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THE CONCEPT OF EUROPEAN UNION

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We, human beings and human societies, become what we think we are. If we have conflicting ideas of what we are, we become a puzzle to ourselves and to others. If we have no clear idea of what we are, we become what circumstances make us. Conceptual dissonance and conceptual drift have been characteristics of the life-story of the three societies (called European Communities) which are now contained in a society called the European Union. A member of a select but ominous class of international social systems which also includes the Holy Roman Empire[1] and the League of Nations,[2] the European Union is a paradoxical social form, namely, an *unimagined community*.[3] And, inadequately imagined, Europe's latest half-

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[1] The Holy Roman Empire was "neither holy nor Roman nor an empire," Voltaire, *Essai sur les moeurs et l'esprit des nations* (c. 1756), ch. lxx (Paris, Éds. Garnier Frères, 1963), tm. I, 683. The shadowy Empire (*Reich*) evaporated when Francis II resigned the imperial title in 1806 and declared himself Emperor of Austria, after 16 German states had left the Empire to join the Napoleon-inspired Confederation of the Rhine. In his own lively constitutional imagination, Napoleon, who crowned himself in 1804 as "Emperor of the French" (taking the crown from the hands of the Pope), was the true successor of the Frankish king Charlemagne, who had been crowned by the Pope as Emperor in the year 800, and whose kingdom had been divided following his death. The East Frankish (German) king, Otto I, invaded Italy, took the title King of Italy, and in 962 (the traditional date of the founding of the Holy Roman Empire) was crowned as emperor in Rome by the Pope. The empire came to be called "Roman" under his son, Otto II, "Holy" in the twelfth-century, and "of the German Nation" in the fifteenth-century. The ghost of the old Empire returned in 1871 when, after the Prussian army had occupied Paris, the newly unified Germany was proclaimed, in the Palace of Versailles, as a new German Empire, with the King of Prussia taking the title of Emperor (without being crowned as such). The last German Emperor abdicated in 1918.

[2] There is a fine example of semantic *mésentente cordiale* in the fact that the English *league of nations* (with indistinct echoes of the inter-city alliances of ancient Greece or the Hansa) was also the French *société des nations* (with overtones of the then-fashionable Durkheim and Duguit and ideas of social solidarity).

[3] Benedict Anderson, in *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (London, Verso, 1983/1991), refrained from imposing any general structural theory on his examination of the way in which societies, always and everywhere, have used a remarkable armoury of imaginative and mind-manipulating techniques to establish subjective social identity. A general inference from his study is that it evidently requires much skill and effort to make and maintain the subjective identity of a society.

revolution may yet become a member of another unfortunate social class—the class of *failed revolutions*.[4]

To re-imagine European Union is to help the people and the peoples of Europe to choose to become what they are capable of being. We must create the constitutive idea and the revolutionary ideal of "European Union"—to sustain, justify, control, surpass and perfect the half-revolutionary institutional structure currently known as "the European Union."[5]

I. The Self and the Other—the Dilemma of Identity

For self-imagining human beings and self-imagining human societies, the self is an other. The self makes itself as it comes to know itself as an other. And, for the self, the other is a self. The self comes to know itself as a self as it comes to know the other as another self. Each self and every other are mutually self-constituting. Such an abstract (Fichtean-Hegelian)[6] conception of the making of human identity is applicable, not least, to the history of Europe—a three-thousand year drama of the self-constituting of countless selves in relation to countless others. European Union is the latest chapter, but presumably not the last chapter, in that interesting story. A putative European public mind (European social consciousness) is constituting a putative European self, which is not merely a multiple *self* formed from the far-from-putative selves of the subordinate societies of Europe, but also a single *other*, a self in its own right, recognised by the far-from-putative public minds of those societies and by the private minds of their members.

Idealised (and controversially identified and explained) large-scale cultural patterns of shared psychic experience have dominated an accumulating pan-European self-consciousness, forming a shared cultural heritage, forming a communal psychic self, at least within the minds of an internationalised

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[4] Europe's failed revolutions of the twentieth-century (Russian, German and Italian) have deeply depressed the European spirit, by seeming to prove finally the lesson of 1792 that fundamental social change, born of a marriage of ideas and violence, must lead to chaos, corruption, terror, and reaction. For bitter accounts of one such revolution by former believers, see Koestler, A. and others, *The God that Failed. Six Studies in Communism* (London, Hamish Hamilton, 1950). "The Soviet Union has deceived our fondest hopes and shown us tragically in what treacherous quicksand an honest revolution can founder" Gide, A., 198.

[5] This distinction based on the presence or absence of the definite article "the"—in English and those other languages which permit of such a contrast—expresses the fact that a society is not merely a systematic structure of social power but also a structure-system of ideas (a theory) about social power, the latter being represented by abstract words, that is to say, in the formula of medieval philosophy, by words of "the second intention," words expressing ideas about ideas (cf. the distinction between "law" and "the law").

[6] "They [more than one consciousness] *recognize* themselves as *mutually recognizing* each other," Hegel, G.W.F., *Phenomenology of Spirit* (1807), §184 (tr., Miller, A.V., Oxford, Oxford University Press, 1977), 112.

élite. The intellectual and artistic glory that was ancient Greece. The republican-military grandeur of ancient Rome. The spiritual hegemony of the medieval Roman Church. The revival of a Byzantine version of Roman law. The Italian-led cultural revolution from 1250 to 1520. The global projection of Europeanism, led by Spain and Portugal. The multinational politico-religious revolution of the sixteenth-century. The multinational scientific and philosophical revolution of the seventeenth-century. The French-led cult of *savoir-vivre* in the eighteenth-century. The multinational eighteenth-century Enlightenment. The socio-economic revolution after 1770 led by Britain and France. German-led nineteenth-century academic intellectualism (the human sciences) and rationalistic public administration. The new global projection of Europeanism in nineteenth-century imperialism. The new scientific revolution after 1860.

Cultural diversity, cultural competition, and cultural exchange have been intensely enriching within European consciousness. We recall the universities of the Middle Ages, with teachers and students from all over Europe. We think of the cultural travelling of individuals, a "free movement" of lively minds. Alaric and Luther and Claude Lorrain and Gibbon in Rome; Montesquieu and Voltaire and Rousseau in England; Goethe and Thomas Mann in Italy; Dürer and El Greco and Turner and Proust in Venice; Wagner in Paris and in Italy; Plato with the Pythagoreans in Sicily; Aquinas and Hume in Paris; Byron in Italy and Greece; Petrarch in Avignon; Cicero in Athens; St Augustine in Milan; Alcuin at the court of Charlemagne; Handel and Peter the Great and Karl Marx in London; Voltaire with Frederick the Great in Potsdam; Diderot with Catherine the Great in St Petersburg; Erasmus with Thomas More in London; the intrepid Grand Tourists of the eighteenth-century.

Such cultural self-displacement affected the thinking of those whose thinking had important effects on European consciousness in general, and hence on the course of European history. Cultural travelling, like other forms of travel, could have both positive and negative effects on those who travelled, mind-broadening and mind-narrowing, often generating an unstable mental syndrome which we might call xenophobophilia. Cultural travellers might admire and detest foreign manners and ideas, sometimes both at the same time, sometimes at different stages of the traveller's personal intellectual development.[7]

Like Babylonian and then Aramaic in the ancient world of south-western Asia, a succession of pragmatically determined international languages—Greek, Latin, French, English—enabled élite to speak to élite across Europe's

[7] England was a particularly puzzling and irritating phenomenon for Continental observers, a strange mixture of barbarous manners and advanced thinking. For a vivid account of French xenophobophilia, see Texte, J. *Jean-Jacques Rousseau and the Cosmopolitan Spirit in Literature. A Study of the Literary Relations between France and England during the 18th Century* (tr., Matthews, J.W., London, Duckworth & Co., 1899).

political and linguistic frontiers, and across the span of historical time. Heroic efforts of creative Enlightenment philology managed to assemble most of the many European languages into language-families, derived from an "Indo-European" hypothetical *Ur*-language, but linguistic diversity has been a permanent source of diversity of identity. It is commonly supposed that the character of a given language expresses the character of a given people, reinforcing the idea of a Lamarckian, if not Darwinian, biological basis for intensely individualised identities. The legally imposed formal multilingualism of the European Union affirms an historically determined heterogeneity which history also negates.

