

# Philosophies of Europe: a brief survey of the pre-history and history of the European idea

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1. The idea of Europe, in the sense in which we know it – especially that of the European Community, Communities or Union<sup>1</sup> – is arguably a recent creation: it is, we might say, a construction of the post-Second War period. By this I mean that the labyrinthine edifice in question – roughly, the notion of Europe as a democratically inspired and organized supra-State – is of a fairly radically different nature from anything that preceded it. I shall therefore be concerned with the pre-history, not of a single doctrine, but of an interwoven complex of ideas and philosophies, of ideologies and movements, which have contributed in very different ways to the diverse present-day conceptions of European identity.

It further seems to me – though I cannot argue for the point in this short paper<sup>2</sup> – that, while the dynamic roots of recent European unification lie in the fields of practical political goals and of practical economic necessity, its motor is to be found in innovations and practices in the legal field. I shall return to this point,

<sup>1</sup> Previously known as the European Community, before that as the European Economic Community or Common Market. In fact, like some other great political constructions before it (notably the Austro-Hungarian Empire), this historically unique entity has no single or unequivocal name. The Maastricht Treaty concerns the *European Union*; it modifies the Treaty of Rome, which established the *European (Economic) Community*, one of the *European Communities*. But the European Community persists. The European Union seems not to possess legal personality, and so can make no treaties, which the European Community does and can. The European Commission functions as the executive of both the European Community and the European Union, with different powers in the two cases.

<sup>2</sup> A version of this paper was presented to the autumn 1995 conference of the Dutch Association for the Philosophy of Law and published as: G. LOCK, *Impossible Europe?*, in «Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie», 3, 1995. I would like to thank my mother, Mrs E.A. Lock, for her support during the preparation of this piece.

asking in particular whether these legal initiatives have secure roots in the history of legal theory and philosophy.

2. I want first however to say a few words about the history of the effort to impose unity in Europe. It appears to me clear that the process of European unification which we are now witnessing has little in common, in respect of ends or means, with, say, the attempt of a half-century ago at a military unification of Europe under the domination of Germany and its allies; or with Napoleon's quest for supremacy by force of arms. For quite different reasons, it is hardly comparable with the pan-European religious unification of the mediaeval epoch, or with the political and administrative system imposed or aimed at by the Holy Roman Emperor. Nor, to turn the clock even further back, can it usefully be seen as a resurrection or further development of the principles underlying the expansion of Roman power and the constitution of an extensive Roman Empire, covering indeed many of the regions constituting modern Europe<sup>3</sup>.

In the domain of ideas, on the other hand, it is admittedly not especially difficult to establish plausible – but perhaps superficial – analogies between various earlier systems of thought on the one hand, and the tenets which supposedly underlie the emergent Europe of the post-1945 epoch.

An example of the attempt to find such precursor conceptions of the so-called idea of Europe is to be found in the reference sometimes made to the Stoics and their notion of a universal or world State. In Stoic thought there can be found arguments for the equality, not only of individual human beings, but of the various «nations» (*gentes*) which constitute mankind, which requires to be unified. This cosmopolitanism – a notion which of course recurs in various schools of political thought, up to and including the twentieth century – was however accompanied by a vision of nature (for instance, in the early Stoa, as a creative conflagration); of an ascetic ideal; of an ethics, sometimes explicated, in the late Stoa, in terms of the realization of innate moral predispositions; of time – conceived not as a line of progress but as a cyclical course; and in general of a reference to the supremacy of natural law over man-made legal systems which would be difficult to reconcile with the late

<sup>3</sup> Roman-controlled territory failed however to extend to large areas of northern Europe: parts of Germany, Scandinavia etc. – the world of the Goths, Huns and others. The question of *Roman law* on the other hand must be posed in rather different terms, since its later development (Roman law as the modern world knows it) does involve the Germans, as well as the Eastern – Greek and at last partly non-European – Empire.

twentieth-century view of Europe. Again, it is always possible to abstract an element of an earlier system – in the case of the Stoics, it might be their principle of world citizenship – which can be claimed to anticipate our present-day notion, *in casu* of a supra-national, European citizenship. But again, the parallel is misleading, because of the manner in which the two conceptions function within a broader system of thought.

I have taken the Stoics as one example: many other, mostly later instances of supposed harbingers of the European idea could be adduced. They have indeed been proposed in recent works. Thus Jean-Pierre Faye, in a collection of readings entitled *L'Europe Une: Les philosophes et l'Europe*<sup>4</sup>, includes extracts from, among others, Sully, Leibniz, Rousseau, Voltaire, Bentham, Saint-Simon, Nietzsche, Husserl and other twentieth-century thinkers. In the Preface, Jacques Delors comments that the book shows how, throughout history, princes, politicians and philosophers have «conceived the European project as one of peace between peoples». Krzysztof Pomian, in his essay on *L'Europe et ses nations*<sup>5</sup>, discusses the role of Paganism, early Christianity and the Carolingian epoch in the formation of a European identity, drawing the conclusion that while the regions controlled by Charlemagne cannot, strictly speaking, be identified with Europe, his rule does «prefigure Europe» and «prepare [its] future emergence». His reason is that the institutional renewal realized in this period, conceived of as a *renovatio imperii romani*, and culminating in the establishment of a new Empire, succeeded in uniting the Latin and Germanic peoples and in transcending their ethnic differences – and this *because* it was the incarnation of «Romanity», which is to say of «humanity». Rémi Brague, in his *Europe, la voie romaine*<sup>6</sup>, develops a line of thought similar in one respect. On Brague's view, one can consider Europe, in the present-day sense, as a result or residue of a number of dichotomies: between the West and the East (the barbarian territories)<sup>7</sup>; between the Christian and the Moslem regions; between the Latin and the Byzantine worlds; and – later – between the Catholic and the Protestant realms. These divisions, Brague argues, are themselves constitutive of European identity – in the sense that they determine it, but also subvert it: that is to say, subvert any univocal sense which this term might be thought to possess.

