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THE NEW EUROPEAN CONSTITUTION LEGAL AND PHILOSOPHICAL PERSPECTIVE

Lecture in Honour of Leon Petrazycki

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Legal and Philosophical Perspective

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On 6th June 2001, Professor MacCormick was knighted in the Queen's Birthday Honours List 'for services to scholarship in law'.

The legal philosophy of Leon Petrazycki was first drawn to my attention in 1969, during a visit by Adam Podgorecki to Oxford University. In those long ago days a group of us interested in legal theory used to meet on Thursday evenings in the rooms of H.L.A. Hart in University College Oxford to talk about issues in legal theory. The persons involved regularly included John Finnis, David Bentley, Joseph Raz, Hart himself, Ronald Dworkin, Richard Buxton, Gareth Evans, and various others. Philosophers of law and sociologists of law visiting Oxford used to take part with us, and Podgorecki was one such.

Most of our group was at least partly engaged with the issues of analytical jurisprudence provoked by Hart's *Concept of Law* and various of the ideas that had come up through reactions to that remarkably influential work. But perhaps we were a little narrowly Oxford-centered or Hart-centered in our outlook, at least at that time. Certainly Podgorecki thought so. One night in a fit of indignation he said: 'Why does everybody always start from Hart's ideas, and work only from there? Other people offered analyses of legal concepts long before Hart, taking different starting points. Why do you not start some day from Petrazycki rather than Hart?'

34 years is a long time to take a piece of good advice, but at last I can repay a debt to Adam for forcing me to take a broader look. It is a real honour to give this year's Petrazycki lecture, especially when I reflect on the huge intellectual debts, and indeed obligations of friendship, I owe to so many colleagues from this great country, this great intellectual culture.

Since 1999, I have stopped being a full-time scholar. Shortly before I did so, I brought out a book called *Questioning Sovereignty*. This attempted to apply a decidedly post-Hartian version of the institutional theory of law to certain urgent contemporary questions in the philosophy of law and political philosophy circulating around the ideas and the roles of law, state, and nation in

'the European Commonwealth' (as I there called it). Then, partly by accident, I was elected as one of the eight members of the European Parliament representing Scotland. My theoretical questions acquired a directly practical edge. All the more so at the end of 2001, for then I had the good luck to be elected to take part in the Convention on the Future of Europe set up by the European Council at Laeken in December of that year. I was elected as one of two representatives (the Alternate Member, I confess) from the Group of the Greens and European Free Alliance on the European Parliament 's delegation to the Convention. Naturally, I have found this a fascinating and challenging experience.

1. THE CONVENTION AND ITS WORK

Following the Treaty of Nice, which paved the way for the wonderful and welcome enlargement that is now under way, European Union leaders acknowledged the need for a wide-ranging consultation on the future shape of the Europe. The Convention emerged from the European Summit in December 2001, through the Declaration of Laeken. It was created with a remit to lead an open and far-reaching public debate on the future constitutional and institutional structures of the EU. The process involved parliamentarians as well as governments for the first time in relation to a full-scale revision of the Treaties prior to an Intergovernmental Conference ('IGC'). It was modeled on the highly successful Convention that drafted the Charter of Fundamental Rights of the EU, adopted at Nice in December 2001, though only as a 'political declaration'.

Chaired by former French President Valéry Giscard d'Estaing with two Vice Chairmen, former Belgian Prime Minister Jean Luc Dehaene, and former Italian Prime Minister, Giuliano Amato, the Convention began its work in February/March 2002.

The Convention comprises:

- governmental representatives of all member states, acceding states and candidate states -28 in all;
- representatives from the national parliaments of all member states, acceding states and candidate states;

- MEPs and representatives from the European Commission;
- observers including the European Ombudsman, and representatives from Economic and Social Committee and from the Committee of the Regions.

A. THE PROCESS

The Convention's work was divided into phases. The first was that of 'listening' phase, with wide-ranging consultations across Europe. Then came a phase of analysis, with a dozen working groups examining such major issues such as subsidiarity; the place of the Charter of Fundamental Rights in the EU constitution; the EU's legal personality and how to simplify the treaties; the role of national parliaments; and so on. Reports of the Working Groups were debated in plenary sittings of the Convention during the autumn of 2002 and through to early winter 2003.