Above all, throughout Europe's three millenia, there has been a fusing of the contemplative and creative consciousness of individual Europeans into the European collective consciousness, the transcendent European public mind. *Contemplative* consciousness reflects on the most general questions which present themselves to the human mind—religious, philosophical, and scientific. Such questions present themselves as universal in character, calling for universal answers. Although different nations have contributed in distinctive ways to the making of the reflexive European public mind, that diversity has been an enriching of a common project with overrides differences of time and place. To understand the universal and perennial character of collective European philosophical consciousness,[8] we need only call to mind a particular philosophical tradition—say, the (idealist) tradition which links Parmenides, Pythagoras, Plato, Aristotle, Zeno, Aquinas, Descartes, Spinoza, Kant, Fichte, and Hegel; or the (sceptical/empiricist) tradition which links Protagoras, Aristotle, Carneades, William of Ockham, Montaigne, Bacon, Hobbes, Locke, Berkeley, Hume, Kant, and Hegel. And the same could be demonstrated still more cogently in the case of religious or scientific consciousness.

The work of Europe's *creative* consciousness has also been the rich product of artists travelling through time and across political and cultural frontiers. We may think of the development of oil-painting in Europe from a powerful union of Byzantine, Flemish, and Italian skills and traditions. We may think of the development of European music as a high art-form, formed from a union of skills and traditions from all over Europe, if especially from Italy, France, Germany, and Austria. We may think of European architecture, especially medieval Gothic architecture and then the revival of Greco-Roman architecture, flowing out from France and Italy to provide a communal style of habitat for our communal living. We may think of the development of the play and the novel and the film as high art-forms, to which authors from every part of Europe contributed, forms of collective self-contemplating

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[8] Hegel took the view that all philosophies are part of one philosophy, the accumulating "self-knowledge of Mind" in which "they never have passed away, but all are affirmatively contained as elements in a whole." Hegel, G.W.F. *Lectures on the History of Philosophy* (1831) (tr., Haldane, E.S., London, Kegan Paul, 1892), 55, 37.

which may be seen as a continuation of philosophy by other (and more accessible) means.

Finally, there have always been external *others* to help to constitute the European *self*. Ancient Greece could not fail to be exceptionally conscious of the ancient civilisations which had preceded it, some of which co-existed with it. Ancient Rome, at least as its history is traditionally told, was never allowed to forget the other surviving civilisations and the countless unRomanized and non-European "tribes" which were a permanent, and ultimately disastrous, physical and psychic challenge to its very self-conscious self. Medieval Christendom found a formidable *other* in Islam, which seemed to be a challenge both to Christianity as a religion and to Christendom as a social formation. As later medieval travellers ventured further from mainland Europe, in particular to India and China, it became necessary to re-imagine Europe's place in a physical and cultural world which far surpassed it. As European colonisers moved through the rest of the world, a New World, it became necessary to re-imagine the nature and the responsibility of Europeanism as an exportable cultural phenomenon. As most of the rest of the human world developed socially and politically, largely under European influence as a sort of Greater Europe or Europe-in-exile, it became necessary, most recently, to co-exist with global social phenomena which seem to pose a life-threatening challenge—physical, economic, cultural, and spiritual—to old Europe.

We may conclude that the magnetic attraction of a shared European subjectivity has thus always been in dialectical opposition to the attraction of a particularising subjectivity—a European self at work as a self, and not merely as an other, within the self-constituting of individual Europeans. But there are two seriously complicating factors when such a thing comes to take its place in the self-constituting of European Union. (1) It is a shared subjectivity largely confined to the minds of society-members who have pan-European intellectual horizons—so that it cannot simply be assumed to be present, actually or potentially, in the minds of other sections of the population. (2) It is a shared subjectivity which has always been used and abused within another dialectic of social self-constituting, namely, that of *the one and the many*, the game of social power, where it has been *invoked* in order to promote resistance to a Europe-threatening other, internal or external, and where it has been *denied* in order to evoke loyalty to some particularising conformation of social power.

II. The One and the Many—the Dilemma of Power

Every society is a permanent reconciling of its unity and its multiplicity. Society transforms the natural power of its members (human beings and subordinate societies) into social power, through social structures and systems.

Society-members retain their individual capacity to will and act, but society, by means of such structures and systems, may cause their willing and acting to serve the common interest of society. The many of society are one, in so far as they will and act in society's common interest. The one of society is many, since it can only actualise the common interest through its members, human beings and subordinate societies of human beings with all their own particular interests.

Edward Gibbon said that history is "little more than the register of the crimes, follies, and misfortunes of mankind."[9] It is certainly true that any account of European history must include a pathetic story of every form of social pathology, the "internal diseases" of society identified by Thomas Hobbes, writing during the disorderly re-ordering of England in the seventeenth-century, not least "the insatiable appetite of enlarging Dominion" which he called *bulimia*.[10] But, on the other hand, an Olympian observer of Europe's long history, seeing it as a whole in accelerated form, would be struck by the frenzy of ever-changing forms of polity by means of which Europe has sought to reconcile its unity and its multiplicity. Within such a perspective, the apparent novelty and specificity of the European Union would seem like yet another baroque variation on a very familiar theme. The European Union is a waking dream of the bulimic political imagination, offering governmental dominion over 15 countries and 365 million people, with the prospect of much more to come. Beyond the European Union there remains only the dream of all politico-bulimic dreams, a dream which is no longer merely a dream—global governmental dominion over everyone everywhere.

"The variety of Bodies Politque is almost infinite."[11] For thirty centuries, successive European ruling cliques have shown remarkable skill and imagination in making the social forms that they have used to organise social power, and in making the theories necessary to establish and to sustain a particular organisation of social power. Political metaphysics and social poetry[12] are the raw materials from which the infinite variety of polities may

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[9] Gibbon, E. *The History of the Decline and Fall of the Roman Empire*, vol. I (1776), ch. III (ed., Womersley, D., London, Allen Lane; 1994), 102.

[10] Hobbes, Th. *Leviathan* (1651), ch. 29 (London, J.M. Dent & Sons, Everyman's Library, 1914), 177. Evelyn Waugh, describing the history of an imaginary European country, says that it had suffered "every conceivable ill the body politic is heir to. Dynastic wars, foreign invasion, disputed successions, revolting colonies, endemic syphilis, impoverished soil, masonic intrigues, revolutions, restorations, cabals, juntas, pronunciamentos, liberations, constitutions, *coups d'état*, dictatorships, assassinations, agrarian reforms, popular elections, foreign intervention, repudiation of loans, inflations of currency, trade unions, massacres, arson, atheism, secret societies. . . Out of [this history] emerged the present republic of Neutralia, a typical modern state." Waugh, E. *Scott-King's Modern Europe* (London, Chapman & Hall, 1947), 4.

[11] Hobbes, Th. *Leviathan*, ch. xx, above n 10, at 120.

[12] The term "social poetry" is particularly associated with the names of Giambattista Vico (1668–1744), for whom historiography is the re-constructing of the story of the social

be formed, sustaining intricate legal structures of social power with subtle superstructures of ideas, to form an inexhaustible supply of different permutations of the unity-from-multiplicity and multiplicity-in-unity which is a society. Constitutional intelligence of a high order, with the clarity of mind which ruthless self-interest inspires, has been used by princes of all kinds, wise and worthless and everything between, and by the clever and the shameless courtiers and ministers and bureaucrats and clerics and intellectuals who have served and advised them.

The European Union is a society which contains an extreme multiplicity of subordinate societies, from the government-managed state-societies through non-governmental societies of all kinds, including industrial and commercial corporations, to individual families. The European Union is also a society in which law has been the main means of social self-constituting, making use of the constitutive potentiality of two other realms of law—international and national—to form its own constitutive legal realm. The One of its own legal order is a Many of the three legal orders which it contains.

The layering of polities within a superstructure of law has been a perennial characteristic of European political history. The transformation of the Roman polity from republic to empire, during the principate of Julius Caesar's great-nephew, Caesar Augustus (63 BCE–14 CE), was also the forging of a new kind of empire, in which the imperial power would respect the cultural, and hence legal, diversity of the colonised peoples while superimposing a common law: civil law governing relations among Roman citizens; *ius gentium* for relations with and among non-citizens; natural law, as an ideal of meta-cultural and perennial law-about-law. In this, as in countless other ways, the Church of Rome respected the Roman imperial precedent. The legislative, executive, and judicial system of the Church was superimposed on the internal systems of all the Christian countries of Europe, using charismatic spiritual authority and the threat of supernatural sanctions to enforce an hegemony which went far beyond matters of faith and conscience. The emperor Constantine's fourth-century creation of a dual Roman Empire, eastern and western, left the Church as the sole form of supranational integration in western Europe, a fragile ark acting as a refuge for an already ancient culture, when the western empire was swept away in the late-fifth-century. With the establishment of a new Frankish "Roman Empire" in the ninth- and tenth-centuries,[13] the Church took the hazardous step of encouraging a rival form of supranational European integration.

The relationship between the imperialised Pope and the sacralised Holy Roman Emperor would be the focus of permanent struggle, intellectual and

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self-constructing of human consciousness, and Georges Sorel (1847–1922), for whom social consciousness is both a weapon and the target of revolutionary social change.