<sup>4</sup> J.P. FAYE, *L'Europe Une: Les philosophes et l'Europe*, preface by J. DELORS, Paris 1992.

<sup>5</sup> K. POMIAN, *L'Europe et ses nations*, Paris 1990.

<sup>6</sup> R. BRAGUE, *Europe, la voie romaine*, Paris 1992.

<sup>7</sup> I.e. the regions east of the Mediterranean basin.

Brague also poses another significant question. He defends a thesis which, very roughly summarized, is that if the concept of European identity has any meaning, this meaning lies in the fact that Europe has always defined itself in terms of its relation to an external factor: but not, as in the case of some other civilizations, as the contrary or converse or antithesis of this foreign or alien element, rather in an internal relation to that element. Thus, Latin Europe – in the sense in which European civilization, for many centuries, was dominated by the high culture of the Latin language – defined that culture in terms of its relation to its classical Greek predecessors. For classicism embodied the notion of a barrier set up against barbarism, without it being the case that Latin, Christian civilization identified itself with classicism: classicism was after all a pagan system<sup>8</sup>. On a parallel basis, Brague argues that the Europe of our own times needs to renew its links with what for some years (indeed, in large part, precisely in those years which have seen the rise of the European Community) has been neglected and even to a considerable degree eliminated from the cultural and educational agenda: not only the classical but also the Roman, the Christian, the Latin past. The argument is not so much – as it was, in the early nineteenth century, for Novalis – that Europe must become Catholic again, as that it must re-establish a substantial cultural line to its Roman, Christian and Latin (pre)history in order to remain what it always was: a society whose self-consciousness is defined not in inward-looking terms (underpinned by the image of an external enemy) but in terms of a reference to a world which, though no longer or simply not identical with it, stands to it in a foundational relation.

Brague's argument raises a number of other issues relevant to our present theme. I lack the space to discuss them here: I will just say that they concern, among other things, the topic of culture and the proper role of education<sup>9</sup> and that of the relation of European society to its self-reflexive historical sensibility.

<sup>8</sup> But some European thinkers, like the historian Gibbon, did of course identify themselves precisely with the classical and pagan, as opposed to the Christian tradition: this is the theme of GIBBON'S *Decline and Fall of the Roman Empire*. The same is true of Machiavelli and has been true of many thinkers since, up to and including the twentieth century.

<sup>9</sup> In his essay of 1935 on *Philosophy and the Crisis of European Humanity* Edmund Husserl asks what the spiritual shape of Europe is. His answer is that Europe is to be characterized in terms of an *attitude* to the surrounding world, an attitude which he calls philosophical. This philosophical attitude is distinguished from other attitudes by the fact that it is *theoretical* – that is to say, motivated not by the usefulness of the knowledge which it may produce, not by «the natural interests of life»: it «turns away from all practical interests and ... strives for and achieves nothing but

3. But let me first briefly direct attention to quite another factor in the debate on European unity: that which concerns its history of violent conflict. This factor leads us into a consideration of the place of legal history in the constitution of Europe. One of the present-day factors of European unity has as a core element the fact that its component States have spent several centuries making war against one another<sup>10</sup>. It may indeed be this pattern of old conflicts and old hatreds that links together the major European lands; as it may be the determination to overcome this pattern, once and for all, which accounts in part – together of course with the motive of securing a common economic market – for the emergence of the European Community after the Second World War.

There are theories which attempt to reflect on this relation between European identity and war. In most cases, this attempt consists in an honest recognition of the violent character of European history, which is deplored, combined with puzzlement that the existence of a highly-developed civilization could thus be accompanied by cruelties of such an unparalleled degree<sup>11</sup>. A rare exception in this respect is the account proposed by Carl Schmitt<sup>12</sup>.

pure *theoria* ... [Thus does man become a] surveyor of the world; he becomes a philosopher». On this view, *philosophy is something typically European* – and *specifically European*: other societies, however much interest they may display in, say, theoretical science or religion, do so because these activities are for them extensions of the «natural», practical attitude to life: because they are thought to be useful, at least in the longer term. The function of philosophy in European society is thus fundamental: it is the activity which most perfectly embodies and helps to reproduce the specific character of that society. We might add: the institutions of higher education, or at least the universities are, on this view, the typical site of such philosophical activity, the place of free investigation where the question of *social relevance* is necessarily parenthesized. See E. HUSSERL, *The Crisis of European Sciences and Transcendental Phenomenology*, Evanston 1970, p. 269 ff.

<sup>10</sup> E. BALIBAR, in *L'Europe après le communisme*, typescript, 1991, proposes a definition according to which those peoples are to be considered typically «European» which took part in the 1914-18 war. In this sense, he remarks, Americans (from the United States) cannot be excluded from this category, just as the Senegalese and some other perhaps unexpected candidate peoples cannot; while the place of the Swiss and of the Dutch, among other peoples, is more problematic.

<sup>11</sup> Cfr. E. MORIN, *Penser l'Europe*, 1987/1990, pp. 163, 242: «Certains demeurent perplexes devant l'ambiguïté encore persistante de la double identité européenne, humaniste et colonialiste, civilisatrice et oppressive ... Toutefois, bien que partiellement et insuffisamment démocratique dans son histoire, l'Europe de l'Ouest est devenue aujourd'hui démocratique dans sa totalité, et toutes ses démocraties sont purgées de l'ancien colonialisme, ce qui ne veut pas dire qu'elles soient purifiées des tutelles militaires ou des contrôles économiques sur les pays anciennement colonisés...»

<sup>12</sup> I ignore here all the debates concerning Schmitt's disastrous political engagements under the Nazi regime (cfr. for instance J. BENDERSKY, *Carl Schmitt: Theorist for the Reich*, Princeton 1983; H. MEIER, *Die Lehre Carl Schmitts*, Stuttgart 1994).