Last was the now almost complete 'writing phase'. Following on the publication and initial discussion of a Preliminary Draft, a framework document presented to the Convention in October 2002, there commenced in early winter of 2003 the serious job of fleshing out the skeleton table of constitutional contents with draft Articles. This was overseen by the Praesidium, which comprises the President and Vice-Presidents, two European parliamentarians, two national parliamentarians, two Commissioners, two national government representatives, and Mr Peterle from Slovenia to watch for the interests and concerns of acceding states. Already the Convention was determined that these must be articles of a draft constitution, not just a revised treaty. As each tranche of first draft articles was delivered, a torrent of amendments flowed in from the pens of the members and Alternate Members of the Convention. In the past few weeks, the Praesidium of the Convention has responded to amendments and debates about the Articles by re-drafting and re-drafting again. The end-game is now nearing its own end. The final text is being hammered out by such consensus as can be achieved in each of the sub-sets of the whole Convention, and in the political groups that participate in it. Our President will, we hope, present the Convention's final conclusions comprising a complete Constitution-text to the governments of member states at the European Council in Thessaloniki on 20 June 2003.

B. THE LIKELY OUTCOME

The currently emerging draft constitution for Europe is divided into 4 parts:

Part 1 establishes the EU, sets out its values, objectives and governing principles. It states in outline the EU's competences and methods of acting, establishes and empowers its institutions and lays down conditions of membership. In other words this part deals with the institutional re-shaping of the EU. It also determines that the EU will have a 'legal personality', allowing it for the first time to sign treaties, including the European Human Rights Convention and sit on international bodies.

Part 2 consists of the Charter of Rights which, it is now accepted, will be binding as a matter of law. It binds all EU institutions, but binds the governing authorities of the member states only when they are implemented in EU law. Otherwise this will not impinge on domestic human rights legislation in member states, and the text of the Charter is calculated to facilitate avoiding conflict with the Human Rights Court at Strasbourg and its established case-law.

Part 3 states in detail the competences of the EU and deals with its policies. This part derives entirely from existing treaties, but adjusts them to fit the new constitutional framework.

Part 4 deals with implementing the constitution and its provisions.

C. SOME IMPORTANT PRINCIPLES

Among the many proposals, there are some I would like particularly to highlight for the purpose of today's lecture. Particularly I want to look at principles that have been stated as universally governing the exercise of the powers and competences of the Union and its institutions.

- The principle of conferral holds that the EU can only exercise those powers conferred on it by the member states.
- The constitution also gives new sharper definition to the principle of subsidiarity, under which the EU shall only act if a policy cannot be implemented at national, regional or local level. Parliaments of the Member States will become watchdogs over the EU legislative process, with rights to

intervene and protest about legislative proposals that would violate the principle of subsidiarity. There will be a power for Parliaments to call the Commission and Parliament and Council to account over this, and eventually to take cases before the European Court of Justice for a final ruling on a complaint that proposed or enacted Union legislation is encroaching on to their domain.

- Under the principle of proportionality, the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.
- A fourth main principle is that of the primacy of EU law over national law. In itself, this is not new. It amounts to saying that the laws validly made by the legislator of the EU have the same binding effect throughout the Union, and cannot be overridden by national laws.
- There is a considerable increase in the scope of Qualified Majority Voting in the Council, with removal of some 20 national vetoes – on the ground that, in an enlarged EU, gridlock will quickly ensue if too many decisions require unanimity. There is not an absolute overlap of QMV with Parliamentary co-decision, however, which rings alarm bells concerning democratic accountability. The European Parliament's powers will, however, be expanded in more than 30 policy areas
- New, and hitherto pretty contentious, arrangements are proposed concerning the Chair of the European Council, and of the Council of Ministers in its various formations. This has been a battleground between large and small states, and between those who see the Commission as the real Executive Branch of EU Government versus those who want the Council to act as a kind of super-executive, with the Commission's role seen as more administrative in character.
- Provision is made for voluntary withdrawal from the union and for suspension of membership

That is a quite partial account in all senses of the term. Nevertheless, I hope it conveys some sense of the progress that has been made.

