

Peace and the New Dimension of the Nuclear Threat

Once again, mankind is in thrall to the nuclear nightmare. The nuclear threat did not vanish with the end of the Cold War; on the contrary, the logic of nuclear deterrence, no longer limited to the confrontation between the USA and Russia, has become one of the factors contributing to the growing uncertainty and instability of today's regional and global balances. The need to rule out the possibility of nuclear war is actually even more urgent now than it was in the 1980s, the period in which the USA and the USSR embarked on the atomic era's most concrete attempt at peacemaking and millions of people the world over went out into the streets to demand the dismantling of the nuclear arsenals.

And yet apparently, in recent years, nuclear disarmament has not been a main concern of politics, of governments or even of public opinion. It is certainly true that mankind now faces many other difficult challenges (climate change, the energy crisis, the depletion of the world's raw materials and the problem of international terrorism), but it is an illusion to think, as many do, that these crises can be tackled effectively in a world that continues to live, as it has for almost seventy years now, under the sword of Damocles of an escalation of the risk of nuclear war — a world in which, because of this risk, resources continue to be channelled away from the necessary promotion of sustainable development in line with our planet's environmental limits and with the need to improve the living conditions of billions of people. It is equally senseless to think, as some governments appear to do, that the nuclear threat can be confined to the possible and occasional use of atomic weapons by and between warring states, believing that this use can be controlled and at the same time feigning ignorance of the dramatic effect it would have on mankind as a whole. After all, we are living in an international climate in which some states, like Iran, are being opposed in their efforts to obtain nuclear weapons, while others, like India, are being encouraged to develop them.

While such attitudes may help to dispel some of the fear surrounding the nuclear threat, for this very reason they prevent people from grasping

the real seriousness of the problem and from gaining a proper understanding of its root causes, which are linked to the world's division into sovereign states. Instead, if we want to shake politics out of its current passive acceptance of the growing nuclear anarchy in the world and put an end to the widespread cultural and psychological apathy towards the nuclear question, we must reformulate and affirm the criteria that must be met in order to tackle the problem of peace effectively, and also seek to analyse carefully how events have evolved. The reflections that follow are intended to do just this.

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The first point that must be made is that the threat of nuclear actions cannot be removed without also removing the risk of war. And this is possible, as Kant explained, only by replacing the system of sovereign states with a global federal system “in which every state, even the smallest, might expect its security and its rights, not by virtue of its own power or as a consequence of its own legal judgement, but solely by virtue of this great federation of peoples, this united power and the decisions based on laws of the united will.” This is the only way in which the problem of peace and war can be resolved definitively. But to guide our action in the current phase, in which this objective is not yet immediately pursuable and constitutes only a point of reference, we need to identify, as Kant again pointed out in the *Preliminary articles for perpetual peace*, the minimum conditions that must be met in order to allow the states to renounce their constant pursuit of greater power and start moving towards the promotion of the political unity of the whole of mankind. As Mario Albertini pointed out, the greatest difficulty lies “in the need to use the powers that were *born of the need for power* — the states — in order to attain security *not though power* but only through law — the federation.”

In the past few decades, the world, in spite of the growth of interaction and interdependence in the economic, commercial and environmental spheres, has not set out on the road that will lead to its political unification. On the contrary, it has been forced to witness both its own disintegration and also the rather alarming evidence of the frailty of the United Nations and of other global organisations. Even regional integration in its most advanced form, the EU, has proved unable to make a valid and practical contribution to finding a solution to this problem and to that of the definition of an adequate model of supranational government. And yet it has never been as clear as it is today that mankind, to avoid catastrophe,

must find a way of uniting.

The efforts of US president Ronald Reagan and Soviet Communist Party secretary Mikhail Gorbachev, during the Geneva and Reykjavik summits of 1985-86, to launch a process of détente reveal both the nature of the difficulty inherent in putting the power of the states at the service of the building of peace, and also the extent to which this difficulty is linked to the evolution of the framework of international power. The memoranda of conversation of these meetings, now freely available on the Internet, were commented on at length by Jonathan Schell in his most recent book *The Seventh Decade*, and by Richard Rhodes in *Arsenals of Folly*, and they dramatically explode the idea that international politics is governed purely by the free choices and goodwill of the parties involved; indeed, what they actually bring out is just how little room for manoeuvre the states have when striving to promote peace in a world governed by the rule of force. These memoranda provide an illustration of how the nuclear logic induces states first to procure atomic weapons, in order to increase their own security or power, only then to find themselves, fearful of the terrible damage they could incur, doing everything they can to reduce the risk of actually using them. What the memoranda also reveal is the extent to which the global balance of power always conditions the course and outcome of negotiations between states.

As regards the first of these aspects, it must be recalled that one of the aims of the Geneva and Reykjavik summits was precisely to try and reduce the risk of nuclear war (even accidental). Indeed, both Washington and Moscow realised they could no longer rationally keep their respective arsenals under control. And it was this realisation that prompted Reagan and Gorbachev to give up on the “negotiating minutiae” of the experts, which were leading nowhere, in favour of what is referred to in the memoranda as “big politics.” Having abandoned the propagandistic and ideological tones typical of the bipolar confrontation, the two governments had to start afresh from the difficult acceptance of the parity of their strategic military offensive and defensive capabilities. In practice (and leaving aside the wrangling over *minutiae* by the hawks and doves on each side), the USA and the USSR had, by this time, each acquired a power of destruction so great that it could no longer credibly be claimed to serve as a deterrent in the bipolar confrontation. Today, we tend to forget, even though we are going back only two decades, that the American and Soviet delegations (including their respective military leaders) striving to find a solution to this problem even entertained the idea that nuclear weapons might, within the space of a decade, be

eliminated altogether.

The second aspect, namely the influence of the development of the global balance of power, instead explains why the Iceland summit ended inconclusively. Ultimately, the summit came to nothing not because one side lacked faith in the other's possibility of reducing its existing arsenal, but rather because there prevailed an attitude of diffidence, which proved insuperable, towards the respective plans to develop strategic defensive and offensive nuclear forces. This diffidence was exacerbated by the absence of rules and of institutions above the parties that could share the exploitation of the new technologies, but mainly by the uncertainty that reigned in two areas of the world crucial for the security of both the USA and the USSR: Europe and Asia. In Europe, the real cause for concern was certainly not the nuclear arsenals of France and the United Kingdom. The Soviet and American governments knew very well that the stabilisation of Europe depended on a defusing of military tensions between Moscow and Washington, and they were quite unconcerned about the scope and quality of the single European states' nuclear capabilities. "Can we really believe that Thatcher and Mitterrand, or whoever will succeed them, might in any conceivable circumstance press the nuclear button against us? Can our strategy towards Europe really be based on such an idea?" the Soviets asked in their internal memorandum prepared in the run-up to the Reykjavik summit. Conversely, Europe's weakness was a real problem for the Soviet and the American governments, both of which realised that, at most, all they could hope to achieve in this continent, so exposed to international and regional crises, so dependent (both for trade and energy) on the rest of the world, and so militarily weak, would be a temporary, not a definitive, stabilisation of their power relations. In short, it proved impossible to banish from the negotiating table the possibility (or spectre) that the power vacuum in Europe might heighten tensions between the superpowers and induce them to step up the level of their confrontation there.

In Asia, on the other hand the problem was of an entirely different nature: neither the United States nor the USSR could ignore the potential for growth, and also for nuclear development, of countries like China and India. In truth, these developments were already seen as inevitable. Thus, when, in 1988, India proposed a "Baruch plan" for Third World, under whose terms the developing countries would have undertaken not to procure nuclear arms and not to carry out fresh nuclear tests providing the two major superpowers undertook to destroy their own arsenals by 2010, neither Reagan's America nor Gorbachev's Soviet Union — which only

two years earlier had been examining the possibility of eliminating their own nuclear weapons by the end of the century — felt able to take the offer seriously. What this episode revealed, above all, was the provocative nature of the Indian proposal and also the shallowness of the pacifism professed by the two superpowers.

The rest of the story, which unfolded in the last decade of the last century, is familiar to us all. While the USA and the USSR were officially reducing their nuclear arsenals, behind the scenes they were confirming their funding of military development programmes unveiled quite openly in the course of high-level talks: in the USA's case, the plan for a strategic defence initiative — although this actually never saw the light of day, it became the point of reference for the development of the USA's strategic doctrine for the twenty-first century — and in the USSR's case, the plan to increase its strategic response capacity with a new generation of missiles (the installation of which began during Putin's presidency).

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This experience shows clearly how attempts at peace-building always struggle to take root and survive outside a situation of relative international political, economic and military stability. In 1985, in Geneva, the USA and the USSR told the world that “a nuclear war cannot be won and must never be fought” and that, for this reason, they had decided no renounce their efforts “to seek to achieve military superiority.” Yet less than twenty years later, the Moscow Treaty of 2002 confirmed on a diplomatic level the shift in the relations of force that, on a practical one, was already a reality; in other words, the return to confrontation, regional and global, between the USA and the Russian Federation, successor of the former Soviet Union. Indeed, as America's worried senators and congressmen were told in a report issued by the National Resources Defense Council in the wake of the attack on the Twin Towers, the new treaty, unlike the previous ones, did not place any “binding restrictions on what each of the superpowers could do.” As a result, once again the quest to achieve military superiority began — officially, too — to dominate Russia-American relations. It is worth recalling briefly why and how this point was reached, a point that has been followed only by a deterioration of the situation: a growth of the reciprocal mistrust and confrontation between these two states.

The cooperation between Russia and the USA over the question of disarmament began falter when the events of the late 1980s radically

altered the relations of force between them. The collapse of the USSR produced a situation characterised by a marked imbalance of power, in favour of the USA. It was at this point that the United States made the grave mistake (partly due to the absence of other poles of power in the world) of failing to appreciate, in time, that it lacked the strength, by itself, to guarantee international stability and instead sought, at the expense of others, to consolidate and increase its military superiority.

In the space of just a few years, it became clear that Russia's military inferiority was a contingent situation, whereas America's superiority, on the other hand, was quickly undermined by the rapid succession of military crises in different parts of the world, by the rise of the Asian powers, and by international monetary and financial crises. But the abrupt end of unipolarism — this is the expression used in politics to refer in less crude terms to the end of the USA's hegemonic ambitions — has not, however, ushered in a new, more advanced multipolar equilibrium, even though new poles of power have emerged and become established on the world stage. On the contrary, in the current era of globalisation, the practically infinite scope for the intertwining of production, commercial and social processes at international level, together with the level of global interdependence, is actually increasing the causes of confrontations and tensions between the national governments. As a result, today we are, in many ways, living in a situation that, to borrow a term used by Lord Lothian when analysing the international situation between the two World Wars, might be defined as one of international anarchy, even though a few are now, tentatively and euphemistically starting to talk of *apolar disorder*, another ambiguous neologism.

However, the risks of a deterioration and disintegration of the international system have become too obvious to be ignored. It is these risks that prompted former American secretaries of state Henry Kissinger and George Schultz (one of the leading figures at the Geneva and Reykjavic summits) and scientists like Richard Garwin, who helped to design America's first hydrogen bomb, to appeal repeatedly in the international press and on the Internet for the world to be freed from the nuclear threat. And it is these looming risks that have also convinced others, such as Richard Haass, president of the Council for Foreign Relations, to suggest promoting within "a core group of governments" a rapid transition to a cooperative form of multipolarism capable of averting the dangers inherent in *apolar disorder*.

Despite constituting only a very small first step in the right direction, this proposal, should it be taken up, could certainly influence positively

the evolution of the international climate. But *who* should take the initiative in promoting this transition towards an order based on cooperation, and *how*? On the one hand, the USA, despite its progressive weakness and Russia, undeniably a less powerful influence than in the past, are the only two states to have reached, and retained, the status of nuclear superpower, both regionally (in America, Asia and Europe) and at world level; they are also the two states that share the historical and political responsibility for embarking on the strategy of nuclear deterrence, in all its possible forms — from the concept of mutual assured destruction to those of the flexible response and the limited war — and also for attempting all forms of détente, from the balancing of powers to the first embryonic forms of reciprocal security. On the other hand, the confrontation between the USA and Russia in Asia and in Europe shows a disturbing continuity with the second half of the last century. Whereas in Asia the USA and Russia have always been forced to act as leading powers, on an equal footing with China and India, in Europe, they continue to play a predominant role, given that neither the major European states (including Europe's two nuclear powers, Great Britain and France) nor the European Union have the will, strength, means or credibility to look after their own security. In these circumstances, for the USA and Russia, failure to exert an influence over part of Europe would mean running an unacceptable strategic risk, just as it did twenty years ago.

It was precisely to avoid this risk that, after the end of the Second World War, the USA and the USSR began to build and add to the vast nuclear arsenals that, still today, are the basis of their confrontation. It is worth recalling that these arsenals, despite having been reduced, together still account for nearly all of the nuclear weapons present in the world and, considered separately, are still far superior to those of all the Asian and European nuclear powers put together. Were the Americans not fearful, on account of the divided Europeans' intrinsic and chronic weakness, of seeing Europe fall under Russia's influence, they would have no reason to keep nuclear weapons within reach of the Russian Federation. Russia, on the other hand, if it did not have the worry of the physical presence of the American nuclear superpower on its doorstep, would have everything to gain from reducing its arsenals and cooperating more closely with the Europeans. Indeed, a European pole of power, even equipped with only a minimal nuclear deterrence, would have sufficient powers of dissuasion but would not constitute, for Russia, an offensive threat even remotely comparable to the one currently posed by the Americans.

In the light of these considerations, it is possible to see the causal link between the need to create a new European framework, the possibility of bringing about lasting and effective Russian-American reconciliation, and the start of a new era of nuclear disarmament. There is a clear and single reason why, in the 1980s, the European Community failed to do anything to favour the attempt at reconciliation led by Reagan and Gorbachev; why, in the 1990s, the European Union proved unable to prevent the creeping return to the confrontation between the USA and Russia; and why, since the start of this new century, the Europeans have looked on passively as the confrontation between the USA and Russia has once again started to be played out on their own territory. And the reason is this: Europe's institutional framework has shown itself to be incapable of evolving through an infinite series of small steps into a state entity of continental dimensions capable of dealing, on an equal footing, with the world's other poles of power. What is needed, in order for a European actor to be able to enter the global stage, is a federal leap forward, a break with the Union that, in spite of the successes it has recorded, continues to be paralysed by the power of the member states to decide in the last instance on the most crucial questions. In other words, it is necessary, at long last, to create a European federal state equipped with the will and with the minimum means necessary to affirm its independence from Russia and the USA.

The fact that many are still hostile to this idea reflects the difficult historical period the Europeans are currently living through. On the one hand, the majority refuse to accept the obvious need to overcome the current framework in order to create a new one, preferring to keep the existing national sovereignties rather than create a European federal state. They refuse to accept that this step, difficult as it is, is now the only realistic and feasible way of restarting the European project and, through it, of bringing about the transition to a more cooperative, and thus more innovative and peaceful, form of international multipolarism. Others, on the other hand, accept the need for a European pole of power to exert a stabilising influence on the global equilibria but, fearing that the birth of a new state of continental dimensions might further exacerbate international competition, they fail to accept the need to go as far as the foundation of a European state.

Clearly, the creation of a European federal state would not eliminate, overnight, the risk of war *tout court* or even the risk of a nuclear war, but simply freeing the USA and Russia from the obligation to confront each other in Europe would constitute an enormous step forwards on the road

towards world peace. But there is more. The European federal state's acquisition of a minimum nuclear deterrence would be an entirely new development. Indeed, European nuclear sovereignty might reasonably become a reality if, and only if, two conditions are met, in this order: a) France must manifest its willingness to transfer control of its nuclear deterrent to a supranational level, and b) there must be an undertaking from Germany, in the first instance, to share with France the responsibility for governing European nuclear policy in the ambit of the initial core of a European federation. From this perspective, it is clear that a European pole of power will not be created under the banner of a new project for power or a new arms race, but rather under that of the first ever — and thus revolutionary — example of voluntary and peaceful transfer of nuclear sovereignty by a nation-state to a superior level of government.

There is only one avenue that can now be pursued if we want to prevent a further degeneration of the current climate of international anarchy and, by so doing, tackle the new dimension of the nuclear threat. It has become necessary to try, starting in Europe, to impress a new and peaceful direction on the evolution of international relations, and in particular on relations between the USA and Russia. It is a difficult task, but not an impossible one and for the Europeans it will probably turn out to be the last chance history will give them to try, through the force of their example, to persuade the other global powers back on to the road to peace.

