauder, this is a sign "that we want to master the future. And everyone has to contribute to this, each in his or her specific role." Accordingly, a "sharing of responsibility for this country" is something he would expect from a manager taking a profit-oriented decision on whether to invest in Caracas, Bratislava or Emden; and he would likewise expect it from a sales assistant in a bakery in deepest Bavaria, and from a secondary school pupil in Berlin. But can these individuals really be said to be united by a shared responsibility for their country? Moreover, Kauder, in spite of his professed allegiance to Europe, is here referring exclusively to German common destiny, failing to take into account instances of dual nationality, in spite of the fact that the German Federal Constitutional Court's equal-rights interpretation of the 1913 Reich and State Citizenship Law⁷ has resulted, as indeed it has throughout Europe, in a vast number of dual nationalities, on account of the ever-increasing number — currently 1.3 million — of bi-national marriages.⁸

Leaving aside the effects produced by the football World Cup, it can only be this sense of unity that Wolfgang Schäuble was talking about. And it implies more than the German term *Volk*, derived from the Germanic *fylka*, first used in the 8th century AD to denote a homogeneous group of people sharing common characteristics. Because, as Schäuble put it, what it means to be German will always be changing under the influence of immigration. And the same is true in every other European country.

III

Political science is concerned with the nation-state. Constitutional law rests on the existence of nations and ethnically homogeneous peoples. According to Ernst Wolfgang Böckenförde, a very influential teacher of constitutional law and for many years a member of the German Federal Constitutional Court, democracy as a constitutional principle is based essentially on the existence of a pre-law community: a phenom-

enon of consciousness that demands a common national affiliation, a common religion, language, culture, and political awareness.⁹ States that lack this national homogeneity are destined to encounter serious political problems, as historians have pointed out, citing the Bismarckian Empire. Naturalisation creates an attachment to the nation as an association of people with a common destiny who share in the state's successes and achievements, interior weaknesses and external dangers (as though this did not equally apply to guestworkers, often of the third or fourth generation!).

As a historical-political term, the meaning of nation is not unambiguous, Böckenförde continues. Used in reference to a politically-oriented community of consciousness, it defines its own membership criteria; used as a political term it implies, in France and in the English-speaking world, a common political creed: the nation is something you can join, become associated with. The Germans and the people of Central and Eastern Europe, on the other hand, define nation in ethnic-cultural terms, as something linked to a common language, history and culture. Böckenförde laments the twentieth century's many instances of ethnic expulsion and cleansing — incidentally all of these took place in states with an ethnic-cultural definition of nation!

Rolf Grawert, another important teacher of constitutional law, points out¹⁰ that every people, understood as a set of humans endowed with a supra-personal character, historical continuity, real capacity to act, and complex sense of community, has displayed certain typical structural elements. Basing his argument on definitions of people other than the juridical one, he claims that it is possible to identify a pre-state existence that, through self-recognition and self-affirmation, has the potential to evolve into a collective existence and to create an identity, but at the same time to lead to exclusivity and exclusion. His notion of the self-creating and self-determining nation is based on concepts that reflect the nation-building processes seen in Continental Europe since early modern history and particularly since the French Revolution and it completely disregards the African, South Asian, and Latin American states.¹¹ With the metamorphosis of the third estate into nation and the widespread attribution of citizenship, the people and the nation ceased to be notions referring to a community of solidarity, made up of equal, free citizens, and became a set of key political-constitutional terms. The structure of the supra-individual association and the ability to survive irrespective of state form — this author continues — are brought out by a characteristic common spirit of the people or by their collective awareness of themselves as a

people, even though all modern states excluded women, slaves, minorities (Native Indians, Roma, Sinti, Jews), religions (e.g. Catholics in the USA, the United Kingdom, and Scandinavia), and above all the millions of underprivileged. Grawert advocates a return to the nation-state and nation as the institutions of the pre-integrated world. For him, the integration of the European peoples (art. 1 para. 1 ECT) constitutes a threat to the political communities and to the stability of institutional orders.

Paul Kirchhof, leading teacher of constitutional law and reporting judge in the German Federal Constitutional Court's decision on the Maastricht Treaty who was tipped to become minister of finance in the event of a CDU/CSU victory in the general elections of 2005, sees the state as something that develops from a core of cultural, religious, economic and political sentiments, and which has never been perceived as an organisation that may be arbitrarily extended or confined.¹² As long as the world is seen as an order of creation in the Augustinian sense, and as long as Thomas von Aquin's affirmation that human nature and the order of things follow a divine plan of creation remains valid, state building must be regarded as the "tracking down" of a pre-existing order rather than a deliberate act. Even modern political science, devoid of religious influence, interprets the development of a state order against a background of pre-existing natural, economic and cultural conditions, in the sense of its being born into a culture and a history.

Under the influence of the Germany's division, Klaus Stern, another important teacher of constitutional law, in 1980 reduced Joseph von Held's *Deutungsvarianten des Volks*¹³ (a concept referring to the peoples of the "Old World", the nations in the natural sense) to a unitary concept defined by the state; the only exceptions to this were Switzerland and the USA, both of which managed to incorporate a number of peoples, or parts thereof, into a nation.¹⁴ Stern argues that the nation is the totality of people who — through common ancestry and cultural heritage, a shared language, shared religious convictions and historical perceptions as well as a certain mental and spiritual concord — have become a distinct unity and as such have developed a feeling of belonging together, of being one people. The nation is the conscious expression of this sentiment, and the nation-state is the visible expression of this nation's identification with the state. Stern observes that in Africa, and also in parts of Asia, there is no such close connection between nation and state; as he correctly points out, it was normally the state that created the nation¹⁵ — a result of colonialism.

IV

Common destiny is the central issue in this discussion. But what, for instance, is Germany's common destiny based on? On two lost world wars with all their killing and suffering perhaps? No, it is not that, seeing as not everyone shared in this suffering: the capital owners came out of these experiences unscathed, even strengthened. Could it be based on Germany's position at the heart of Europe? Again, the answer is no since every state has a special geographical feature, but this can hardly be considered its destiny. On the crimes committed in the name of Germany, then? Certainly, these crimes still influence Germany's position in the world and are regarded — by some more than by others — as Germany's destiny. Nevertheless, it is hard to see how the prevailing opinion, reflected in the above-reported deliberations of leading scholars of constitutional law, can contribute to efforts to explain the past or master the future.

Just like the borders in Africa, the East and Latin America, Europe's borders are largely the products of random developments determined by diplomacy, political marriages, the possession of better weapons and so on; in short, by developments always driven by the firm resolve of the elites, never by the needs or wishes of the population. Even so-called homogeneous states with natural borders, such as Italy, Spain and the United Kingdom, are conglomerates of different population groups, often in competition with each other, as is continually shown by the activities of the Lega Nord in Italy, the Basques in Spain, and the Welsh and Scots in the UK. According to a poll conducted on 26 November 2006 (i.e. 300 years after the Act of the Union), 52 per cent of Scots and even 59 per cent of English want to abolish the union between England and Scotland.

It was the rulers, aided by their vassals in the third estate and their obedient supporters in the first and second estates, who forced the rest of the population to submit to a "united we stand" sentiment, be it with regard to politics, language, economy or religion. While in some places a national language was forced upon the people (e.g. in Italy), elsewhere deviations from the national language (e.g. Polish or Serbian in Germany) were frowned upon, or even banned (as in France after 1789, when all regional languages were declared illegal). Ethnic minorities were exterminated (e.g. the Native Indians in the USA) or persecuted (as the Sinti and Roma are to this day, particularly in Eastern Europe). As early as 1535, the Religious Peace of Augsburg spelled the end for Christian

minorities (*cuius regio eius religio*); Jews were expelled, marginalised or Christianised by force; Muslims were not tolerated anywhere. In the USA, Huntington identifies the Hispanics' reduction of the WASPs, the White Anglo-Saxon Protestants, to a minority group as a real battle of cultures.¹⁶

V

In political and economic terms, there has never been a united whole. "The people" is the sum of its individuals, not a collective subject. The expression "a nation of Krupps and Krauses," which draws a distinction between great industrialists, like Alfred Krupp, and simple working men, is just *one* of the synonyms for the social disparities that have never been resolved. There is no feeling of solidarity between the mega earners in the big or global firms and the rest of the population. In fact, the former see the latter as little more than a pliable mass that can help them to improve their stock exchange ratings. But neither is there a feeling of solidarity between the group embracing the more or less affluent civil servants, employees and self-employed and the large group of people on low incomes, including the long-term unemployed and people on social benefits. The latter two groups are in fact deeply resented among the wealthy, and are accused of exploiting the welfare systems. As Adolf Muschg, a leading Swiss author, wrote in *Was ist europäisch* (What is European?),¹⁷ we have already got used to accepting as inevitable that a certain proportion of the world's population fall by the wayside; this is true of the weak of our own society, and even more so for those of African societies.