I have found it wholly exhilarating and intensely interesting – sometimes moving, though sometimes also in certain details boring – to take part in this monumental exercise of continental constitution drafting. The debates have been long and sometimes repetitive, but debates they have been, and people have adjusted positions under the pressure of public arguments, not private horse-trading, though there has been some of that as well. People have conversed with others, not just talked at them. The 210 participants have come to have a collective sense of the Convention as a common enterprise, and to recognise others' points of view and understand them better. For somebody with my personal and intellectual background it has been an amazing stroke of good luck that I took part in this at all. It has taught me in a year more than I used to learn in a dozen.

You are entitled to think, though, that such a thing may be indeed a special treat for a legal theorist like MacCormick. But that does not force you to suppose it a worthy thing for so many Europeans to have done at such great expense for such a comparatively long time. This thought takes me to my next question. Should the Convention have existed at all? What business have these people, or any people, to be drafting such a constitution at all?

2. A CONSTITUTION AT ALL?

The Convention's work has posed in a stark way the issue of how to make basic improvements to the legal structure and order of the European Union and its governance in the EU. It has made us ask how to make laws simpler and more accessible, and the institutional system more responsive and transparent. It has tried to find concise yet inspiring statements of the aims and objectives towards which the laws and institutions are oriented. In the very first place it has challenged us to face the fundamental question: dare we do this by proposing such a thing as a constitution for adoption by our fellow citizens through decisions of their several states?

There is considerable public concern about this idea, certainly in the UK, but also, I believe in certain other countries, among

them perhaps Poland. People look anxiously at this great beast of a constitution slouching to Rome to be born. They find the very idea of a European Constitution deeply troublesome. This is on the ground that a Union with a Constitution must inevitably be or become a super-state that cancels the independence and integrity of the Member States as sovereign entities. I shall try to persuade any of you who share it that such alarm is groundless.

There is a vital conceptual distinction we should draw in this context. This distinction I characterise as being between a 'constitution in a functional sense' and a 'constitution in a formal sense'.

A constitution in the functional sense necessarily exists wherever a self-referential legal order exists. There is legal order whenever there is a set of institutional rules regarded as some kind of a unity which guides the behaviour of a community of people. This legal order becomes self-referential through the practice of its institutions, and of those other persons who look to the institutions for rules and decisions by which they will guide their conduct. That practice can reach the point where questions of validity of the rules that guide the conduct have come to be considered as questions wholly internal to the particular legal order.

That state of affairs exists in Europe, at least so far as concerns the law of the European Union, where the famous line of cases on supremacy and direct effect brought about the condition of self-referentiality in what was then called Community law, but which henceforth today I shall call 'Union Law'. The Court of Justice decides what counts as valid Union Law, and how it applies over the head of national law. The Court can do this because the Court has interpreted the Treaties as authorising it to do so – and because over the years the states have acquiesced in this interpretation. So this is not just a matter of judicial self-assertion. The other relevant agencies and institutions have acquiesced in these decisions. The character of the Union legal system has come to be settled through the custom and usage of those officially engaged in its business. This legal order of the European Union is one in which norms exist that establish and empower agencies to carry out certain essential governmental functions that can be assigned to the standard trio of judicial, executive, and legislative powers. In the exercise of these functions, relevant agencies create other

norms that directly or indirectly impose obligations or confer rights on legal subjects within the system.

A constitution in the functional sense is precisely the set of norms that, taken all together as a dynamic unity, achieves this. The norms in question lay down who may exercise what powers, by what formal or informal acts, and subject to what limits. It is a characteristic of the process of implementation and interpretation of a constitution in this sense that, over time, there evolves an ever more dense corpus of constitutional law. This consists both of precedents set by courts and other institutions, and of doctrines and principles developed partly through judicial discourse and partly through the work of scholarly commentators, serious journalists, politicians, statesmen and stateswomen, and others.

The Court of Justice has more than once referred to the foundation Treaties as a 'constitutional charter' of the European union. This expresses in different terms the point I want to make when I speak of a constitution in the 'functional sense'. The key point is to observe that the constitution in this functional sense is a constitution-in-practice. The facts I have recited to you enable us to draw the following conclusion: **In the functional sense, there is already a constitution of the European Union**.