The Federalist

The Democratic Principles of the European Union in the Treaty of Lisbon*

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1. *Introduction.*

The Treaty of Lisbon, signed on 13 December, 2007, amended the Treaty on European Union (hereinafter “TEU”) and the Treaty establishing the European Community, and also gave the latter a new name: the Treaty on the Functioning of the European Union (hereinafter “TFEU”).¹ Among the various changes made to the previous texts, the Treaty of Lisbon introduces, into the TEU, Title II, “Provisions on democratic principles.” Title II is a series of new and existing provisions, all of which aim to render the whole EU system more democratic. These provisions, already in part contained in the Treaty establishing a Constitution for Europe, signed in Rome on 29 October, 2004, and subsequently abandoned, constitute the response to the pressing requests contained in the Laeken Declaration on the Future of the European Union, issued by the European Council on 15 December, 2001, which, in defining the mandate of the European Convention, referred as many as twelve times to the need for “democratic legitimacy”, “democratic control”, “democratic values” and the like, thereby reflecting the fact that the system’s level of democracy was, at that time, still the crucial unresolved problem in the process of building Europe.

It is, of course, widely known that each of the various treaties modifying the Treaty of Rome, starting with the Single European Act, set out, among their main objectives, to resolve, or at least, lessen, the problem of the so-called democratic deficit or gap, a problem that has accompanied the process of European integration from its very beginnings, and which the progressive extension of the EU’s competences has apparently aggravated. The problem, basically, is that there is felt to be

too little democratic representation in Community institutions that can issue substantially legislative acts liable to affect the citizens directly, and also a lack of parliamentary control over the Council, the main legislative organ of the European Union. Some people, basing their position on the increasing instances of European Parliament involvement in the Community decision-making process through the co-decision procedure, and also on the fact that each Council member is ultimately answerable to his own national parliament, have played down the extent and the gravity of this problem. Others, on the other hand, noting that the co-decision procedure does not in fact allow the European Parliament to steer the action of the Community in the direction it would like, and also that the control which the national parliaments are able to exercise over their respective Council members seems to be too remote to make any difference, have expressed more concern over it.

In any case, the fact is that the democratic deficit is a problem that has been postponed from one Treaty revision to the next, without there ever emerging the political conditions in which it might be resolved definitively. This should not surprise us; to a certain extent, it is something that seems to be taken for granted in the current stage of European integration. Indeed, it remains true that complete elimination of the democratic deficit will be possible only through the application, within the European setting, of the principle of the separation of powers, according to which legislative power is attributed to a democratically elected body, which also has political control over the executive. There are only two ways in which this could be achieved completely: either by giving the European Parliament (already elected by direct universal suffrage) legislative power within the Community, even against the Council's will, or by having the citizens elect the Council directly, thereby transforming it from a representative body of the states into a sort of high chamber, or senate, within a federal bicameral structure in which state and/or regional interests would be represented. But these solutions would imply movements in a federal direction, and thus the relinquishing of sovereignty by the states. And because such movements have always seemed politically unthinkable, the problem of the democratic deficit can only be lessened, not completely solved.

2. Democratic Principles and Representative Democracy.

In this setting, and given these precedents, the drafters of the Treaty of Lisbon, realising that the citizens of the member states will feel truly

close to the European Union only once they have acquired a greater level of democratic participation in its functioning, introduced into the TEU, as mentioned earlier, Title II, significantly entitled “Provisions on democratic principles.” Title II includes, in Art. 10(1), the following statement of principle: “The functioning of the Union shall be founded on representative democracy.” The said provisions are intended to guarantee the European citizens as much involvement as possible in the functioning of the European Union (both directly and through the national parliaments that represent them), but obviously without ever crossing the threshold at which this level of involvement would imply the relinquishing of sovereignty by the member states. In fact, were the European Union truly and fully based on the principle of representative democracy, it would, as we said a little earlier, be a federal entity that would take the place of the member states. The political need not to cross the threshold just mentioned clearly makes it difficult to establish institutional balances (inevitably fragile) in the current European integration setting and the provisions we are about to consider here are influenced by this difficulty. Indeed, as we shall see, they are often formulated in ambiguous or highly convoluted terms.

Article 10 of the TEU sets out the foundations of the principle of representative democracy, citing the following facts: (i) the European citizens are directly represented at Union level in the European Parliament, (ii) the representatives of the member states in the European Council and in the Council are democratically accountable to their national parliaments or to their citizens, (iii) every citizen has the right to participate in the democratic life of the European Union, (iv) political parties at European level contribute to forming European political awareness and to expressing the will of the citizens of the Union.

This provision, a commendable effort to approach this issue systematically, contains elements that certainly constitute steps towards reducing the problem of the democratic deficit, albeit within the framework of the intrinsic limitations just mentioned.

Analysing the above points in more detail, the reference to the European Parliament’s representativeness is undoubtedly significant, given the greater number of decisions that now, under the Treaty of Lisbon, have to be adopted in accordance with the ordinary legislative procedure, which is basically the equivalent of the co-decision procedure. This procedure, by making provision for acts to be adopted jointly by the Council and the European Parliament, basically gives the Parliament the right of veto, but not the capacity, at least when it is in disagreement with

the Council, to direct the action of the European Union according to its own will, which is what the concept of representative democracy would demand. Furthermore, the reference to the fact that the single members of the European Council and of the Council, in their capacity as heads of state or of government or members of national governments, are politically accountable to their national parliaments, is a statement of the obvious, and one that nevertheless fails to confer democratic legitimacy on these institutions at European level. In fact, these institutions continue to escape the political control of the European Parliament, continue to embody the will of the executive powers in the respective member states, and their members continue to be politically accountable, in their pursuit of national interests rather than the general interests of the European Union, to their respective national parliaments. Consequently, neither of these two institutions can be regarded as a (democratically elected) second chamber within a bicameral parliamentary system, and it would be incorrect, referring to the affirmation that the legislative function within the European Union is exercised jointly by the European Parliament and by the Council [Art. 14(1) and Art. 16(1), TEU], to liken this function to the one typically fulfilled by a bicameral parliament within a democratic system.

As far as the citizens' participation in the democratic life of the European Union is concerned, Art. 10(3) TEU refers explicitly to the principles of openness and closeness, stating that decisions shall be taken as openly and as closely as possible to the citizens. Furthermore, Art. 11(1) TEU recalls the opportunity that citizens are to be given to make known and publicly exchange their views in all areas of Union action, and in particular when the Commission issues its so-called green papers. An interesting new development, in this regard, is the conferring on groups of citizens (that must each number at least one million people) of a power of initiative that would allow them to invite the European Commission to submit appropriate proposals should legal acts be considered necessary for the purpose of implementing the Treaties [Art. 11(4) TEU]. It is, however, specified that the citizens entitled to use this power of initiative must come from a "significant number" of member states, a number that, in accordance with Art. 24(1) TFEU, will be decided by the European Parliament.

Finally, the reference to the role of political parties at European level adds little to the provisions that were already in place. It is worth recalling that political parties come into being wherever there exists political power to be won or held on to. The function of political parties, in a

democratic state, is to compete with one another to form the majority in a legislative body of which the executive power is the expression and by which the executive power is controlled. The role of the political parties within the European Parliament, which does not have sole legislative power, or any political control over the Council, cannot be likened to that of the national political parties, but seen rather as a paving of the way for a—let us hope—federal evolution of the European Union, or of a section of its member states. However, in this regard, a further important new development is introduced by Art.17(7) TEU (integrated and better specified by Declaration 11, annexed to the text of the Treaty of Lisbon), which states that the European Council, when it presents the European Parliament with a candidate for the role of President of the Commission, must take into account the results of the elections to the European Parliament, meaning that the said candidate must, in principle, belong to the political party that won a majority in the European Parliament. This provision can be read in both a positive and a negative light. On the one hand, it is, on a purely formal level, an element that makes the European Union's institutional framework more democratic. On the other, it must surely be obvious that it is not necessarily a good thing for a body (the Commission) that should be promoting the general interests of the European Union, free from the political influences to which the Council is, instead, necessarily exposed, to have an openly political president who identifies with a political majority. We feel, instead, that the Commission, in its capacity as overseer of the application of the Treaties, should be absolutely free from political influence; indeed, in exercising its power of legislative initiative it should only be formulating proposals that are in the general interests of the European Union, proposals that it will then fall to the European Parliament and Council to evaluate politically.

3. The Provisions on European Citizenship.

Within the body of the provisions relating to democratic principles and to the participation of the citizens in the democratic life of the Union, Art. 9 TEU, in particular, makes reference to citizenship of the European Union, an idea that dates back to the Treaty of Maastricht and is now covered, in detail, by Articles 20 to 25 TFEU, even though these articles have not introduced any substantial changes.

In accordance with Art. 9 TEU, every national of a member state is a citizen of the European Union. It must be understood that an individual's

status as a national of a member state depends on the law in force in the single member states, meaning that EU citizenship is acquired or lost as a result of the acquisition or loss of national citizenship.² In situations in which a member state recognises an individual's dual citizenship (that of the said member state and of a third state), this dual-nationality status does not prevent him from enjoying, throughout in the EU and regardless of the law in force in other EU member states, all the rights that his EU citizenship confers on him. This is what was decided by the Court of Justice³ when it obliged Spain to guarantee EU citizenship rights to an individual recognised by Italy as having dual (Italian and Argentine) nationality, even though in Spanish law the fact that the individual in question lived in Argentina made him an Argentine national.

Art. 9 TEU states that citizenship of the Union "shall be additional to national citizenship and shall not replace it", a point that is reiterated by Art. 20(1) TFEU. EU citizenship is thus a *sui generis* concept of citizenship not to be confused with national citizenship which, determined by each country's internal legal order, implies subordination to a state. In short, the European Union adopts its own idea of citizenship, which does not interfere with any of the characteristics typical of national citizenship status as defined in national domestic law and is, in fact, defined exclusively through the Treaties. In this regard, even though Art. 20(2) TFEU states that EU citizens "shall enjoy the rights and be subject to the duties provided for in the Treaties", in actual fact, the provisions included pertain only to rights and no reference at all is made to duties associated with EU citizenship. This constitutes further confirmation of the *sui generis* nature of the idea of European citizenship.

In short, the EU citizen shall (a) be entitled to move and reside freely within the territory of the member states (Art. 21 TFEU); (b) have the right, when residing in a member state of which he is not a national, to vote and stand as a candidate in elections to the European Parliament and in municipal elections in that state, under the same conditions as nationals of that state (Art. 22 TFEU); (c) the right to protection by the diplomatic or consular authorities of any member state, under the same conditions as the nationals of that state, when in the territory of a third country in which the member state of which he is a national is not represented (Art. 23 TFEU); (d) the right to petition the European Parliament, to apply to the European Ombudsman (who is empowered to receive complaints relating to instances of maladministration), and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language [Art.20(2)d, TFEU].

This list of rights is not to be considered absolute: the list of rights given in Art.20(2) TFEU is, in fact, preceded by the expression *inter alia*; moreover, the Council, acting unanimously, may add new rights, which, in order to come into force, must be approved by the member states in accordance with their respective constitutional requirements (Art. 25, par. 2, TFEU).

Extension of the list of rights conferred by EU citizenship thus demands a special simplified procedure for revising the Treaties, different from the general simplified revision procedure provided for by Art. 48(6) TEU. The differences between the two approaches lie in the fact that in the case of the special procedure it is the Council, not the European Council, that is the driver of the initiative, and also in the fact that the modification concerns Part Two of the TFEU (which includes the provisions on EU citizenship), whereas the simplified revision procedure provided for by Art. 48(6) TEU is applicable only to the provisions contained in Part Three of the TFEU. The similarities, on the other hand, include the absence of the need to convene a convention or intergovernmental conference, and the reference made in both cases to the need for “approval”, rather than “ratification” by the member states. This choice of terminology seems to indicate recourse to rather weak forms of manifestation of the state’s will (weak compared to formal ratification), but it is important to remember the need to comply with each country’s internal constitutional requirements.⁴ As far as the Italian legal system is concerned, we could examine the possibility of introducing changes in this area as agreements in simplified form, which do not require ratification and thus parliamentary authorisation to proceed with their ratification. However, it seems to us that this would contravene Art. 80 of the Italian Constitution, which states that parliamentary intervention is required in the case of political treaties and treaties that imply changes to the law (a treaty modification will always result in a modification of the law on the authorisation of ratification of treaties and of the mode of execution of the treaties).

The non-absoluteness of the list of rights is justified, also, by the fact that some parts of the EU Charter of Fundamental Rights of 7 December 2000 (Charter of Nice), now acknowledged as having the same legal value as the Treaties [Art. 6(1) TEU], make provision for the application of certain rights (basically the ones mentioned above) exclusively to the citizens of the member states, rather than to all people.

The main rights deriving from EU citizenship need to be analysed specifically, in order to verify the degree to which they really do concern

the participation of the citizens in the democratic life of the Union. For example, all citizens of the European Union are, as such, entitled to move and reside freely within the territory of the member states, which therefore means even when they are not (or are no longer) working there; workers, on the other hand, enjoy a special freedom-of-movement regime based on the provisions contained in Part Three, Title IV, TFEU. It is worth recalling that the concept of the free movement of persons that emerges from the provisions on the EU as an area of freedom, security and justice (contained in Part Three, Title V, TFEU) is much broader, given that it applies to all people, regardless of whether or not they are citizens of an EU member state.

The freedom of EU citizens and their family members to move and reside freely was regulated by Directive 2004/38/EC of 29 April 2004, which (Art. 7) requires that, for a stay of over three months, the beneficiary must be able to demonstrate that he has sufficient economic resources not to become a burden on the social welfare system of the host member state. Furthermore, as shown by Art.21(1) TFEU, this freedom is not limitless, but “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.” In particular, under Article 27 of the above directive, member states may take measures restricting freedom of movement providing this is done on grounds of public policy, public security or public health, and in accordance with the principle of proportionality.

Despite being provisions aimed at the member states, both Art. 21 TFEU and the directive just mentioned give beneficiaries a right that can be invoked before national judges, given that the European Court of Justice had already recognised the “direct effect” of a previous provision that corresponded to Art. 21 TFEU.⁵

With regard to the right to vote and stand as a candidate in municipal elections in one’s country of residence (when one is not a national of that state), in some countries it proved necessary to modify the Constitution in order to allow full recognition of this right.⁶ To give effect to the provision in question, the Council issued Directive 94/80/EC of 19 December 1994. This directive gives EU citizens the faculty to choose whether to vote in their own country or in their country of residence, and it gives the states the possibility to bar non-citizens from holding executive posts at local level (e.g. from becoming mayor) and to introduce derogations when more than 20 per cent of the resident electorate is composed of EU citizens who are not nationals of the state in question.⁷ The right to vote and stand as a candidate in elections, as set out in the

provision under examination here, is linked to the prohibition of discrimination on grounds of nationality declared in Art. 18 TFEU. (This article, however, fails, even by implication, to guarantee EU citizens the right to vote in political elections held in their country of residence, which may not be the country of which they are nationals).

The freedom to vote and stand as a candidate in European elections in one's country of residence (when one is not a national of that country) is a right that had, previously, already been established unilaterally by some states. The arrangements for the exercising of this right are laid down in Directive 93/80/EC, issued by the Council on 6 December, 1993.⁸

Diplomatic or consular protection in third countries is normal practice in international relations and is indeed expressly provided for both by the Vienna Convention on Diplomatic Relations of April 1961 (Art. 6 and Art. 46), and by the Vienna Convention on Consular Relations (Art. 8 and Art. 27) of 24 April, 1963. In fulfilment of the provision in question, the representatives of the governments of the member states, meeting within the Council of 19 December 1995, issued decision 95/553 regarding protection for citizens of the European Union by diplomatic and consular representations. This protection comprises assistance in cases of death, serious accident, arrest, violent crime, as well as repatriation of distressed citizens of the Union, but it cannot extend to the provision of financial assistance without the prior permission of the member state of which the citizen in question is a national. Obviously, to make it possible to implement this kind of protection, provision is also made for the reaching of special agreements not only between the member states involved but also with the third country in which the EU citizen seeks protection. It is worth recalling briefly that the diplomatic and consular protection under discussion here is something entirely different from the diplomatic protection that, in accordance with general international law, can be provided by a state whose citizen, in another state, has suffered an injustice as a result of violation of the rules on the treatment of foreigners.

In the light of all that has been said above, the only rights emerging as strictly relevant to the citizens' participation in the democratic life of the European Union are the right to vote and stand as a candidate in elections to the European Parliament and the rights to petition the European Parliament and apply to the European Ombudsman; all the other rights deriving from EU citizenship are ones that are exercised, rather, vis-à-vis the member states, and it appears artificial to include them among the provisions relating to this participation.