A theme which runs through much of Schmitt's work is: What is the historical source of the order and ordering which is law? In his work *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950) he adds to this concept of order that of a geographical siting of the State (*Ordnung und Ortung*). In general, he claims, it is the seizure of land which creates law and a human community – though as a matter of fact it was England's maritime dominion over the seas which produced the first *nomos* of the earth. Such a *nomos* is the «full immediacy» of a power of Right not (yet) mediated by laws; a *constitutive* act of legitimacy. But if the *nomos of the Earth* is originally created by the seizure and division of some territory, it is not an abstract idea; it is always concrete – in fact, in origin it lies in a particular individual: a ruler, a king or whatever. Pindar, quoted by Plato, speaks of the *nomos basileus*, the king-nomos or king-law. The *nomos* is an expression of the «metamorphosis of Being into an Ought-to-be». Or, more perspicuously, the *nomos* is a constitutive act of legitimacy, which provides «mere law» with its legality.

What is characteristic of the *nomos* called the *ius publicum Europaeum* is, on this account, that it has succeeded in establishing and imposing rules of war. Hegel already talks about the rationalization and humanization of war, which he understands as the emergence of the «war between States» (not State sovereigns: the dynastic principle and the war between dynasties is already in process of being superseded), regulated by its own law of conflict. Schmitt develops this idea. The *nomos* of the Earth, he argues, as it developed at the turn of the last century, established a sharp distinction between the mainland and the high seas, and between the various territories of the European States together with their colonial possessions. The central notion of European law is that of the (mutual) recognition of States – which implies the creation of a legal community, within which wars of the new kind can be fought. A law of war, and especially of forcible occupation (*occupatio bellica*) emerges roughly at the time of the Congress of Vienna of 1815.

But the period 1890-1918, Schmitt suggests, saw the dissolution of the *ius publicum Europaeum*, partly on account of the rise of the United States. Several competing laws of nations emerged – there was no longer a single *nomos of the Earth*. More generally, difficulties always arise when there is ambiguity or unclarity in the sovereignty question. And this there notoriously is in the case of the European Union. In any case, on Schmitt's view, the application of reason to the modern world requires not – as many believe, including many participants in the debate on the future political structure of Europe – the substitution of administration for sovereignty,

but rather the «purification» of the idea and practice of sovereignty: the construction or reconstruction of the means for resolving political conflict by unambiguous authority.

Schmitt's account of what is typically European in the legal and political developments of the last centuries clearly stands outside of the democratic tradition. But in this respect he is by no means an isolated figure, as we shall see, even if his answers may be considered eccentric against the background of the mainstream tradition in legal and social philosophy. Indeed, Schmitt arguably does no more than reverse the terms of a question posed incessantly by the philosophers of the last three centuries and more: for them (see above) Europe was characterized in terms of a struggle for peace, via the establishment (see below) of a balance of (military) power; for Schmitt, as we have seen, it is to be distinguished by success in the regulation of the waging of war.

4. Let us now return for a moment to the question of the emergence of the political idea of Europe, to the extent that this discussion is relevant to the debate around the legal-philosophical aspects of proto-European development.

The term «Europe» was used by the ancient Greeks<sup>13</sup> – by Herodotus, Aristotle and others – but with a geographical meaning. In that sense, it probably dates from around the 7th century BC. Herodotus for instance divided the world into three parts: Europe; Asia; and Libya (meaning Africa). Aristotle distinguishes between Europeans and Asiatics. According to his classification, the Greeks are Europeans with an Asiatic element. Barbarians, in contrast – that is, the non-Greeks – are the pure Asiatics on the one hand and the pure Europeans on the other. The pure Asiatics are intelligent but lack courage, Aristotle suggests; the pure Europeans are courageous but lack intelligence. Nor is there any Roman idea of Europe in the political sense, I suggested: there is the conception of the Roman Empire, but that is a quite different thing.

After the fall of the Roman Empire, there arose something else, the notion of the universal Church – the Christian Republic, the *respublica christiana*. This, again from a geographical point of view, is roughly coincident with Europe, but only, so to speak, accidentally so. The term «Europe» was sometimes used in the Middle Ages, but without any standard meaning. Much more important as a concept was the *Empire* – the Holy Roman Empire of the German Nation – whose authority extended over a large part of the European continent. Thus in an extensional sense «Europe» was

<sup>13</sup> It appears originally to have been the name of a goddess, daughter of Phoenix (the Phoenician), married to the King of Crete and the object of Zeus' love.

already a reality, given that the Church and Empire had achieved centralized administrative control over most or much of the continent: but it was as yet far from a reality, under that name and concept, as a self-conscious entity. Nor was the degree of unity achieved at that time to be ascribed in any large measure to the imposition of a standardized system of laws.

Neither the Reformation nor the Renaissance produced an idea of Europe, in the strictly political sense. Indeed, the Reformation destroyed hopes of the maintenance and expansion of a united Christian Commonwealth – the so-called *unitas reipublicae christianae* – so that political attention switched to the goal of attaining what became known as the «public peace of Christendom»: that is, peace between the various Catholic and Protestant territories. But this peace was for obvious reasons difficult to achieve. The Catholic Church still spoke officially in the name of the *respublica christiana*, while – more significantly – the French monarch had claimed for himself the title of «the most Christian king», just as his Spanish equivalent became known as «the most Catholic» monarch.

Thus, by the 17th century, in the eyes – and in the language – of the Protestant enemies or potential enemies of France and Spain (the Netherlands and England in particular) the term «Christendom» came to assume unpopular political overtones. This is especially true of Whig circles in England. In contrast, the term «Europe» had by 1680 become a codeword there for the Orange cause, which was soon to triumph in the Glorious Revolution<sup>14</sup>. The danger from Turkey brought about a temporary resurrection in the fortunes of the notion of Christian society and of the *bellum sacrum in rem christianam*. But William of Orange's landing in England took place under the slogan of the «interest of Europe»; similarly, the phrase the «liberty of Europe» was used more or less equivalently with that of freedom for the Protestant religion.