There is not, however, a constitution in the formal sense. Let us define this sense. As with the functional sense, a constitution in the formal sense concerns the governance and ordering of a human group, association or polity. As a constitution, it has to establish appropriate institutions of government, and state the powers, the 'competences', that are conferred upon them. It has to declare the limits on these powers, and establish some way of settling boundary disputes about the limits of powers and their legitimate exercise. This is 'formally' achieved when a suitable legal-cum-political instrument is drawn up after deliberation to that end. Such a text must then be solemnly adopted by a formal act of a kind that is ideologically appropriate to the kind of polity or association involved.

A constitution has to be adopted by an appropriate act, for example, by a referendum vote in a democratic polity, or by ratification of a constitution-treaty by appropriate constitutional acts of States, which in turn might themselves include recourse to refer-

endum. This is the culmination of a procedure aimed at securing recognition of the text adopted as the basic law, or foundational charter, of the polity whose constitution it purports to be.

On that definition, we may take as settled a second thesis: **The European Union does not at present have a constitution in the formal sense. By next Friday, however, I quite confidently expect that** such a formal constitution will be available to it. Mr Giscard D'Estaing will carry the text to Thessaloniki a week later and offer it the European Council as a proposed formal Constitution for the European Union, to be adopted by means of a new Treaty following an Intergovernmental Conference.

The distinction between constitutions in the functional and the formal sense is a real and important one. We may, for example, remind ourselves that many have been the states and unions, for example the Union of Soviet Socialist Republics, that have clothed themselves with constitutions in the formal sense. These have fully responded to democratic ideas about separation of powers and equal participation of all citizens in political processes, and so forth. But the real political life and functioning of the state or union in question has not been regulated by nor therefore been explicable in terms of the formal constitution. The functional constitution diverged to a very substantial degree from the formal text.

Constitutional writers in the United Kingdom, especially in the late nineteenth century, were vigorous critics of what they called 'written constitutions'. They saw that throughout the world of their epoch that there were many such constitutions in what is here called the 'formal sense'. These solemnly pronounced separations of powers, declarations of rights and such like, but they actually afforded no shield against despotic or even substantially lawless processes of government. A. V. Dicey, in particular, took the line that a constitution like the British constitution as he conceptualized it, consisting in practices of Crown, Parliament and the Courts underpinned by a genuinely effective common law tradition, worked more satisfactorily to the end of ordered liberty than any of the formal constitutions.

In the circumstances of the time when he was writing, Dicey was right both about the true prevalence of liberty under a satisfactory constitution in the functional sense (putting the point in my terms) and about the dismal record of many, though by no means all, formal constitutions. The English constitutional tradition to which he contributed so massively has cast a long shadow over attitudes in the UK to constitutional politics. This casts a long shadow down to the present day, giving rise to a peculiarly English – English much more than British – nervousness about the very idea of adopting a European constitution.

One point of incontestable weight survives in any event from Dicey's reflections. Putting it in terms of the distinction between functional and formal constitution, it is this: a satisfactory functional constitution, even without any formal text formally adopted, is preferable to a dysfunctional formal constitution. This is especially so when the existence of a formal constitution acts as an ideological cover-up for despotic or otherwise undesirable governmental activity.

What that does not mean is that formal constitutions themselves are undesirable or dangerous. On the contrary, where there is a formal constitution with satisfactorily liberal-democratic provisions for the polity in question, and where the practice of those in office in its various branches conforms to the ideals of the constitution and to the restrictions it lays down on the exercise of power, there is both a constitution in the formal sense and a matching functional constitution. This is highly desirable, because in such a case there is a great deal more transparency about the conduct of government.

The citizen who wishes to know how the polity runs itself can read the constitution and be enlightened by it, especially in the light of further commentaries about constitutional practice and usage. This tends to be the case whenever the formal constitution is fully observed as the functioning basis of legal and political order. Perhaps the growth of conventions and parts of constitutional law dependent on precedent might make the functional constitution somewhat more extensive in reach than the text of the formal constitution would suggest. But that would not matter and would indeed replicate common experience.