4. *The Involvement of the National Parliaments.*

The provisions on democratic principles, contained in Title II TEU, are completed by a series of rules, nearly all of which are introduced by the text of the Treaty, relating to the involvement of the national parliaments in the good functioning of the European Union. These rules are summarised in Art. 12 TEU and integrated with further provisions set out in the TFEU, as well as with Protocol 1 (on the role of national parliaments in the European Union), which is annexed to the Treaty of Lisbon. First of all, Art. 12(a) TEU states, in general, that the national parliaments are to be informed of legislative acts that the EU institutions intend to introduce, and forwarded draft copies of them. This right to be informed is better specified in the abovementioned Protocol 1, which states that the national parliaments must be forwarded (a) all consultation documents produced by the Commission, and (b) all draft legislative acts submitted to the European Parliament and to the Council by whoever, within the European Union, has the power to take such initiatives or submit such requests (the Commission, a group of member states, the European Parliament, the Court of Justice, the European Central Bank, the European Investment Bank).⁹

These obligations to provide information are intended to make it possible for the national parliaments to exercise their powers of control (and, in some cases, of veto) for which provision is made by other articles of the Treaties, which we shall now examine. In this regard, the most prominent is Art. 12(b) TEU, according to which it falls to the national parliaments to ensure compliance with the principle of subsidiarity; the national parliaments also have the faculty, in accordance with Art. 3 of Protocol 1, mentioned earlier, to send the presidents of the European Parliament, the Council and the Commission their reasoned opinions should they believe that the said principle has not been complied with. The effects of these reasoned opinions are set out in Protocol 2, which deals with the application of the principles of subsidiarity and proportionality.

Protocol 2, modifying agreements between the institutions and other, previous protocols, establishes the procedures for applying the principles of subsidiarity and proportionality, envisaging a very forceful role for the national parliaments. First of all, it reiterates the abovementioned obligations, set out in Protocol 1, to notify the national parliaments of all draft European legislative acts. Under Art. 5 of Protocol 2, such acts must be justified with regard to the principles of subsidiarity and proportionality,

and, in particular, must contain a “detailed statement” that will make it possible to appraise their compliance with these principles, together with qualitative and, where possible, quantitative indicators, including indicators of the financial impact of the proposal in question. In other words, every proposal must take into account the need to ensure that the financial burden on the European Union and/or the member states is kept to a minimum and always commensurate with the objective being pursued.¹⁰

Any national parliament can, within eight weeks of the transmission of such a draft proposal, present the presidents of the main EU institutions with a “reasoned opinion” (as already provided for by Protocol 1) setting out the reasons why they believe the proposal in question fails to comply with the principle of subsidiarity (the relevant provision — Art. 6 of Protocol 2 — makes no mention of the principle of proportionality). Let us, for the sake of brevity, limit our considerations here to the case of a draft legislative act that requires application of the ordinary legislative procedure; in this case, if the majority of the national parliaments present reasoned opinions, the draft proposal must be re-examined by the Commission. This re-examination may result in maintenance, amendment or withdrawal of the proposal. If the proposal is maintained, the Commission must, in its turn, present a reasoned opinion explaining the reasons why it deems the proposal to comply with the principle of subsidiarity, and then refer the question to the Council or the European Parliament. At this point, the proposal can be rejected only if the Council or the European Parliament decides, respectively, by a 55 per cent majority of its members or of the votes cast, that it does not comply with the principle of subsidiarity.

In conclusion, a draft proposal can be maintained even when it is opposed by a majority of the national parliaments; in this situation, either the Council or the European Parliament can have the last word and, should the abovementioned majorities not be reached, determine that the proposal must be maintained. Two observations appear warranted in this regard. First of all, the situation just outlined would be liable to generate conflicts between the European Parliament and the national parliaments. Although it is naturally to be hoped that such conflicts will not materialise in practice, they cannot be excluded in theory, given that the national parliaments represent the interests of the citizens of each single state and not the general interests of all the European citizens. Second, the value of the national parliaments’ role as guarantors of the application of the principle of subsidiarity seems to be more formal than real. Added to this, the procedure for exercising this role is muddled to say the least, making

it unlikely that it will frequently be applied. Nevertheless, a national parliament that deems a European legislative act to infringe the principle of subsidiarity can, under Art. 8 of Protocol 2, always have its government appeal to the Court of Justice. Indeed, in accordance with this provision, a nation-state can, under Art. 263 TFEU, submit such an appeal against infringement of the principle of subsidiarity, even on behalf of its national parliament, thereby allowing the latter, indirectly, to assert its objections to a draft legislative act (objections possibly set out in a reasoned opinion that, at the end of the procedure for involving the national parliaments which we have just outlined, has failed to produce the desired effect). Obviously, European law cannot interfere with the constitutional rules governing the relationship between parliament and government that are in place within each single member state, and therefore cannot oblige a state to appeal to the Court, even should its national parliament be requesting this. Art. 8 of Protocol 2, in fact, establishes that presentations, by states, of appeals on behalf of their parliaments must come about “in accordance with their legal order.” Having said this, given that, in a democratic state, the government is subject to the political control of the national parliament it must be assumed that the provision will, in general, obtain the desired effect. It is, instead, worth pointing out that this effect could have been achieved anyway, even without being explicitly provided for in Art. 8 Protocol 2, given that the state is the only entity with the faculty to appeal to the Court, and also given the irrelevance (to the appraisal of the appeal itself) of the fact that, within the country in question, it was the national parliament that asked the government to present it.

Protocol 1 does not envisage other situations (other than that of non-compliance with the principle of subsidiarity) in which the national parliaments can respond, through the submission of a reasoned opinion, to a draft European legislative act; however, in general, it does state that the Council must wait at least eight weeks after the notification of a draft European legislative act to the national parliaments before placing the relative proposal on the agenda, with a view to its adoption. We recall that, under Protocol 2, eight weeks is indeed the period of time the national parliaments are given to formulate any reasoned opinions they may have for deeming the draft proposal a violation of the principle of subsidiarity.

Under Art. 12(c) TEU, the national parliaments, within the framework of the area of freedom, security and justice, take part in the “evaluation mechanisms for the implementation of the Union policies”

and are “involved in the political monitoring of Europol and the evaluation of Eurojust’s activities.” Within the framework of these rather elaborate formulas, provision is made for various, and different, forms of intervention.

First of all, in this sector too, it is the national parliaments that ensure compliance with the principle of subsidiarity, as Art. 69 TFEU recalls and as indeed would be the case even without this explicit reminder. Furthermore, the national parliaments are to be “informed” of any evaluations that the member states may conduct, in accordance with Art. 70 TFEU, in relation to the implementation, by the authorities of the member states, of EU policies in this sector. Likewise, they are to be kept “informed” of the work of a standing committee set up within the Council in order to ensure, within the Union, the promotion and strengthening of cooperation on internal security (Art. 71, TFEU). However, this right to be informed does not give the national parliaments specific powers.

A far more significant point is, instead, the right of veto that Art. 81(3) TFEU (last paragraph) attributes to the national parliaments in relation to any draft legislative act determining aspects of family law with cross-border implications. The inclusion of this right by the drafters of the Treaties reflects the obvious perplexity aroused in some member states by the EU lawmaker’s incursions into the field of family law. The right of veto in question must be exercised within six months of notification of the relative proposal.

Finally, remaining within the framework of the area of freedom, security and justice, Art. 85(1) TFEU (last paragraph) and Art. 88(2) TFEU (last paragraph) make provision for the issuing of regulations intended, respectively, to “involve” the national parliaments in the evaluation of Eurojust’s activities and in the scrutiny of those of Europol. However, the Treaties do not attribute any specific power to the national parliaments in connection with this “involvement.”

Art. 12(d) TEU, by adding the faculty to take part in the revision procedures of the Treaties, in accordance with Art. 48 TEU, extends the prerogatives held by the national parliaments. This faculty concerns, in particular, the simplified revision procedure provided for by Art. 48(7) TEU, under which, for certain Council decisions, the unanimity requirement can be abandoned in favour of the qualified majority procedure or, in some cases, the Council’s decision making procedure can be changed (from the special legislative to the ordinary legislative procedure). In either case, the European Council must notify the national parliaments of any decision taken and cannot proceed if even just one of the national

parliaments, within the space of six months, makes its opposition known. Should the national parliaments fail to respond within the stipulated six-month period, the European Council will be able to adopt the decision, which will come into effect without the need for further ratification or approval by the member states. In this way, the Italian legal system is made to incorporate a procedure for concluding international agreements that is not provided for by the Constitution, given that the parliament intervenes not to authorise ratification by the Head of State and to establish the method of implementation, but only at the stage of the approval *tout court* of the change itself. This procedure could raise delicate constitutional issues in Italy, as indeed it already has done in other countries in connection with the same provision contained in the previous Treaty establishing a Constitution for Europe, which never came into effect.¹¹

Art. 12(e) TEU mentions the right of the national parliaments to be “notified” of any application for membership of the Union, in accordance with Art. 49 TEU; instead, Art. 12(f) states that the national parliaments will, together with the European Parliament, take part in “inter-parliamentary cooperation” defined, in general terms, by Art. 9 and Art. 10 of Protocol 1, which also make provision for the discussion of matters of common foreign and security policy within the framework of a conference of parliamentary committees specialised in Union affairs (discussion that will have no particular legal consequences).

Even though the provisions just examined give the national parliaments only some rights of notification and control (linked, however, with quite considerable general powers, particularly in relation to the application of the principle of subsidiarity and the simplified revision procedure of the Treaties), they nevertheless have, or at least seem to have, positive implications from the point of view of the democratisation of the functioning of the European Union and of the Union’s closeness to the citizens represented in the national parliaments. (Traditionally, the citizens have only ever been conceded a purely internal role in the drawing up of the acts of the European Union, in other words, have been able to influence only the methods of forming the will that each member state would subsequently express within the Council). However, they can also be read in a less positive light. To democratise the European Union in the manner most compatible with the overall characteristics of the system, it would, in fact, be necessary to strengthen the role of the European Parliament (which acts in the general interests of the citizens of the European Union), not that of the national parliaments (which act in the

interests of the citizens of the respective member states). The involvement of the national parliaments as provided for by the Treaties can, instead, be seen as an implicit delegitimation of the European Parliament, to the detriment of the general interests of the citizens of Europe which it represents, and also as an attempt, on the part of the member states, to safeguard further the Community method and thus conserve the means at their disposal for conditioning its development. Finally, it has to be remarked that while the involvement of the national parliaments might well condition to some extent the activity of the respective representatives of the member states within the Council, this conditioning can only be understood in terms of further protection of the interests of the national citizens represented, precisely, by those national parliaments. In other words, this involvement will not serve to give the Council democratic legitimacy at EU level (and thus to make it resemble the second chamber in a bicameral system), because this legitimacy can stem only from, the direct election of the members of the Council itself.

5. Conclusion.

The reforms introduced by the Treaty of Lisbon in the attempt to tackle the problem of the democratic deficit in the functioning of the European Union thus emerge, for the most part, as ambiguous if not actually counterproductive; and where partial improvements do emerge, these are too limited to be able to make a real contribution to remedying the problem.

There are, basically, two structural reasons for the limits presented by these reforms: the first concerns the fact that the member states currently lack a common vision of how the European Union might evolve and remain divided between those states that would like to see a strengthening of the prerogatives of the national powers (in their view, the only ones capable of being democratic) and those that would instead like to strengthen — and democratise — the European institutions. It follows, from this structural situation, that only abandonment of the unanimity rule provided for by the Treaties, and thus an act of secession on the part of a group of countries, France and Germany first and foremost, will make it possible to break the current impasse. The second reason is the one referred to right at the start: the fact that it is only by making a federal leap forwards, and thus by taking on the connotations of a true state endowed with the prerogative of sovereignty and founded on the consensus and direct legitimisation of the citizens, that the European Union will prove

able to eliminate the democratic deficit inherent in its nature and confederal organisation. Until there emerges, particularly within the framework of the founding member states, the will to make this leap, the European Union is destined to go on perpetuating its inherent flaw — if not aggravating it, given the difficulties created in this sense by its continual enlargements — and thus to see its level of support among the citizens falling progressively until the whole Community structure is on the brink of collapse.

NOTES

*This article is a reworking of a paper prepared by the author for the convention on “The European Union before the challenges of the 21st century: what advances does the Treaty of Lisbon contain?”, which was held on 9 May 2008 at the Catholic University of Milan.

¹ On the Treaty of Lisbon, we cite only, R. Baratta, *Le principali novità del Trattato di Lisbona*, *Il Diritto dell’Unione Europea*, 2008, p.21 onwards; M. Fragola, *Osservazioni sul Trattato di Lisbona tra Costituzione europea e processo di “decostituzionalizzazione”*, *Diritto comunitario e degli scambi internazionali*, 2008, p. 205 onwards, to which we refer readers for its extensive bibliography; on the specific topic of democratic principles, see J. Ziller, *Il nuovo Trattato europeo*, Bologna, Mulino 2007, p. 71; C. Morviducci, “Il ruolo dei Parlamenti nazionali nel nuovo Trattato”, in *Sud in Europa*, a special issue devoted to the Lisbon reform, February 2008, p. 23 onwards; A. Santini, *Non basta un nuovo Trattato per rilanciare l’Europa*, in *Vita e Pensiero*, n. 1/2008, p. 32 onwards, especially p. 37.

² Declaration 63, annexed to the text of the Treaty of Lisbon, refers to the specific situation of British overseas territories citizens.

³ Judgement of 7 July 1992, C-369/90, *Micheletti case*.

⁴ These forms are provided for in some states, e.g. The Netherlands.

⁵ For example, in the judgement of 17 September 2002, C-413/99, *Baumbast case*.

⁶ This happened, for example, in France, following the Constitutional Council’s declaration of 9 April 1992.

⁷ Italy gave effect to this directive through a legislative decree (n. 197 of 12 April, 1996).

⁸ Italy gave effect to this directive through a legislative decree (n. 408 of 24 June 1994) converted into law n. 483 on 3 August 1994.

⁹ In accordance with Protocol 1, the national parliaments must also be sent the agendas for and minutes of meetings in which the Council is deliberating on draft legislative acts.

¹⁰ It must be held that the simple failure to provide reasons in this regard can certainly lead to contestation of the act before the Court of Justice on the grounds of infringement of an essential procedural requirement, in accordance with Art. 263 TFEU. Practice shows that reasons establishing conformity with the principles of subsidiarity or proportionality are normally mentioned in the “whereas” of the various measures and are sometimes succinct. The Court, when faced with this problem, showed that it was prepared to accept such succinct or, sometimes, even implicit justifications (see, for example, the judgement of 13 May 1997, case C-233/94, *Germany v. Parliament and Council*).

¹¹ See the French Constitutional Council’s decision n. 2004/505 DC of 19 November 2004, published in the *Journal Officiel de la République française* of 24 November 2004, p. 19885.

Notes

FEDERATION OR COOPERATION?

Many scholars and observers of the process of European unification are today saying that the concepts of sovereignty and of state have now been superseded, and that we are moving towards a world without sovereignty, and above all towards a Europe without sovereignty. According to them, Europe is witnessing the emergence of a new phenomenon, in which sovereignty is no longer a prerogative of the member states, or of the Union.

In reality, however, this is a conclusion that tends to confuse the problem of the *existence* of sovereignty with that of its *transfer* to a higher level of government. In fact, the crucial problems currently besetting the process of European unification are the overcoming of the Union's present structure (that of a confederal organisation of sovereign states, each weak), and the creation of a federation (state) that, far from being devoid of sovereignty, would actually embody the transition from national to European sovereignty.

The European Union, even though it is highly developed and organised on the basis of extremely advanced forms of integration, is nevertheless still an international organisation that relies on voluntary cooperation among its members.

The concept of cooperation among states is described excellently by Kenneth Wheare in his study of the constitutional structure of the Commonwealth.¹ In the first decades of the last century, there was some debate within the Commonwealth over whether the organisation should be transformed into a federal state, or instead continue to be a structure founded on cooperation among states. This latter solution is the one that ultimately prevailed. According to Wheare, whereas a federation rests on the existence of a government equipped with the power to decide and to implement its decisions on matters of common interest, cooperation instead means working or acting in concert, and it presupposes the *freedom* of all the subjects involved. While cooperation can range from mere exchanges of information to more complex arrangements entailing common actions vis-à-vis foreign countries or the joint administration of

certain activities, the voluntary element is nevertheless a constant: states that cooperate with each other are bound by their joint decisions only insofar as they themselves decide to be bound by them.

Obviously, to reflect accurately the full machinery of the European Union, this definition of cooperation would need to be reformulated in greater and more precise detail; but it is, nevertheless, one that describes perfectly the action of the EU in the two sectors in which a state most typically manifests its sovereignty: those of foreign policy and defence and of economic and fiscal policy.