This tendency is enhanced by globalisation, which severely reduces every nation-state's socio-economic scope for action. In fact, we are witnessing a gradual and voluntary withdrawal of the nation-state, which is tending increasingly to hand over its tasks to private national and international organisations and committees, none of which are in any way democratically legitimised. In a world ruled by capital, a world in which there is no democratic legitimisation and in which the only interest is to maximise profits, the principle *homo homine lupus* prevails as men battle mercilessly for the best opportunities to make money, be they in Europe or elsewhere in the world — *ubi bene ibi patria*. The notion of "home" is, at best, a nostalgic sentiment.

So-called market pressures are dominating all political relations, destroying the last remnants of solidarity. And where there is no solidar-

ity, there is no feeling of belonging together, only pure egoism. To quote Muschg once again, the market is the personification of insecurity *per se*; it is *the* system for all those who worship at the altar of profit. And the maxim of such people is the ruthless satisfaction of their — real or imagined — needs. The market cannot solve the problems of the future, be they environmental, economic or social.

The other conditions set by constitutional theory are crumbling, too. According to a microcensus conducted in 2005, one-fifth of the German population — not counting the millions who were expelled from the former East German regions after 1945 — have a migratory background, be it as repatriated ethnic Germans from the former Soviet Union or as naturalised immigrants. In Bremen nearly a quarter of the population has a migratory background, and for a couple of years now statistics have shown that more than half of all newborn babies have at least one foreign, mostly Turkish, parent, making it almost impossible to talk in terms of a traditional German culture. The trend is the same, or even more marked, in other big cities; only in rural areas is it somewhat less marked.

Therefore Wolfgang Schäuble was right to point out that what it means to be German is changing all the time, subtly but continually, as it did in the past. The last census of the German Empire, which was conducted in 1910, showed 58,952,000 persons whose first language was German as opposed to 5,859,000 who spoke a different language; 250,000 of these also spoke German, while the rest spoke only their native language, be it Belgian, Danish, French, Lithuanian, Dutch, Polish or Czech. German passports were held by 4,699,000 of these foreign-language speakers. Under art. 45 para. 2 of the Reichstag regulations, art. 41 para. 2 of the Prussian parliament's rules of procedure, and art. 42 para. 2 of the Landtag regulations, representatives *who were not in command of the German language* were granted permission to read their speeches. Under the terms of art. 73 of the Prussian Land Constitution of 1920, mixed-language provinces were authorised to enact laws allowing foreign-speaking sections of the population to use official languages other than German.¹⁸ That is how it was in Germany then and it is also how it is today in Spain, for instance, where there are four official languages.

The picture is quite similar with regard to religion. In Berlin and numerous other cities, Muslims, often naturalised citizens or German converts, are already the second-largest religious denomination. But even among Christian groups there is little common ground, especially if we consider "normal" Catholics and Protestants as opposed to Pentecostal and fundamentalist sects, whose way of life, family relations and

treatment of women are widely considered unacceptable in this day and age.¹⁹

Last but not least, regional identities are being rediscovered throughout Europe, challenging the dominance of the national identities. Alexander Grasse,²⁰ who regards Italy's regions as a modernising influence, noted that a change of model was needed in this country, given that the concept of the nation-state had, since the mid-nineteenth century, subordinated all other forms of collective territorial identity there. These territorial identities had long been regarded as competitors, as a threat to national unity and identity. Certainly, I personally have more in common — language apart — with other northern Europeans than with the people of southern Germany, Bavaria or Württemberg for example.

Even in the early twentieth century, "homeland" was still a term one associated with one's immediate surroundings, not with the state. Now, on account of modern communication methods, its range has been considerably extended. But still today, as always, people remain particularly attached to their local district. Hence the rejection — or at least the extremely hesitant acceptance — of anything that is foreign. In the years after 1945, people in Western Germany targeted, above all, those expelled from the former Eastern provinces, who, because of the compensation payments they received from the state, were accused of fattening themselves up at the expense of the Westerners. After 1950 these suspicions shifted to refugees from East Germany, whose reasons for abandoning the German Democratic Republic were felt to be purely economic, i.e. wanting a share of the good life. Many believed that they should be sent back to the Communists if they could not prove that they had actually been the victims of persecution. That this did not happen can largely be attributed to Germany's "economic miracle" and the resulting labour shortage. This is the kind of anti-foreign sentiment that is experienced by migrants everywhere, as they bring their different way of life into a more or less homogeneous community.

VI

So, in terms of constitutional theory, what remains of the nation — as an apparently organic, unquestionable condition — leaving aside the waving of flags? Certainly, the nation, under the "united we stand" banner thought up by the elites, is a useful concept for drawing men into the army and for sending them into battle with other men united by that same feeling. Thus, in Prussia, anti-French sentiments and the mystified

"war of liberation" against Napoleon were promoted as the central ideas of Prussian statehood in order to give the population what was badly lacking in Greater Prussia: a common identity. The battlefields of the First and Second World Wars are soaked in the blood of millions of people who, even as victors, did not draw any benefit from the community of solidarity proclaimed by their elites. In the post-war periods, the people on both sides experienced a sharp decline in living standards, while the elites, on both sides, were the true victors.

In the state, the people are joined together as a legal community (hence the term "constitutional patriotism"), with a more or less efficient administration and a government whose politics, in democratic systems, they can influence. Nationality laws distinguish them from people of other nationalities; in states governed by the rule of law they have certain fundamental rights, but also certain obligations, e.g. military service. The state is a complex system of legal and sociological relations, without emotional value. Former West German president Heinemann aptly remarked once that he loved his wife, but not Germany. The "united we stand" feeling of being a community sharing a common destiny requires common interests. These may be found in the struggle against another state, as in the case of Hitler's Germany when it started attacking neighbouring states in pursuit of racist ideals, killing and enslaving millions of people in the process. But the "united we stand" feeling can transcend borders, too, as seen with the strikes at General Motors plants throughout Europe, staged as a response to the management's closure plans.²¹ It can also be generated by need and scarcity, as, for example, in the German Democratic Republic, or through the mounting of opposition to the politics of companies and associations, their managers and shareholders, whose "love of the home country" counts for nothing when it is weighed up against company profits and stock exchange ratings. But in order to achieve a true "united we stand" feeling based on solidarity, the interests of the majority of people must at least be similar.

At present, however, these interests are too divergent to allow a feeling of solidarity to develop in today's multi-faceted society.²² There is no *common* destiny. Instead, there is growing segregation, even at regional level. All the major cities have their *banlieues* or outskirts, which are plagued with poor public services and infrastructures and populated, in the vast majority, by the old, the unemployed and foreigners. Clearly, on its own, the principle of the democratic state based upon the rule of law is not enough, as is shown by the non-relationship between the societies of West and East Germany with their different voting patterns and

political affiliations. According to a poll conducted by the main German television channel (ARD-Deutschlandtrend) in October 2006, 51 per cent of Germans were dissatisfied with the German political system, and as many as two-thirds regarded the country's social system as unjust. That these are not fleeting sentiments is shown by other surveys: in August 2005, a Forsa poll revealed that 43 per cent of West Germans, but 74 per cent of East Germans, were dissatisfied with the functioning of democracy in their country, while Eurobarometer's July 2006 survey gave figures of 38 per cent and 65 per cent, respectively. According to this latter survey, the level of dissatisfaction with European democracy was slightly less: 43 per cent and 56 per cent. This rift between East and West Germany has existed for a long time. A survey conducted for the second most important German television channel in 1985 showed that 59 per cent of West Germans identified Germany with the Federal Republic only, while 25 per cent also included the German Democratic Republic. According to a social survey conducted in 2004 by *Sozialwissenschaftliches Forschungszentrum Berlin-Brandenburg*, of those living in East Germany, 73 per cent feel moderately or strongly attached to East Germany, 38 per cent to Germany as a whole, and 22 per cent to Europe.

But how is their affiliation to Germany as a whole supposed to grow in the face of the increasing unwillingness of the rich West German *Länders* and of the country's "Southern League" to bear the costs of Germany's reunification (an unwillingness demonstrated anew in connection with health service compensation payments)? A similar lack of solidarity is displayed by the Flemish in Belgium, who refuse to support to their Walloon sisters and brothers, by the Lega Nord in Italy, which does not want to subsidise Southern Italy (the Mezzogiorno), and by Catalonia and other rich parts of Spain towards their poorer brethren. Even in well-to-do Netherlands the North of the country has begun to feel different from the rest and formed a special party, the *Partei van den Noorden*.