Nobody thinks that the European Union as it currently exists is a 'state' or a 'super state'. It is *sui generis*, a multi-state

union of its own kind that involves a sharing of certain sovereign powers in circumstances of interactive constitutional pluralism. (For the functional constitution of the Union is not a subordinate offshoot of any particular state's constitution, far less of all of them compendiously; nor is the validity of any state's constitution derived from that of the Union). A union of this novel and distinctive form exhibits some of the characteristics of classical federal unions, some of those of international organisations, and some of the ideal type of a confederation where states' governments acting together in a regulated way form a collective government of the whole.

Since the Union has a constitution, but is not a state, nor a sovereign federal union, it follows that it can perfectly well adopt a formal constitution without thereby transforming itself into a state or a superstate. The obviously open possibility is to adopt in more explicit and satisfactorily transparent terms a constitution appropriate to the *sui generis* entity that it actually is. Under the Convention's proposals, this will happen, in the process redeeming nearly all of the inherited democratic deficit by fully empowering the Parliament as the second legislative chamber of the union. A further element of democratic transparency is that whereby the Council of Ministers will have to act quite openly in its formation as General Affairs and Legislative Council, whenever it is deliberating on, or deciding, the enactment of European Laws or Framework Laws. This candid recognition of the two-chamber character of the Union's legislative process is a federal-like element in the constitution. The Constitution as a whole, however, stands well short of anything recognisable as full-blown federalism.

This can be seen both in the character of the European Council, the consensus-based assemblage of the Heads of States and Governments of the Union's states, and its special role in guiding and giving impetus to the Union. The European Commission is also very far different from either a Parliament-based government such as we have in most member states, or a directly elected executive presidency such as France enjoys.

For those who believe in the old idea of a 'mixed constitution', the element lacking has been that of the 'monarch', the

leading figure who personifies and energises the executive achievements of a polity. Setting aside for a moment the vexed question of the Chair of the European Council, the Convention foresees a power in the European Council to nominate a President of the Commission to the European Parliament following a European election. Once the first, or a subsequent, nominee is elected, this new President will propose a Commission based on nominations by the Member States, the whole to be approved by both Parliament and Council. This will be a government of many talents, transnational in composition and politically a coalition rather than a Party government. The Commission will have the main power of legislative initiative, but the power to make the laws will be exercised by the Parliament and the Council of ministers. Its President will be something rather more than *primus inter pares*.

This will not be unlimited government. On the issue of incorporation of the Charter of Rights into the constitution, no convincing objection has survived. The Charter will take its place as part II of the Constitution. Then the institutions of the Union, and the states when acting in implementation of union-based powers, will be bound to the Charter as a common and agreed standard for the rights of all persons in the Union. But this will be done in a way that acknowledges the European Convention for the Protection of Human Rights and Fundamental freedoms as the final long-stop. Acknowledging rights and becoming a state or superstate are quite different issues.

3. ON 'SUIGENERICITY'

Long ago, the European Court of Justice described the legal order of the European Communities as being of its own kind, *sui generis*, neither international law nor domestic state-law. This seemed to me right at the time and it still seems so. In parallel, I am inclined to think of the European Union (as it now is) a polity of its own kind, a commonwealth *sui generis*.[1]

[1] This theme is discussed at length in my recent book *Questioning Sovereignty*, Oxford: Clarendon Press 1999, chapter 9.

The same quality has continued to inhere in the constitutional order of the Union emerging from the Treaty of Nice (in force as of 1 February 2003), and before it Amsterdam, Maastricht, the Single European Act, several Accession Treaties, the Rome and Paris Treaties and all the jurisprudence of the Court and the secondary law that adds up to the acquis communautaire. As I see it this quality of 'suigenericity', as I shall call it, will continue to characterize the Union if the Convention's proposed constitution is accepted by the states and their citizens and comes into force. Suigenericity is well placed to survive after the deliberations of the Convention are at an end, and when its conclusions have been adopted with or without adaptation by an IGC and then ratified state by state.

The special and distinctive character of the Union emerges from its place in history and the complexity of its membership. We have seen that it has for some purposes a federal character. Yet some of its own members are federal unions, and others are decentralized states with various schemes of more or less asymmetrical local self-government for internal nations or regions within the larger whole. It is not typical of federal states that they bring together entities that are themselves already federal or quasi-federal in character. For subsidiarity to be a working principle in such a set-up, it has to be thoroughly iterative in character and application. Thus at each level of government the question must be asked what decisions should properly be left for detailed decision at a point closer to the people who will be affected. The constitution of the whole ought in some way and degree to reflect the internal-constitutional character of its members.