The common aim of English and Dutch foreign policy was now taken to be, not just the liberty of Europe, but also – I return to the theme alluded to above – the *balance of power* in Europe. This conception of the balance of power was linked to the notion, mentioned above, of the «public peace of Christendom». In the course of the 17th and 18th centuries, this goal of *peace* became a predominant focus of attention for political theorists. One can find texts on the question of European peace by for instance Grotius, William Penn, Leibniz, Rousseau, Kant and Jeremy Bentham. Many

<sup>14</sup> Cfr. H.D. SCHMIDT, *The Establishment of «Europe» as a Political Expression*, in «The Historical Journal», IX, 1966, 2, pp. 172-178.

others reflected on the question, including jurists and active political figures – Metternich, for example, insisted on the importance of the principle of the balance of power in Europe, as did Castlereagh in England, and Bismarck. The goal of a religious equilibrium between Catholicism and Protestantism now mutated into the goal of a political equilibrium between the various European dynastic and nation-States.

Slowly, however – from around the end of the 18th century<sup>15</sup> – a conception was beginning to be articulated which was perhaps already present, but only implicitly, in the history of European philosophy, and was rendered explicit in particular by Kant and by the German idealists.

5. Kant claims, on the one hand, that a balance of power between the European states is one of the principal political goals to be striven for by mankind. His argument can be found in his essay on *Perpetual Peace (Zum ewigen Frieden)* of 1795. Kant's contribution to the discussion lies in his attempt to find a principle, not for the mere *management* of conflicts between nations (in the manner, say, of the philosophy of Hobbes, as applied to international relations), but of what he calls «cosmopolitan right» or *ius cosmopoliticum*: of what is in itself right (or wrong) in the conduct of States.

The first «definitive article» of a perpetual peace, Kant argues, is that the *internal*, civil constitution of every state must be «republican». A republican constitution is itself characterized by three principles: that of *freedom* for all the *members* of the state; that of the *dependence* of all – of all *subjects* – on a single, common legislation; and that of *legal equality* for all – for all *citizens*<sup>16</sup>. There is thus a domestic political condition, to be fulfilled in the case of each European State, for the success of his project of international cooperation.

On the other hand, when we have once established republican constitutions in the lands of Europe, Kant argues, we can go on to secure a relation of perpetual peace between them. This relation will take the form of a «federation of peoples» or «congress of

<sup>15</sup> In a recent seminar taught by Prof. John Burrow and myself at Oxford University in Trinity term 1995, we put forward the suggestion that the modern idea of Europe emerges some time around the middle of the eighteenth century, when the notion of Europe begins to be glossed in terms of, and identified with, «civilization», in the sense of a world or society in which philosophy (in the broad sense) and polished manners take a central part. This however is arguably still a social rather than a properly political idea of Europe (see below).

<sup>16</sup> The members of civil society, the subjects of legislation and the citizens of the state are of course the very same people, seen from three different angles: angles which illuminate the historical and analytical differences between these statuses.

States» – a *foedus pacificum*<sup>17</sup>. This, Kant insists, is *not* the same thing as an international or a European State. Such a State, he argues, is an impossibility. If it ever were to be established, it would self-destruct. The reason he gives is that – as he puts it – «laws progressively lose their impact as the government increases its range»; thus the result of the establishment of a European government would be a «soulless despotism» that «would finally lapse into anarchy» – the opposite, of course, of the original intention.

Every ruler, says Kant, would like to achieve lasting peace by establishing his domination over the whole world. But «nature wills it otherwise, and uses two means to separate the nations and prevent them from intermingling»: namely linguistic and religious differences. Indeed, «nature *wisely* separates the nations», says Kant – it is a matter of anthropology, of the differences between national characters<sup>18</sup>.

But at the same time, a *second* idea of Europe is articulated by Kant. According to this second idea, Europe is what Kant calls «cosmopolitan Reason». In fact, the first idea, that of a congress of States in permanent equilibrium, is linked to the second. The project of a congress of States is, on Kant's view, a project of Reason (and not a pragmatic policy consideration). This rational idea of a peaceful international community, Kant notes in his *Metaphysic of Morals*, is in fact «a principle of *Right*». Right, in so far as it affords the prospect that all nations may unite for the purpose of creating certain universal laws to regulate the intercourse they have with one another, can be termed *cosmopolitan* (so that this system can be called *ius cosmopoliticum* or *Weltbürgerrecht*). The rule on which such a constitution – the constitution of such a community – is based, Kant adds, cannot be derived from experience: on the contrary, like his categorical moral imperative, «it should be derived *a priori* by reason from the absolute ideal of a rightful association of men under public laws».

Now for Kant, Europe *is* Reason; it is cosmopolitan Reason, therefore *universal* Reason<sup>19</sup>. Kant here puts his own gloss on an idea

<sup>17</sup> See I. KANT, *Perpetual Peace*, in H. REISS (ed), *Kant's Political Writings*, Cambridge 1970, p. 104.

<sup>18</sup> Cfr. I. KANT, *Anthropologie in pragmatischer Hinsicht*, 1798.

<sup>19</sup> Kant often takes the notion of Europe to be more or less equivalent to that of the civilized world. At one moment he remarks that «I call a nation European on condition that it accepts a constraint in conformity with the law, thus a restriction on liberty in accordance with universally valid laws» (I. KANT, *Gesammelte Schriften*, Ak. Ausgabe, XV, ii, Berlin 1902, p. 773); quoted by B. BOURGEOIS, *La Philosophie allemande de l'histoire*, in «Philosophie Politique», Paris, no. 1, 1991, p. 85. On Kant's view, Europe is not so much an empirical idea as one (re)constructed on the basis of the above-mentioned conception of cosmopolitan Reason.

which is to be found throughout the history of the philosophies of Europe: that Europe is to be identified not so much as a *particular* form of society or culture, but as (the nearest approximation to) a social and political *universalism*.

The political translation of this universality lies, on Kant's account, in the creation of the nation-State and in the emergence of the new phenomenon of the *citizenry* of that State. The term «citizen» here means: the *politically* free, active, autonomous subject or *subjectum*, who has emancipated himself from his old status as *subjectus* (i.e. subject in the sense of *Untertan* – as in «subject of the King», «subject of the Emperor» or whatever)<sup>20</sup>.