Leaving aside the effects, mentioned earlier, produced by the football Word Cup, the nation or people, however political and legal science may define it, remains an empty formula that is intended to cover up the irreconcilable differences between the Krupps and the Krauses. A true "united we stand" feeling requires a community of solidarity and a shared destiny, which is meant to balance out these divergent interests, to prevent these extreme differences in income by establishing a system of social justice. The fact that no political resistance is mounted when a board member of an energy company earns more in a year than a well-

paid employee throughout his entire working life is, in solidarity terms, quite unacceptable. And this does not apply only to Germany. How can there be talk of solidarity if a company raises its board members' pay by 30 per cent, while at the same time introducing longer working hours and reduced pay for its employees in order to cut costs. There are many examples throughout Europe of such misguided developments in a market controlled by the elites who profit from it. These same elites also dominate the mass media and are thus able, in their own interests, to influence public opinion on these and other issues, including environmental ones, as was the case with Berlusconi. Faced with an increasing number of environmental catastrophes — solely attributable to the nation-states and their determination to accumulate capital — the world's entire population shares a common destiny.

VII

Since all, or nearly all, the EU's largest member states are displaying a profound and sorry lack of aims and values, people are asking what it is that keeps their countries together. But who should answer this question? The need for values even decided the outcome of the US presidential elections in 2004. The desire for identity, aims and values will also decide the future of the European Union, be it the present one with its 27 member states, or perhaps a core group embracing the founding members. Even such a core will need a political identity to guarantee integration, a set of positive values on which to base a common policy. It is not enough to say, like the Pharisee in Luke 18, 11, "O Lord, I thank You that I am not as the other men, the robbers, betrayers and other sinners." In other words, it is not enough for Europe to say, "O Lord, I thank You that I am not super-capitalistic like the USA, not a repressive force like Russia and China, and not like all the other sinning states of the world." What is needed are positive aims and values on which to build a positive identity, that the people will accept.

Europe must not simply be a neoliberal market union in a free-trade area. All those working to unite Europe should, before they broach the question of political will, give some thought to its common values. At the top of the list we find the common wish for social security, in other words for a welfare state, adequate means of dealing with criminality, acceptance of international law together with peaceful means of overcoming international conflicts, and commitment to fundamental rights, here and throughout the world. Only after they have done this can they turn to the

question of the institutional structure (of the whole or of a core), which will have to be federalist if it is to embrace different societies. In this federation, more competences will be left to the member states (following the example of the *Länder* in Germany). This is in order to satisfy the common desire for subsidiarity, but it is also because it is the only way to ensure representation of all the member states in the European Parliament and the Commission. The electoral systems of Norway, Spain and Great Britain guarantee that very thinly populated areas have political representation. In Norway, for instance, the thinly populated North has three times as many members of the Storting, the national parliament, compared to the South, where three-quarters of the population live. Europe has to accept that it will, for instance, have no single election law, but will instead have to keep the system of national quota mandates in the European Parliament, which has no real relation to the population.²³ It also means, that any core — the Shengen area or the Eurozone — may constitute a limited subject, certainly at first, and not a complete Union, and that these different cores need not always include the same countries. But, ultimately, it is these cores that will prompt all the member states to join together and form a real Union.

VIII

In all European states, a “united we stand” sentiment, a feeling of solidarity and common destiny, the “daily plebiscite” that Ernst Renan called for in 1879, requires certain socio-economic conditions. Borders are and will be necessary in order to be able to shape the social relations within. But where these are or should be in today’s political and economic scenario will not be defined by language, religion or ethnicity. Given the prevailing circumstances, the likely outcome will be a united Europe, in spite of Paul Kirchhof’s claim, made in his opening speech at the 66th *Deutscher Juristentag* on 19.9.2006, that as a nation-state we Germans are being suffocated by today’s ever closer European Union. As long as Europe’s member states remain — as the German Federal Constitutional Court defined them — masters of the European Treaties, they will continue to set the rules governing many inter- and inner-state relations — but if we look to the future, it is clear that they are an obsolete model: political entities without any real meaning. They are destined to be incorporated into a federation of a new kind. In the economic field, the idea of the European company or enterprise is an important step in that direction.

But unlike other federations, with the possible exception of India, this new form will be characterised by the multifaceted, side-by-side existence of very small and very big members, and by the absence of a dominant centre. There will be a diversity of languages, probably with English as the lingua franca. There will be no dominant religion or culture, because the differences that exist, especially regional ones, are far too pronounced. There will be no formal democracy in which all votes carry the same weight, according to the German model. More likely will be the model that takes into account population density and size of the district through quota mandates, as used in Norway, Spain and the United Kingdom. It will be a colourful and thus peaceful political community of many peoples belonging to something beyond the state — very different from the prescribed homogeneity of today’s states. This United Europe will thus be a model for worldwide peace. To quote Ernest Renan again: “*Die Nationen sind nichts Ewiges. Sie haben einmal angefangen, sie werden enden. Die europäische Konföderation wird sie wahrscheinlich ablösen.*” (The nations are nothing for eternity. They have begun one day, and they will end. Probably the European confederation will be solution).

NOTES

¹ This is the case of the Charter of Fundamental Rights: it is only a compilation of the Treaties, regulations, rulings etc., which acquired a new quality when they were brought together in a charter. See Erich Röper, “Von den EU-Grundrechten zur Verfassung”, *Deutschland Archiv*, 2001, p. 122 onwards.

² An exception was the constitution of the Frankfurt National Assembly of 1848/49, elected by the males of all German states. It was more progressive than anything formulated previously and it would still be a good constitution today. It did not come into force, however, because the elites, the crowned rulers and the states did not want it, just as we see in the EU today.

³ Ruling of the German Federal Constitutional Court/Bundesverfassungsgericht (BVerfGE) 89, p. 155 onwards.

⁴ Joseph H.H. Weiler, *Der Staat “über alles”, Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts*, New York, 1995.

⁵ Ernest Renan, “Das Plebiszit der Vergesslichen. Über Nationen und den Dämon des Nationalismus – ein Vortrag aus dem Jahre 1882”, reprint in *Frankfurter Allgemeine*, 27.3.1993.

⁶ “Ein Zeichen gegen die Beliebigkeit, das Wort von der ‘deutschen Schicksalsgemeinschaft’” (expression meaning “German common destiny”), Interview in *Süddeutsche Zeitung*, 21.7.2006, p. 8.

⁷ BVerfGE 37, p. 217 onwards.

⁸ According to the press release of the Federal office of statistics of 8.7.2002 in April 2001 766,000 Germans had foreign partners.

⁹ Ernst Wolfgang Böckenförde, “Demokratie als Verfassungsprinzip”, *Handbuch des*

Staatsrechts, vol. II, Heidelberg 2004, p. 445 onwards.

¹⁰ Rolf Grawert, "Begriff des Staatsvolkes", *ibid.*, p.108 onwards.

¹¹ See, for instance, Nobelpricewinner Wole Soyinka (Nigeria), "Zur Korrektur von Geburtsfehlern, Probleme mit künstlich konstruierten Staaten in Afrika und Europa", Interview in *Tageszeitung (taz)*, Berlin 25.09.1993, p. 16.

¹² Paul Kirchhof, "Europäische Integration", *Handbook of Constitutional Law*, vol. IV, 1992, p. 865 onwards.

¹³ Joseph von Held, *System des Verfassungsrechts der monarchischen Staaten Deutschlands*, Erster Teil, 1856, p. 110.

¹⁴ Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. II, München 1980, p. 4 onwards.

¹⁵ See Erich Röper, "Staaten schaffen Völker, nicht Völker Staaten", *Kommune*, 12/1999, p. 6 onwards.

¹⁶ Samuel P. Huntington, "Auf Mexikaner können Sie sich nicht verlassen, Das Gespenst der Immigration", Interview on his book *Who Are We? Die Krise der amerikanischen Identität*, Leipzig 2005, in *Frankfurter Allgemeine Sonntagszeitung*, 30.10.2005, p. 28.

¹⁷ Adolf Muschg, *Was ist europäisch?*, München 2005, p. 97.

¹⁸ With details Erich Röper, "Vielvölkerstaat Deutschland", *Deutschland Archiv* 27 (1995), p. 625 onwards.

¹⁹ In that sense Ekin Deligöz, turkish-born Member of the German Federal Diet, Interview in *Das Parlament*, 13.11.2006, p. 3. Also with more details Erich Röper, "Die Grundrechte als Integrationsmaßstab", *Zeitschrift für Rechtspolitik*, 2006, p. 187 onwards.