[13] See above n 1.

legal and even physical, at least until the disintegration of Christendom after the sixteenth-century Reformation, and the religious disintegration of the Empire finally enacted in the Peace of Westphalia (1648).[14] For six centuries, this struggle produced a flood of ideas about the source and conditions of authority in society, a ferment which would make possible the intense development of general social and legal philosophy in the following centuries, including the development of what would come to be called liberal democracy.

The three layers of positive law[15] in Romanized Christendom (the law of nations, canon or Church law, national law)[16] were joined by a fourth layer—imperial law—within the realm of the Holy Roman Empire. In institutional terms at least, the Empire rested with a relatively light hand on its constituent members, which were themselves both very numerous and very disparate in character. The Empire was more Many than One. And some of its constituent members were more equal than others, either because their sovereigns were Electors, participating in the appointment of a new Emperor, or simply because of their greater political or ecclesiastical or economic or military power. Paradoxically and ominously, the existence of the Empire can be seen as having contributed much to the prolonged fragmentation of a major part of western Europe.

From the ninth-century, the legal and cultural unifying of England and France followed parallel courses. The unifying of Italy and Germany took a very different course. That discrepancy has had a decisive effect on the whole of European history—from the Treaty of Verdun (843), dividing

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[14] Even the most obvious solution—the "two cities" (Augustine) or "two swords" (Dante) view, with the Pope as emperor of a spiritual realm and the Emperor as master of a secular realm—left a rich fund of less soluble structural problems, pre-figuring the constitutional puzzles of the European Union. Is the Emperor, like the Pope, an agent of God on earth in his own right or is he subject to the spiritual authority of the Pope? Can two "sovereignties" co-exist? Which trumps which, if they are in conflict? Are the non-spiritual (so-called "temporal") possessions of the Pope subject to the authority of the Emperor? Are bishops, exercising great power within the separate secular realms, the exclusive appointees of the Pope or must they be approved by the local monarch? What are the limits of the legal competence of the Church authorities, within the separate national systems, and of Church (canon) law in relation to national law?

[15] In the influential model proposed by Thomas Aquinas in the thirteenth-century, there are three layers of *higher* law (i.e., of *ius* which is not *positum*): eternal law (the divinely ordained order of the Universe); divine law (the ultimate law for human beings: the will of God made known through faith and revelation); natural law (reason's normative intimation of eternal law).

[16] In many countries, national law also included elements of Roman (Byzantine) imperial law, after the "reception" of Roman law beginning in the twelfth-century. In all countries, national law also included a mosaic of local custom which was gradually transcended by a national "common" law (at first judge-made and partially codified, later also legislated). Within what came to be known as "feudal" societies, each society was constituted as a more or less integrated legal hierarchy, with a vertical distribution of legal powers and responsibilities, and corresponding judicial institutions and remedies.

Charlemagne's Frankish kingdom in a way which would lead to the separate development of France (the West Franks) and Germany (the East Franks), to the Battle of Verdun (1916), where the young of France and Germany would die in bloody and muddy agony. And European history would contain another decisive discrepancy. For ten centuries, a macro-level world of inter-governmental conflict and competition, a realm full of a wild and perverted form of rationality, an unsociety of war and diplomacy, would co-exist with the steady systematic rationality of Europe's economic and cultural development. The most recent effect of this dual discrepancy at the heart of European history is known as the European Union.

So far as the forming of the tenuous One of England (later Great Britain, later the United Kingdom) is concerned, it is an interesting irony that a man who has some claim to be regarded as the first king of England may well have been its best. He is the only English or British monarch on whom tradition has conferred the epithet *Great*. Alfred (c. 849–899), king of Wessex (the West Saxons), was both a general and an intellectual, an English Marcus Aurelius. He led the struggle to recover control of England from Danish invaders, thereby making possible the re-uniting of a country which had come to be divided into a number of ill-defined kingdoms after the sudden departure of the Roman occupiers in the fourth-century and the immigration of Germanic peoples in the fifth-century. He also sponsored and participated actively in a cultural renaissance, echoing that associated with Charlemagne in continental Europe,[17] translating Roman and ecclesiastical literature from Latin into Anglo-Saxon (a German dialect, as one might say), the proto-English language.

It is another irony that, from the eleventh- to the fifteenth-century, English history is inseparable, at least at the governmental level, from the history of France. England and France helped to make each other as self-conscious nations. A Duke of Normandy (illegitimate son of a first cousin of an English king) used force to assert a claim to the throne of England (1066), killing the English king in battle. After an English king became the second wife of the widow of the French king in his capacity as Duke of Aquitaine (1152), there was created a sort of Anglo-French dual monarchy, covering a large part of south-west France, including the wine-producing area around Bordeaux. In 1337, an English king used force to assert a claim to the throne of France, initiating a campaign of violence (the Hundred Years War) which, at one time, placed one quarter of France under the control of the English king. The English were finally excluded from France, with the exception of Calais, in 1453.[18]

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[17] Alcuin, from York in the English kingdom of Northumbria, had been a leading figure in the Carolingian intellectual renaissance.

[18] Calais remained under English control until 1558. The formal title of the kings of England (later, of Great Britain) continued to include the words "and of France" until the eighteenth-century.

The struggle at the inter-governmental level between England and France,[19] especially as mythologised in the plays of William Shakespeare or in the story of Jeanne d'Arc, became an integral part of the self-other identifying of the English and the French. Traces of a fantasy-psychology of intimate enmity remain to this day, as the two countries find themselves inter-governmentally re-connected in the European Union. But the intentions of the English government in the Hundred Years War were also strategic and economic, and the contemporaneous re-making of society took very different forms in the two countries. The Many of France, many polities of many kinds under the more or less formal authority of the King of France, would be made into a One under centralising monarchs, from Louis IX in the twelfth-century to Louis XIII and Louis XIV in the seventeenth-century.

Although there were a number of strong and creative monarchs in England, not least the Tudors in the sixteenth-century, English unification was a more complex process, involving an interaction between law and economics. An almost mystical belief in the social significance of law, reminiscent of the ethos of republican Rome, was combined with an assertion of the economic imperative of society-constituting which united baronial landowners with aggressive urban merchants against kings who needed money for their incessant wars and who could be used to produce the necessary legally-based (and property-based) conditions of social stability (the King's Peace). The institutional detachment of the Church in England from the Church of Rome in the sixteenth-century was merely the end of a long process,[20] but it contributed much more than mere symbolism to the establishment of England as a self-contained polity.[21]

A new One of Germany was finally made in 1870 from a luxuriant Many, but not including an Austria whose people and government had been intimately involved, politically and culturally, with the polities which were included in the new German state-society, not least in the context of the thousand-year Holy Roman Empire of the German Nation. The Germanic

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[19] England and France were not allies in war from the Siege of Acre in 1191 to the Crimean War in 1854.

[20] In 1395 "twelve conclusions" containing the radical proposals of John Wyclif (c. 1330–1384) for the reform of the Roman Church were attached by his followers to the doors of St Paul's Cathedral and Westminster Abbey. The proposals were close to those which would form the basis of the sixteenth-century German Reformation programme. But *renovatio* or *reformatio* had been for centuries a *Leitmotiv* of vigorous debate within the Church. Luther acknowledged his debt to Wyclif and to the man he called "Holy Johannes Hus" (c.1371–1415; condemned by the Church as a heretic and burned to death). Hus learned of Wyclif's work through what might be called the Bohemian connection, following the marriage of the sister of King Wencelaus of Bohemia to England's King Richard II in 1382.

[21] There is a fine irony in the mirror symmetry between the wording of the Act of Parliament known as the *Act of Supremacy* 1559, which terminated the legal authority of the Church of Rome in England, and the wording of sec. 2 of the *European Communities Act* 1972 which introduced the legal authority of the European Communities into the United Kingdom.

tribes described by the Roman historian Tacitus (c.55–c.120), tribes which had filled much of non-Roman northern and eastern Europe, were too extensive and too diverse to generate either a natural selfhood or a natural polity. In the sixteenth-century, Martin Luther's appeals to "the German nation" and to his "beloved Germans" and his call for the use of the German language in prayer and liturgy and religious and secular writing were acts of dialectical negation, directed against the hegemony of non-Germany, especially Italy and Rome, rather than a call to nationalism in a political sense. And the post-Reformation religious divisions within a possible German nation, and especially the Thirty Years War (1618–1648), not only set back the formation of an integrated polity but, perhaps, contributed to the relative isolation of Germany from social developments taking place in other parts of Europe, at least until the remarkable flowering of German culture from about 1760.