Hegel, for his part, agrees with Kant that Europe is to be identified with (the sphere of) Reason and therefore with universality. He believes that the idea of Europe for this reason alone transcends that of a balance of power; for a balance of power is in itself compatible with any principle of *internal* organization in the nation-States that it conjoins. *Universality* refers in Hegel's system, as it does in Kant's, not so much to geographical extension as to the *rational* character of the political structures of the national States. In this philosophical sense each national State can strive for universality<sup>21</sup>.

Now Hegel – like Kant – is not a supporter, but an opponent of European political unity. This latter, on his view, would violate the essence of Europe, for this essence is Europe's character as a *moment* of national particularity (and not the other way around – it is not national particularity that is a moment of Europe). Europe can be identified with Reason, in so far as Reason manifests itself *in*

<sup>20</sup> On an anecdotal note: arriving in Brussels recently from London, I noticed the instructions to passengers, displayed in various languages, informing them which queue they should join. Travellers were told in English that «citizens» of member-States of the European Union should queue on the left; in Flemish, that this applied to «*onderdanen*» (subjects) of those States.

<sup>21</sup> The principle of universality is thus compatible with that of nationalism, at least on certain readings of the latter notion. On Fichte's account, for instance, Europe is the vocation of the German people. The Germans are, on his view, the most European of all nations, *just because* they are inspired by the most European of all motives: that of national liberty – in opposition to Napoleon's attempts to impose a despotic unification of Europe. (But Germany is threatened by the importation of foreign and corrupting ideas, like that of ... the balance of power: see in particular J.G. FICHTE, *Reden an die deutsche Nation*, 1808 ital.). Fichte propounds his own theory of the relation between morality and law. His «deduction» of right precedes his «deduction» of morality: each of us meets other individuals in an already legally organized society. Thus each of us lives, and must live, in an established «community»; we enjoy no rights except in such a community, and have immediate and unconditional duties towards that community. The German nation, defined linguistically, is – at least in principle – such a community.

each national State; and first of all in Germany. Europe is nothing but the *particular existence* of the *universal essence* of Spirit: it is a concrete universality, that is to say a totality which *includes* – rather than excludes, as a politically unified Europe would do – national particularities<sup>22</sup>. The essence of Europe, its universality, lies in its *acceptance of differences*; that is to say, in its acceptance of the freedom of *each nation* to determine its own fate (of course, according to the principle of Reason)<sup>23</sup>.

6. At the beginning of this paper I claimed that the political idea of Europe is a recent creation. There are various historical reasons for this, some of which I have touched on. There is however another reason, which deserves to be mentioned here, not least because of its political significance.

The ideological package which underlies or at least helps to legitimate the construction of a united Europe, in the form of the European Union, contains pivotal references both to the domain of individual rights – in particular in the form of a guarantee of respect for human rights – and to democratic principles<sup>24</sup>. One might even say that these principles constitute something like the official ideology of the European Union.

<sup>22</sup> Hegel's idea is that any universal essence remains an uninstantiated abstraction until it is realized in some particular and concrete State system, somewhere and at some time on earth. So that translation will always be historically specific, just as morality (*Moralität*) needs to be embodied in some historically existing system of ethical life (*Sittlichkeit*): cfr. § 141 of G.W.F. HEGEL, *Philosophie des Rechts*, 1821.

<sup>23</sup> A recent discussion of the contrast between the ideas of Europe as universality and as particularity can be found in A. DE MOOR, *Contract, justice and diversity in the remaking of Europe*, in «Rechtstheorie», Beiheft 15: *Recht, Gerechtigkeit und der Staat*, pp. 76-77. De Moor writes: «The principles invoked to ground a common European political and constitutional structure would [on the first view] be universal principles of justice, valid for all times and irrespective of the national heritage of the different countries making up the Community ... [Such] a structure would focus mainly on individual rights and autonomy in a formal way, without anchoring either rights or autonomy in the national cultures of the member states.» The author is not satisfied with this approach which, she believes, «ends up erasing the diversity of our national traditions», failing to be anchored in «any way of life, in any 'life-form', be it national or 'European'». Moreover, it «would suffer from the further drawback of being in no way distinctively European, as opposed to common to the world community». She therefore proposes a synthesis between universalism and particularism, for the details of which the reader is referred to the article cited.

<sup>24</sup> Twenty years ago the European Community attempted to provide a definition of its own identity, in the so-called «Copenhagen Declaration on European Identity». This document defines the «fundamental elements» of European identity in terms of the «safeguarding of the principles of representative democracy, of the rule of law, of social justice and of human rights». This definition, aside from being formalist and abstracting from cultural and geographical factors, is essentialist. It does

Now in this connection it is somewhat embarrassing to be obliged to note that, while some of the great philosophers or intellectual precursors of the democratic and constitutional State turn out to be anti-Europeans<sup>25</sup>, the well-known pro-Europeans of philosophical history, at least up to the Second World War, often turn out to be anti-democrats. [At the beginning of this paper I posed the question as to whether the legal initiatives which, I suggested, constitute the motor of contemporary European development, are well rooted in the history of European philosophy<sup>26</sup>. The answer might now seem to be a qualified no.] The obvious reason for this is that the key «values» at issue – not only that of democracy, but even that of human rights – are historically bound up not so much with internationalism but, in nationally specific forms, with the rise and consolidation of the various nation-States; while the ideal of a united Europe has so often turned around an appeal, not to those values, but to aristocratic tenets of one kind or another.

Perhaps the best-known example of an anti-democratic pro-European is Nietzsche. Nietzsche's position on Europe is diametrically opposed to that of Hegel. Nietzsche is no friend of the nation-State: on the contrary<sup>27</sup>. The significant point on his view is that the new Europe – the Europe of the nation-States – has inherited the Christian tradition and thus fallen prey to the democratic virus. This «collective degeneration of man», his «animalization», his transformation into a «pygmy of equal rights», and so on, is a function of the rise of the institutions of the nation-States, which is the same thing as the rise of democracy.