²⁰ Alexander Grasse, *Modernisierungsfaktor Region, subnationale Politik und Föderalisierung in Italien*, Wiesbaden, 2005.

²¹ See Erich Röper, "Europäischer Streik bei GM-Europa", *EuroAS* (5/01) 2001, p. 87 onwards.

²² *Gesellschaft im Reformprozess*, study of the Friedrich-Ebert Foundation, Sept.2006, http://www.fes.de/Dokumente/061016_Gesellschaft_im_Reformprozess.pdf (20.12.2006).

²³ See Julia Gieseler, *Föderalisierung durch gewichtetes Wahlrecht*, Münster, 2006.

European People, Constituent Power and the Building of a European Federal State

GIULIA ROSSOLILLO

Recent events in the process of European integration, in particular the use of a convention to draw up the text of the Treaty establishing a Constitution for Europe, and the rejection of the said text in the subsequent French and Dutch referenda, have led many to point out the importance of the role of popular will in the European building project. Popular will is generally seen as a driving force in the process of integration, and also as a force working against the states, which are determined not to relinquish their hold on the key attributes of national sovereignty. If, then, the people of Europe were allowed to express their will freely (as they were doing, some say, through the Convention, until the Intergovernmental Conference stepped in to scrutinise and modify the text it had produced; and as they would have done, the same people say, in the Netherlands and France, had the referenda in those countries not been conditioned by domestic political issues), the difficulties encountered by the process of integration could soon be overcome, thanks to the will of the citizens to move rapidly in the direction of an ever more united Europe.

Reflections of this kind certainly highlight the need to think hard about the meaning of terms such as people, citizenship, and constituent power when they are used in reference to the process of European integration. Indeed, they can easily generate confusion and misunderstanding when they are transposed from the national setting, where they originated and evolved, to the supranational one.

1. European Citizenship and National Citizenship.

Even the Treaty establishing the European Community is sometimes guilty of applying these terms inappropriately. Its use of the term European citizenship is a case in point.

As we know, the concept of European citizenship was introduced into the Community system with the Maastricht Treaty, the aim being to give the Union a stronger political character (this was the “evolutionary” period in the process of integration that brought the decision to take the important step of creating a European currency).

The term “citizenship” was used, implicitly, in the same way as it is when it is used in reference to the modern democratic states, that is, to denote the bond between an individual and a political community, a bond that gives the former the right to decide the destiny of the community through his participation in the choices that shape its very life. Evoking the idea of citizenship was thus a means of conveying the idea that the Community was evolving into something more than a purely economic entity.

The European Court of Justice has always interpreted the provisions on European citizenship broadly, seeking for example to guarantee, as far as possible, people’s freedom of movement within the Community area; yet European citizenship still emerges as profoundly different from national citizenship.

First of all, the provisions on citizenship are structured in an entirely different way in the European setting compared to the national one. In the case of European citizenship, they take the form of a simple and definitive list of the rights held by each European citizen; in national law, on the other hand, the various aspects of citizenship status give rise to a seemingly endless assortment of rights and obligations. In fact, European citizenship grants an EU citizen only: the right to vote and to stand as a candidate in municipal and European elections held in his member state of residence, the right of free movement and of establishment in any member state, the right to enjoy the protection of the diplomatic and consular authorities of any European member state in third party countries where his own state is not represented, the right to appeal to the European Ombudsman, and the right of petition to the European Parliament.

Furthermore, if European citizenship really were structured along the same lines as national citizenship, the provisions on European citizenship would concern only relations between the citizen of the Union and the Community institutions. But this is not the case: some of the Treaty’s provisions on European citizenship serve to regulate relations between the foreign citizen and the state in which he resides. We may consider, as an example of this, the provisions on the right to vote, and to stand as a candidate, in elections to the European Parliament and in municipal elections¹: the rule that a citizen of a European member state can take part

in European and municipal elections in the state in which he resides, even if he is not a national of that state, is one that concerns the citizen’s relations with the state in question, not his relations with the Union’s institutions.

But what really distinguishes national from European citizenship is the fact that the latter does not give rise to the rights and obligations typically associated with “classic” citizenship. European citizenship does not imply an obligation to do military service, since there is no European army and defence does not fall within the competence of the European Community. In the same way, it does not give rise to any fiscal obligations, since economic and fiscal policy are still in the hands of the member states and the European institutions do not have the power to impose taxes. Finally, European citizenship does not give the citizens the right to choose their own government, because Europe does not have a true government.

It is, in fact, quite easy to see why European citizenship has this limited and singular nature: it derives from the attempt to use a term — citizenship — that implies a bond with a political community in a context in which this type of community simply does not exist.

In a democratic state, when one talks of citizenship one is referring to a political community that, through democratic means, chooses and controls its own elected leaders, and, through them, ultimately has the power to take the decisions crucial to its own future: it is the citizens as a whole, the people, the ultimate holder of sovereignty, that, having elected its leaders, agrees to obey them.

The limited nature of European citizenship is due precisely to the absence of this sovereign power at European level. Indeed, for there to exist a bond of citizenship in the traditional sense of the term, by which we mean the power of individuals to determine the destiny of the political community to which they belong, the bodies and representatives that the citizens have chosen must be equipped with the capacity to decide the destiny of those same citizens; in the EU, this is not the case. The power to decide in relation to the essential questions that concern the citizens generally (questions such as peace and war, fiscal policy etc.) is still in the hands of the states, which thus continue to be the holders of sovereignty. Consequently, even though the European Union is the world’s most democratic international organisation (being the only one to have a body, the European Parliament, elected by the citizens by direct universal suffrage), much of the significance of this is lost when one considers that the European citizens are not able, though the election of their representa-

tives to the European Parliament, to contribute in any real way to the crucial political decisions that shape their future.

It is also easy to appreciate the bond between citizenship (in the full sense of the term) and sovereignty if one considers that only in one other instance has the term citizenship been used, as it is in Europe, in association with a limited set of rights: I am referring to the citizenship of the Commonwealth of Nations, an organisation that is obviously not a sovereign body, or one in the process of evolving towards its ultimate transformation into a political community. In fact, citizenship of the Commonwealth (like citizenship of Europe) does not replace an individual's citizenship of one of the Commonwealth's member states, but exists in addition to it; and it is a form of citizenship that gives rise to rights very similar to those deriving from the provisions on European citizenship contained in the EC Treaty (right of movement, right of participation in the elections held in one's member state of residence, right of diplomatic and consular protection in countries in which one's own country has no diplomatic and consular representation).

The only Community act to contain a formulation of European citizenship more advanced than the current one was the 1984 Draft Treaty establishing the European Union, a project characterised by a strong federal orientation. Indeed, article 3 of this treaty, by affirming that European citizenship meant taking part in the political life of the Union, enjoying rights enshrined in Community law, and being obliged to respect the provisions laid out therein, linked the status of citizenship with an indefinite series of rights and duties, which is exactly what we see in the national systems.

2. Popular Will and the Treaty Establishing a Constitution for Europe.

The above-described situation would not have been changed in any radical way had the Treaty establishing a Constitution for Europe come into force, and the same will be true of the Reform Treaty, should it be adopted.

Neither instrument really alters the basic terms of European citizenship. And, moreover, the only provisions that relate to the citizens' participation in the life of the Union — these are not part of the provisions on citizenship (nomination of the President of the Commission and the citizens' right of initiative) — do not really change the role of the citizens compared to the existing Treaties.

With regard to the nomination of the President of the Commission,

article I-27 of the constitutional treaty stated that the European Council, taking into account the outcome of the elections to the European Parliament, should propose to the Parliament the name of a candidate — until now the candidate has always been nominated by the Council acting by a qualified majority and submitted to the European Parliament for approval — and that this candidate should be elected by the European Parliament by a majority of its members. However, this change, i.e., the part referring to the European Parliament elections, does nothing to alter the fact that President of the Commission is chosen not by the political majority that was victorious in the European elections, but by the European Council (i.e., by the member states); indeed, the European Council undertakes merely to take into account the results of the elections to the European Parliament. Furthermore, it is again the Council, by common accord with the nominated President of the Commission, that chooses the other members of the Commission. It is thus a procedure that fails to give the citizens the power to choose, through the European Parliament, the members of the Commission.

With regard to the citizens' right of initiative, article I-47 of the constitutional treaty merely established that no fewer than "one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission [...] to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution." It is, in short, merely the right to encourage — there is nothing binding about it — the Commission to propose legislation, while the power actually to do so remains firmly in the hands of the Commission, in other words in the hands of an institution that has no democratic legitimacy.