With regard to economic and fiscal policy, it is actually the Treaty on European Union (TEU) that affirms that the states are required only to coordinate their national economic policies.

But it is an affirmation that also applies to the area of foreign policy and defence. In fact, the European Union, despite the federal vocation originally envisaged for it, has evolved in a manner quite different from that in which all the classic federal states evolved. The latter all stemmed from the need to guarantee their member states security and prosperity. In other words, the fear of a foreign invasion, the presence of a common external enemy, and the desire for independence have always been key factors determining the formation of a federal union.

In the process of European integration, on the other hand, these elements have been far less apparent. Indeed, even though, in the 1950s, the idea of creating a European Defence Community sprang from the need to guarantee external security and, above all, from fear of the Soviet threat, after the collapse of the EDC project it was the pressing need to solve the problem of Germany and to guarantee security within Europe that prevailed. This characteristic of the European process of integration is linked to the international situation within which it unfolded, that is to say, the Cold War and the division of the world into two opposing spheres of influence. The fact that Europe was part of the Western bloc, and thus fell within the sphere of influence of the United States, was indeed a factor that contributed to the evolution of the process of integration (as long as the control of the global balance remained in the hands of the two superpowers, Europe was free to concentrate on creating, within its confines, an area of stability and peace from which the process of integration was able to benefit in many ways); but, at the same time, it placed a limit on the process: since Europe's defence was taken care of by the United States, the Europeans were relieved of their responsibilities in this regard and, without the pressing need to defend themselves against an external threat, they were also left without the impetus to create a

common defence and a federal state.

This lack of impetus emerges particularly clearly in the part of the Treaty (both the current version and the version modified by the Lisbon Treaty) relevant to the issue of common security and defence policy. The absence of any will to take responsibility for Europe's defence and an acceptance of the fact that questions relating to the defence of the Europeans are decided outside Europe both emerge clearly in the new article 42 TEU, which reads as follows: "commitments and cooperation in this area [defence] shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."

Even though, in this same provision, it is stated that the common security and defence policy will lead to a common defence whenever the Council should, by unanimity, so decide, it is quite clear, from the statement indicating that NATO remains the foundation of Europe's collective defence and the forum for its implementation, that there is no real will to assume responsibility for this defence: states genuinely wanting to create an entity truly endowed with independence and sovereignty and, through it, to assume responsibility for their own security would never dream of stipulating, in the founding act of that entity, its subordination to an external forum.

The other provisions contained in the same article, moreover, highlight the fact that the EU's common security and defence policy is today based on cooperation among its member states, which is the same as saying that it is entirely dependent on their willingness to cooperate. In fact, the Treaty states that "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." And that "decisions relating to the common security and defence policy [...] shall be adopted by the Council acting unanimously," thereby decreeing that the opposition of just one member state is enough to paralyse any initiative. It is added that "if a member state is the victim of armed aggression on its territory, the other member states shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter." What can such an affirmation mean, if not that relations between the member states in the sphere of security and defence are still governed by international law and that there exists not even an embryonic European power capable of intervening in the event of an act of aggression against

a Union member state?

These problems, and the fact that the European Union should be capable of guaranteeing its own defence and of presenting a united front to the outside world, are clearly apparent to a section of public opinion and to some politicians. Indeed, whereas once (before the fall of the Berlin Wall), the substantial homogeneity among the member states and the stability of the international setting made it seem that cooperation might be able to go on working efficiently and make it possible to achieve important results, today the lack of this homogeneity, and of a stable international setting, lays bare the limits inherent in the system of voluntary cooperation among states, which, given the profoundly divergent national positions, is threatening to paralyse the Union completely.

Angela Merkel and Nicolas Sarkozy, among others, have spoken of the need for a European defence, and this need has also been underlined by members of the SPD's working group on security and defence policy in the Bundestag, in the context of a project for the creation of a European army.²

But the problem is that the question of the security and defence policy cannot be tackled without also tackling the crucial issue of sovereignty, and people must be aware of this.³ The creation of a true European foreign policy and of a true European defence, like the creation of a European economic policy, means that the competence to exercise the relevant powers directly over the citizens (the power to impose taxes to fund their activities and the power to form an army) must be attributed at European level, and this, obviously, demands the creation, first, of a democratically legitimised European government.

This possibility often is viewed with alarm by those who do not want to see the European Union turned into a super-state. However, their fears are linked to ideas of sovereignty and of state based on experience of the European nation-states. Indeed, people say that Europe should not become a sovereign state, but only because they are influenced by the fact that the states they know — today's European states — are themselves too small and too lacking in power to be able to exercise their sovereignty effectively. As a result, the concept of sovereignty assumes negative connotations. In the same way, the idea of a European federal state is rejected simply because the only model of state that people are familiar with is that of the centralised state, that is, an entity that tends to cancel out all the differences that exist within it.

In Europe, the real challenge is, instead, to demonstrate that there can exist a form of sovereignty able to overcome the European nation-state

framework and take on continental dimensions, without, for this reason, erasing the traditions and peculiarities of each of the member states, given that the only competences attributed centrally would be those that are absolutely necessary in order to guarantee (echoing the intentions of the founding fathers of the American federation) the security and prosperity of the citizens of Europe.

No one can say whether this project will ever become a reality, because no one has a crystal ball with which to see into the future. What is certain is that, given the absence of theoretical and legal impediments, the only obstacle to the creation of such a federation is the lack of political will to take this step.

This is why all those who believe that the creation of a European federation is our continent's only hope of a future should feel it their duty to remind their politicians and fellow citizens why a European federal state is necessary. Those who instead continue to insist that it is impossible to build a federation out of the existing nation-states should be more honest and admit that they simply do not want one.

Giulia Rossolillo

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¹ K.C. Wheare, *The Constitutional Structure of the Commonwealth*, London, 1963, p. 128 onwards.

² Arbeitsgruppe Sicherheits- und Verteidigungspolitik der SPD-Bundestagfraktion, Auf dem Weg zu einer europäischen Armee, Positionspapier 5. Mai 2008.

³ In truth, this point is raised in the above-cited SPD document, which, despite the remark that the creation of a European army is a “long-term” project, also quite rightly points out that the creation of a European army implies the need for a debate on the transfer of sovereignty from the member states to a democratically legitimised European power.

Viewpoints*

SOVEREIGNTY AND THE EUROPEAN FEDERAL CONSTITUTION — NEW PERSPECTIVES ON SOVEREIGNTY IN A MULTILEVEL SCHEME OF CONSTITUTIONALISM

I. Introduction, First Thesis: Multilevel Constitutionalism Requires Shared Sovereignties.

“Sovereignty and federalism are”, write D. Chalmers and others in their treatise on European Union law, “as politically sensitive as they are legally central to the European project.”¹ For sake of an “ever closer Union,” both qualify not only as fundamental but also as *constitutional* principles in the ongoing process of European integration. The Treaty of Lisbon might have abandoned the term “constitution” (as ambitious as it was programmatic), but it has not abandoned the constitutional quality (D.T. Tsatsos) of its basic rules.² To use a classical Latin phrase: “Falsa demonstratio non nocet.” The newly shaped three-part treaty, which includes the legally binding EU Charter on Fundamental Rights, re-introduces a *constitutional scheme* for the Union.³ As a result of this constitutional momentum, the strict demarcation line between international and constitutional law has been blurred.

All this is quite a tremendous shift compared to the early stages of European integration. Then, it was widely assumed that the traditional model of international law would apply to the European Communities,

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too.⁴ The member states were held to be the only “masters of the treaties.” However, in its *Van Gend en Loos*⁵ and *Costa v. ENEL*⁶ decisions the ECJ clearly overturned these assumptions. The following expression, emerging during the *Van Gend en Loos* case, became famous: “a new legal order of international law for the benefit of which the states have limited their sovereign rights.”⁷ The Court shaped its doctrine even more radically in the *Costa* ruling, according to which EC regulations were directly applicable in all member states and thus EC law enjoyed some form of sovereignty vis-à-vis domestic law. Clearly, this being the case, the Community’s powers could not be seen as deriving exclusively from the member states but had to be understood as being “somehow autonomous and original.”⁸ Hence, the aforementioned European treaties are more than ordinary international treaties. What makes them “more” is the “transformation” (J.J. Weiler) of formerly closed nation-states into an integrated Union and the consequent *sharing of sovereignties*⁹ between the Union and its member states.¹⁰

Compared to the traditional concept of sovereignty¹¹, the idea of shared sovereignties might seem quite provocative. Clearly inspired by J. Bodin,¹² the French Constitution of September 3, 1791 reads: “La Souveraineté est une, indivisible, inaliénable et imprescriptible; elle appartient à la Nation; aucune section du peuple, ni aucun individu, ne peut s’en attribuer l’exercice.”¹³ Bodin’s view was that sovereignty is not bound by the law, but confers the power to create new laws and thus to overcome the old feudal system. The new “princeps” was “legibus solutus.”¹⁴ Only natural and divine law could restrict his powers. In its turn, the 1791 constitution was to overcome another “ancien régime,” replacing the sovereignty of the “princeps” with the sovereignty of the nation. This development, making provision for nothing less than a new source of legitimacy,¹⁵ shows that understanding of sovereignty depends on the specific historical context of ever-changing political orders:¹⁶ feudalism, the Westphalian system of 1648, constitutionalism, emerging democracies, and today’s global governance structures,¹⁷ which comprise both state and non-state subjects.¹⁸ Widespread tendencies to treat sovereignty as some *mystical absolute*¹⁹ are thus to be resisted for a very obvious reason: they are ahistorical and disregard the *intrinsic procedural* structures of political order building.²⁰ Political entities are not static. On the contrary, they are based on a permanent process of self-creation.²¹ In the same way, sovereignty, at once *depending on* and to an extent *creating* the relevant political entity, is in a permanent state of flux.

Thus, sovereignty today, inasmuch as it helped to build, further and

strengthen the very *process* of integration, corresponds to the European scheme of integrated political entities.²² “Multilevel constitutionalism” is the term most commonly used to describe the many-layered structure this process has produced.²³ Others speak of constitutional pluralism.²⁴ Multilevel constitutionalism refers to an “ongoing process of establishing new structures of government complementary to and building upon — while also changing — existing forms of self-organisation of the people or society.”²⁵ The most important parameters of this “ongoing process” include the extent of voluntary relinquishing of sovereignty to international organisations and to the respective inter-governmental bodies, the appearance and growing influence of non-state actors, and, not least, the continued viability of the nation-state. The question of the legitimacy of this sharing of sovereignty between national, European and international levels is linked to a key aspect of political integration: the *common good*.²⁶ The division is legitimate if, and to the extent to which, the authority thus divided can maximise the common good. Multilevel constitutionalism demands shared sovereignties to allow all the actors involved to cooperate in their service of the common good.

Finally, it should not be forgotten that *shared sovereignties* are not unknown either to classical public international law or to traditional constitutional thought. The scope for dividing sovereignty was already recognised by Grotius: “While sovereignty is a unity, in itself indivisible, (...) and including the highest degree of authority, which is not accountable to any one; nevertheless a division is sometimes made (...). Thus, while the sovereignty of Rome was a unity, yet it often happened that one emperor administered the East, another the West, or even three emperors governed the whole empire in three divisions.”²⁷ Grotius gives another ancient example of divided sovereignty, going back to Plato’s third book of *Laws*. This reference might well work as a paradigm for today’s integrated Europe as a two-pillar Union of the states *and* the peoples (see, for example, Art. 1 TEU): “Since the Heraclids had founded Agros, Messene, and Sparta, the kings of these states were bound to govern within the provisions of the laws which had been laid down; so long as they should do so, the peoples were bound to leave the royal power in the hands of the kings themselves and their successors, and not allow any one to take it away from them. To this end, then, not only did the peoples bind themselves to their kings, and the kings to their peoples, but also the kings bound themselves to one another, and peoples to one another. Further, the kings bound themselves to neighboring peoples, and the peoples to neighboring kings, and they promised to render aid, each to the other.”²⁸

Let us move from Ancient Greece to recent judgements of the US Supreme Court. In *Alden v. Main* the Court relied on the federal theory of dual sovereignty: “Congress has vast power but not all power. When Congress legislates in matters affecting the states, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord states the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central government and the separate states.”²⁹

II. *Further Elaboration of the First Thesis and the Second Thesis: A Modern Scheme of Sovereignty Requires an Integrated Approach, Taking into Account the National, European and International Dimensions.*

As we have seen, the term sovereignty itself has a long and troubled history.³⁰ Sovereignty is a sociological category as well as a legal concept,³¹ and in both cases it is related to the question of political identity.³² Among various meanings, sovereignty is most commonly “used as a description of statehood; a brief term for the state’s attribute of more-or-less plenary competence.”³³ Nevertheless, sovereignty is no longer an exclusive attribute of the nation-state; instead it is expressed by *interdependent* emanations at different levels: national, European, and international.³⁴

1. The development of sovereignty in the traditional state-centred context is very well known;³⁵ from 1648 on, one might speak of a “Westphalian constellation.”³⁶ The personal sovereignty of the liege lord in feudal systems was superseded by the sovereignty of the “princes” in absolute monarchies. The sovereignty of the “princes”, in turn, was replaced by the sovereignty of the people³⁷ — sometimes conceived of as the sovereignty of the nation, and in the French tradition also as the sovereignty of the republic. In England, the absolute monarchy was replaced by the sovereignty of Parliament. As Chris Patten put it, “The theory of absolute monarchy never recovered from the blow that struck off Charles I’s head. Parliamentary sovereignty was on the rise. The Bill of Rights in 1689 asserted that it was illegal for the king to pretend the *power of suspending of laws, or the execution of laws... without consent of Parliament*. Parliament alone, then, was sovereign. And that sovereignty was no longer an expression of the will of God, but the will of the people.”³⁸

In the light of the established doctrine of popular or parliamentary sovereignty, the transferring of sovereign rights to a supranational level³⁹

might easily be mistaken for an infringement of the very basis of the entity's legitimacy. However, it would not constitute an infringement for two reasons, one formal and the other, more important, functional. Formally, it is within the sovereign power of Parliament and the people to forfeit voluntarily their sovereign rights and competences — at least to some extent. Functionally, sovereignty is not a means in itself but rather a means of serving the political entity's crucial objectives: external and internal peace, including territorial integrity; freedom, including both fundamental rights and fundamental freedoms as well as political independence and the self-determination of the people;⁴⁰ and security, including the authority to create and enforce law. All of these objectives can be pursued by the nation-state or, even more effectively, by nation-states cooperating with each other, eventually institutionalising this cooperation through the formation of international or supranational organisations endowed with sovereign rights of their own.

2. The supranational Community and, in the future, the supranational Union is not a replacement for the nation-state but rather a pre-federal integrative mechanism for transforming the latter from a self-contained entity into a cooperative and open political entity.⁴¹ In the process of this transformation the people involved (or better, the citizens concerned), by giving up sovereign rights, regain the power of sovereign self-determination and self-organisation — a “win-win-situation.” Certainly, given the intrinsic dynamics of transformation and integration, the national political entities are no longer the exclusive “masters of the treaty.” And neither is the Community or the Union. The “masters”, should this term be maintained at all, are the citizens in their dual capacity as nationals *and* citizens of the Union. The *principle of conferral*, restricting both national and “European” sovereignty, is the instrument *for fulfilling* this dual role.

The European Court of Justice, by subjugating national high courts and legislators to the autonomous legal order of the Community, thereby also challenging the principle of parliamentary sovereignty, might very well have compromised national legal practices.⁴² However, what has been compromised finds compensation not only through functional necessity but also through the democratisation of decision-making processes at European level.⁴³ The primacy of EU law⁴⁴ is counterbalanced by the aforementioned principle of conferral. The principle of mutual fidelity, according to which “each level and unit of government must act to ensure the proper functioning of the system of governance as a whole,”⁴⁵ makes provision for a pre-federal balancing structure of its own. The doctrine of pre-emption,⁴⁶ which gives the Community exclu-

sive legislative competences, is counterbalanced by shared competences (typical of federal systems) exercised through supporting, coordinating, and complementary actions, and, of course, by the exclusive competences of the member states in areas in which any kind of harmonisation is prohibited. All these examples illustrate what shared sovereignties and European rule of law thinking have in common: a vertical balance of powers.