If one reads through the section on «Peoples and Fatherlands» in *Beyond Good and Evil*, one discovers that Nietzsche's abhor-

however, precisely in its essentialism, suggest two interesting notions: first, that the political idea of Europe is (as I claimed) a recent one – for few European States prior to the present century, and not all in this century, would satisfy the stated conditions; second, that Europe has not only made great progress in recent decades, but that it is only now, after many centuries, that it has realized its potential, its *telos*, in the figure of the establishment of the European Community and Union.

<sup>25</sup> Whatever the reason for this: some would argue that they simply lived too early to appreciate the possibility of the construction of a genuine European (super-or supra-)State.

<sup>26</sup> In this connection I have in mind those thinkers generally considered to occupy the first rank in philosophical history. I therefore ignore for present purposes – whatever the merit of their political contribution to the European cause – those who, in the nineteenth and twentieth centuries, published (sometimes elaborate) schemes for a federal or United States of Europe, schemes which nevertheless lack any deeper philosophical reflection.

<sup>27</sup> On Nietzsche's view, Hegel is merely a follower of Prussian political fashion and is in this respect no more than a pseudo-philosopher.

rence of the nation-State – directed, in the first place, against Germany – is tempered by his belief that a process is beginning in which some of the citizens of these nation-States are «becoming Europeans»; that is to say, there is a «slow emergence of an essentially supra-national ... type of man».

Now the paradox is that Nietzsche predicts that this process of Europeanization will first of all lead to a further democratization of political life on the European continent. But this is a movement which must undermine itself: the future Europeans will, Nietzsche claims, probably be «multifarious, garrulous, weak-willed and highly employable workers who need a master, a commander, as they need their daily bread»; so this process will lead to the «production of a type [of human being] prepared for slavery». Yet the same process will, in individual and exceptional cases, provoke the emergence of *strong* men, «stronger ... than has perhaps ever happened before».

Everything therefore depends on the form that any movement towards a supra-national Europe might take. In this connection, there are, leaving aside the German case, at least two possibilities, says Nietzsche: on the one hand, the emergence and domination of a «European *noblesse* – of feeling, of taste, of custom, in short *noblesse* in every exalted sense of the word – [which] is the work and invention of *France*»; on the other hand the possibility of the victory of «European vulgarity, the plebeianism of modern ideas», which is the work of *England*.

But, one way or another, the *unification of Europe* must, on Nietzsche's view, take place. In his own time, he says, this is not yet understood: «Thanks to the morbid estrangement which the *lunacy of nationality* has produced and continues to produce between the peoples of Europe, thanks likewise to the shortsighted and hasty-handed politicians who are, with its aid, on top today and have not the slightest notion to what extent the politics of disintegration they pursue must necessarily be only an interlude – thanks to all this ... the most unambiguous signs are now being overlooked, or arbitrarily and lyingly misinterpreted, which declare that *Europe* wants to *become one*».

It is worthwhile recalling the circumstances in which Nietzsche was writing. *Beyond Good and Evil* was published in 1886 – that is to say, in a period in which it was generally considered in political circles that Europe had «ceased to exist». Jean-Baptiste Duroselle<sup>28</sup> quotes for instance a French Ambassador, writing in 1875, to the effect that «one of the principal causes of the dangers now confronting us is the absence of what used to be called Europe». And

<sup>28</sup> J.B. DUROSELLE, *L'Idée d'Europe dans l'histoire*, Paris 1965, p. 235 ff.

a few years later, Jules Ferry (the French colonialist statesman) was writing that «Europe has ceased to exist, and that is our weakness».

The key date in this connection is 1870-71, the date of the victory of Prussia in its war against France, following its victory against Austria-Hungary, and thus of the consolidation of Prussian domination in much of continental Europe. It is also the date of the establishment of the German Empire. The outstanding figure in the same connection was of course Bismarck – who, although not a German nationalist, did believe in a plurality of historically-defined European nation-States. But the only healthy basis for the politics of a great State, said Bismarck, is egoism. There is no valid European law. It is not true that *pacta sunt servanda*. This means that there can be no «Congress of European States», of the kind proposed by Kant. Bismarck was quite explicit on the matter: «Whoever talks about Europe», he noted, «is making a mistake»; Europe is nothing but «a geographical idea».

In contrast, Nietzsche insists that the *union of Europe* must come. What interests me, he says, is not the Empire or the national State, but a *united Europe*. The task of the deepest and comprehensive spirits of our age is to prepare this European synthesis: for all kinds of reasons, including an economic reason. The nation-States, he argues, are no longer viable as autonomous units – there ought in particular to be not only a single European State but also a single currency. Only the English can hold up this process, he adds; but not for long...

This new Europe can however only be successfully constructed on condition that we liberate it from the menace of democracy and other forms of the *marasmus femininus*. The new, united Europe will thus serve as an *antidote* to the *democratic* nation-State.

Nietzsche, in summary, is a pro-European *because* he is an anti-rationalist and an anti-democrat.

By contrast in one respect – to take only one other example – Julien Benda, who published in 1933 his *Discours à la nation européenne*, is a pro-European because he believes (as Kant, Hegel and others had done) that Europe is the realization of the principle of Reason. But, like Nietzsche, he is an «aristocrat». The difference is that Benda is an aristocrat of Reason. He is suspicious of democracy because he holds that the masses can never attain to this principle of Reason. The masses are nationalist or religious fanatics; only the intellectual élite can lead a future united Europe. Europe will therefore not be a kind of super-nation, appealing to a sort of European patriotism, as the nation-States appealed and still appeal to a national patriotism. Europe will be a product of pure Reason.



That is why it must be the work of an intellectual élite<sup>29</sup>.