The failure to introduce real changes with regard to the role of the citizens is due to the fact that neither the Treaty adopting a Constitution for Europe nor, even more so, the treaty that will replace it in the future, alters the nature of the European Union: the EU continues to be an international organisation without a government accountable to the citizens, and without competence in the fields of foreign policy and defence, or in those of economic and fiscal policy. These powers, which are the very cornerstones of sovereignty, remain in the hands of the states, leaving the Union still incapable of taking the decisions crucial to the lives of its citizens.²

The serious consequences of this weakness of the European institutions are exacerbated by the fact that the European states, too, have gradually lost their capacity to take decisions in these areas, or at least to

take decisions that carry any real weight. Many of the issues that affect people's wellbeing and that really affect their lives (one need only think of the environmental problems we face) are now decided outside the confines of Europe's nation-states, and cannot be tackled with the instruments and resources that the nation-states have at their disposal. In this way, on the one hand we have an increasingly weak national citizenship, unable to embody the citizens' right to make the decisions that most profoundly affect the life of the national community, and, on the other, a European citizenship which cannot compensate for this weakness on account of the absence of a true political power at European level.³

This contradictory situation, which is due to the inadequate *scope* of democracy and citizenship, could have extremely grave consequences: ultimately, it could cause the citizens simply to lose their faith in the state and in democracy.

3. *The Need to Overcome the Current Framework.*

In the current political debate, there seems to be no real sense of urgency over the need to find a solution to this impasse. Indeed, attention is focused mainly on the minor adjustments that could be made to the existing Treaties and on what should be included in the future Reform Treaty.

The policy of step-by-step progress, or gradualism, which has characterised the process of European integration ever since the collapse of the EDC, and which is today the only route that the national governments and European institutions seem capable of considering, demands, in order to work, that two conditions be met: first, there has to be a common final objective, shared by all the states, towards which the process must move (in the case of the process of European integration, this objective is the creation of a federal state); second, there have to be further small steps that still need to be taken to bring us closer to the ultimate objective. Today, in Europe, neither of these conditions is met. First, there is no longer a common final objective that is shared by all the states: at the start of the process of integration, Europe's six founding member states were united in their desire to prevent, through the creation of a European federation, the outbreak of another war; today, on the other hand, the European Union embraces countries, like Poland, that openly and vehemently reject such a prospect. Second, there are no small steps that can still be taken in order to bring us closer to the final objective; it only remains to take the great and final step of creating the European federa-

tion. No proposal for changing the structure of the European Union, unless it is advanced with a view to creating a European political power and bringing about a relinquishing of sovereignty by the member states, can now help to solve the problems set out above.

Therefore, texts like the Treaty establishing a Constitution for Europe (and, even more so, the Reform Treaty), by setting out to make only minor changes to the existing Treaties rather than to tackle the crucial question of the relinquishing of sovereignty, and being designed with a Europe of 27 members, or even more, in mind, in other words for the present European framework, is, by definition, bound to be entirely ineffectual.

The significance that many attached to the means through which the text of the Draft Constitution was drawn up, i.e., to the Convention — some saw the Convention as the expression of the constituent will of the European people — also needs to be played down. First, the Convention was operating within a clear mandate, set out in the Laeken Declaration, which concerned sectors that did not touch on the essential cornerstones of national sovereignty: it was immediately clear that the members of the Convention, by sticking to this mandate, were not destined to change the nature of the European Union, that is, to turn it into an entity endowed with sovereignty. Second, the process of drawing up the text of this treaty, even though it involved a body, called the Convention, which some saw as the expression of the constituent will of the European citizens, was in fact a procedure that reflected entirely the logic of the existing Treaties. Indeed, as stipulated in the Laeken Declaration, the final text of the Draft Constitution was put to an intergovernmental conference for appraisal and would have come into effect only if all the member states had approved it, each in the manner provided for in its respective constitution.⁴

Hence, if a constituent process, by definition, implies an overturning of the pre-existing rules and the choice of a new form of political existence, that is, if it implies a break with the existing rules and sets itself outside their ambit, in such a way that its legitimacy cannot be determined on the basis of the rules that have, up to that point, been in place, then we can certainly say that the process for drawing up the European Constitution did not correspond to the exercising of constituent power by the European people.⁵

4. *The Federal Core and Constituent Power.*

If what has been said thus far is true, then what is clearly needed is a reform of the European Union that extends beyond the confines of the

current framework. In other words, in the presence of 27 member states, some of which are openly opposed to any form of political integration, preferring instead to see Europe transformed into a purely economic area, the question of a multi-speed Europe has to be raised.

But if, before we can even talk of citizenship and democracy, there indeed has to be a political community, and thus a political power capable of representing the citizens' right to decide their own future, then a multi-speed Europe can only mean the creation, by those states that wish to pursue this project and that are willing to relinquish their sovereignty, of an initial federal core — an out-and-out state, open to any EU state that should, in the future, wish to become part of it. Only in this way can the first truly supranational form of democracy and citizenship be realised.

But how can this step be taken? And what role should the "people" play in the creation of the new power?

First of all, it must be pointed out that the creation of this federal core would certainly have all the attributes of a constituent process. It would not, in fact, be a reform of the Treaties carried out on the basis of the procedures provided for in those same Treaties, but instead a break with the norms that govern the working of the Union and the revision of the Treaties and an expression of the will to move outside the existing framework in order to create a new sovereign entity.

However, in this case, the problem of identifying the holder of constituent power and the ways through which this holder of power might manifest itself becomes particularly tricky.

Usually, when we talk of a people exercising its constituent power, we are thinking, essentially, of the history of the European states and the constituent processes whereby, in the various countries, one form of government was replaced with another. In the case of a federal core embracing only some of the EU's member states, however, we would be referring to the creation of a new state entity embracing a territory in which there had hitherto existed several different national sovereignties.

Thus, the already difficult and complex business of identifying the constituent power and the subject, defined the "people", that is the holder of that power becomes even more difficult and complex when it is a question of creating a federal core from a number of previously separate nation-states.

In fact, as has already been pointed out "*le peuple ne préexiste pas au fait de l'invoquer et de le rechercher: il est à construire;*"⁶ in other words, the exercising of constituent power by the people presupposes that the people have an awareness of their own political existence;⁷ certainly, with

regard to the creation of a federal state from a number of separate states, this awareness appears to be lacking. Unless "people" is interpreted as an ethnic concept (an idea I do not share), an entity that can be called a people can be deemed to be present only when there exists a political project, and specific values, with which individuals can identify; but of course, for the people to be able to identify with it, the project must first be in place.

There is no need to emphasise the fact that the creation of a federal core uniting some of the current EU member states would be an event of fundamental historical importance, or that the project would have to enjoy broad public support in order to come about at all. The problem is that the European people cannot gain an awareness of its own existence until such time as it is called upon not merely to reject the existing power structure (a European Union incapable of acting), but indeed to appraise its position vis-à-vis a new and different form of organisation of power⁸; in other words, when someone proposes the creation of a federal core and takes the initiative of building this new state.

It is likely that this task will fall to the states, or some of them, that, at the end of the Second World War, decided to create the European Coal and Steel Community, Euratom and the European Economic Community. These are, in fact, the only EU member states that have seen European unification as a process that, through the creation of a federal state, would rule out for ever the possibility of further wars breaking out on European soil. They are also the states that have always been a driving force in the process of integration. Only if this initiative is taken will the people be in a position to intervene (supporting it in the states that will have proposed it and putting pressure on the governments in those left out of the initiative) and to choose its representatives in a constituent assembly.

But all this needs to happen soon, before it is too late. Indeed, should the solution fail to materialise, in the ambit of some of the member states, the European Union will simply carry on being what it is today, an organisation increasingly incapable of meeting the needs of the citizens. If this happens, the citizens' support for the process of integration, and with it all hope of creating a united Europe, will evaporate rapidly, leaving the European states as the mere satellites of some global super-power. The European Union's lack of a political dimension and, as a result, the restricting of its decision-making capacity to purely technical questions, will inevitably culminate in completion of the current bureaucratisation of the EU and feed the resentment of the citizens, who feel that they are being forced to submit to the decisions of bodies that have no

legitimacy.

On the other hand, the prospect of creating a federal core endowed with limited competences, but with all the powers it needs to meet the needs of the citizens, would boost public support for the European building project and provide the basis for the people's true exercising of its constituent power.

NOTES

¹ Article 19 EC Treaty: "1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State. 2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

² The Treaty establishing a Constitution for Europe leaves economic and fiscal policy in the hands of the member states and does not create any common foreign and defence policy, stating only that "the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements" (art. I-41, par.2), and that the "Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council" (art. I-41, par. 3) (this thus means military capabilities belonging to the member states, which the member states will voluntarily place at the disposal of the Union).