3. The European structure just described is not paralleled, although it is to some extent reflected, at international level.⁴⁷ When “the combined impact of technology, tourism, global capitalism, deterritorialized communities and migration are blurring and redrawing cultural boundaries at a rapid rate”⁴⁸ and simultaneously bringing about a shift from “coexistence” to “cooperation” in public international law,⁴⁹ international regimes will need to have some constituent power or *constitutional* quality in order to justify, limit, and organise their specific cooperative governance. This is not to be confused with the quest for exclusive sovereign power, which even the UN Security Council would not be able to attain. It is, rather, the quest for decision-making authority vested either in international bodies or in the international community as such. Many examples can be found in WTO law regulating the integrated and interconnected global economy; and in UN law, especially with regard to the powers of the Security Council under chapter VII, e.g. the new “smart sanction” mechanism⁵⁰ (see also the *Yusuf* decision of the Court of First Instance).⁵¹ Additionally, sovereignty today is not only a source of sovereign rights but also entails certain responsibilities, in particular duties of protection towards other states.⁵² The most significant example of this re-definition of the traditional concept of sovereignty, however, is provided by so-called humanitarian intervention, which might be summed up as *human rights-based “international sovereignty” as opposed to human rights-disregarding “national sovereignty.”*⁵³

4. The debate about humanitarian intervention draws attention to the common roots of national, European, and international sovereignty. Sovereignty is to be understood *instrumentally* as the supreme authority of a political entity to ensure and enforce a human rights-based legal order.⁵⁴ The only *original sovereignty*, not derived from another sovereign source, is the *sovereignty of the individual human being*. In the *Tadic* case, the Appeals Chamber of the International Yugoslavian Tribunal explicitly stated: “A state-sovereignty approach has been gradually supplanted by a human-being-oriented approach.”⁵⁵ Politically, this latter approach to sovereignty resembles the “sovereignty of the citizen,”⁵⁶ an

area in which the EU is quite advanced. In substance and in procedure, EC and EU law effectively stands for the empowerment of individual citizens vis-à-vis their governments. The sovereign citizen has been turned into one of the most important enforcers of international agreements.⁵⁷ In classical public international law, it was Emmerich de Vattel who based his sovereignty theory on republican principles of *individual* freedom and equality. His argument was that since all men are naturally equal, and on the strength of this natural equality have equal rights as well as equal obligations, nations comprised of men must be equal, too. They have inherited the same obligations and rights from nature, or, to use a modern phrase, they have inherited their *sovereign equality* as an emanation of the natural law decreeing the equal freedom of their individual citizens.⁵⁸ “The very rationale that supports the sovereign equality of states,” remarks M. Sellers, “implies the sovereign equality of citizens, too.”⁵⁹

III. *Contextualisation, Part I: A Modern Scheme of Sovereignty Requires a Cultural Framework (Culture of Cooperation).*

Law must be understood in context⁶⁰ and the same applies to sovereignty, given that it is a legal concept. A concept of sovereignty *in and for* Europe cannot ignore the fact that Europe itself is more than just a geographical area; indeed, it is, primarily, a culturally moulded area. From the very origins of western legal thought and throughout all the subsequent epochs (e.g. the Holy Roman Empire), there has always been a more or less present but always genuine awareness that Europe, beyond its states and peoples, is a political entity requiring legal consideration and, most recently, even the creation, on a *transnational* and *supranational* level, of a constitutional structure.⁶¹ This *awareness of unity*⁶² has many facets: social, cultural, economic, and political, as well as religious, revolutionary and evolutionary. It is deeply rooted in the traditions of ancient Roman law with its Ciceronian notions of “*res publica*” and “*salus publica*.” Finally, it is an *awareness* based upon a common Age of Enlightenment narrative: on human rights universalism and rule of law thinking. Cooperative Europe is like a model of “unity in diversity” (J.C. Burckhardt), and it is eager to overcome, step by step, its division into nation-states yet without sacrificing the states’ political, that is to say *national*, identities. The image of “the House of Europe” — a reference to the classical Greek “*oikos*” philosophy — depicts well the richness of heterorganic, asymmetrical political entities, which ought to be assembled under a common roof.⁶³ The cooperative architecture of the European house corresponds to the aforementioned *multilevel constitutional-*

ism, a term not meant to bring to mind a structure of hierarchically organised constitutional levels but rather one of intertwining and thus interdependent elements linking the national and the European constitutional settings (national constitutions, constitutional elements within the EU Treaty, the EC Treaty, the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union).⁶⁴

Multilevel constitutionalism demands a culture of cooperation.⁶⁵ Two elements must be present: cooperation among member states and coordination of their constituent laws. If either is lacking, influential international political entities with the capacity to act become inconceivable. Cooperation materialises in legal, political, factual and normative ways. However, effective cooperation has many prerequisites. It demands, at least, a clear allocation of competences, basic human rights standards among the cooperating subjects, and a certain democratic legitimacy of the political decisions stemming from the cooperation itself. Given these premises, the conclusion is simple: 1. Cooperation demands that sovereign rights be shared between the cooperating entities (or subjects). 2. Each sovereign right requires a basis of legitimacy. As regards the legitimacy question, it is necessary to consider not only the *input* of democratic legitimacy, but also the functional or result-oriented aspects that derive from it: effective task fulfilment through collaboration, sharing of responsibilities, the assignment of competences to the political entity or societal actor best equipped to fulfil the task and, finally, a general convergence of interests, are all basic elements of the cooperation principle. In accordance with the subsidiarity principle, the smaller entity shall remain responsible as long as there emerges no need (e.g. economic, environmental, political, or security-related) for a joint cooperative action. In the context of globalisation and internationalisation, cooperation will increase the scope of political decision-making possibilities at local and regional level, respectively. The individual is able to accept the world beyond the state only if she or he can feel “*at home*” in the familiar setting of local, that is to say, small-scale, political entities. Understood in such a way, the major aim of *cooperation* is *integration*.

IV. *Contextualisation, Part II: (National) Sovereignty and Supranationality Need to be Understood as Complementary Functions of European Integration.*

If cooperation, on the one hand, is meant to serve integration and, on the other, is made possible by shared sovereignties, then national sover-

eignty itself can be understood as a specific *complementary function of*, and not an *obstacle to*, European integration. Both, national sovereignty and supranationality — being expressions of non-state-centred sovereignty⁶⁶ — interact to make integration possible and to make integrated political systems work. The functions of sovereignty are well known:

- to guarantee external peace and security, in accordance with Art.2 (4) UN Charter, which reflects the intention of the Briand-Kellogg Pact to abolish recourse to war as an instrument of national policy,
- to guarantee internal peace and security by linking security with freedom,
- to guarantee freedom and equality, i.e., fundamental human rights,
- to guarantee a minimum standard of living, without which the citizens would not be able to enjoy their freedoms, fulfill their duties, or exercise their rights,
- to guarantee fair enforcement of the law (John Rawls' idea of procedural justice as fairness),
- to ensure effective distribution of competences in accordance with the principle of subsidiarity.⁶⁷

There is another function of sovereignty which might seem slightly paradoxical. However, it is a core function: sovereignty must reflect critically upon its (sometimes changing) sources of legitimacy. This is all the more important when and where EU law takes precedence over the law, including the constitutional law,⁶⁸ of the member states.⁶⁹ Here, finally, a reference should be made to the reflections of Chalmers and others on the execution and administration of EU law by domestic governments: “For the primacy of EU law to remain effective, therefore, it generally needs to retain the goodwill of the Member states. If EU law is deemed unreasonable, states have the means to evade its requirements. If states unreasonably seek to evade measures of EU law, however, they risk the censure of other states (and even of their own citizens) for disrespect of a legal text. In this sense, sovereignty in the European Union may be seen as circular or at least paradoxical. EU law needs to justify itself as reasonable, while a state seeking to disapply EU law must likewise justify its action as reasonable. This cycle of justification, where, ideally, power is never taken for granted, but where its exercise must always be justified is, (...), one of the most distinctive and one the most civilising features of EU law.”⁷⁰

Conclusions and Future Perspectives.

Today, the United States of Europe, as idealistically conceptualised by W. Churchill in his famous 1946 Zurich speech, is an unrealistic vision, supported neither by the majority of the EU member states nor by the majority of the EU citizens.⁷¹ Regardless of all pre-federal elements⁷², particularly the fidelity principle (Art. 10 TEC),⁷³ a European federacy, along the lines of the U.S. example, was not envisaged by the failed European Constitutional Treaty,⁷⁴ and was envisaged even less so by the Treaty of Lisbon (Reform Treaty). The constitutional architecture of the integrated Europe will continue to be a mixture of principles of *constitutional law* and principles of *public international law*, as well as a mixture of *federalisation* and *confederation*,⁷⁵ a dynamic process in which the emphasis is sometimes placed on the *federal*, and sometimes on the *confederal* elements. This so-called open finality could be a weakness; on the other hand, it could prove to be a strength, a force ensuring that the sovereign nation-states are not simply be replaced by another — bigger — sovereign entity⁷⁶ but rather embedded in a structure of *intertwined sovereignties*. This is an entanglement that can best be likened to the multi-layered governance structures of the 21st century, which exist at both regional and global level.

1. Within this structured entanglement, sovereignty emerges not as an *absolute* but as a *relative* category. Oriented by the common good, it functions as a guiding principle for the distribution of shared competences and responsibilities. In accordance with the principle of subsidiarity⁷⁷, the entity that is best equipped to decide shall be vested with all necessary powers and shall assume all responsibilities resulting thereof.

2. Thus, sovereignty also corresponds to governance structures.⁷⁸ This is particularly true with regard to the legitimacy question. Whoever governs needs to exercise legitimate power. Governance is not justified in itself but needs to be linked to *legitimate* sources of sovereign authority.

3. The legitimacy question also leads to a human rights-based understanding of sovereignty as described above. Sovereignty is not a means in itself but is to be understood as instrumental in the service of the freedom, equality, subsistence and security of the individual. Sovereignty exists — and here we introduce an obvious allusion to F.D. Roosevelt's famous "Four Freedoms" speech (January 7, 1941) — to establish a world order founded upon the essential freedoms of the human being.⁷⁹

4. Sovereignty is not a static concept. It demands a *procedural* understanding that takes into account the dramatic changes the international community faces in times of globalisation, internationalisation, and European integration.⁸⁰

5. Sovereignty is, and has always been, based upon *freedom*, secured externally by the notion of sovereign equality, non-intervention and first and foremost by Art. 2 (4) UN Charter; and secured internally by popular sovereignty understood as freedom of the citizens *in rebus politicis*.⁸¹

Regardless of how a future political entity will be structured, as long as it is founded on freedom, an “end of sovereignty” will not be in sight.⁸² However, the concept of sovereignty will remain permanently in a state of transformation, and the idea(l) of “shared sovereignties” emerges as a sustainable “modus vivendi/modus gubernandi” — within and beyond the European Union.

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NOTES

¹ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 182; for further references, see N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003; K. Nicolaidis, R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford, Oxford University Press, 2000; see also J.-P. Jaqué, “Der Vertrag über eine Verfassung für Europa: Konstitutionalisierung oder Vertragsrevision?” *Europäische Grundrechte-Zeitschrift*, 2004, p. 551.

² On the constitutional elements of EU and EC law, see A. von Bogdandy, “Constitutional Principles”, in A. von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law*, Oxford, Hart Publishing, 2006, p. 3.

³ There is a large body of literature on these issues. See, for example, J. Geerlings, “Der Europäische Verfassungsprozess nach den gescheiterten Referenden in Frankreich und den Niederlanden”, *Deutsches Verwaltungsblatt*, 2006, p. 129; H.M. Heinig, “Europäisches Verfassungsrecht ohne Verfassung(svertrag)?”, *Juristenzeitung*, 2007, p. 905; F. C. Mayer, “Wege aus der Verfassungskrise – Zur Zukunft des Vertrages über eine Verfassung für Europa”, *Juristenzeitung* 2007, p. 593; H.-J. Rabe, “Zur Metamorphose des Europäischen Verfassungsvertrages”, *Neue Juristische Wochenschrift*, 2007, p. 3153; T.S. Richter, “Die EU-Verfassung ist tot, es lebe der Reformvertrag!”, *Europäische Zeitschrift für Wirtschaftsrecht*, 2007, p. 631.

⁴ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 183.

⁵ Decision of the European Court of Justice of February 5, 1963 in the case of Van Gend en Loos, C-26/62.

⁶ Decision of the European Court of Justice of July 15, 1964 in the case of Costa v. ENEL C-6/64.

⁷ Decision of the European Court of Justice, C-26/62.

⁸ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 183.

⁹ See G. de Búrca, "Sovereignty and the Supremacy Doctrine of the European Court of Justice", in N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003, p. 449; A. Schmitt Glaeser, "Souveränität und Vorrang", in A. von Bogdandy, *Europäisches Verfassungsrecht*, Heidelberg, Springer Verlag, 2003, p. 205.

¹⁰ For an analysis of a parallel development in early US constitutionalism shortly before and after 1787 see J.-P. Jaqué, "Der Vertrag über eine Verfassung für Europa: Konstitutionalisierung oder Vertragsrevision?", *Europäische Grundrechte-Zeitschrift* p. 551-553. See important references to A. Hamilton's letters no.s 15 and 16 in C. Rossiter's introduction to *The Federalist Papers*, New York, Clinton Rossiter ed., 1961.

¹¹ For an equally critical and innovative in-depth analysis, see U. Haltern, *Was bedeutet Souveränität?*, Tübingen, Mohr Siebeck Verlag, 2007; from a different perspective, N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999, p. 123.

¹² *Six Livres de la République*, 1576.

¹³ For the original text and its German translation see G. Franz (ed.), *Staatsverfassungen*, 2nd ed., Munich, Oldenbourg, 1964, p. 314; for a comparative approach, F. Chopin, *La République "une et indivisible"*, *les fondements de la fédération américaine*, Paris, Pion, 2002.

¹⁴ So, already Ulpian, *Digests* 1, 3, 31. Bodin (*Six Livres de la République*, 1st Book, chapter 8) says: "Maiestas est summa in cives ac subditos legibus soluta potestas". For an analysis from the classical point of view, U. Scupin, "Der Begriff der Souveränität bei Johannes Althusius und Jean Bodin", in *Der Staat*, 1965, p. 1; H. Quaritsch, *Staat und Souveränität*, vol. 1, Frankfurt am Main, Athenäum, 1970, p. 243; id., *Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jh. bis 1806*, Berlin, Dubcker & Humblot, 1986, p. 46; D. Engster, "Jean Bodin. Skepticism and Absolute Sovereignty", *History of Political Thought*, 1996, p. 496.

¹⁵ On the legitimacy question in the context of European Union law, see G. de Búrca, "The Quest for Legitimacy in the European Union", *Modern Law Review*, 1996, p. 349.

¹⁶ F. Hinsley, *Sovereignty*, Cambridge, Cambridge University Press, 1986; H. Steinberger, "Sovereignty", *Encyclopedia of Public International Law*, 1987, p. 397; A. Verdross, B. Simma, *Universelles Völkerrecht*, 3rd ed. Berlin, Dubcker & Humblot, 1984, p. 25.

¹⁷ See *Governance Team*, Report to the Commission: Consultations Conducted for the Preparation of the White Paper on Democratic European Governance, SG/8533/01-EN, July 2001; A. Arnulf, "What is Governance", *European Law Review*, 2001, p. 411; M. Ruffert, "Demokratie und Governance in Europa", in H. Bauer, P.M. Huber, K.-P. Sommermann (eds), *Demokratie in Europa*, Tübingen, Mohr Siebeck, 2005, p. 319 (further references, p. 320-1, footnote 5).

¹⁸ See also the analysis by M. Sellers, "Republican Principles in International Law", *Connecticut Journal of International Law*, 1996, p. 403, and p. 412: "Vattel's argument for strict national sovereignty and the rigorous independence of states rested on this analogy between personal and national freedom. When Vattel was writing in the mid-eighteenth century, personal freedom hardly existed outside Switzerland and the Netherlands. At that time, it made sense for enlightened and well-meaning authors to establish an absolute principle of non-intervention in the internal affairs of sovereign states. The most likely interventions of Vattel's era would have curbed emerging popular sovereignty. Similarly,

even after the French and American revolutions, preponderant power remained in the hands of European despots. Relatively progressive states, such as Britain, promoted non-intervention in defense of nascent continental liberty, as in Naples and Spain, against reactionary European monarchs. The United States also embraced non-intervention to protect itself and other recently liberated American republics against the reimposition of European autocracy in the New World. But the emergence of the United States as a world power altered this equation, and many republics now have the strength to protect foreign liberty, without endangering their own democratic institutions or national independence.”

¹⁹ This problem is dealt with by A. Bleckmann, B. Fassbender, “Art. 2 (I)”, in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, vol. I, Oxford, Oxford University Press, 2002; S. D. Krasner, *Sovereignty. Organized Hypocrisy*, Princeton, Princeton University Press, 1999.

²⁰ R. Lhotta, “Sovereignty and Symbolization”, *Rechtstheorie*, 1997, p. 347: Sovereignty as a “historical category.”