The political unification of Germany (in 1870) might be seen, in three respects, as a by-product of the French Revolution. (1) Its political structure was formed by a series of steps which began with Napoleon's rationalising of the colourful patchwork of minor south German states, making possible the Confederation of the Rhine (1806), which was followed by Metternich's Austria-dominated, but more or less ineffective, German Confederation (1815), and by the Prussian-dominated *Zollverein* (customs union) which lasted until the formation of the Prussian-dominated North German Confederation (1866), and which has encouraged the idea that economic union can lead to political union, at least if there is someone with the intelligence and determination of a Bismarck to energise the process. (2) The re-constituting of German society after 1815 profited from the extraordinary transformatory energy of Napoleonism which had transformed the unfocused spirit of the Revolution into a concentrated spirit of rationalistic and paternalistic social reformism. Napoleonic enlightened absolutism was a formula which could be used not only to overcome the irrational proliferation of German polities but also to re-organise the internal systems of society to serve a notion of the common interest determined by the professionalised servants of a rationalised Hegelian "state." (3) The metaphysical-mystical hypostasis of the *nation* which had served to carry the ancient idea of France from the old regime of personal monarchy into a new regime of constitutional monarchy could be used as a reservoir for long repressed feelings of collective German identity, an idea of Germany which was much more than merely the idea of a shared language or shared high culture. The One of the Germany made by Bismarck's Prussia was much more than the sum of its many discordant parts.

The future of the Many-in-One of European Union cannot escape the wonderfully turbulent past of the countless integrations and dis-integrations and re-integrations which are the history of the One-and-Many of Europe. In ancient Athens, the people were more than, and prior to, the "democratic"

polity which was also their embodiment. In Republican Rome, the One of the *populus* was not merely a collection of human beings but "an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good."[22] In the Roman Church, the Church was, and is, the faithful, and also something which transcends the faithful. In the Holy Roman Empire, the Union's participating governments were masters of the totality when they acted together in the Council, and they were subjects of the Union when they acted individually under the law of the Union. In the United States of America, the horizontal relationship of the constituent states had to be transformed (in 1787) by a sort of treaty-constitution into a vertical relationship between the Union and the individual citizens, a relationship which both contains and transcends the constituent states.[23] In a human society, the One is always also a Many, in order that the Many can also be a One.

III. Unity of Nature, Plurality of Value—the Dilemma of the Will

Every society has an ever-evolving theory of itself which contains an ever-changing harmony of ideas set against an ever-changing counterpoint of discordant ideas. Social harmony and social discord at the level of ideas flows between the public mind of society and the private minds of society-members, in a process of permanent mutual psychic conditioning. The theory of a society is an evolutionary product of its process of social self-understanding and self-judging.

A particular society is a shared inheritance of acquired mental characteristics. Ideas form a republic into which we are born, in which we live, which we modify by our very existence, and which we leave as an inheritance to the generations which follow us. We are citizens of the republic of ideas in our capacity as human beings, sharing in the ideas which flow from our evolved physiology, from instinct and biological necessity, our phylogenic *species-consciousness*. And we share in the ideas formed in the public minds of the

[22] ". . . coetus multitudinis iuris consensu et utilitatis communione sociatus." Cicero, *De re publica*, I. 25 (tr., Keyes, C.W., Cambridge, Mass., Harvard University Press; 1988), 65. At least since Aristotle, and most conspicuously in Hobbes and Rousseau, the metaphor of the *body politic* has been more than a metaphor, expressing the transcendental unity of society, a systematic unity which goes beyond the mere aggregation of society's *members*.

[23] "It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign States. A voluntary observance of the federal law by all the members could never be hoped for. . ..Hence was embraced the alternative of a government which instead of operating on the States, should operate without their intervention on the individuals composing them. . ." J. Madison, letter to T. Jefferson (24 October 1787), in Boyd, J.P. *et. al.*, eds., *The Papers of Thomas Jefferson* (Princeton, Princeton University Press, 1950–), vol.12, 271.

countless societies to which we belong, our ontogenic *social consciousness*. And we contribute to social consciousness the ideas formed in our private minds, in the many layers of our own ontogenic *personal consciousness*, including the inarticulate but active layers of physiological consciousness, the inexpressible but active layers of our personal unconscious consciousness, and the expressible layers of the social consciousness which we have internalised, and which we can re-externalise to modify social consciousness.

Species-consciousness—social consciousness—private consciousness—interpersonal consciousness. These elementary structures reflect the dual species-characteristic of human beings, as thinking beings and as social beings. And they account for the fact that there are not only shared ideas but also conflicts of ideas. We live together through the sharing of ideas and through the conflict of ideas. Human social co-existence and human social progress are made possible by the sharing and the conflict of ideas. And the extraordinary fact is that this multiple layering of human consciousness manifests itself not only in the personal consciousness of human individuals but also in the public minds of whole societies. As human beings who happen to be Europeans, we are fellow-citizens of a single republic of ideas, rich with an inheritance formed from the social consciousness of the countless societies, and forms of society, which Europe has generated. And we are citizens of the particular republics of ideas to which we particularly belong, including our own natal nation and our own natal family, each with its own special inheritance of socially produced ideas. And each of us is a unique repository of a personal consciousness which contains those special inheritances in a unique form, the republic of ideas which is the private mind of each European.

The United States of America was constituted as a society from the fittest ideas which had survived from the long history of European social philosophy, as those ideas presented themselves to minds formed by the tradition of English legal history and by the Anglo-Scottish Enlightenment of the eighteenth-century,[24] and as those ideas could be made applicable to the

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[24] "This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of . . .; but to place before mankind the common sense of the subject . . . Neither aiming at originality of principle or sentiment. . . ., it was intended to be an expression of the American mind . . . All its authority rests on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney &c." T. Jefferson, in a letter to H.Lee (8 May 1825), in *Thomas Jefferson. Writings* (New York, Literary Classics of the U.S., Cambridge, Cambridge University Press, 1984), 1501. *The Federalist Papers* (1787–88), a theoretical and polemical analysis of the federal solution by three participants in the re-constituting of the Union (Hamilton. Madison, Jay), was described by Jefferson as "the best commentary on the principles of government which ever was written" Letter to J. Madison (18 November 1788), in Jefferson's *Papers*, *ibid*, vol. 14, 188.

agriculture-based society of colonial America.[25] The European Union is the attempt to constitute a society from the surviving ideas of perennial social philosophy, as those ideas are understood in the late twentieth-century, in minds enlightened and burdened by two more centuries of the most intense human social experience, including the ambiguous and still-disputed inheritance of the French Revolution,[26] and, not least, Europe's twentieth-century experience, about which the public mind of Europe has not even the beginnings of a shared theory for understanding and judging.

Values are ideas which act as the algorithms of human behaviour. An input of circumstance may produce an output of behaviour and, if that process of production involves the application of ideas, those ideas are values. Values are the motive force of the will. Even if, as David Hume insisted, ideas can never move us to action,[27] they are certainly the way in which we present choices of action to ourselves before we act, and justify our action after we have acted. To re-form an idea of Hegel's: *theory* and *practice* form a *syllogism of action* of which the middle term is *value*. The history of Europe is the sum total of all the actions taken by Europeans and, therefore, the history of Europe is the enactment of the values which have been involved in the choices, the acts of will, which have made those actions. The history of Europe is the product of the consciousness of all Europeans, of the sharing of ideas and the conflict of ideas in European consciousness, at every level from human species-consciousness to the personal consciousness of each individual European.

European experience since 1789 has made the values which were expressed in the making of the United States only partly relevant for the European mind as it makes European Union, whatever may be their continuing relevance for the American mind.[28] The process of development of the social consciousness of Old Europe has separated itself from the development of the social consciousness of New Europe across the Atlantic Ocean. In particular, the story of the operation of the syllogism of action in Europe contains a special, and dramatic, chapter relating to the making of three particular concepts of social totality. *Society. Nation. State.* The *union* of European Union and the constituent *communities* of the European Union

[25] "I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America. When they get piled up upon one another in large cities, as in Europe, they will become corrupt as in Europe." T. Jefferson, in a letter to J. Madison (20 December 1787), in Jefferson's *Papers, ibid*, vol. 12, 442. There is a substantial and disputatious literature on the economic bases of the American Revolution.

[26] For a lucid overview of the continuing controversy among historians about the socio-economic basis of the French Revolution, see Comminel, G.C. *Rethinking the French Revolution. Marxism and the Revisionist Challenge* (London & New York, Verso Books, 1987).

[27] Hume, D. *A Treatise of Human Nature* (1739), II.III.iii.

[28] For "American mind," see the opinion of Thomas Jefferson, above n 24.

are concepts of social totality which cannot avoid forming a relationship, of affirmation or negation or transcendence, with *society, nation,* and *state*.