³ See Jürgen Habermas, "Citoyenneté et identité nationale. Réflexions sur l'avenir de l'Europe", in Jacques Lenoble, Nicole Devandre (editors), *L'Europe au soir du siècle. Identité et démocratie*, Paris, 1992, pp. 17 onwards, in particular p. 32.

⁴ In the declaration on ratification of the Constitution, annexed to the Treaty establishing a Constitution for Europe, it was stipulated that if two years after the signature of the constitutional treaty, four fifths of the member states had ratified it and one or more member states had encountered difficulties in proceeding with ratification, the matter should be referred to the European Council. But the European Council takes decisions by unanimity and the member states would never have agreed unanimously to the constitution's coming into force only in those states that had ratified it. What is more, the entry into force of the

constitution in a limited number of states could never have led to the formation of a federal core, given that no provision was made in the constitutional treaty for the replacement of the EU with an alternative, truly sovereign body.

⁵ According to Carl Schmitt, *Verfassungslehre* (6th ed.) Berlin, 1983, the power to modify the terms of the constitution (regulated by a positive constitutional legislation) cannot be defined constituent power. Indeed, it is a limited power, incapable of upsetting the framework of the existing constitutional order. Describing the American experience, Bruce Ackermann (*We the People. Foundations*, Cambridge-London, 1991, pp. 167 onwards) points out how, just six years after the ratification of the Articles of Confederation, "after a short summer of secret meetings, thirty-nine 'patriots' at the Convention were not only proposing to destroy the initial hard-won effort. They were also claiming authority, in the name of the People, to ignore the rules that the Articles themselves laid out to govern their own revision. The Articles explicitly required the agreement of thirteen states before any constitutional change was enacted, yet the Founders declared that their new Constitution spoke for 'We the People' if only nine states give their assent."

⁶ Pierre Rosanvallon, *Le Peuple introuvable*, Paris, 1994, p. 18. As pointed out by Edmund S. Morgan, *Inventing the People*, New York-London, 1989, p. 153, "before we ascribe sovereignty to the people we have to imagine that there is such a thing, something we personify, as though it were a single body, capable of thinking, of acting, of making decisions and carrying them out, something quite apart from government, superior to government, and able to alter or remove a government at will, a collective entity more powerful and less fallible than a king or than any individual within it or than any group of individuals it singles out to govern it."

⁷ Carl Schmitt, *Verfassungslehre*, cit., p. 114.

⁸ According to Carl Schmitt, *Verfassungslehre*, cit., p. 120, in critical situations, when a people says "no" to an existing constitution, their position is clear only because it is a rejection, whereas their positive will is less clear to see.

Globalisation, International Law, People and the State

THOMAS SCHMITZ

I. *The World Order of States.*

Let us imagine that a group of aliens (law professors from another galaxy) were to visit Earth, wanting to explore its legal system. They would soon discover that the world order of this planet rests upon a fundamental, formal principle which is valid in every corner of the globe and nowhere called seriously into question: the *principle of the territorial state*. Even in the era of globalisation, in legal terms humanity is not united but divided into approximately 200 distinct communities (peoples). These establish independent (sovereign) governing entities which are known as *states*. Each state is allocated a delimited portion of the Earth's surface (state territory) over which it has exclusive power to rule (state power), but to which its power is generally restricted. In this rudimentary world order based on public international law, the concept of public power refers essentially to the rule of a sovereign governing entity over the territory it controls, that is to say of a state over its state territory. There might be other authorities exercising public power within a territory, but sovereign public power — not derived and not dependent — can be held only by the states. In addition, every state — but only a state — may determine its own organisation and may exercise or delegate its public power just as it likes, subject only to some minor restrictions imposed by *jus cogens* norms in public international law.

The legal term for this special position of the state is *sovereignty*. Sovereignty is not a condition but a legal consequence of the status of *state*, as this is understood in public international law. It is the *undervived and independent, unlimited legal capacity to act in internal and foreign affairs*. It is not affected by the process of supranational integration until such time — should this time come — as the states involved formally transfer their statehood to the supranational organisation of which they have become members, which then will replace them as states. Sover-

eighty is absolute; as conceived by international law, it is inseparable from statehood. Therefore, it can only be transferred part and parcel with statehood. Some colleagues in the field of European law have developed ideas of “shared”, “divided” or “pending” sovereignty, but these ideas are just dreams. Dreams which, by the way, the Europeans could not realise on their own because they would first have to change the foundations of the existing legal world order. The world order of states might seem to be outdated, even ridiculous, in the twenty-first century, but it is still in force. So our alien law researchers will be disappointed: the blue planet is not the homogenous and coherent beauty it looks to be from afar.

II. *The Nation-State and the Challenge of Globalisation and Geo-regionalisation.*

For a long time, the subdivision of Earth into states (based mainly on the ideological concept of the nation-state) was accompanied by a *mind-set that revolved entirely around the individual nation-state*. Each state concentrated on solving its own problems on its own. Responsible cooperation with other states developed only sluggishly during the second half of the twentieth century, as the increasingly global nature of the single problems became clear. Today, it is obvious that the nation-state, with few exceptions, is out of its depth in a growing number of areas. In fact, the list of problems that the individual state is no longer equipped to solve is overwhelming: global trade, global communications, the development of new technologies and technological infrastructures, the prevention of global epidemics, pollution, migration, organised crime, worldwide terrorism and now the threat of climate change. To fulfil its functions as successfully as the traditional nation-state of the nineteenth and early twentieth centuries did, the state of the twenty-first century probably needs to have at least 300 to 400 million inhabitants.

III. *The Rise of a Supranational Form of Organisation in Europe.*

Although, at the end of the Second World War, many Europeans initially thought that the creation of a great European federal state, along the lines of the American model, would be the right response to the new challenges the continent faced, in the end, their attachment to the old ideology of the sovereign nation-state proved too strong. So the West European nation-states sought another solution: they founded supranational organisations to which they transferred sovereign rights, thereby

enabling them to exercise public power directly over the citizens and public authorities in the various member states. Three of these, the European Communities, being related to one another, were also designed to promote the general integration of their member states. They were reformed several times, combining more and more intensely the supranational and the federal elements. The Treaty of Maastricht transformed them into the European Union, adding two further “pillars” of intergovernmental cooperation and making it very difficult to understand the true nature of the organisation. Given its particular characteristics,¹ I prefer to classify the European Union as a new kind of state community, which it is appropriate to call a *supranational union*, and which can be *defined* as follows: a supranational union is an international organisation founded for the purpose of promoting integration which tends to evolve continuously, is designed to carry out any kind of task, and indeed accomplishes its integrative function primarily by carrying out a wide variety of tasks in the public sphere itself, exercising public power in its member states.² The supranational union is a *novel, independent*, legally distinct form of organisation *founded on public international law*. It has developed as a specific form of organisation, designed for the transition from the nation-state to a possible future civilisation state (*Kulturkreis-Staat*).³ It is situated in the triangle between international organisation, confederation and federal state. Its dual nature as an entity which is not a state but resembles a state has manifold consequences in the fields of law and political theory. For example, who is “the people” in this state-like but non-state union?

IV. *The Concepts of People, Sovereignty of the People and Democracy in the Process of Supranational Integration.*

From the beginning, democracy was a sensitive issue in the European process of supranational integration. According to Western political theory, or the “general theory of the state” (*Allgemeine Staatslehre, théorie générale de l'Etat*), every exercise of public power needs to be *democratically legitimised*, which is to say linked to the people. But to what people or peoples, and in what way? According to the general theory of the state, sovereignty within the state, which must be clearly distinguished from the sovereignty *of* the state, must lie with the people. But how can this concept be applied to a non-state but state-like union? More than a hundred publications dealt with these problems in the nineties.⁴ I cannot analyse this extensive debate in detail in this short paper, but I would like to present a particular approach.⁵

1. The democratic deficit in the process of supranational integration.

First, we have to admit that the integration process *has* created a democratic deficit. During the nineties, many constitutionalists misjudged or underestimated this problem, seeing the European institutions as sufficiently legitimised through the national parliaments and governments. After all, there exists the unbroken “chain of legitimisation” between the institutions and the citizens that is traditionally deemed necessary. However, in a democratic governing entity, supranational union or state, what is important is not just the existence but also the *strength* of the democratic legitimacy, and this depends on the *degree of mediation*. The decision taken by a directly elected parliament enjoys greater legitimacy than that of a government, which is linked only indirectly to the will of the people. This is the reason why most constitutions stipulate that essential political decisions require an act of parliament. Yet the position of the European Parliament remains weak. Even the Treaty establishing a Constitution for Europe would not give it the power to carry through its own proposals against the will of the Commission and the Council. The Council, which is legitimised very indirectly, remains the most powerful institution. Theoretically, the national governments represented in the Council are answerable to the national parliaments. However, given that Council decisions are often the result of complicated negotiations or package deals, as far as I know, in fifty years of European integration there has not been a single case of a national government being brought down because of a position it adopted in the Council. Meanwhile the national parliaments often become nothing more than “executing officers”, merely implementing the will of the governments that, through the Council, is imposed on them. In many cases, the national governments, working together, have taken decisions in the Council that they would not have been able to carry through at home, encountering no, or not much, resistance from the European Parliament. Usually we use the terms “deparliamentarisation” and “governmentalisation” to describe this phenomenon, but we can also call it the *rule of governments*.