²¹ E. Renan, “What is a Nation? (Qu’est-ce qu’une nation?)”, Lecture at the Sorbonne, 11 March 1882, in G. Eley, R. Grigor Suny (eds), *Becoming National: A Reader*, Oxford, Oxford University Press, 1996: p. 41-55: “A nation’s existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual’s existence is a perpetual affirmation of life.” P. Häberle, *Verfassung als öffentlicher Prozess*, 3rd ed., Berlin, Dubcker & Humblot, 1998.

²² In general, L. Kühnhardt, *European Integration: Challenge and Response*, ZEI Discussion papers C. 157, 2006; U. Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechts im europäischen Mehrebenensystem*, Tübingen, Mohr Siebeck, 2004.

²³ I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, *Common Market Law Review*, 1999, p. 703.

²⁴ N. Walker, “The Idea of Constitutional Pluralism”, *Modern Law Review*, 2002, p. 317.

²⁵ *Ibid.*, note 15.

²⁶ From a global perspective, C.W. Jenks, *The Common Law of Mankind*, New York, Frederick A. Praeger, 1958, p. 17; E. Badie, *Souveränität und Verantwortung. Politische Prinzipien zwischen Fiktion und Wirklichkeit*, Hamburg, Hamburger Edition, 2002.

²⁷ H. Grotius, “De Jure Belli ac Pacis”, in *Classics of International Law* 102 (James Scott Brown ed., Francis W. Kelsey trans., 1925), Oxford, Clarendon Press, p. 123-4; see also J. Ngugi, “Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?”, *U.C. Davis Journal of International Law and Policy*, 2002, p. 73-83; see quotations in footnote 36.

²⁸ H. Grotius, “De Jure Belli ac Pacis”, in *Classics of International Law* 102 (James Scott Brown ed., Francis W. Kelsey trans., 1925), Oxford, Clarendon Press, p. 123-4

²⁹ 527 U.S. 706 (1999); also, *Prinz v. United States*, 521 U.S. 898 (1997); Justice Kennedy used the strong metaphor of the founding fathers having “split the atom of sovereignty” in 514 U.S. 838 (1995); in analysis thereof J.-P. Jaqué, “Der Vertrag über eine Verfassung für Europa: Konstitutionalisierung oder Vertragsrevision?”, *Europäische Grundrechte-Zeitschrift*, 2004, p.551-555.

³⁰ M.W. Hebeisen, *Souveränität in Frage gestellt*, Baden-Baden, Nomos, 1995; C. Hillgruber, “Souveränität – Verteidigung eines Rechtsbegriffs”, *Juristenzeitung*, 2002, p. 1072; S. Oeter, “Souveränität — ein überholtes Konzept?”, in *Festschrift für H. Steinberger*, Berlin, Springer Verlag, 2002, p. 259; a classic is H. Kelsen, “Keyword Souveränität”, in: K. Strupp (ed), *Wörterbuch des Völkerrechts*, vol. II, Berlin, De Gruyter, 1925, p. 554; also

H. Heller, "Die Souveränität", in: id., *Gesammelte Schriften*, vol. 2, Leiden, Stijhoff, 1971, p. 31; C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 5th ed. (reprint of the 2nd ed.), Berlin, Duncker and Humblot, 1990; E. A. von der Heyde, *Die Geburtsstunde des souveränen Staates*, Regensburg, Druck und Verlag Josef Habel, 1952.

³¹ H. Heller, "Die Souveränität", in: id., *Gesammelte Schriften*, vol. 2, Leiden, Stijhoff, 1971, p. 31; p. 57 mentions the sociological problem of sovereignty; see also M. Baldus, "Zur Relevanz des Souveränitätsproblems", *Der Staat*, 1997, p. 381.

³² P. W. Kahn, "The Question of Sovereignty", *Stanford Journal of International Law*, 2004, p. 259.

³³ J. Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 1979, p. 26 with reference to the "Reparations Case", *ICJ Reports*, 1949, p. 174-180.

³⁴ For a more comprehensive picture, including the worldwide perspective, reference should be made to L. Kühnhardt, *The Global Proliferation of Regional Integration*, ZEI Discussion Paper C 136, 2004.

³⁵ The history of sovereignty is a story of change: J. Kokott, "Souveräne Gleichheit und Demokratie im Völkerrecht", *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, 2004, p. 517; M. Kotzur, "Souveränitätsperspektiven – entwicklungsgeschichtlich, verfassungsstaatlich, staatenübergreifend", *Jahrbuch des Öffentlichen Rechts*, 2004, p. 198, with further reference to the classics of sovereignty theory on p. 200, footnote 22; B. Fassbender, "Sovereignty and Constitutionalism in International Law", in: N. Walker (ed), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003, p. 115.

³⁶ U. Haltern, *Was bedeutet Souveränität?*, Tübingen, Mohr Siebeck, 2007, p. 3 with reference to A. Linklater, "Citizenship and Sovereignty in the Post-Westphalian State", *European Journal of International Relations*, 1996, p. 77.

³⁷ One might also speak of the "sovereignty of the citizens" as representing the pluralistic diversity of a modern democracy, see P. Häberle, "Zur gegenwärtigen Diskussion um das Problem der Souveränität", *Archiv des öffentlichen Rechts*, 1967, p. 259.

³⁸ Rt Hon. Chris Patten, *The Chatham Lecture*, Trinity College, Oxford, 26 October 2000.

³⁹ J.P.G. Bach, *Between Sovereignty and Integration: German Foreign Policy and National Identity after 1989*, New York, St Martin's Press, 1999.

⁴⁰ A. Cobban, *The Nation State and National Self-Determination*, London, Collins, 1969; M. Pomerance, *Self-Determination in Law and Practice*, Den Haag, Martinus Nijhoff, 1982; M. Sellers (ed.), *The New World Order. Sovereignty, Human Rights and Self-Determination of the Peoples*, Oxford, Berg, 1996.

⁴¹ A. von Bogdandy, "The European Union as Supranational Federation", *Columbia Journal of European Law*, 2000, p. 27.

⁴² See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 183.

⁴³ G.F. Schuppert, "Überlegungen zur demokratischen Legitimation des europäischen Regierungssystems", in *Festschrift für D. Rauschning*, Cologne, Carl Heymanns Verlag, 2001, p. 201; C. Calliess, "Optionen zur Demokratisierung der Europäischen Union", in H. Bauer, P.M. Huber, K.-P. Sommermann (eds), *Demokratie in Europa*, Tübingen, Mohr Siebeck, 2005, p. 281; G. Lübke-Wolff, "Europäisches und nationales Verfassungsrecht", *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 2001, p. 248; M. Zürn, "Über den Staat und die Demokratie im europäischen Mehrebenensystem", *Politische Vierteljahresschrift*, 1996, p. 27; P. M. Huber, "Die Rolle des Demokratieprinzips im europäischen Integrationsprozess", *Staatwissenschaften und Staatpraxis*, 1992, p. 349.

⁴⁴ B. de Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order", in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 196.

⁴⁵ D. Halberstam, "The Political Morality of the Federal Systems", *Virginia Law Review*, 2004, p. 101- 104.

⁴⁶ M. Waelbroeck, "The Emergent Doctrine of Community Pre-emption: Consent and Re-delegation", in T. Sandalow, E. Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II, Oxford, Clarendon Press, 1982.

⁴⁷ Very instructive, B. Fassbender, "Sovereignty and Constitutionalism in International Law", in N. Walker (ed), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003, p. 115.

⁴⁸ S.E. Merry, "Changing Rights, Changing Culture", in: J.K. Cowan, M.-B. Dembour, R.A. Wilson (eds), *Culture and Rights – Anthropological Perspectives*, New York, Cambridge University Press, 2001, p. 42.

⁴⁹ A. Bleckmann, *Allgemeine Staats- und Völkerrechtslehre. Vom Kompetenz- zum Kooperationsvölkerrecht*, Cologne, Carl Heymanns Verlag, 1995; M. Kotzur, *Theorieelemente des internationalen Menschenrechtsschutzes*, Berlin, Duncker & Humblot, 2001, p. 157.

⁵⁰ C. M. Vázquez, "Trade Sanctions and Human Rights – Past, Present, and Future", *Journal of International Economic Law*, 2003, p. 797-838, which includes further references; also, R. Lapidoth, "Some Reflections on the Law of Sanctions and the Practice Concerning the Impositions of Sanctions by the Security Council", *Archiv des Völkerrechts*, 1992, p. 114; D. Starck, *Die Rechtmäßigkeit von UN-Wirtschaftssanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevölkerung*, Berlin, Duncker & Humblot, 2000; G. Biehler, "Individuelle Sanktionen der Vereinten Nationen und Grundrechte", *Archiv des Völkerrechts*, 2003, p. 169-170; O. Poeschke, *Politische Steuerung durch Sanktionen?*, Wiesbaden, Deutscher Universitäts-Verlag, 2003, p. 78.

⁵¹ T. Schilling, "Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrates", *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, 2004, p. 343; C. Walter, "Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen", *Archiv des öffentlichen Rechts*, 2004, p. 39; M. Kotzur, "Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft – Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat", *Europäische Grundrechte-Zeitschrift*, 2006, p. 19; K. Schmalenbach, "Normtheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht", *Juristenzeitung*, 2006, p. 349; C. Tietje, S. Hamelmann, "Gezielte Finanzsanktionen der Vereinten Nationen im Spannung, 2006, p. 299; C. Möllers, "Bezwingendes Recht", *Frankfurter Allgemeine Zeitung*, 15.02.2006, p. 39.

⁵² R. Jennings, A. Watts, *Oppenheim's International Law*, vol. I/1, 9th ed., London, Longman, 1996, p. 502; C. Stahn., "Nicaragua is dead, long live Nicaragua – the Right to Self-defence under Art. 51 UN Charter and International Terrorism", in C. Walter et al. (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin, Springer, 2004, p. 823-864.

⁵³ S. von Schorlemer, "Menschenrechte und 'humanitäre Intervention'", in *Internationale Politik*, 2000; K. Schmalenbach, "Recht und Gerechtigkeit im Völkerrecht", *Juristenzeitung*, 2005, p. 637; P. Schaber, "Humanitäre Intervention als moralische Pflicht", in *Archiv für Rechts- und Sozialphilosophie*, 2006, p. 295; N. Lange-Bertalot, *Weltbürgerliches Völkerrecht: Kantianische Brücke zwischen konstitutioneller Souveränität und humanitärer Intervention*, Berlin, Duncker & Humblot, 2007. See also M. Sellers, "Republican Principles in International Law", *Connecticut Journal of International Law*, 1996, p. 403-411, who starts his line of argument with Grotius: "Grotius denied the republican doctrine of popular sovereignty, observing that no nation had ever allowed women, minors, or paupers

to join in public debate. As husbands govern wives, and masters rule slaves, so kings may own nations, to avoid the turbulence of uncertain jurisdiction. These proto-Hobbesian arguments and assumptions would not be made openly today. But they survive in the modern doctrine of non-intervention in the domestic jurisdiction of sovereign governments, as interpreted by some contemporary commentators on international law. Yet even Bodin admitted the right of intervention in a state's formerly internal affairs, when the state's sovereign oppresses his subjects, and Grotius fully recognized the equivalence between slavery and regal sovereignty while nevertheless excusing both."

⁵⁴ J.P. Müller, "Wandel des Souveränitätsbegriffs im Lichte der Grundrechte", in *Symposium für 60. Geburtstag von Luzius Wildhaber*, Basel, Helbing & Lichtenhahn, 1997, p. 45, p. 61; M. Kotzur, *Theorieelemente des internationalen Menschenrechtsschutzes*, Berlin, Duncker & Humblot, 2001, p. 322.

⁵⁵ HRLJ 16 (1995), p. 437-458 (no. 97); see also C. Kress, "Friedenssicherung und Konfliktvölkerrecht an der Schwelle zur Postmoderne", in: *Europäische Grundrechte-Zeitschrift*, 1996, p. 638.

⁵⁶ V. Havel, "Die Herrschaft der Gesetze", in: id., *Sommermeditationen*, 2nd ed. Hamburg, Rowohlt Taschenbuch Verlag, 1994, p. 14, p. 27; M. Kotzur, "Souveränitätsperspektiven – entwicklungsgeschichtlich, verfassungsstaatlich, staatenübergreifend", *Jahrbuch des öffentlichen Rechts*, 2004, p. 198, p. 215. Rousseau would have spoken of popular sovereignty, which to some extent is implicit in the right to the "self-determination of peoples", see M. Sellers, "Republican Principles in International Law", *Connecticut Journal of International Law*, 1996, p. 403, especially footnote 24.

⁵⁷ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 183.

⁵⁸ M. Sellers, "Republican Principles in International Law", *Connecticut Journal of International Law*, 1996, p. 403, especially footnote 43.

⁵⁹ M. Sellers, "Republican Principles in International Law", *Connecticut Journal of International Law*, 1996, p. 413.

⁶⁰ P. Häberle, "Die Verfassung im Kontext", in D. Thürer, J.F. Aubert, J. P. Müller (eds), *Verfassungsrecht in der Schweiz. Droit constitutionnel suisse*, Zurich, Schulthess, 2001, § 2, p. 17.

⁶¹ A. Padgen (ed.), *The Idea of Europe. From Antiquity to European Union*, Cambridge-New York, Cambridge University Press, 2004.

⁶² P.M. Stirk, *A History of European Integration since 1914*, London, Pinter, 2001; J.E. Stiglitz, *The Process of European Integration and the Future of Europe*, Gunnar Myrdal Lecture presented at the U.N. Palais des Nations in 2004.

⁶³ P. Häberle, *Europäische Verfassungslehre*, 5th ed., Baden-Baden, Nomos, 2008, p. 65, p. 102; also, R.H. Ginsberg, *Demystifying the European Union. The Enduring Logic of European Integration*, Lanham, Rowman and Littlefield, 2005.

⁶⁴ Also P. Dann (ed.), *The Unity of the European Constitution*, Berlin, Springer, 2006.

⁶⁵ See M. Kotzur, *Grenznachbarschaftliche Zusammenarbeit in Europa*, Berlin, Duncker & Humblot, 2004, p. 326; instructive, E. Schmidt-Aßmann, "Verwaltungskooperation und Verwaltungs-kooperationsrecht in der Europäischen Gemeinschaft", *Europarecht*, 1996, p. 247; a very early analysis was, on the one hand, that of P. Häberle, "Der kooperative Verfassungsstaat", in: id., *Verfassung als öffentlicher Prozess*, 3rd ed. Berlin, Duncker & Humblot, 1998, p. 407, and on the other hand that of E.-H. Ritter, "Der kooperative Staat", *Archiv des öffentlichen Rechts*, 1979, p. 389; also, S. J. Nuttall, *European Political Co-operation*, Oxford, Clarendon Press, 1992; for a specific source of reference, M.E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation*, Cambridge, Cambridge University Press, 2004.

⁶⁶ See M. R. Lucas, *Nationalism, Sovereignty, and Supranational Organizations*. Hamburg, Institute for Peace Research and Security Policy, 1996.

⁶⁷ J. Golub, *Sovereignty and Subsidiarity in EU Environmental Policy*, EUI Working Papers, 2/1996.

⁶⁸ This is clearly illustrated in, for example, the decision of Germany's Federal Constitutional Court in BVerfGE 89, 155 — *Maastricht*. Regarding human rights questions, see also BVerfGE 37, 271 — *Solange I*; BVerfGE 73, 339 — *Solange II*; BVerfGE 102, 147 — *Bananenmarktordnung*. See N. MacCormick, "The Maastricht-Urteil: Sovereignty Now", *European Law Journal*, 1995, p. 259.

⁶⁹ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 206.

⁷⁰ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press, 2006, p. 187.

⁷¹ M. Burgess, *Federalism and European Union. The Building of Europe 1950-2000*, New York, Routledge, 2000. On the subject of visions, L. Brittan, *The Europe We Need*, London, Hamish Hamilton, 1994.

⁷² So, emphatically, P. Häberle, *Europäische Verfassungslehre*, 5th ed. Baden-Baden, Nomos, 2008, p. 424; also, H.-P. Schneider, "Föderative Gewaltenteilung in Europa. Zur Kompetenzabgrenzung zwischen Europäischer Union und den Mitgliedstaaten", in *Festschrift für H. Steinberger*, Berlin, Springer, 2002, p. 1401.

⁷³ A. Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union*, Baden-Baden, Nomos, 2001.

⁷⁴ Y. Devuyst, *The EU at the Crossroads*, Brussels, P.I.E. Peter Lang, 2003.

⁷⁵ See also J.J. Weiler, "Federalism without Constitutionalism: Europe's Sonderweg", in K. Nicolaidis, R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, New York, Oxford University Press, 2000, p. 37.