It might usefully be remarked, in parenthesis, that this question of *European leadership* is both a controversial and a difficult one. I have claimed elsewhere<sup>30</sup> that it may to some extent be illuminated by comparing and contrasting the sociological theories of Max Weber and T.C. Schelling. Weber famously distinguishes between charismatic, traditional and bureaucratic leadership types. Charismatic leaders, I argued (provisionally adopting Weber's typology), have a tendency to arise under certain conditions, typically conditions of social – political or economic – crisis, *within a recognizable community*, whether that community is pre-existent or a creation of the leader himself. It is however fairly evident that in the last decades, since the creation of the first European so-called Communities, there has in fact been, in the perception of its peoples, no *European community in the relevant strong sense* with sufficient perspicuous identity to provide a framework within which a charismatic leader might emerge. While figures like Coudenhove-Kalergi, Robert Schuman, Walter Hallstein or Jean Monnet are impressive enough, one could hardly claim them to be charismatic European leaders. Nor, I think, can we reasonably – whatever our political preference – express a hope that, at least in the shorter term, any such leader might emerge, nor even hold that this would be a desirable development.

But if we thus exclude the serious possibility, in the coming years or even decades, of a charismatic European leadership, it is in my view even more obvious that nothing much can be expected in the form of a *traditional* leadership. By definition, traditional leaderships are rooted in history; and the European Union is a notoriously recent construction. It is of course possible, in this case as in others before it, for an appropriate history – a myth – to be invented. Indeed, something like this is sometimes attempted, even if in a half-hearted sense. But the result is just as improbable as the attempt.

It might thus appear manifest that the European leadership of the next century will be found among the ranks of the legal-bu-

<sup>29</sup> Benda writes for example, in an appeal to this intellectual élite: «Clercs de tous les pays, vous devez être ceux qui clament à vos nations qu'elles sont perpétuellement dans le mal, du fait qu'elles sont des nations. Vous devez être ceux qui font qu'elles gémissent, au milieu de leurs manoeuvres et de leurs réussites: 'Ils sont là quarante justes qui m'empêchent de dormir'», cit., p. 71. These are the «heroes of reason» (p. 104) who are to lead a future Europe (cfr. below).

<sup>30</sup> See G. LOCK, *The impossibility of leadership*: paper for the 90th Anniversary Conference of the Instituto Superior de Ciências Sociais e Políticas, 18 January 1996.

reaucratic class described by Weber. This indeed is an idea which is to be found in many works on the future of Europe and of the European Union. This Union, it is often argued, is being constructed on the basis of political and economic motivations, but with a legal motor. And if that is so, then it might be concluded that the class (in the broad sense of the term) which will provide the necessary leadership in its further development is precisely the bureaucratic or legal-rational class, in some fairly orthodox, more or less Weberian interpretation.

But what would this mean? On the Weberian story, there can be no such rational-bureaucratic leadership if the European peoples do not at least *believe in* the legitimacy of European law, of European directives and of the authority of those raised to positions of administrative direction within the European Union. On Schelling's theory, in contrast, this is not necessary<sup>31</sup>. On the latter theory, it is enough that a citizen of Europe (that is, of a member State of the European Union) should believe that there is *some good reason* for obeying European law, for respecting European directives and for following European leaders: whatever political figures happen to represent the Union at a given moment. But that reason need not be a conviction about the legitimacy of those laws, directives and officials. One may perfectly well regard Europe as a kind of *fait accompli*. One may even be of the opinion that it lacks any – or any substantial – legitimacy of the kind that counts (and there are various opinions about what kinds do indeed count); or, as is more likely in the case of the typical citizen, one may just be largely agnostic with respect to the question. All this matters little on Schelling's account. If Europe is indeed a fact of political, social and economic life, then it will often «make sense» to submit to its laws, rules, leaders and officials – and its *leaders* will on this view be not much more than *senior officials* – simply because there is no obvious alternative solution to the various coordination problems which arise in daily life at the appropriate level. Of leaders of this kind less is demanded than of Weberian legal-bureaucratic leaders; and much less is required of them than of the «heroes of Reason» who are to lead Europe according to Benda's vision.

To return however to the matter at hand: it is of course unfair to ask the reader to draw, on the basis of so few examples, the conclusion that in general the great pro-European philosophers of history have been anti-democrats. I believe however that a study of the

<sup>31</sup> See Th.C. SCHELLING, *The Strategy of Conflict*, Cambridge, Mass. 1980, on the general idea of coordination games, which can be applied in connection with the theme of leadership.

relevant texts will show that this is indeed often enough the case to throw some doubt on the obviousness of the (sometimes even definitional) identification of the idea of Europe with the ideals of democracy, the rule of law and human rights.

7. My last theme requires me to return briefly to Hegel, or rather to a recent application of Hegelian categories to the question of Europe and of the European Union.

I quote from an article on «Europe et démocratie» by Gérard Duprat<sup>32</sup>. Duprat argues that «from the Hegelian point of view», the experience of the European Community is one of a process in which that Community has been unable to represent the «idea» of the Europe that it wants to construct. This process has therefore followed a «logic of negation»: in the absence of such an idea of Europe, the European Community has become a «government without a State». In other words, it is something more like a *management system for civil society* than like a State in the proper sense.

Why does Duprat claim that the Europe now in process of construction in the figure of the European Community or Union resembles, on a Hegelian view, a management system for civil society?

What, for Hegel, is civil society? In his *Philosophy of Right*, Hegel defines it as a system of needs, plus the protection of property through the administration of justice, plus the prevention of crime and the common organization of business, therefore the police and the corporation. In short, civil society is concerned with *private or subjective need* and with the administration and control of the processes of satisfaction of such need.

Now considered in itself, civil society is what Hegel (in the *Phenomenology of Spirit*) calls the «soulless community». Such a community, he says, «is pure devastation». It destroys the bond between one individual and another. The reason is that this bond is reduced to a legal relation in which all *particularity* is extinguished, is annihilated: an individual, in so far as he can make a rightful claim in law, is no more than an empty shell, a simple producer, consumer, bearer of legal rights and the like.

To hold that the politics of the European Community is an anti-politics, as Duprat does, is then to claim that the identity of the individuals recognized by the «management system» of the Community is defined in such formal, that is, economic and legal terms alone. The bond between them is reduced to an abstract bond: a bond of democracy (the formal right to vote and to be elected), of

<sup>32</sup> G. DUPRAT, *Europe et démocratie*, in «Philosophie politique», n. 1, 1991, pp. 135-147.

the rule of law, of social justice and of respect for human rights – a bond, therefore, in which every *substantial* link is missing; there is no «subjective side», as Hegel calls it. What does this mean?

