



# HOKKAIDO UNIVERSITY

Title	Completing the French Revolution: Democracy and Legitimacy in the Future of the European Union
Author(s)	Weiler, J. H. H.; ワイラー, J. H. H
Citation	北大法学論集, 51(1), 358-345
Issue Date	2000-06-21
Doc URL	<a href="https://hdl.handle.net/2115/14999">https://hdl.handle.net/2115/14999</a>
Type	departmental bulletin paper
File Information	51(1)_p358-345.pdf



## Completing the French Revolution: Democracy and Legitimacy in the Future of the European Union

J.H.H. Weiler \*

As the Union lurches towards yet another Intergovernmental Conference, it may seem timely to look forward and speculate about its future.

“Looking forward” indeed Marching forward, is part of the very ethos of European Integration — encapsulated in its defining rhetorical aspiration: Determined to lay the Foundations for An Ever Closer Union among the peoples of Europe. Ever Closer? — what a breathtaking belief in the idea of progress, in the idea of a future which is ever shining so long as we move towards it, ever closer.

I belong to a tradition which, in looking ahead, insists on considering the past, and in which memory of that which has happened is inextricably linked, indeed defines, our hopes and vision for the future. And our personal, political and social experience suggest that at least sometimes one gets too close. So, in examining the future I would like to take stock of the past and the present; and in thinking about the future, I want to address too, not only the future or futures we hope for but also the futures we fear and at least to contemplate the possibility that in pursuing an ever closer union among the peoples of Europe, some very worthy things about the Community of the past and present may be endangered even lost.

In interpreting the Community experience I do not purport to present a received knowledge. Interpretation in this context is an act of giving meaning to events and processes. The future of the Union will depend, to a degree much greater than you would imagine from reading the literature, on the way its founding myths (in the

---

\*Manley Hudson Professor of Law and Jean Monnet Chair, Harvard Law School. This paper was prepared for a lecture given for the Legal Society and Globalization Studies Seminar at the School of Law, Hokkaido University, 11 November 1999.

## Completing the French Revolution

anthropological sense) are defined.

For a long time now it has ceased to be intellectually *chic* to lavish praise on the European Union. Not only is the Union technocratic and bureaucratic but its officials are overpaid and over-satisfied; not only is it big, messy and slippery, but its cancer like spread into ever growing dimensions of national autonomy seems to proceed unchecked. Most annoying, defying the skeptical chorus which has accompanied it from its inception, the European construct [in large measure the product of French imagination and statecraft] has proved resilient and successful.

In the face of this record, there can be, surely, only one respectable posture to adopt – that of the prophet at the gate decrying the dangers and evils of the city within. There have been no shortage of angry prophets and the Union provides no shortage of issues against which to rail. Dutifully I shall provide shortly my own Book of Lamentation.

But what should be our overall judgment? At least some perspective exists: After all, a half-century has passed since Schuman's Declaration of 1950 and the subsequent signing of the Treaty of Paris in 1951 which set the ball rolling. And we are approaching the end of the decade, and the century and millenium and all that. Shocking or laughable, then, as it may seem to some, my own judgment is unequivocal: The advent of European integration in the second half of the 20<sup>th</sup> Century – a veritable revolution – is as important to the organization of life among nations and States as the French Revolution was to the organization of life within nations and States.

In making this comparison we import, of course, the rich ambiguity with which we understand the French Revolution. To many, its rhetoric of social justice and its dream of human equality and fraternity were just that, rhetoric. But even those Gattopardi to whom it is no more than the most exquisite of proofs that to preserve all that which exists – privilege, status, power – everything must change, will not deny its consequentiality.

From the perspective of the lawyer, the French Revolution constitutes a major landmark in three related respects:

It is, along with other events, a milestone in the re-definition of the internal notion of sovereignty and legitimacy-of-power henceforth to be linked inextricably to the people of the polity;

it is, likewise, a milestone in the emergence of the rule of law — at least as an ideal — as an indispensable component in what much later we will come to call the liberal democratic state;

finally, the French Revolution was part of what we often have come to think of later as the Kantian and Neo-Kantian repositioning of the individual qua human being as a subject and not merely an object of the State and of political process.

It is from this perspective that I see the link between the two Revolutions. For though driven as much by self-interest as by any idealistic rhetoric, as much by accident as by design (there is much of the story of the Golem in the history of European integration) the European construct has in some fundamental respects reshaped those very same elements albeit in the international sphere:

*It has reshaped the notion of sovereignty and the legitimacy-of-power in transnational relations;*

*it has radically recast the rule of law in transnational relations (I would argue it made the term Rule-of-Law meaningful for the first time in transnational relations);*

*and it is in the Community legal order more than any other transnational legal order that the individual has emerged as a subject, the holder of enforceable rights and duties even, primarily, against his or her own government and not merely an object, like ships.*

One cannot overestimate the importance of these changes to the conduct of what we once called international life and for which now we have not yet found an adequate term.