⁷⁶ Therefore, the term "post-national constellation", as used by J. Habermas, might be misleading. See also M. Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order*, New York, Palgrave, 2001.

⁷⁷ The literature addressing the subsidiarity principle is abundant. For all, see A. D'Atena, "Die Subsidiarität: Werte und Regeln", in *Liber Amicorum P. Häberle*, Tübingen, Mohr Siebeck, 2004, p. 327, which contains many further references.

⁷⁸ A. Chayes, A. Handler Chayes, *The New Sovereignty: Compliance with International Regular Agreements*, Cambridge MA-London, Harvard University Press, 1995; G. P. Sampson, S. Woolock (eds), *Regionalism, Multilateralism, and Economic Integration. The Recent Experience*, New York, United Nations University Press, 2003.

⁷⁹ "In the future world, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression — everywhere in the world. The second is freedom of every person to worship God in his own way — everywhere in the world. The third is freedom from want — which, translated into world terms, means economic understandings, which will secure to every nation a healthy peacetime life for its inhabitants — everywhere in the world. The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour — everywhere in the world." For the citation see: L. Kühnhardt, *Die Universalität der Menschenrechte*, Munich, Olzog, 1987, p.112; also, H. Lauterpacht, *An International Bill of the Rights of Man*, New York, Columbia University Press, 1945, p. 6 and p. 84 .

⁸⁰ M. Kotzur, "Föderalisierung, Regionalisierung und Kommunalisierung als

Strukturprinzipien des europäischen Verfassungsraums”, *Jahrbuch des öffentlichen Rechts*, 2002, p. 257.

⁸¹ J.J. Weiler, “The European Union Belongs to its Citizens: Three Immodest Proposals”, *European Law Review*, 1997, p. 155.

⁸² See T. Christiansen, *European Integration between Political Science and International Relations Theory : the End of Sovereignty*, Florence, EUI Working Paper Series, 1994.

Thirty Years Ago

A DISCOURSE FOR YOUNG FEDERALISTS*

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If one holds, as I do, that every *political line* always has (consciously or otherwise) three levels: tactical (the way in which each episode is tackled, even individually), strategic (the way in which forces are employed) and theoretical (the relationship with the course of history and the profound nature of political and social problems), and if one also accepts the corollary of this idea, which is that the active recruitment of new forces occurs only at the theoretical level, then one can say that, ever since the end of the 1960s, the federalists have placed greater store by the strategic than by the theoretical aspect of their political line. This is because at that time, with the drive for European economic integration over and the election of the European Parliament already identified as the key front on which to fight for political unification, the federalists were obliged to decide whether to go on exercising their usual opposition to government, regime and the national community (and thus to remain confined within the pre-political sphere of political culture, of the struggle to create balances that do not yet exist), or whether instead to return, as in the times of the EDC, within the sphere of power, thereby accepting an immediate confrontation with the other political forces.

Convinced that Europe was about to enter the phase that would lead to its political integration, the federalists saw it as urgent to mobilise all the available forces around the question of the election of the European Parliament. Thus distracted from the theoretical questions and from the need to recruit, they neglected the activity of training cadres. It is no coincidence that the active young federalists of the time, given the priority importance attached to the strategic moment, entered the fray

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alongside the European Federalist Movement (Movimento Federalista Europeo, MFE). In fact, the action of the young European federalists (Gioventù Federalista Europea, GFE) became indistinguishable from that of the MFE. But now, as political struggle in Europe prepares to enter another new phase, we federalists, following our victories on the front of the European elections and the re-opening of the debate on the single European currency, once again find ourselves faced with the question of what to do. And when federalists experience a shift in their relationship with historical reality, “what to do” becomes a question of life or death.

What we have to ask ourselves is this: will federalists still have a function within the sphere of power once, following the advent of European elections, there is political competition not only for the national powers but also for European power? It is still not possible to answer this question absolutely because, given the state of national and Community power, the contest for European power could, initially, be too weak. But what is certain is that we are drawing closer to a time in which the MFE’s life will, once again, largely be a form of cultural politics destined to be the foundation of every subsequent political existence. Hence the need, now, for a fresh analysis of the problems and of the historical situation, in order to try and get closer to the truth than the other political forces are able to do, just as we did, in Italy, in the period between 1954 and the mid-1960s. Once again, the very existence of the MFE is at stake. It must not be forgotten that the MFE, which lacks the usual instruments of power (the vote, violence), lives only because it breathes life into itself, while those who are sustained by power — I refer to the parties, the historically established institutions, etc. — instead live off the power that others have created.

The Meaning of Engagement in the Young.

For those who are seriously committed to politics, there can be no drawing of distinctions between the responsibilities of the young and those of the less young, because a political line is, by definition, one line and not two. Nevertheless, alongside the problem of managing today’s politics (struggling for objectives that can be realised in the short term by exploiting the existing balances of forces) there also exists, particularly for a movement like ours which lies outside traditional political life, the problem of managing the politics of tomorrow, in other words, the political and cultural struggle to move forces from the field of what is *possible* to that of what is *necessary*, in order to create the new balances

that will have to be in place in order to tackle the problems raised by the process of historical development; problems that reason can already perceive, but that are beyond the grasp of strictly political reason, that is, of the thought and action of those who manage the balances that have already emerged and who thus view both the course of history and historical-social problems from this limited perspective. It is this relationship between practice and awareness, according to which politics is perceived only as exploitation of existing political balances, that explains why new values, even those universally recognised as needs, cannot be affirmed and thus why new social realities cannot be brought about. If young people involved in politics do bear a specific responsibility, this should be reflected in a greater commitment to the struggle to bring about not only that which is possible *today*, but also, and above all, that which will be possible *tomorrow*. This is the meaning that can be attributed the GFE's ambition to become, once again, the left wing of the MFE, a meaning that is emerging in a concrete way, precisely because the disintegration of the national balances and the progressive formation of new European and global balances has now opened up a space in which to tackle the problems of the growth of society and the crisis of the state. In this context, the recruitment and training of the cadres becomes, as in the past, the priority concern for the life of the movement. The federalists' task will thus be, once again, to promote the gathering and shaping of fresh energies using the method already tried and tested during our period of absolute opposition to national power and the Community structure: identification of the true solution to key problems, entry into the political equilibrium through participation in debates on these problems, attempting to make as many forces as possible converge with our positions, and abandonment of the political equilibrium, accepting no compromises, each time power reaches a decision that does not represent an adequate solution to the problem debated. In this context, the ideas of *entry* and *abandonment* refer not so much to the political field as to the arena in which specific problems are debated; in this way, it becomes possible to remain within the political equilibrium during the debating of a problem and to step out of it when a problem is deemed to have been met with a highly inadequate solution.

Industrial Reconversion and Control of the Historical-Social Process.

At the present time, political debate leads at best (in Italy often through the Italian Communist Party) to the identification of the key

problems but never to a solid understanding either of the problems themselves or of their effective solutions (the right needs are highlighted, which is no small thing, but awareness of these needs is mistaken for understanding of the solutions demanded). This is particularly apparent in relation to the increasingly pressing problem of the need to rebalance economic development and find a way out of the economic crisis by tackling the question of industrial reconversion, which is never linked concretely either with the scale (global) of the phenomena we are experiencing, or with their content, which, not only economic, even casts doubt on our way of life and, in a broad sense, our quality of life. However, if it is true, as indeed it is, that history raises only the problems it is able to solve, the fact that industrial conversion is considered a political problem that directly concerns power in Europe and in the world shows that mankind is now on the brink of assuming conscious and deliberate control of the historical-social process at world level.

Some reflection on this connection between industrial reconversion and the historical-social process is called for. The main observation that must be made in this regard is that the individual problems of industrial reconversion coincide with the contradictions and the crossroads that are encountered in the historical-social process. This means that submitting the question of industrial reconversion to the will of mankind is the same as submitting the historical-social process (the industrial revolution in the Third World and the post-industrial revolution in the world's advanced societies, the two seen as a single process that revolves around the global market) to the will of mankind. It must thus be recalled — because often this is not taken into account, even though it is accepted on a theoretical level (for example in Kant as well as in Marx) — that, so far, the evolution of history (the evolution of the mode of production), despite being the result of the sum of single acts of will, has, as such, always been independent of the will of mankind. Basically, the reason the historical process is now on the brink of being controlled is that its unfolding (which produces historical-social needs) has given rise to the problem of industrial reconversion, that is, the need to control the direction, mode and location of the production process (or, and this is the same thing, the need to control the development of the forces of production).

What this also means is that if, on the one hand, industrial reconversion cannot be entrusted only to the forces of production and the logic of the market, but must instead be planned (also from an urban and environmental point of view, for example), on the other, it — providing it is understood for what it is, the politics of the development of the forces

of production — demands the release of all the production energy that exists in the world, and thus, within the framework of its planning and coordination at world level (the new economic order), a global market that is as free as possible. All the industrialised countries are tackling the problem of industrial reconversion, that is, the directing of economic development. But since the advances in the mode of production and the greater interdependence between different countries and different areas have progressively widened the framework of reference of economic development so that it now embraces the whole world, there is clearly a need to coordinate the different countries' industrial reconversion policies. This coordination can be achieved only through an economic plan organised at world level. It is in this light that we should interpret the proposal to promote organised liberalism globally. In the national setting, industrial reconversion can mean only protectionism and corporatism pursued at the expense of the developing countries, as moreover already emerges clearly in the provisions adopted or requested — often by the Left — in France, the UK, Italy, and so on. The prospect of European Union instead makes it possible to overcome the degenerative tendencies of a protectionist and corporatist nature that are associated with the national setting because it raises the problem of the need to harmonise the industrial reconversion proposals emerging in the different European countries, and also to render European industrial development compatible with the needs of the world's developing countries.

The first attempt to respond to the problem of the need for harmonious growth of global development could thus stem from the contribution that the European Community may make, once it has acquired the necessary capacity for action; this is because Europe, owing to the nature of its economy, is keener to see Third World development than either the USA or the USSR are, and also because Europe, by altering the global equilibrium and realising the first ever model of democratic government of a group of nations, will push the world forwards along the road to unity, creating the conditions for the first embryonic forms of world politics. That said, in order to escape from the realm of vague notions and generate a clear mental image of industrial reconversion as a historical fact, it must also be added that this image, like every historical image, derives from a merging of freedom with necessity, which nevertheless need to be distinguished from one another, in order to give each its dues. The analysis of industrial conversion, as such, can tell us only what problems need to be tackled in the economic context. It can also lead us to the realisation that these problems exist on a scale so great that they will define the very

course of history, and also that their nature has now made it essential for the course of history to be controlled by the will of men. However, in itself, it does not tell us how these problems should be resolved; it merely clarifies that production can be controlled only by controlling society.

The general fact that must be considered at this point is this: the analysis we need, in order to identify the problems, refers, precisely, to necessity, and only to necessity (therefore, historical materialism is the most efficient theoretical means). Analyses of this kind allow us to establish that these, not others, are the real problems we face, and that the others, nevertheless discussed, exist only in our imaginations; in other words, they allow us to register the situation in which we find ourselves, which is not of our choosing, which we must accept, and which forces us out of the realm of reality if we fail to recognise it. Instead, the analysis through which we seek the solutions to the problems refers, precisely, to freedom, and only to freedom, and thus demands an entirely different use of reason from that manifested when we have recourse to historical materialism (or to any other intellectual means of identifying a situation which belongs to the realm of necessity). In fact, man exerts control if, and only if, a situation, rather than being merely submitted to, becomes a matter of choice, not in the sense (obviously impossible) of our being able to choose what is in fact imposed on us (the situation), but in the sense that we can use the situation as a means to an end, which demands a free act, a conscious act, an act of will. In this way, necessity (the unchosen means) and freedom (choosing the ends according to the means) come together. Let us take an example. Industrial reconversion has presented us with an opportunity to start the process of industrial revolution in the Third World. Industrial production, moreover, is a means to certain ends (more widespread schooling, a certain level of law, etc.); and it is precisely through the achievement of these ends (which, as such, are not economic, but cultural, legal etc.) — that production (the situation) is controlled.

If necessity and freedom come together, it follows that recourse must be had, in the political analysis, both to historical materialism (or in any case to historical verification), and, at the same time, to a concept of freedom (the freedom of all, which implies and demands justice and equality). Following this line, having recognised industrial reconversion as the historical turning point mankind has reached, it is a question of bearing in mind that our historical problems are those that belong to the framework of industrial reconversion (always remembering that no other problems exist, that all the rest is pure illusion); but also bearing in mind

that the solution to these problems is not only material, not only economic, but concerns the whole human condition in its current setting, which is defined by the current level of the available means (the stage currently reached in the development of the mode of production).

Before ending this section, it is necessary to recall that, in a conjectural way, it is perfectly legitimate to affirm that mankind, at the technological level he has now reached, is capable even of self-destruction: this is the negative aspect of the fact that mankind is faced with the need to control the historical process. It amounts to saying that mankind really does seem to have reached the threshold of freedom, in the sense that his life (survival) does not now seem to depend on a natural (natural-historical) process, but rather on his own capacity to know and to act. It seems to me that this observation sheds a very clear light on the culture of the scientific, industrial and democratic revolution, and in particular on the thought of Kant, Hegel and Marx. However, within the limits of our political analysis, what must now be examined, in the light of the meaning of industrial reconversion, is the concept of control of all by all, in other words, the significance that is acquired by the participation and freedom of individuals within the institutions, it remaining clear that we are talking about the participation of clearly-defined production forces in a clearly-defined process, and not about some imaginary world.

General Will and Participation.

Whenever the life of the community is in question there emerges, even in liberal and democratic states, a uniting of forces that goes beyond the normal government-opposition dialectic. But today the causes of a community's life or death are more complicated than they were in the past. In the past, international politics was the only factor involved in the life or death of a people, which was decided by war. Now, however, generally, the life or death of a people can also be seen to depend on the implementation of the economic plan, or rather, on what constitutes the true content of modern economic planning. Just as the majority-opposition dialectic disappears in times of war (both because the opposition is sidelined or subjugated at such times, and also because the general danger and the degree of social integration spontaneously lead to unity), so, now, the implementation of the economic plan demands a greater level of unity, which must manifest itself through forms of participation, respecting the freedoms mankind has acquired in the course of history. It is thus necessary to specify exactly what significance the federalists attribute to

the economic plan, to the democratic unity necessary to implement it, and also to the danger that would apparently derive from it, given that it would reduce the areas in which citizens can disagree and thus be guaranteed their classical or traditional freedoms.

It must be remarked that what the old term “economic plan” actually indicates, at the level of need at least if not at that of awareness, is planned control of the “material” elements (understood in a Marxian sense, and including territorial and environmental ones) of the historical-social process. It is in this framework that the concept of urban development is to be understood, and that a harmonious relationship between “city and country” must be pursued, in the sense of abolishing all differences between town/city and country in the framework of the “regional city” (the widespread diffusion throughout the territory of urban characteristics and facilities), and of overcoming simply “environmental” or “economic” visions of the spatial setting in which man lives.

Mankind’s task is to “humanise” nature, not to abandon it to its own devices or to safeguard it “in itself” (Marx remarks that nature, in itself, by which he means the nature that “preceded human history”, “no longer exists anywhere except perhaps on some recently formed coral island”). Obviously, this is not to say that environmental resources can be used only in the pursuit of maximum economic profit, this being only one of the elements that serve to evaluate the effects of man’s intervention on the environment. The fact is that, to date, no territorial policy has been developed, it being clear that such a policy should stem, at once, from a coming together of the objectives of global planning with the process of the formation of public will. But public will cannot be formed in the absence of the intellectual means for conducting the local and territorial surveys of the resources that are needed in order to decide the location of production activities.

But how is the economic plan realised? If we want to identify a main thread of this analysis, we cannot consider the various aspects haphazardly, but must start at the beginning with what comes first. In other words, we must consider the question of the formation of political will, but do so bearing in mind: a) that a plan can be said to exist if, and only if, throughout its stipulated duration, everyone acts according to the provisions it contains; and b) that the plan must be something everyone wants (wanting the plan is a much bigger thing than voting for a party, because the plan implies new customs, a new way of living for mankind, and new scope for each single individual to make decisions regarding his own life and his own social relations).