2. The need to adapt — not to abandon — the concepts of the general theory of the state in the process of supranational integration.

In the attempt to find appropriate solutions to the many problems that accompany European integration, we must not abandon the concepts traditionally found in the general theory of the state, but rather adapt them carefully to the peculiarities of supranational integration. The common

idea that the European Union is not and never will be, or must never become, a federal state is dangerous because it provides an easy justification for neglecting, in the integration process, the fundamental European values and ideas. The same is true of the stereotype of the EU as a *sui generis* entity, which may be seen as nothing other than a capitulation of science. The European Union might be the first entity of its kind but it will not be the last. Already today, with the African Union, there exists an organisation intended, sooner or later, to follow in the EU's footsteps and become a second supranational union, and there will be others in other parts of the world. It is true that the Union is not a state. But it is close to being a state and therefore *as dangerous as a state*. When we analyse this situation thoroughly, we find that there could come a point at which it is in the interest of our common values to change from the dynamic form of organisation of the supranational union to the more stable federal state. And we will find that in most cases it is more appropriate to transfer and adapt the ideas that, in the past, were developed for the states, rather than those developed for institutions based on public international law. In short, the general theory of the state needs a new chapter containing a *general theory of the supranational union*.⁶

3. The existence of a people at the level of the European Union.

In the general theory of the state, the notion of the "people" plays an important role. Yet even now, on the eve of a European constitution, the idea of a "European people" generates uneasiness. The idea of a transnational people still appears rash — as long as this transnational people does not declare itself a nation (and thereby return to the old concepts). In addition, the idea of a people in the absence of a state as a legal and philosophical phenomenon is not compatible with the traditionally state-orientated way of thinking. Finally, will a European people not compete with — or even replace — the peoples of the member states?

The answer is no, it will not, providing we develop a concept that, in the context of a functional approach, adapts the notion of people to the late-twentieth-century concepts of permeable statehood (*offene Staatlichkeit*)⁷ and supranationality. We have to rid ourselves of the historical, ethnocentric and cultural prejudices created in us by the doctrine of the nation (the cultural nation or *Kulturnation*). For legal science, what counts is not an ethnological, cultural-anthropological or historical concept, but rather a *normative notion of people, deriving from the general theory of the state*. "People" is the term for a community of humans

that belongs to a given governing entity. Traditionally, for us, the people is the people of a state, that is the community of the citizens of the state who support the state and are responsible for it. As such, it can but does not need to be based on ethnic or cultural homogeneity, a common language or a common history. It is the *formal link constituted by their common citizenship of the same governing entity that unites individuals as a people*. And just as national citizenship unites the citizens of a state as the people of that state, so citizenship of the Union (art. 17 et seq. EC Treaty) unites the citizens of the Union as the people of the European Union. Hence there is no need to cite the common roots in antiquity, Christianity, the Enlightenment and a 2000-year-old Western culture in order to prove the existence of a European people. However, it seems clear, that for legal science, there is no "European people" as such, only the people of a particular European governing entity. And, to mention another point: at the moment, the Swiss citizens do not belong to that European people, in spite of all their strong ethnical, cultural and historical links with the rest of Europe.

However, even this formal and functional approach cannot entirely forgo material criteria of cohesion. A corrective, of a sociological nature, is indispensable in order to make sure that the notion of people does not become divorced from reality: there has to be the *will to live together in the community concerned*, and in the case of the European Union this will has already been demonstrated in the democratic procedures for the ratification of the founding and accession treaties.

4. The plurality of peoples in the multi-level system of the twenty-first century: the people of the union, the people of the state and the people of the region.

The supporters of the traditional nation-state perspective might feel concerned: if there is a European people, what has happened to the peoples of the member states? As we have seen above, the states have not given up their statehood and their sovereignty is intact. So there is no reason to assume that their peoples have disappeared. However, we have to adapt the general theory of the state to the *complex manifestations of public power in the twenty-first century's multilevel system of government*: just as there is a plurality of governing entities fulfilling public tasks at different geographical levels (union, state, federated state/region, municipality etc.), so there is a *plurality of peoples*. Every governing entity that represents the citizens at its particular geographical level is

supported by its own people. The different peoples are imbricated vertically one in another (like Russian dolls), as are their governing entities. Thus, there is a Catalan people within (and not instead of) the Spanish people, a Bavarian people within the German people, and a South Tyrolean people within the Italian people, and all are part of the European people. Principally, each people performs for its particular level the functions that law or legal science assigns to "the people". We can call this a *functional notion of people*. The same human being is part of the Catalan *and* the Spanish, the Bavarian *and* the German, the South Tyrolean *and* the Italian people, and finally part of the European people too. And so he will remain in the event of the transformation of the European Union into a European federal state, because in this case it is not the existence but only the status of the various peoples that will change. From the perspective of the functional notion of people, the transition to a European statehood appears much less threatening. The plurality of peoples demands a *multiple (cumulative) identification* of the citizen with the various governing entities to which he belongs, and in fact this is, largely, what already happens in practice.

With regard to the consequences of statehood and sovereignty it is obvious that the different peoples are not totally equal. The legal status of a supranational union, a state and a sub-national governing entity (federal state or region) is different, and this affects the status, role and functions of the respective peoples. For example, the peoples of the state or their representatives can decide to eliminate sub-national entities, thereby eliminating the related peoples as legal entities too. If they dissolve the Union, its people, too, will disappear. Until such time as the European Union is transformed into a European federal state, the European people cannot, by itself, secure its own existence. Therefore, we should not refer to "the people" in general but to the "people of the union" ("*peuple d'Union*", "*Unionsvolk*"), the "people of the state" ("*peuple d'Etat*", "*Staatsvolk*") or the "people of the region" ("*peuple de Région*", "*Regionalvolk*" / "*Landesvolk*").

5. The capacity of the European people to provide democratic legitimacy.

Essentially, as the people of the Union, the community of the citizens of the European Union can perform the same functions at the level of the Union that are performed in a state by the people of the state. The same goes for the peoples of the regions. There is no need to dream up dubious concepts like the "Catalan part of the Spanish people" or the "Bavarian

part of the German people" in order to demonstrate the democratic legitimacy of the politics of the Generalitat de Catalunya or the Freistaat Bayern. The capacity to create democratic legitimacy is not a privilege of the peoples of states or of nations. Rather, it is the task of the *entire body of citizens who must support and accept responsibility for the decisions of their governing entity*. Most founders of democratic theory, such as the Abbé Sieyès for example, would not hesitate to transfer the ideas they developed for the state (in their time, the only important form of organisation) to the new supranational form of organisation.

Language differences certainly do not make democracy impossible but they can be a serious obstacle when it comes to *putting it into practice*. Complex measures, technical and organisational, are needed in order to ensure a broad democratic debate that overcomes language barriers. Given the availability of modern means of communication, such as multichannel TV and multilingual internet sites, this is not a problem of possibility but of good will. In this regard, the European Union, once a groundbreaker with its multilingual internet server "Europa", has regressed considerably in the wake of its enlargement.

The existing founding treaties do not exploit the potential of the European people as a source of legitimacy. They do not allow European referenda and they institute a European Parliament which, according to art. 189 EC Treaty, consists "of representatives of the peoples of the States." While the European Parliament might, in practice, act as though it represents the European people, in theory it does not. The constitutional treaty, however, allows another interpretation. According to its art. I-20(2), the future European Parliament shall be composed of "representatives of the Union's citizens." In addition, it makes provision for the "citizens' initiative" [art. I-47(4)], which must have the support of a million nationals from "a significant number of Member States."