These concepts of social totality are *paratheses*. That is to say, they are produced by the mind in order to act as a shared presence in public and private consciousness. A parathesis is an idea acting as a social force.[29] Typically, it generates a particular kind of mental entity (*ens rationis*), namely an *hypostasis*, producing effects in consciousness analogous to the effects produced by what the mind conceives of as material objects or forces.[30] The particular parathetic hypostases of *society, nation* and *state* have the notable characteristic that they act as abundant repositories of social value. They are not merely theoretical and practical but also highly *affective*. They can generate powerful emotions of many kinds, not least of attachment and hatred, causing and justifying even death in the public interest. They are powerful terms in the syllogism of social action.

It has been suggested elsewhere that the paratheses of society, nation, and state are epitomes, in a single idea and a single word, of the historically produced constitutional psychology of, respectively, England, France, and Germany.[31] No doubt one might find the same, or comparable, ideas acting as concepts of social totality in the constitutional psychology of other societies which are or may be members of the European Union. Such ideas express a worldview, determining not only a society's understanding of itself but also of its conceptual status in relation to other societies. And it is an understanding which is reflected not only in its own willing and acting as a society but also in what it expects and demands from the willing and acting of society- members, up to and including the sacrifice of their lives for the society.

The central focus of the parathesis s*ociety* is an idea of the common wealth, the common interest, and the common destiny of the society and its members. The central focus of the parathesis *nation* is an idea of the common identity, the affective unity, and the common destiny of the society and its members. The central focus of the parathesis *state* is an idea of a shared social order under law, a mutuality of service between society and its members. The legal system of each society reflects such large-scale ideas. They determine, and are determined by, what Montesquieu called "the spirit of the laws." They determine the distribution of public-realm power, including the ultimate terms and conditions of it exercise, its purposes, the bases of its

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[29] This use of the word *parathesis* is proposed as a novelty, an extension of its meaning in classical Greek (a setting-out for the purposes of comparison).

[30] *Hypostasis* (that is, an immaterial thing which is treated as if it had substance) is a word with a complex history, including its use as an element in a Christian theology of the three-in-one God. See, Stead, C. *Philosophy in Christian Antiquity* (Cambridge, Cambridge University Press, 1994), ch. 14.

[31] Allott, Ph. "The Crisis of European Constitutionalism: Reflections on the Revolution in Europe" 34 *CMLRev* (1997), 439.

control and accountability. The values—high values and everyday values—which the legal system enacts and enforces are direct or indirect deductions from such ideas. Consciousness, not only of the public mind but also in the private minds of the society-members, is powerfully conditioned by such ideas and such values, so that, as Montesquieu recommended, the spirit of the laws and the spirit of the nation should be in conformity with each other.[32]

It is a major challenge to the making of the idea of European Union that the spirits of the laws of the different member societies are the product of radically different historical circumstances, of radically different constitutional psychologies, of radically different value-filled worldviews. And yet the European Union, as an institutional system, is a system which has been constructed on the basis of law, which has created its own distinctive legal system, and which, in its everyday social life, is dominated by law.

IV. Justice and Social Justice—the Dilemma of Order

No society is an island. Every society, including the European Union, exists in relation to an *inner space* which contains not only human individuals, with their own minds and projects, but also subordinate societies—families and collective entities of all kinds—each a self-constituting in and through its own social consciousness. And every society, including the European Union, exists in relation to an *outer space* which contains all other human beings, with their own minds and projects, and all other societies, up to and including the society of all-humanity, the society of all societies, all of them a self-constituting in and through their own social consciousness.

As a system of order, every society, including the European Union, implies an order which transcends its own order. The rules of a game imply the rules of games. The conventions of a map imply the conventions of map-making. The form of a sonata implies sonata-form. The pattern of a painting implies the pattern of vision. The syntax of speech implies the order of language. The rationality of thinking implies the order of the mind. The order of a given society implies the self-ordering of human co-existence.

The fact that we are *able* habitually and constantly to connect the *actual* and the *ideal* as a seemingly inseparable duality in the functioning of our minds is, no doubt, a product of our biological evolution. But the fact that we are *conscious* of that connection, and of its practical potentialities, is, certainly, a product of the reflexive self-contemplating activity known as philosophy and, within the social consciousness of Europe, a product of the

[32] He quotes with approval a saying of Solon (a "law-giver" of Athens, seventh to sixth-century BCE) which the makers of the European Union might well bear in mind : "I have given them the best [laws] they were able to bear," Baron de Montesquieu, *The Spirit of the Laws* (1748), ch. XIX (tr., Nugent, T., London, Collier Macmillan, 1949), 305.

particular form which that philosophy took in ancient Greece and of the haz-ard-filled story of the survival of that philosophy into the medieval and modern world. It has meant that European social consciousness has been filled with a permanent and vigorous dialectic in which the actual is constantly subjected to the possibility of its surpassing by the ideal. The uniquely and relentlessly progressive character of European civilisation, in principle if not always in practice, is the most striking effect of the enacting in social consciousness of this particular European form of self-contemplating human consciousness.

As considered above, in relation to what has been identified to as "the dilemma of the will," the social order of a society produces and processes its values in a way which generates a unique value-content within its social consciousness. But each society also develops its own relationship to that which it conceives as the transcendental, that is, the ideal order which transcends it. Within European social history, there have been a number of such transcendental worldviews. Mythology. Religion (Greek and Roman polytheism, with elements of monotheism). Metaphysical philosophy (Socrates–Plato–Aristotle). Religion again (Christianity). Philosophical theology (Aquinas). Baconian natural philosophy (science). Humanist natural law (Grotius, Wolff). Cartesian rationalism. Social idealism (Hobbes, Rousseau, Kant). Philosophical empiricism (Locke). Empiricist idealism (Kant, Hegel). Social positivism (Comte). Historicism (Hegel, Marx, Ranke). Biological naturalism (Spencer, Freud, sociobiology).

The pursuit of the ideal, a higher-order explanation and justification of human order of all kinds, is evidently a human species-characteristic. More problematic is the question of whether the above list, more or less in chronological order, is the history of human self-perfecting. We, wiser or more experienced than the more optimistic of the *philosophes* of the eighteenth-century Enlightenment (especially Vico and Condorcet) or the nineteenth-century positivists (especially Comte), can see that such developments are neither inevitable at the level of ideas nor necessarily effective in the improvement of social practice. Who, having known the European twentieth-century, could say that the proclamation of the death of God and the rise of human naturalism have instituted the kingdom of heaven on Earth?

The European mind has traditionally expressed the dialectical potentiality of law in the concept of *justice*. Actualising the ideal of justice in the social justice generated by the legal system of a given society at a given time, a society nevertheless retains the supra-societal transcendental ideal of justice as both a critical negation of the actual and a permanent aspiration within the actual. But there has always been (from the Sophists of ancient Greece and Carneades in Hellenistic Greece to Hume and Marx and beyond) a movement of thought which seeks to conventionalise the transcendental and de-transcendentalise the ideal, especially by arguing that such ideas, being socially produced, have no claim to priority over any other socially produced ideas.

One social form which has been used to resolve, for practical purposes, this negation-of-the-negation of the ideal and the actual is the concept of *constitutionalism,* that is to say, the idea that a society may contain its own socially produced transcendental ideal. The ancient and universal idea of the sovereignty of the law, or the "Rule of Law," was combined with the relatively ancient, and not so universal, idea of the contractual basis of society to produce what came to be called *liberal democracy*, a theory of society in which the ideal is internalised as the pursuit of the common interest, by means of laws which society-members impose on themselves, in accordance with higher-law principles (law-about-law), including fundamental rights or fundamental principles of legality, which they implicitly accept by participating in the society. It was an aspect of this particular form of the social integration of the ideal and the actual which came to be known by the idealising name of constitutionalism, because the legal constitution (written or not) could be regarded as the enacting of an ideal constitution.[33]

But, in practice, the internalising of the ideal of justice has not suppressed the transcendental potentiality of the ideal of justice. We remain capable of judging the actual of a liberal democratic society in terms of an ideal which transcends that society and its theory of its own self-sufficiency. And we evidently remain free, eager even, to judge, by reference to what is presumably a transcendental ideal of justice, societies which are not organised on the basis of a theory of liberal democracy or do not practise it to our satisfaction.

With the creation of the European Communities, a strange thing happened. Through the process and forms of diplomacy (negotiation, treaties), some of the institutional aspects of constitutionalist societies (parliament, court, executive bodies) were externalised and extrapolated into what was otherwise a social void, that is to say, the "international" realm. The insouciance of the politicians and technocrats involved would have been remarkable if it had not been characteristic of so many previous attempts at international pseudo-constitutionalism (the League of Nations, the United Nations, the Permanent Court of International Justice, the Permanent Court of Arbitration, the Bretton Woods institutions, the GATT, the Human Rights system of the Council of Europe. . .) Abstracted from the national societies, the national histories, and the national consciousness which give life to such things, the orphan institutions of the European Communities were supposed to survive on their own, gradually forming around themselves the organic social conditions of their own survival and prosperity.