These premises are enough to show that the political will needed to realise the plan must inevitably be a new form of public will, possibly culminating in a new general will (a new state). This is another question on which it is necessary to reflect. It now seems possible to assert that unless the question of the general will, of the formation of public will, can be raised to this level, democracy will have no further scope for recovery or progress. If, in dealing with this issue, we concern ourselves (for now) only with the development of a model — restricting ourselves to the question of conceivability —, and if we remember that the main constitutional issue is that of the electoral system (on account of its intrinsic relationship with the formation of the general will), then it seems to me that the only coherent proposal is one that makes provision for the formation of public will through a “cascading” proportional electoral system, that is for a succession of elections coordinated at different levels, from local level through intermediate levels to the general level, in such a way as to allow each human group to gain an awareness of its own particular problems as it is shaping its will, and then to go on, through progressively wider elections, to make this awareness and this will part of the general awareness and the general will.

Indeed, unless the electoral context becomes a genuine process of formation of public will through raising awareness and laying the foundations of the economic plan, the citizens will be destined to exercise their will in vain (they will decide without knowing) and the experts will end up knowing everything except that which it is essential for them to know: the concrete needs of the various human groups, which by definition are known either to these groups or to no one at all. What is needed is for district-level elections to focus on the problems of the district, for municipal elections to be preceded by debate of the problems of the municipality (based on a knowledge and understanding of those of the district), and for this pattern to be reproduced at all the subsequent levels. Naturally, to belong to everyone the plan must be one, and one alone. It should therefore be made quite clear that the “cascading” electoral system, hypothetically, allows everyone to contribute to the formation of the plan but does not guarantee its implementation; this depends on a maturing of society and on an institutional transformation that, together, make it possible to overcome the contraposition between majority and minority in relation to the execution of the plan, albeit with a reservation that we shall now examine.

It should be clear that it is not a question of establishing a unanimist regime. And here we come to a real problem. If the plan is as I have

outlined it, and as long as the situation with regard to technology, the exploitation of resources and the setting in which man lives is what we think it is, then the plan is destined not just to decide short-term issues, as the majorities and governments of old did, but indeed to shape the destiny of future generations, a role that is clearly outside the legitimate competence of any majority. But at the same time, the reservation about the unitary and collective execution of the plan may guarantee the realisation of dialectic forms of unity. This reservation is due, ultimately, to the fact that scientific knowledge in the social field stops at the level of the identification of trends and cannot, by definition, predict innovations and single cases — in short, all that which lies outside predicted trends and the plan formulated on the basis of these trends. The plan thus implies two spheres of execution: the sphere of its routine implementation (decided by all) and the sphere that pertains to unforeseen situations and events (which cannot be resolved on an electoral basis and whose management must thus be entrusted to a representative body with the faculty to make immediate decisions). At this latter level, the plan, still within the framework overseen by Parliament, would work on the basis of the traditional majority-minority mechanism (which would thus maintain its constitutional role). This special executive function, which would derive great arbitral value from the fact that it is concerned with everything that is excluded from the plan while remaining within the logic of the plan, should be carried out by a president elected directly by the citizens, also because this would give rise to a majority chosen by the people. This president should guarantee both the implementation of the plan (entrusted to an executive body directly linked to Parliament and bound by the results of the “cascading” elections), and adherence to the agreement reached between the political and social forces with regard to its objectives.

The General Will and Solidarity.

The problem before us is that of the need to make the general will coincide with the formation and execution of the plan (and it is worth noting that in any case, and regardless of the value of what I propose here, it is indeed this problem that must be resolved in order to be able to tackle the problem of the future of mankind, if it is true that this future is now entrusted to his freedom and that thus the time has come to bridge the gap and overcome the divisions that have opened up between politics and society, power and culture, science and values, etc.). Naturally, the

general will is what its name suggests (i.e. authentic, not manipulated) if, and only if, its formation stems from the social will of every single individual, that is to say from the will of human groups taken at the level at which there emerges the first, and most direct, form of social aggregation). In traditional terms, one might say that the freedom and participation of individuals can manifest themselves effectively at a general level — formation of the public will, electoral system, distribution of power — only if they are fully expressed at local level too.

Thus, the criterion is, as far as possible, that general will must, as far as possible, coincide with government at all levels. This is what participatory democracy means. And at the lower levels, where one encounters the reality of daily relations, where social relations take the form of personal relations, the indispensable criterion for the formation of a true general will is that of the replacement of power relations with relations of solidarity. It must immediately be made clear, however, that this is something that cannot come about without an urban planning revolution.

Beginning at local level, democracy must be linked to urban planning. Industrialisation, by destroying the city understood in the true sense of the word, i.e. as a dense, harmonious network of human relations (and thus as a territorial, material basis of culture), has destroyed the spontaneous solidarity that once sprang up at the most local level before evolving into cultural (personal and social) identification with the parish (in the same way as, at city level, there was cultural identification with the diocese, and so on). Today, we face the problem of eliminating urban disintegration (which dehumanises social relations) and of giving cities back to men (all men), through the controlled planning of development and the scientific organisation of the territory; and it goes without saying that cities can be given back to men only through the elimination of all suburbs and outskirts (territorial discrimination) and their replacement with true urban aggregations. The city must once again become the heart of the formation of culture and this will be possible only when each district has a school to mirror and embody the culture of the district, and each city a university to mirror and embody the culture of the city.

At the present level in the development of relations of production the city can no longer be understood as a physical place, but rather as a global function — as the system of civic services organised across the territory. In this way, the sense of belonging to a given city should be shared by all those who make use of a certain system of services which includes production activities, green spaces, communications networks, cultural centres, and so on. In this way, the city can be understood as a spread of

urban aggregations in the framework of the overcoming of the distinction between town/city and country.

In Italy, the election of district and school councils has highlighted these social needs and, in particular, the fact that one of the problems to be solved is that of making schools more open to society. But if the school is meant to become the heart of the district — as the university is meant to be the heart of the city — the election of school councils does not make sense, given that it is the district that should control the social orientation of the school (just as the city should control the social orientation of the university); on a technical level, on the other hand, the administration of the school should be in the hands either of the teachers, or of no one. If a district council is elected but not given authority over the school — i.e., not given the one competence that gives meaning to all its other competences — then what is elected is an empty shell. On the other hand, if a separate school council is elected, then the school becomes a separate institution.

This point needs to be clarified. From a strictly educational point of view, schools must be the province of the “specialists” (teachers and professors). This is because culture and science depend on two factors: on the autonomy of the individual (spontaneity) and on society (the authority that is inherent in society). Without society, there can exist neither knowledge nor the specialisation through which knowledge is preserved. It is society that, over time, accumulates knowledge, and this body of knowledge must be learned, exactly as it is, in each of its branches, from the only person whose job it is to know it: the teacher or professor. Only in this way can knowledge be exploited by spontaneity and innovated. As things stand, however, this mechanism does not manifest itself perfectly because there is a separation between spontaneity and specialisation and a subordination of the former to the latter, instead of a shared link between each of them and society. But this separation is a fact of power, not of thought. The relationship that exists between knowledge and time and between knowledge and society shows that specialisation is rooted in society (at all levels, from the district to the world), but that it is only one part or element of the culture of society which, as such, is intrinsically (already, at root level), and must become explicitly (in an intentional, deliberate and organised way), the culture of all.

Only through this living relationship between individual freedom and social freedom does it become possible to re-forge “the link between the transient and the eternal,” providing, it must be remembered, that an open school is not a school divorced from life (the latter being the kind we have

today, which, as long as it remains this way, certainly needs more than just elections in order to be revived). If the school is the seat of a district's or a city's culture, then it must also be, for everyone, a library, a sports centre, a centre for art and music, a place for debate, for raising awareness of the problems of the district and city, in short, an out-and-out urban laboratory. Only through this kind of school, and this kind of link between city and school, will it be possible to find again the motivation capable of promoting a rebirth of solidarity and of activity done on a voluntary basis.

From this perspective, it becomes possible to review the concepts we have of work and freedom. Work, in the sense of paid work, is an effort; it is the legally regulated part of human activity. There has to be work in order to allow everyone also to engage in free and creative activities, because the human race survives at the level of organised production, and the more organised this production is, the more free hours, the more freedom, man has. Being regulated by the law, work demands obedience on the part of all, in order to safeguard the social life of individuals.

Activity, on the other hand, is not determined by the law, by profit, or by penalties. It is freely motivated and, for this reason, the source and the sphere of morality. Nowadays, because of the urban disintegration that impedes relations between one man and another and leaves everyone isolated, the incentives and outlets for activity are much reduced. In this regard, it must thus be said that just as classical political freedom is possible only in the liberal setting (of the distribution of power) and in the federalist one (of the territorial division of power), thus freedom, in the existential sense (activity), is possible only if districts, by becoming the fullest expression of life and of open relations between individual and social life, allow, within the ambit of open schools (open to all activities, including sporting and artistic activities, etc.), a coming together of all cultural demand and all cultural supply (everyone has something to teach or impart and everyone has something to learn).

Militant Democracy.

All that has been said thus far on the general will and on participation derives, in part, from a reflection on the democratic experience in Italy. I would now like to refer these considerations to the historical situation, in order to have reality as a point of reference while nevertheless remaining within the ambit of this examination of the theoretical component of our political line, and thus in the ambit of the attempt to develop models (so as to have definite, clear and recognised aims; so as to know,

from a comparison of the action with the models, where we are heading; and so as to avoid making mistakes, like that of the elected school council and the empty-shell district).

Democracy, for a long time underestimated and opposed, also by vulgar Marxism and by vulgarity *tout court*, is in fact an extremely advanced — and still precarious — point in the evolution of history. Still a recent development in Europe and America, it is practically non-existent in the rest of the world, where it remains a great target to be reached. This is why the things that happen in democratic countries are so important, and why it is particularly important to consider what happens in the two great test benches of democracy: Germany and Italy.

Italy and Germany are touchstones because they are experimental democracies. They are the two great experimental democracies both because of the particular link between modern culture and the past that characterises them, and because of the problems that they must resolve in order to complete the democratic transformation of their societies.

Democracy is a habit; it is ingrained in the popular consciousness in both the French- and the English-speaking worlds. In the former, it was born of the French Revolution, that is to say, of *the* great democratic revolution in the history of mankind, and in the latter, it is tied up with the history of the state, i.e., with a process of constitutional evolution. It must be borne in mind that great historical events are out-and-out “cultural events”: they educate the people through the mere fact of their existence. Thus, when a Frenchman or someone from the English-speaking world thinks about his country’s past, what he is thinking about is democracy. But this is not true of Germans or Italians. Germans and Italians have to decide to be democratic, and it is a decision that, in part, goes against their own past; and they must also learn to be democratic, learn to be democratic on the basis of reason, because they are not yet completely democratic out of habit.

Democracy in Germany and Italy is in part a reality, in part a project, and this is the reason why events in Germany and Italy highlight the problems to be faced in building a democracy. What is more, they do this in a way that completes the exemplary and irreplaceable lessons provided by French and British-American history, because in the case of Germany and Italy we are talking about the building of democracy in today’s society, and (equally crucial given the ever-increasing unity in the world) about the building of democracy not as a closed, exclusive state, but as an open state, a member state in a federal community of states, which is, itself, in the process of being built (Europe).

From this perspective, it can be said that the problem that has emerged in Italy is that of making the general will coincide with government (participatory democracy). But the limits and shortcomings of the Italian experience are the very things that lead us to think that the German experience has highlighted a second problem, that of making the general will coincide with legality (militant democracy). Basically, in Italy we can find examples of participation (districts, school councils, etc.) that never manage to get beyond the level of intention, that never reach the level of true participation because they are not organised in such a way as to be able to represent moments truly contributing to the formation of the general will. And, in Germany, there are examples of militant democracy (for example the controversial *Berufsverbot* case) that, being poorly framed, expose themselves to sometimes dangerous misinterpretation, and do not yet illuminate with clarity the direction to be followed, which is that of the formation of legality as the general will. This is the criterion: the coincidence of the general will with respect for the law. It should in any case be remarked that those who, out of ignorance or the desire to exploit ignorance, use the term “protected democracy” instead of “militant democracy” are either lying, or captive to a lie; and it should also be remarked that any antifascist who is neither a coward nor a guilty prefascist must consider the problem of the collapse of democracy in the dictatorship (Germany must be attributed with the great moral and cultural merit of having raised, in the wake of Weimar and Nazism, the problem of militant democracy, that is, the problem of a democracy that regards freedom, legality and constitutionality as assets to be defended, not abandoned to the mercy of the false and the violent; in the same way, the Italy of the Resistance has the moral and cultural merit of having raised the problem of participatory democracy).

But at what point exactly does militant democracy adapt the general will to legality, and vice versa? Germany raised this question, and it is one that Italy must tackle on account of the strength of the terrorist, subversive, and extremist currents present in the country and of the level of hostility to the constitutional principles of democracy (an attitude shared by many Italians, even well-educated ones, both because of the limits of the liberal tradition in Italy, and also because of the negative aspects that accompany the positive ones, often in the absence of a sufficiently clear distinction between the two, in socialist, communist and Catholic culture). The root of this question lies in the fact that freedom should not be used to destroy freedom. Such behaviour lies outside the social pact, outside the general will and probably for this reason can show us the

solution. What I would like to try and propose is this: when one acquires the right to vote, at the age of 18, one should take an oath not to this state, just as it is, but to legality and constitutionality (also to educational ends, to create a “cultural event” that embodies the story of mankind’s difficult journey towards freedom). Whoever should choose not to take the oath, because they are not convinced that the principles of democracy are valid, should not — until such time as they should change their mind and take the oath — enjoy political rights (there is no sense in voting when you do not believe in democracy), but instead be regarded as guests. And, as guests, they would not be able to hold a licence to carry fire-arms, for example. Their freedom (*theirs* in the true sense of the word, the freedom to be what they are, without having to adopt a disguise) would be better protected (they would not come under suspicion, as extremists in the presence of terrorists inevitably do); they would have an entirely honest and loyal relationship with the citizens of their host state, in other words, a relationship that would command respect, to the point that it would render human, as it should be, the cohabitation of the citizen with the guest (i.e. with the outsider who does not yet have, or cannot have, a homeland). That which today is called, or indeed is, repression, would make way for tolerance, for freedom, because, for a guest, it certainly amounts to freedom when he can say and do what he likes, apart from endanger the state or violate the hospitality agreement.

One area that would not be entirely clarified is that of the crime of opinion, often very difficult to distinguish from the right to free expression of thought. But the violation of the oath would be a very clear offence (and should carry severe penalties, very severe ones should it be repeated); violation of the hospitality agreement would be another clear-cut issue (starting with the possession of arms, which should be considered, for a guest, a very serious crime). Political action not conducted in full accordance with legal and constitutional principles would be a very difficult and very risky undertaking. In any case, such political action, being punishable as a violation of the oath or of the hospitality agreement, could not, publicly, be organised, developed or exploited propagandistically; therefore, by ruling out the possibility of the formation outside the law of groups that nevertheless take advantage of legal relations, it would prevent those prepared to accept the price of secrecy and clandestinity from entering into any kind of relationship with society (e.g. through groups of supporters, admirers etc.).

At this point, I would like to remark that thinking along entirely new lines is difficult. Perhaps what I have said about the problem of militant

democracy makes little sense. But the problem itself is real, hence the need to try and say something. And that something must follow certain lines: those of loyalty, constancy and virtue. It must be said that the right to freedom is once more becoming a lofty matter — each individual's critical appraisal of himself, his sense of responsibility, his humanity. To evaluate this question objectively, it must be noted that nowadays freedom coincides with social progress, with the progress of justice. When workers still did not have the right to vote, or the right of association, or adequate negotiating power in the economic and political spheres, freedom flourished in the realm of privilege. But in states that have universal suffrage, political and economic freedom for the workers' movement, a mixed economy, and scope for economic planning, it is only through the freedom of the individual that the freedom of everyone can be promoted, only through freedom that economic, social and political relations can be shifted from the realm of privilege to that of justice. Those who use their freedom to destroy freedom are not only against democracy. They are also opposed to the onward march of the workers' movement towards equality and the definitive overcoming of class privileges.

I wish to end this still rather tentative discourse with two clear proposals. We may use the term haphazard to define the politics of those who, in their action, fail to establish a concrete relationship with the real human condition and with the way things are moving, i.e., with the course of history, which is determined by the needs and problems of today's people, each with their own capacities and limits. And haphazard politicians risk ending up without a result, or with one that is the opposite of what they hoped to achieve. Those who swim against the current of a river ultimately return to the riverbank or drown. The same applies to the course of history. And it seems to me, as I have said, that industrial reconversion, providing it is understood for what it really is, can show us what is, and what could be, the course of history. Only if this process is not slowed down and distorted will we be able to build new forms of society and new forms of state. And there is more. The renewal of society and of the state depend on a converging of the will of all, that is, on projects and actions that interpret this renewal as a new, and loftier, stage in the formation of the general will. To conceive of the renewal of society and of the state without thinking of it in terms of the general will would be to set oneself outside and above the general will, that is to move backwards, not forwards, on the road to democracy.