The European Union, especially after the Commission's 2001 White paper on the Governance of the Union, already takes quite good account of this. After the adoption of the newly stated principle of subsidiarity, and of the new Protocol on its content and its administration, this multi-level democracy, with subsidiarity in play all along the line, will have become more explicit still. I see every reason to hope that the interactive processes of multi-level democracy will over time reinvigorate our sense of shared self-government throughout Europe, gradually roiling back today's corrosive atmosphere of apathy tinged by weary contempt for politics and politicians.

It will remain the case that remarkably little of the day-to-day administration of European law and policy will rest with the Commission itself and its Directorates-General in Brussels. The Union's work is very substantially achieved by the efforts of the Member States and their internal administrations – again, critically including regional and local administrations, and their parliaments too, when it comes to transposition of Union Directives (in future to be known as 'framework laws'). The judicial system of the Union is also strongly decentralized, with Union law being primarily implemented through the appropriate tribunals of the member states, with reference to the Court of Justice for rulings on points of interpretation as and when these arise.

Add to all this two highly important facts: first, at least in their dealings with the World beyond the Union, each of the Member States retains international legal personality and for many purposes continues to function as an independent sovereign state. This is particularly salient in relation to defence and foreign affairs. The effect of Union membership is in a way to enhance the standing and clout any of its members can exercise, so membership enhances sovereignty in some aspects while severely qualifying it in others. But this will require susbstantially greater solidarity and self-discipline in working together around a Common Foreign and Security policy in the framework provided by the new constitution.

This residual sovereignty – I am inclined to prefer the term 'post-sovereignty'[2] – is mirrored in the special role played by the European Council in the governance of the Union, particularly in relation to defence and foreign affairs, but also in giving impetus and direction to the general policies of the Union. The Council in the formation in which it brings together heads of state has ceased to be in truth simply a special formation thereof. Yet the special role accorded to the Council as the assembly of Heads of State and government of the Union is one that marks it

[2] See *Questioning Soverignty*, pp 132–142.

off from ordinary federal unions, and certainly from federal states as such. This also shines out of the latest developments in the provisions for the chairing of the Council, creating a longer-term chairpersonship (or, as I would suggest, 'Moderatorship') for the Council, to render its work more coherent in the circumstances of substantially enlarged membership. It seems to me no longer at all likely that this office will challenge or undermine that of the President of the Commission, and indeed, by a late amendment proposed by myself and others, the Constitution no longer precludes election of the same person to the two offices. The resulting set-up affords another mark of the Union's continuing suigenericity.

Related to this is my second highly important fact: a feature of the Union that can be typified as 'constitutional pluralism'.[3] None of the member States is indebted to the union for the terms or the provisions of its constitution. Each has a constitution whose roots and whose basic legitimacy are independent of any grant by the Union. They are constitutionally independent entities. They remain so despite the fact that their membership of the Union entails the subordination even of their constitutional law to the general laws of the Union, under the principle of primacy of Union law. Even secondary Union law overrides member state constitutional law in the case of incompatibility. Conversely, the validity of the Union's constitution and legal order is not derivative from the validating power of any one state's constitutional order, but exists and will continue to exist either by virtue of an independent basic norm underlying its own existence as an institutional normative order, or (arguably) by virtue of the norms of public international law, or both.

Taking account of the suigenericity of the Union as explained here, it seems to me that it would be more than misleading to describe it as a federation in the same sense as that in which the federal Republic of Germany, or Austria, or the United States of America, are all paradigmatic instances of federations. 'Confederation' remains a less misleading term. This is so, despite the

[3] See *Questioning Sovereignty*, chapter 7

undoubtedly federal aspects of the Union's constitution, in all those parts of it that exhibit the working of the so-called 'community method' or 'community way' as we may have to learn to call it in the light of the currently proposed text of the first Article of the draft Constitution.