The radical but implicit negation of the high values of totalitarian tyranny had evidently been thought to be a philosophically sufficient, sufficiently

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[33] For further discussion, see Allott, Ph. "Intergovernmental Societies and the Idea of Constitutionalism," in Heiskanen, V. & Coicaud, J.-M., eds. *The Legitimacy of International Organisations* (Tokyo, U.N. University Press, forthcoming).

incontrovertible, and sufficiently substantial transcendental basis for the new enterprise. There was a vague obeisance in the direction of the Rule of Law (Articles 220 and 230 EC (formerly 164 and 173)), but no explicit provision of fundamental rights or of higher-law principles of any kind. Instead, an imperious economic *telos* was installed as the ideal focus of the whole system, and certain rudimentary institutional aspects of a capitalist "market" were extrapolated and externalised. Justice was equated with social justice, and social justice was equated with economistic justice, the efficient functioning of a "common market."

V. New Citizens, Old Laws—The Dilemma of Becoming

Societies are dynamic living organisms, as dynamic as every other life-form, constantly changing over time, undergoing repeated metamorphoses, both systematic and psychological, actual and ideal, growing, flourishing, and decaying. To analyse the self-constituting of a society as the product of that society's work on the five "dilemmas" which have formed the basis of the present study is not merely to offer a new instrument of thinking about society.[34] It is to propose a universal hypothesis about the making and maintaining of social organisation.[35] Every society, including the European Union, is a perpetual struggle to resolve dialectically the dilemmas of *identity, power, will, order,* and *becoming*, each of which interacts dialectically with all the others. The constitution of a society is a process not a thing. Every society, including European Union, is a self-producing dialectic of change, a particular history of *becoming* within the universal history of the *becoming* of all living things.[36]

The unfolding history of European Union is part of a three-in-one historical process: its own history, the histories of its member states, and the history of international society. The past of a society, like the past of a person, determines what the society now is and determines its future possibilities,

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[34] Francis Bacon called his own new post-Aristotelian method of thinking a "new instrument" (*novum organum* in Latin, Aristotle's logic having been traditionally known, in Greek, as the *organon* or instrument). René Descartes also proposed a new "method" of thinking (*Discours de la méthode,* 1637).

[35] "There was but one course left, therefore— . . . to commence a total reconstruction of sciences, arts, and all human knowledge, raised upon the proper foundations." Bacon, F. *The New Organon* (1620), *Proœmium* (eds., Spedding, J. Ellis, R.L. & Heath, D.D., London, Longmans & Co., 1858), vol. IV, 8. For further discussion of "the perennial dilemmas of society", see Allott, Ph. *Eunomia—New Order for A New World* (Oxford, Oxford University Press, 1990), chs 4–6.

[36] Aristotle had the mind of biologist and hence the application to society of his fine idea of the nature of living things, as systems which are perpetually actualising their potentiality in a process of becoming, was not a metaphor but a necessary corollary of the fact that human societies are composed of human beings as living things.

but the past is not only beyond change and beyond redemption; it is also beyond retrieval. Instead, a society, like a person, must make its own history, the story of its past which acts within present consciousness to condition our choices among the possibilities available to us. European Union is burdened not only with the burden of the European past but also with the burden of Europe's problematic historiography, the problem of its own idea of its own past.[37] European Union causes the multiple pasts of Europe to flow now in a single channel, but the mixing is imperfect because pan-European historiography is in a still less satisfactory state than the national historiographies, and because the separate participating states are continuing to form their own pasts and to form their own ideas of their own pasts.

In the relentless becoming of a society, *law* acts as a servo-mechanism regulating the process of social change, ensuring stability-in-change, allowing change-in-stability. Law speaks from the past in the present to make the future. Law itself is an unceasing reconciling of the fact of power and the power of ideas. A society's legal constitution is a produced by, and helps to produce, its real and ideal constitutions. Max Weber's *Normativität des Faktischen* (normative effect of the actual) is also, one may say, a *Normativität des Idealen* (normative effect of the ideal). The self-constituting of a society is a three-in-one process, a three-dimensional self-constituting, as idea, as fact, and as law.[38]

The making of the European Union, as institutional system, has been dominated by its legal constitution, but, as yet another form of social self-constituting in Europe's long history of social self-constituting, the Union is the continuing product of a triple three-dimensional self-constituting—its own, that of international society, and that of the "states" which are its institutional "members."[39] It follows that the law of the European Union is performing the function of law at all three levels, a social self-regulating mechanism carrying the European past through the European present to the European future, within the past, the present, and the future of its member societies and of the international society of all-humanity, the society of all societies.

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[37] For a discussion of the conceptual problems of historiography, see Ph. Allott, "International Law and the Idea of History," 1 (1999) *Journal of the History of International Law* (5),1–21.

[38] For the hypothesis that the so-called *constitution* of a society is a process of self-constituting in three dimensions (the ideal constitution, the real constitution, and the legal constitution), see Allott, Ph. *Eunomia*, above n 35, at ch. 9.

[39] A "state" in the international sense is the hypostasis of a society which is managed through a social system known as a "government" and whose identity as a state is recognised by the governments of other states. In some countries (not the U.K. or the U.S.), the word "state" is used internally as a structural hypostasis of the totality of public-realm power.

VI. Making the Economic Constitution

Nowhere is the interaction of idea, fact, and law more evident and more significant than in the making of what has come to be called a society's "economy," its economic self-constituting. On a foundation of the actual social activity of transforming the physical world through the application of physical and mental effort, there has been constructed a superstructure of ideas and law which has come to take possession of every moment and every aspect, physical and mental, of the life of every human being everywhere. The self-constituting of a society is also an ideal, real, and legal economic self-constituting. The economy is a product of the mind. It exists nowhere else than in the human mind. It actualises itself through actual human behaviour organised by the actual law-based systems of a particular society.

The intellectual activity now known as *economics* is a form of social philosophy which—like legal philosophy, psychology, the philosophy of science, the philosophy of history—seeks to explain a particular aspect of human social experience and to justify that explanation as an appropriate basis of human self-knowing.[40] More powerfully and more directly than other forms of sectoral social philosophy, economics, itself a social activity, re-enters the social phenomena which it studies and is liable to have an effect on actual social behaviour. Like such other forms, economics reconstructs sets of social phenomena in the form of systems of ideas and, especially, in the form of *models*.[41] And, like those other forms, economics has its own history, the working-out of a double dialectic of its relationship to changing social

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[40] It was Alfred Marshall (1842–1924) who established the intellectual separation of economics from the rest of social and moral philosophy, a development reflected in the adoption of the word "economics" as the accepted name of the discipline in place of the earlier "political economy." John Ruskin, among others, objected to the "modern *soi-disant* science of political economy. . .based on the idea that an advantageous code of social action may be determined irrespectively of the influence of social affection," J. Ruskin, *Unto This Last. Four Essays on the First Principles of Political Economy* (1860) (London, George Allen & Sons, 1862/1910), 1.

[41] "Economics is a science of thinking in terms of models joined to the art of choosing models which are relevant to the contemporary world." J.M. Keynes, letter to Roy Harrod of 4 July 1938, Moggridge, D., ed., *The Collected Writings of John Maynard Keynes* (London, Macmillan for the Royal Economic Society, 1973), vol. XIV, 296. Keynes was urging Harrod to repel attempts "to turn [economics] into a pseudo-natural-science." "A system [of ideas] is an imaginary machine invented to connect together in the fancy [imagination] those different movements and effects which are already in reality performed," Smith, A., essay on "History of Astronomy" in *Essays on Philosophical Subjects* (Wightman, W.P.D. & Bryce, J.C. (eds), Oxford, Clarendon Press, 1980), 31–105, at 66. Cf. Kant's "idea of reason" and Weber's "ideal-type." The metaphor of a "model" is now a commonplace of epistemologies of other intellectual disciplines, e.g., natural science, see Craik, K. *The Nature of Explanation* (1943) (following E. Mach); and sociology, see Winch, P. *The Idea of a Social Science and its Relation to Philosophy* (1958).

reality and its response to the products of its own past. It works on social phenomena as it works on itself.

The European Union, as an institutional system based on economic ideas and economic systems, has entered into the totality of the history of Europe's socio-economic reality and into the history of Europe's economic philosophy. The idea that it would be possible to create a new kind of society (the European Communities) by creating a new kind of international economic system was the product of a particular stage and state of Europe's economic self-constituting, a particular stage and state of "capitalism." The pathology of the present state of European integration has, as a leading symptom, a crisis in its ideal self-constituting as an economy.