Hegel distinguishes between what he calls the «strictly political State» on the one hand, and the «State proper» on the other. The *strictly political State* (or «State as a political entity») is made up of Legislature, Executive and Crown. Its fundamental characteristic lies in the practical (administrative) activities of its agencies. The *State proper*, in contrast, also comprises the «subjective side» mentioned above, i.e. the political *sentiments* of its subjects or citizens. These political sentiments Hegel calls «patriotism pure and simple». Patriotism is an affect based on a recognition of the community as the substantive groundwork and end of each of its members. The community is an organism – a living being – within which the formative process of the education of its members takes place. The *State proper*, in other words, *contains the nation*, in the sense of the national spirit, the *Volksgeist*<sup>33</sup>.

The politics of the European Community, says Duprat, is not a Hegelian politics. The morality – or, if you like, the immorality – of civil society is not tempered in the European Community by any substantial principle of unity. This Community is, on his view, at best a State in the «strictly political sense»: a management system, but not a «State proper»<sup>34</sup>.

We have seen that, according to certain other philosophies of Europe, this state of affairs need not be considered a problem. Nietzsche would have rejoiced in the death of patriotism. Benda would have rejoiced in the construction of a new nation lacking any «substantial» link of a Hegelian kind, any patriotism, any nationalist sentiment. But neither believed, as we saw, that such a

<sup>33</sup> Hegel writes in §§ 266-268 of his *Philosophie des Rechts* that «substantive universality» must be «aware of itself as its own object and end ... As the substance of the individual subject, it is his political sentiment [patriotism]; in distinction therefrom, as the substance of the objective world, it is the organism of the state, i.e. it is the strictly political state and its constitution ... The political sentiment, patriotism pure and simple, is assured conviction with truth as its basis ... and a volition which has become habitual ... It is the sentiment which, in the relationships of our daily life and under ordinary conditions, habitually recognizes that the community is one's substantive groundwork and end.» (G.W.F. HEGEL, *Philosophy of Right*, trans. with notes by T.M. KNOX, London 1952).

<sup>34</sup> Characteristic of Hegel's theory of the State is that it insists on the unity of universality and particularity, yielding *individuality*. This individuality is expressed in the *nation*. Any attempt to construct a State founded on «pure» universality – that is, a State which stood above the nations and national spirits – would, he claims, «be a happy thought which however overlooks precisely that factor in a constitution which makes it an *ens rationalis*».

goal could be achieved by democratic means or in the framework of a democratic process. And the abandonment of these latter principles would surely be unacceptable to the new Europe of which we too – thinkers of the late twentieth century – are a part. The question may then be posed: What, in the light of the complex and contradictory history of the relation of philosophy to the idea of Europe, is the part, if any, which we as intellectuals have to play within that administrative «monster»<sup>35</sup> of which we are proto-citizens, the European Union?

<sup>35</sup> Cfr. H. OVERSLOOT, *Europe as a Monster*, paper for the *Europaem* Conference on «State and Nation in Europe», Sintra, December 1994. A monster is in the sense in question something whose characteristic definition does not fall into any of the pre-existing categories which might be available for its classification. Europe seems to be such an entity: for it falls neither into the category of the nation State nor into any obvious conceptual slot in orthodox international law. Thus Oversloot argues (p. 1) that monsters are not monsters in and by themselves: «they figure as monsters in and 'because of' the ... specific way [the] cultural order has defined the natural order». He refers to the Copenhagen Declaration (see above) which, in establishing universal principles as constitutive of Europe's essence, «makes Europe boundless»; and «boundlessness is a problem in political theory...».

## Dal linguaggio-azione al linguaggio istituzione. Natura e artificio nella riflessione linguistica e giuridica del Seicento e Settecento

Claudia Stancati

### 1. Premessa

Fin da quando venne formulato esplicitamente da Savigny nel 1814 in *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, e ripreso da Eichorn, Jacob Grimm, Hugo, e Puchta con implicazioni tanto epistemologiche quanto politiche, il parallelo tra linguaggio e diritto è stato ritenuto una delle posizioni teoriche più feconde e originali della scuola storica del diritto. Si tratta di un accostamento che tende, sottolineando le comuni origini nella coscienza popolare di linguaggio e diritto, a evidenziarne il carattere di «fenomeni naturali» che evolvono perciò seguendo le leggi dello sviluppo organico, e ha di mira principalmente la sconfitta delle posizioni «innatistiche» (o presunte tali) e astrattamente razionalistiche del giusnaturalismo sei-settecentesco, nonché la polemica contro la codificazione. Per questa strada si perveniva allora certamente ad ampliare lo studio delle fonti del diritto integrando il normativismo, ma si forniva, contemporaneamente, un potente supporto alla politica reazionaria e conservatrice dei governi dell'epoca<sup>1</sup>.

Questo versante del parallelo tra linguaggio e diritto è certamente quello più conosciuto e studiato e perciò, nonostante vi siano

<sup>1</sup> Di tutta la copiosa letteratura sull'argomento mi limiterò qui ad indicare: A. DUFOUR, *Droits de l'homme, droit naturel et histoire*, Paris 1991. Per quanto riguarda l'utilizzazione in senso più o meno conservatore della artificialità o della naturalità del diritto non si può assolutizzare in nessun caso. È prova di ciò per esempio quanto scritto da F. VON HAYEK, di cui si veda in particolare: *Legge legislazione e libertà*, trad. it. Milano 1986 o da B. LEONI, *La libertà e la legge*, trad. it. Macerata 1994, in cui la tradizione liberale è fatta derivare piuttosto dalla tradizione del *Common law* che dal giusnaturalismo. Hayek inoltre sottolinea i rapporti tra le «scuole storiche» della linguistica e del diritto, cit., pp. 32-33.