3. CONFERRAL – SOVEREIGNTY – PLURALISM

Everybody approves of the idea that the institutions of the European Union should do only those things it is empowered to do. Who can dispute the principle of conferral? Or who dispute the principle of subsidiarity? No one thinks that the Union should do anything more than the things that have to be done at all-Union level, while leaving all those matters that require greater local knowledge and sensitivity to the member states and to federal or devolved levels of government within them. The originally theological-cum-philosophical, but now also legal name for this commonsense view is 'subsidiarity'. It is a good thing, and so is proportionality. Whenever it is appropriate to act at all-Union level, the intensity of action should be matched to that of the result that must be achieved at that level.

If all this is true, why do I not go along with the dissenting minority at the Convention, and their proposal for a Europe of Democracies or 'ED'? I quote their basic message:

1. A VETO ON VITAL ISSUES. Laws shall be valid only if they have been passed by national parliaments. A national parliament shall have a veto on an issue it deems important.
2. THE COMMON CORE ISSUES. Laws shall deal with the rules for the Common Market and certain common minimum standards to protect employees, consumers, health, safety and the environment. In other areas the ED shall have the power to issue recommendations for Member States, which are always free to adopt higher standards.

Is it a good idea, then, as these colleagues propose, to have a Treaty that declares that Europe-level are valid only when passed by national parliaments, with a veto for every parliament?

I fear not. I do not believe that by this means it would be possible to generate a coherent set of 'laws [that] deal with the

rules for the Common Market and certain common minimum standards to protect employees, consumers, health, safety and the environment'. Let us reflect on the constitutional relationship between each Member State and the Union as it has evolved over half a century. Even at present, the Union as a whole, and even more the European Community as its central so-called pillar is a Union (or Community) under law. Thank goodness, by the way, that the Convention has beaten out a pathway to abolish the so-called pillar structure of the Union, and acquire for the whole that legal personality in international law that has hitherto belonged only to the Community. It would be intolerable otherwise. The considerable powers vested in the institutions of the Union would be open to grave abuse were there not a legal framework. If there is a legal framework, it needs a judicial system, and where you have a judicial system you inevitably have a body of precedent or case-law. Hence you get elements of what are often pilloried as judicial activism and judge-made law, as the prophets of the ED pillory them. A legal framework, after all, is of little use unless it is subject to interpretation, adjudication, and (when necessary) enforcement by impartial judges in a standing court of law.

The European Court of Justice has performed this very role, often acting in tandem with the highest courts of the member states, where these have referred problems of interpretation of the Treaties to the Court. They are obliged to do so except where the point at issue is clear and unambiguous. European law is not foisted on the states from without, it is elaborated between states and Community in a collaborative and interactive manner. Let me take the United Kingdom as a material example. From an early stage, well before the UK finally joined what was then the 'EEC' in 1973, the Court (as we noted earlier) had come to consider the Treaties as a kind of 'constitutional charter' of the Community. The law of the treaties, and the laws made under them, were held to constitute a 'new legal order' of a special kind, neither international law, nor a subordinate element within any state's domestic law.

In 1975, when the Referendum was held in the UK, opponents of continuing membership warned very clearly that the classical English doctrine parliamentary sovereignty could not

survive a 'Yes' vote. The people nevertheless voted 'Yes'. In 1991, the UK's final court of appeal (the 'House of Lords') held that the necessary consequence of the European Communities Act (whereby UK membership was enshrined in domestic law) was that later UK legislation inconsistent with governing European law must be 'disapplied' to the extent of the inconsistency. This was in the House's view a necessary implication of a decision to join a Community that had by 1972 acquired the characteristics of the 'special kind of new legal order' that we have been discussing. They were right in this.

It is widely acknowledged, and with good reason, that it remains possible, as a matter of UK constitutional law, for Parliament unilaterally to denounce and revoke UK membership in the Union. Whatever the European Court of Justice might have previously considered as to the legality of such a move in European law, it would have been both legal and binding from the point of view of UK judges. Under the Convention's proposals the 'Exit Clause' in the presently so-numbered Article I-59 now proposes confirming the same proposition from the point of view of Union law for each member state.

'But then', it might be asked, 'if a state can totally revoke membership, why can't it partially revoke it, by declining to accept a certain common provision of law? If some European law does not suit one state, or strays over the line into a domain of competence that it thinks should be reserved to its own jurisdiction, why can't that state just disavow that law? This would fit perfectly well with acknowledging that others who do agree with each other and with the proposal can themselves form a sub-set of the Europe of Democracies, with a common cross-border law on this contested subject matter'.