The intimate and indissoluble and problematic connection between ideas, fact, and law in the economic field has been apparent since Aristotle linked the property-based household-management of the family and the property-based household-management of society.[42] The contradictory relationship between the ideal and the real and the legal in the economics of capitalism[43] has always been apparent. In the words of Thomas More, writing in the early days of modern capitalism:

> "Consequently, when I consider and turn over in my mind the state of all commonwealths flourishing anywhere today, so help me God, I can see nothing else than a kind of conspiracy of the rich, who are aiming at their own interests under the name and title of the commonwealth. They invent and devise all ways and means by which, first, they may keep without fear of loss all that they have amassed by evil practices and, secondly, they may then purchase as cheaply as possible and abuse the toil and labour of all the poor. These devices become law as soon as the rich have once decreed their observance in the name of the public— that is, of the poor also!"[44]

More's theme was taken up by Rousseau, in his deconstruction of the real-world content of the ideal social model known as "the social contract."

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[42] Aristotle, *Politics*, I.3.

[43] "Capitalism", in the present context, may be considered to have two defining characteristics: the separation of the activity of labour from property in the profits of labour and the determination of the economic value of goods and services by social processes beyond the control of the seller and the buyer of the goods or services.

[44] More, Th. *Utopia* (1516), bk. II, in Surtz, E. & Hexter, J.H. (eds) *The Complete Works of St Thomas More* (New Haven & London, Yale University Press, 1965), vol. 4, 241. More was Lord Chancellor under King Henry VIII, but was executed for refusing to acknowledge the King as "supreme head" of "the Church of England," a refusal made treasonable by Act of Parliament (*Act of Supremacy* 1534). In the same passage, More anticipated Marxian ideas of "surplus value" and "ideology." "What is worse, the rich every day extort [*abradunt*] a part of their daily allowance from the poor not only by private fraud but by public law. . .and, finally, by making laws, have palmed it off as justice." K. Kautsky (a leading Marxist theorist who had been, at one time, Engels' secretary) proposed a reading of More as a Marxist *avant la lettre,* in *Thomas More and His Utopia* (1888) (tr., Stenning, H.J., London, A. & C. Black, 1927; republished New York, Russell & Russell, 1959).

"You have need of me, because I am rich and you are poor. We will therefore come to an agreement. I will permit you to have the honour of serving me, on condition that you bestow on me the little you have left, in return for the pains I shall take to command you."[45]

In the words of Adam Smith, hallowed (and ambiguous) prophet of advanced (*laissez-faire*) capitalism:

"Laws and government may be considered . . . as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence. The government and laws . . . tell them they must either continue poor or acquire wealth in the same manner as they have done."[46]

Even in third-stage capitalism (so-called *free-market* or *liberal capitalism*), as analysed by one of its hallowed (and ambiguous) prophets, the role of the legal system in resolving the structural contradiction of capitalism (idealised naturalism *v*. actual artificiality) is fully acknowledged:

"The functioning of competition not only requires adequate organisation of certain institutions like money, markets, and channels of information—some of which can never be provided by private enterprise—but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible."[47]

VII. The Precession Effect

A strange feature of social philosophy in general, and economic philosophy in particular, is that they are always out-of-date or premature or both.[48] This

[45] Rousseau, J-J. *A Discourse on Political Economy* (1755), in *The Social Contract and Discourses* (tr., Cole, G.D.H., London, Dent, J.M. (Everyman's Library), 1913/1973), 148.

[46] Smith, A. *Lectures on Jurisprudence* (lecture of 22 February 1763) (Meek, R.L, Raphael, D.D., and Stein, P.G. eds., Oxford, Clarendon Press, 1978), 208–9. See also Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), V.i.b. (Campbell, R.H. & Skinner, A.S., eds, Oxford, Clarendon Press, 1976), vol. 2, 715: "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all."

[47] Hayek, F. *The Road to Serfdom* (London, Routledge, 1944), 28. He goes on, however, to condemn talk about a supposed "Middle Way" between "atomistic" competition and central direction (at 31).See also Weber, M. *The Protestant Ethic and the Spirit of Capitalism* (1905/1921) (tr., Parsons, T., London, George Allen & Unwin, 1930/1976), 25: "For modern rational capitalism has need, not only of the technical means of production, but of a calculable legal system and of administration in terms of formal rules . . . Such a legal system and such administration have been available for economic activity in a comparative state of legal and formalistic perfection only in the Occident."

[48] "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist . . .; for in the field of economic and

precession effect, as we may call it,[49] is no doubt a necessary consequence of the dialectical character of social change. The social consciousness of a society, including the European Union, always contains an idea of itself which it has negated, and an idea by which it will be negated.

We may find evidence of the precession effect in the historical perspective which has been outlined in the present study. (1) The social fragmentation, not to say chaos, which followed the end of the Roman Empire in the West was met by two new forms of *imperialism*[50] (the Roman Church and the Holy Roman Empire). (2) The inefficiency[51] and remoteness of imperialism were met by the development of *monarchy*, a form of local imperialism. (3) The inefficiency and the abuses of monarchy[52] were met by the development of *liberal democracy*, in which the metaphysical notion of sovereignty, with its absolutist implications, is retained, in the constitutive ideas of *the sovereignty of the people* and *the sovereignty of the polity* (nation, state). (4) The inefficiency and the life-threatening abuses of competing and conflicting European polities, totalitarian or post-totalitarian or liberal democratic, were met by the *neo-imperialism* of European integration in its original form. (5) The inefficiency and the abuses of democratic pluralism in national societies are now being met by what we may call *post-democracy*, a form of absolutist rationalistic governmental centralism, or collective monarchy, whose primary social function is to provide leadership in economic management.

Since the eighteenth-century the development of economic philosophy has tended to dominate the development of general social philosophy. The naturalising of the idea of society in the work of Hobbes and Locke and Rousseau, suggesting that the present needs of social philosophy could be met by a model which seemed to be universal and perennial in character, was

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political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest," Keynes, J.M. *The General Theory of Employment Interest and Money* (London, Macmillan, 1936), 383–4.

[49] *Precession,* as used in mechanics, refers to the behaviour of a rotating body which continues to rotate, but on an altered axis of rotation, after the original axis of its rotation has been affected by an external force (e.g. a spinning-top leaning under the effect of gravity, or a society's institutions continuing to function on the basis of the old ideas which caused them to change their functioning in a particular way).

[50] It seems that an "emperor," in medieval legal semantics, was simply a ruler who ruled over more than one kingdom but, semiotically, it could not avoid association with the old Roman Empires (East and West).

[51] "Inefficiency," here and hereafter, means primarily economic inefficiency, as a form of social reality fails to meet the needs of a new actualising of a society's economic potentiality.

[52] The word "monarchy" (rule by one) expresses the idea that the One of government (*l'état*) is distinct from the Many of society. European monarchs, even those who had originally been Nordic-Germanic elected chieftains in character, were gradually seduced, however petty their kingdom, into pseudo-oriental hieratic ritualism, the most seductive manifestation of which was the court of Louis XIV of France (reigned 1643–1715).

echoed in, and reinforced by, a naturalising of the economy in the work of the French Physiocrats, and then in Smith and Say and Ricardo. The economy was presented as a natural system, and ancient ideas of "natural law" were given a practical social significance at long last. The self-regulating and value-making "market" could be seen as the analogue of the self-regulating and law-making "general will" of society. Society could at last explain itself to itself as being essentially an efficient wealth-producing system.[53]

The European Communities were created at a time (the 1950's) when economic philosophy happened to be dominated by the idea of *aggregate* economic phenomena. It is another strange feature of the history of economic philosophy that it has been characterised by an oscillation between the *macro* and the *micro* as the central focus of economic model-building.[54] In the period of what came to be called feudalism and of the city-state proto-capitalist economies of Italy and elsewhere (phase 1, in the chronology at page 54 above), society was integrated on the basis of property-relations and market-forces (a micro focus). In the period of the local imperialism of monarchy (phase 2), monarchy served to unite a nation economically through the provision of the law and the institutions necessary for maximising the wealth of the nation (a macro focus, conceptualised in what would come to be called "mercantilism").

In the period of the development of liberal democracy (phase 3), Smithian economic philosophy would concentrate on the mysterious aggregative effect (the wealth of the nation) caused by the micro phenomenon of the division of labour. The *laissez-faire* of Smith's disciples was the *liberty* of the disciples of Rousseau. In the fourth period, what came to be called "the Keynesian revolution" reasserted the relevance of aggregate economic phenomena, claiming that post-Smithian economics had failed to produce stable, just, or efficient societies, nationally or internationally. Such ideas could be seen as a necessary part of a more general social revolution produced by the turbulent events of the period 1919–1945.

For those, including Jean Monnet, who had experienced those events and who had witnessed the successful achievement of Allied co-operative economic management during the Wars, the role of managed economic development in reconstructing Europe and in achieving purposive social progress

[53] "The politicians of the ancient world were always talking of morals and virtue; ours speak of nothing but commerce and money," Rousseau, J-J. *A Discourse on the Moral Effects of the Arts and Sciences* (1750), in *The Social Contract and Discourses,* above n 45 at 16. Rousseau was echoing a comment by Montesquieu on English society, in *The Spirit of the Laws*, III.3, above n 32 at 21. See generally, Larrière, C. *L'Invention de l'Économie au XVIIIe siècle* (Paris, Presses Universitaires de France, 1992).