6. The primacy of the democratic legitimisation of European decisions by the European people.

The existence of a source of legitimacy at Union level is necessarily reflected in the role played by the peoples of the member states. They retain their significance within their own states and also their capacity to legitimise the Union's measures. But as mentioned above, what counts is the intensity of the democratic legitimacy conferred. This intensity depends on the degree of mediation but also on the *proximity of the events and problems (Sachnähe) to the legitimising people*. In democratic theory

there exists a principle of the *general primacy of the legitimisation by the people of the acting governing entity*, given that this people is the community most directly affected, the one best able to come to an appropriate decision, the one most dependent on widespread acceptance of the decision, and also the one that will suffer most in the event of a wrong decision. The risk that particular interests of another geographical level might corrupt the decision, is smaller. The European people and its representatives are the best candidates to pursue a *European public interest* that is more than just the sum of the particular national interests of the member states.

Therefore the European Parliament, designed to represent the people of the Union, should play a guiding role in the democratic process, including legislative procedures. A stronger participation of the parliaments of the member states, as was proposed by Giscard d'Estaing, might create a complementary source of legitimacy but it does not constitute an alternative to such a guiding role. Furthermore, the introduction of *European referenda* could increase the European citizens' awareness of their *direct* responsibility for the Union. In this regard, the institution of the citizens' initiative (art. I-47) is a first step in the right direction.

7. The role of the peoples of the member states in the process of supranational integration.

In the complex process of supranational integration, the peoples of the states still have an important role to play. Besides their traditional role within their own states they make a *complementary contribution* to the legitimacy of the Union's decisions, in particular through the democratic legitimisation of the representatives of the national governments in the Council. Furthermore, the primacy of legitimisation at Union level applies only to the *action* of the Union but not to its foundation, to the attribution of competences, or to decisions on its fundamental design. These questions are regulated by international treaties between the member states and deeply affect their legal and political status. Therefore, for these basic decisions, legitimisation by the peoples of states, or a double legitimisation, is required

8. The role of the European and national people in the creation of European Constitution.

The role of the European and national people in the creation of a

European constitution is a particular problem. According to constitutional theory, a democratic constitution must be based on the "pouvoir constituant" of the people; in practice, this is usually guaranteed by a constitutional referendum. However, in a supranational union, this "pouvoir constituant" of the people is not possible: the highest source of law is the founding treaty, and therefore the constitution can only have the legal nature of an international treaty — as in the case of the Treaty establishing a Constitution for Europe. As such it cannot be concluded by the people, neither that of the Union nor those of the member states, given that, in public international law, only the states have treaty-making power. In contrast to the German term *Völkerrecht*, public international law does not recognise the peoples of the states or the union as subjects endowed with the capacity to act. This means that sovereignty of the people, in the sense of their having ultimate decision-making power, is impossible in a supranational union, due to its international foundations. The states, however, can act on their own and in their own name. They can largely disregard the will both of the peoples of the states and of the people of the Union with regard to whether and how a European constitution should be enacted. Given the outcome of the referenda held in France and the Netherlands in 2005, we must assume that this is precisely what has happened in quite a number of states where the Treaty establishing a Constitution for Europe has been ratified not by a referendum but by an act of parliament.

If we insist on the sovereignty and "pouvoir constituant" of the people, we must give up the European constitutional project, unless it is combined with the foundation of a European federal state. If we do not insist on this, from the perspective of democratic constitutional theory, we must then ensure that the legitimacy of the Union's constitution is as similar as possible to that of a constitution based on popular constituent power. No deficit of legitimacy that is not absolutely inevitable due to the international character of the Union can be tolerated. This demands that the people of the Union play a dominant role in the political process. First, the representatives of this people must be predominant in the assembly preparing the draft constitution; that was not the case in the European Convention, which had 84 representatives of national and 18 representatives of European institutions (and not a single direct representative of the people). Second, this people must be active participants in a Union-wide, transnational and multilingual constitutional debate, like that which actually accompanied the work of the European Convention. Third, a political decision of the people of the Union in a Union-wide referendum

is required. This cannot be replaced but should be accompanied by national referenda in all the member states. Since the enacting of the European constitution affects the status of the states, it must be legitimised by their peoples too. The states should be obliged to amend their constitutions, as far as is necessary, in order to allow the referenda to take place. The best solution would be a double referendum combining the votes taken at national and European level.

The standard procedure that has been chosen for the ratification of the Treaty establishing a Constitution for Europe (see art. IV-447 sect. 1) obviously does not meet these requirements. Therefore, should this Treaty come into force, it will be possible to consider it democratically legitimised in a conventional sense (like any other international treaty) but not a democratic constitution as understood in the context of democratic constitutional theory. It will suffer from a considerable lack of legitimacy. It will, however, not be the first constitution to present this shortcoming.

V. *Towards Global Democratic Legitimation in the Era of Globalisation?*

Can we transfer the ideas set out here to global level? Is it conceivable that globalisation will create not only a global market but also a *global people* providing democratic legitimacy for a worldwide governing entity?

Initially, answer would seem to be “yes”, but on deeper analysis it turns out to be “no”: what I have been referring to here is the people of an advanced, deeply integrated organisation. The supranational union draws upon a *close-knit community of responsibility and solidarity* which resembles the community of common destiny (*Schicksalsgemeinschaft*) evident in the state. Should such an organisation arise at global level, it will have its own, global people. However, this is unlikely to happen over the next century. The numerous international and supranational organisations, including the WTO (and NATO), do not serve the purpose of integration but instead act as specialised tools of their member states, helping the latter to perform their functions as states. The only *general* global organisation, the United Nations, is not a deeply integrated organisation either. It does not unite the citizens of its member states in a new, global political community. Incidentally, the notion of “people” not only expresses the close ties that exist within the community concerned, but also serves to set the community apart from others — a function which has been important in the nation-states. As long as there are no others in sight, there is no need for that.

So, global international cooperation can be legitimised only indirectly by the peoples of the states, through the national parliaments and governments. And the legitimacy they confer is clearly weak if we consider the high degree of mediation and the fact that many governments represented in international institutions have no democratic legitimacy at all. At the moment, it is hard to imagine that organisations like the UN or the WTO will one day be democratic institutions. We should refrain from trying to apply to them concepts that belong to the general theory of the state, like people and democracy (or even constitution). Because to do so would be to corrupt them — not to adapt them to the conditions of the twenty-first century. The states do not have the monopoly on the concepts of people and democracy; these are, however, concepts reserved for integration-oriented organisations which unite the citizens involved in the integration process in a new political community.

NOTES

¹ Particular characteristics distinguish the European Union as a governing entity, allowing a new category to be developed within the existing taxonomy. The most important characteristic is the Union's status as a supranational organisation whose purpose is *integration*. Selected partners have come together in a long-term, all-embracing union, recognising that it embodies a value with regard to the common future they envisage. The Union performs its integrative function primarily by carrying out tasks in the public sphere through the *exercise of supranational public power*. It also provides the institutional framework for formalised and institutionalised intergovernmental cooperation, however, and provides a territory for the substantive law through which integration is carried out. As a general organisation based on integration, the Union also provides an adequate conceptual framework for tasks of all kinds from any political sphere. The Union's *dynamic quality* distinguishes it both from traditional kinds of international organisation and from the state.

² Schmitz, *Integration in der Supranationalen Union*, Baden-Baden, 2001, p. 163 onwards.

³ Schmitz (note 2), p. 220 onwards.

⁴ See the references at Schmitz (note 2), p. 94 onwards, in particular the works of Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden, 1997, and Stentzel, *Integrationsziel Parteiendemokratie*, Baden-Baden, 2002. See also Augustin, *Das Volk der Europäischen Union*, Berlin, 2000 (on the question of the existence of a European people).

⁵ See also the more detailed presentation in Schmitz, *Le peuple européen et son rôle lors d'un acte constituant dans l'Union européenne*, RDP 2003, p. 1709 onwards = *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union*, *Europarecht*, 2003, p. 217 onwards.

⁶ There are already publications following this line, see in particular von Bogdandy (editor), *Europäisches Verfassungsrecht*, Heidelberg, 2003; (id.) *Supranationaler Föderation*.

lismus als Wirklichkeit und Idee einer neuen Herrschaftsform, Baden-Baden, 1999; (id.) "Die Europäische Union als supranationale Föderation", *Integration* 1999, p. 95 onwards; (id.) *Die europäische Option*, Baden-Baden, 1993.

⁷ Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, Tübingen, 1964, p. 42 onwards; Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, Berlin, 1998. Kaufmann, "Integrierte Staatlichkeit als Staatsstrukturprinzip", *Juristenzeitung* 1999, p. 814 onwards, even uses the term integrated statehood [*integrierte Staatlichkeit*].

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