This is certainly not impossible to conceive. But it is impossible then also to imagine an effective single market coming into existence or being sustained, far less one that achieves high or indeed any common standards of environmental protection or consumer protection as a common acquisition of the participating states. Of course, there is an important principle of equal membership. If the one state had the power of partial revocation of common laws, so would have has every other member state.

The veto over future lawmaking would beget also an unrestricted veto over past lawmaking. The moment unwelcome implications of existing legislation came to the attention of any government, they could revoke it in relation to their own state's law.

The upshot would be rather chaotic, especially in relation to those aspects of the Union that have hitherto been a success, notably single market law, competition law, and the law relating to the four freedoms. A common market requires a large measure of common law, and if environmental and social rights are to be sustained as constraints on the market, they have to be so sustained on broadly the same terms everywhere.

In other words, so long as you have a European Union that has at its core a single market, you have to endorse the principle of the supremacy of community law for all players in the market. Hence, there can be no partial denunciation or revocation, even while full secession remains a perfectly intelligible possibility.

What then of sovereignty? Clearly, whether or not the Convention-proposed constitution ever comes into being as both functional and formal constitution, states in the Union are no longer absolutely sovereign in the classical sense, since they acknowledge and are bound by the primacy of Union law so long as they do not renounce membership. Yet they do retain the power of departure from the Union by unilateral decision, and this is now made explicit in Article I-49. This secures a critical residue of sovereignty to each state. None is a prisoner of the Union.

The union in turn is not a fully sovereign entity. Although it has or is a self-referential legal order in the sense mentioned earlier, that order is expressly subjected to the principle of conferral. Article I-1 is painstakingly clear on the point that the states confer competences on the Union through the constitution: 'Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common'.

When this constitution comes to be adopted, if it ever does, it will not be by an 'autopoietic' act of citizens who become citizens in the very act of adopting the constitution that empowers the Union. Yet each state whose sovereign act, reciprocally with

that of every other sovereign co-signatory, thus confers competence on the Union through the constitution will do so in a context already framed by the existing functional constitution. The sovereignty so exercised is a sovereignty already qualified though not nullified by this context. I call it 'post-sovereignty' for the sake of a name.

CONCLUDING REMARKS

When the Convention discussed last week the proposed preamble to the Constitution, I found particular resonance in a point made by several colleagues. Various people remarked that the text was too singularly focussed on the civilisation-cradling and progressive aspect of Europe's history. We ought surely to have the humility to recognise also the evils that have scarred our history. That dark side emerged out of bitter rivalries of kings, princes, republics, states of all kinds. It often expressed religious or ideological differences, or both. Always it ended in war, and wars became ever more catastrophically destructive of the very civilisation whose scientific prowess had equally magnified the human potential for destructiveness and for creativeness. The very human rights that our partly religious and partly humanist heritage taught us to hold in reverence were always the first casualties of our conflicts, and remain so.

This is a city in which such thoughts have special significance. It was here also, I think, that Mr Blair, UK Prime Minister, put forward the idea of a European union that would be a superpower but not a superstate. I am no friend of the 'superstate' idea, as I have shown already. But I shudder even more before the idea of superpotency, especially if it were a superpotency untrammeled by the kind of constitutional framework we so urgently need to have and sustain, and into which need to be built real restraints on power such as those in the Charter of Rights.

To consider a possible Union well-ordered under a formal constitution that is also a truly functional one yields the thought of a space of peace, freedom, justice and security for everyone in its territories. As we remember the evils in our past, this can become a way to transcend them. We should not wish to become

a superpower before whom others must stand in awe. We should instead become a place of peace in which a decent and justly shared prosperity can prevail, and can become a support to the same conditions for persons outside of its borders. We remember that many of the present problems elsewhere in the world originated in the imperialisms that old style European sovereignties so actively fostered. The thought of a space of peace, freedom, justice and security, could lead us to make the imaginative leap that grasps it as a practical plan of action in and for all the countries that are in the Union or are about to join it. Perhaps we are now on the brink of that imaginative leap. I hope so.

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