[54] The dispute among economic philosophers about the real or the illusionary nature of economic aggregates (society, economy, market, demand, equilibrium etc.) is reminiscent of the bitter dispute in medieval philosophy between "nominalists" and "realists" about the ontological status of "universals" (the characteristic contents of an idealist metaphysical universe).

was not a political dogma but a practical necessity. European integration on a mixed-economy basis (a government-managed European market) was the logical extrapolation of that necessity.

VIII. The Macro-micro Fault-line

The development of the European Union has been structured on the basis of a series of economic aggregates (customs union, common market, single market, economic and monetary union) which were treated as hypostatic paratheses,[55] and were given legally enforceable substance. They were accompanied by some of the legal-constitutional systems and paratheses associated with liberal democracy. The assumption was that a coherent society at the European level would constitute itself "functionally," as it was said—that is to say, as a natural by-product or side-effect, as it were, of the economic constitution. Unfortunately, the negating and the surpassing of the Keynesian revolution and the re-assertion of the micro-economic focus were more or less contemporaneous with the founding of the European Communities.[56] And the new focus of the economic constitution of advanced capitalist societies has proved to be part of a radical transformation of the political and economic constituting of those societies. Liberal democracy and capitalism were mutually dependent systems of ideas which were successful in managing the vast and turbulent flows of energy associated with industrialisation and urbanisation in one European country after another. Democratic systems made possible the great volume of law and administration required by capitalism. Capitalism made possible an increase in the aggregate wealth of a nation which was capable of being distributed, unequally, among the newly enfranchised citizens/workers/consumers. Post-democracy is also a post-capitalism, a counter-revolutionary absolutism,[57] an integrating of the political and economic orders under a system of pragmatic, rationalistic, managerial oligarchic hegemony, in which law and

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[55] Above text n 29.

[56] M. Friedman's "The quantity theory of money—a restatement" was published in 1956. Friedman proposed a *macro* aggregate (money supply) as the central focus of an otherwise determinedly *micro* worldview. J.F. Muth's "Rational expectations and the theory of price movements" was published in 1961, initiating a counter-revolutionary denial of the reality of economic aggregates. Hayek had already denied the reality even of "society," except as the sum-total of the activities of individual human beings.

[57] The intense concern of post-democratic governments with the problem of "education" was anticipated by A.R.J. Turgot (1727–1781), statesman and economic philosopher, who recommended state-controlled education to the French King as the "intellectual panacea" which would make society into an efficient economic system, changing his subjects into "young men trained to do their duty by the State; patriotic and law-abiding, not from fear but on rational grounds." Quoted in de Tocqueville, A. *The Old Regime and the French Revolution* (1856) (tr., Gilbert, S., Garden City, Doubleday & Company, 1955), 160–1.

policy are negotiated, outside parliament, among a collection of intermediate representative forms—special interest groups, lobbyists, focus-groups, non-governmental organisations, the controllers of the mass media, powerful industrial and commercial corporations—under the self-interested leadership of the executive branch of government.[58]

The contradictions of the European Union as institutional system add up to a structural fault which is at the core of that system and which we are now in a position to identify as its chronic pathology. It is morbidity which is preventing us from imagining the institutional system of the European Union as a society. It means that its half-revolution may yet prove to be a failed revolution.

The contradictions of the European Union as institutional system can be expressed as six dialectical tensions which are acting, not as the creative tensions of a healthy and dynamic society, but as destructive tensions. (1) The tension between the *macro* constitutional order of the Union itself and the *micro* constitutional orders of its member states. (2) The tension between the *macro* economic order of the Union's economic constitution (the wealth of the European nation) and the *micro* economic constitutions of its member states (each an economic aggregate in its own eyes in a traditional form of conflict and competition with all the others). (3) The tension between the Council as the *macro* agent of the Union's common interest and the Council as a quasi-diplomatic forum for the reconciling of the *micro* "national interests" of the member states. (4) The tension between two rival forms of localised imperialism (*macro* and *micro; two cities* or *two swords*), in the form of emerging post-democracy at the two levels—the national post-democratic managerial *oligarchy* externalised as an inter-governmental managerial *polyarchy,* at the level of the European Union. (5) The tension between the imperialist ambition of a *macro* pan-European confederal union and the federalising ambition of a *micro* political union among a limited number of states. (6) The tension between the ambition of the Union to be a single *macro* international actor and the survival of the *micro* "foreign policies" of its participating governments and their separate foreign diplomatic representation.

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[58] Post-democracy may be a fulfilment of the gloomy predictions of Max Weber and of what may have been, at least according to W. Mommsen, his personal preference for some combination of rational governmental professionalism and *plebiszitäre Führerdemokratie* (plebiscitory leader-democracy), Mommsen, W. *Max Weber und die deutsche Politik 1890–1920* (Tübingen, J.C.B. Mohr, 1959), 48, 420. On Weber's discussion of the combining of bureaucracy and leadership, see R. Bendix, *Max Weber. An Intellectual Portrait* (Garden City, Doubleday & Company, 1960), 440 ff. At the heart of post-democracy is something akin to the spirit of nineteenth-century Prussian bureaucracy: "The fundamental tendency of all bureaucratic thought is to turn all problems of politics into problems of administration," Mannheim, K. *Ideology and Utopia. An Introduction to the Sociology of Knowledge* (London, Routledge & Kegan Paul, 1936), 105.

IX. European Union as European Society

To overcome these destructive tensions, to turn them into the creative tensions of a dynamic society, it is necessary to bring to consciousness the European society which transcends the European Union as institutional system. It is not possible to have a legal system without an idea of the society of which it is the legal system. It is not possible to have an economic system without an idea of the society of which it is the economic system. It is not possible to have a political system without an idea of the society of which it is the political system. If the European Union already has these systems, it follows that there is already a latent European society which transcends them and of which we can resume the self-conscious self-constituting as idea, as fact, and as law. We can re-situate the European Union within the long historical process of Europe's social self-constituting. It has been the purpose of the present study to begin that process.

   Given the function of *law* within the self-constituting of a society, the most urgent task is the re-imagining of the European Union's legal system. Law reconciles the ideal and the real, the power of ideas and the fact of power. Law reconciles the universal and the particular, universalising the particular (law-making) and particularising the universal (law-applying). Law provides detailed resolutions from day to day of the dialectical dilemmas of society—the dilemmas of identity (legal personality), power (the distribution of legal powers), will (the actualising of value in the form of legal relations), order (constitutionalism), and becoming (law-making and law-applying). Our concept of the European Union's legal system must fully and efficiently recognise and actualise its capacity to do these things.

   This means that we must: (1) recognise that the national constitutional orders now form part of a general constitutional order of the European Union;[59] (2) install in the European Union system the controlling idea of the common interest of the Union as overriding the individual common interests of its constituent societies;[60] (3) integrate the urgent problems of social philosophy at the two levels, to re-explain and re-justify the future of European Union, as society and as institutional system, including the problem posed by post-democratic public power at both levels;[61] (4) integrate the philo-

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[59] This means *inter alia* undoing the decisions of those national constitutional courts which have conceived of the European Union as essentially an emanation from, and inherently subject to, national "sovereignty."

[60] This means *inter alia* undoing those decisions of the Court of Justice of the European Communities which have tended to substitute a concept of aggregated or reconciled national interest for the concept of the particularising through law of a Union common interest.

[61] This means *inter alia* undoing the constitutional concept (reflected in the new Article 88 of the French Constitution or the revised version of Article 203 (ex Article 146) of the EC Treaty) which treats the EU as essentially the exercise "in common" of national governmental powers.

sophical and practical problem of the self-constituting of European society with the philosophical and practical problem of the globalising of human society.[62]

The crisis facing the European Union is a crisis of social philosophy, a crisis of the ideal self-constituting of a new kind of society and the enactment and enforcement of a new social philosophy in and through a new kind of legal system. European Union, the redeeming parathesis of Europe's higher unity, is not a federation or a confederation, actual or potential, but a state of mind. It is not merely a union of states or governments, but a unity of consciousness. It is a new process of social self-constituting in the dimensions of ideas, of power, and of law. European Union, Europe's society, is more like a family, a family with a common identity beyond its countless separate identities, a common destiny beyond its countless separate destinies, a family with an interesting past, not wholly glorious and not wholly shameful, and with much need, at the beginning of a new century, for collective healing, to find a new equilibrium between its past and its future.

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[62] In this connection, see Allott, Ph. "The Concept of International Law" 10 (1999) *EJIL* 31.