I would further argue that just as the French Revolution and the ethos associated with it had a certain, visible and invisible, spill-over effect beyond French borders, the European experience has had a widespread spill over effect into multiple other international and transnational regimes. The decline, in international relations, of

the old *raison d'état*, and the ability of individuals using *domestic* courts to force their governments to take their international legal obligations seriously even when inconvenient, is spreading widely and in no small measure because of a habit, a socialization process, introduced by the European experience and the experience of Europe. The current Pinochet saga is, on my view, a sharp example of this spill-over.

This does not call for triumphalism. We are, after all, talking about structures and concepts which, in and of themselves can be good or bad. The rule of law is as worthy as the laws which are the rule. Europe is far from the promised land in many areas. Even a reshaped sovereignty and a recast sensibility towards legitimate transnational power is no better nor worse than the ends and means with which and for which that power is exercised, and whilst it is appropriate, perhaps, to celebrate the individuals as subjects and not mere objects of their polities, it is worth recalling that vile individuals will result in a vile polity.

We must, thus, examine not merely structure and process but also content.

In examining the substantive record of the recent European experience ambiguities abound. The record here is far more ambivalent, interpretations far more tenuous; it is in these camps that the battle for the founding European myths is shaping up, myths to which we will reach back to sustain alternative visions of the future.

The originality of the European construct was and is partly in the economic sphere where it took an earlier understanding of trade liberalization, *Zollvereins* and Free Trade Areas to an altogether higher level in its transnational common marketplace and monetary union. The core factual record is not a subject of major dispute. But how to interpret it? The European common marketplace was on one reading a truly remarkable example of transnational economic solidarity — driven of course at least partly by self-interest — but still part of a distinctly European tradition of social-democracy embraced by most political forces and now extended beyond national boundaries. But the same factual matrix has also been the lightning rod, and a convenient political alibi, for a new religion of market as social arbiter and its success as a justification of abandoning radically changing a European social tradition. This debate is not part of a consideration of the future - it is here, with us, at the centre of our current political discourse.

In making our future shall we take the history of the European common

market as vindication of a European tradition of solidarity extended transnationally or as a justification for a rethinking of that tradition and its displacement by a market discipline?

*European originality was and is partly in its political organization: Setting a vision and realizing an unprecedented objective of an ever closer union among its peoples whilst rejecting the American model of One Nation and the familiar structure of a federal State. (Arguably, the European Union is the truest of federalisms!). The success of Europe is tangible and, here too, beyond serious dispute — a level of integration hitherto seen only in federal states coupled, it is argued, with vibrant Member States. That European integration was not a Zero Sum game is a thesis developed independently by historians, political scientists, and even us, lawyers. But what in my field at least was considered once a radical thesis turns out to be in no small measure a self-satisfying and self-satisfied picture of Europe having, unlike all other experiences of integration, the best of both worlds: the Benefits of high levels of integration without the cost of loss of autonomy, identity and power by the constituent Member States.*

*But how long can we hold on to this construct? It is, of course, a construct that helped legitimate the remarkable progress of integration to date, and continues to feed all ambitious programmes for the future. But is it already a myth, one out of synch with an altogether more complex reality? To be reexamined in the light of EMU? To be re-examined in the light of the emergence of the EU as a sprawling system of governance, multi-level and multifunction, rendering it ever more difficult to continue using very paradigm of Community-Member State on which the earlier comforting interpretation rested?*

*Most original in the original European construct in my understanding of it was not, however, in the sphere of the economic nor even the political — but in Europe's vision of human relations expressed in its attempt to preserve the identity of its founding peoples and States.*

*Europe was built on the ashes of World War II, which witnessed the most horrific alienation of those thought of as aliens — Jews, gypsies, homosexuals and other Others. It was an alienation which became annihilation. Europe was, on this reading, not simply about the prevention of another such carnage — that's the easy*

part-but about dealing at a deeper level with the source of these attitudes. In the realm of the social, in the public square, the relationship to the alien is at the core of human decency. It is difficult to imagine something normatively more important to the human condition. It is not surprising that, according to tradition, the most ubiquitous norm in the Pentateuch is that which is designed to shield the alien.

There are, it seems to me, two basic human strategies of dealing with the alien and these two strategies have played a decisive role in Western civilisation. One strategy is to remove the boundaries. It is the charitable spirit of 'come, be one of us.' It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the 'be one of us,' however well intentioned, is often an invitation to the alien to be one of us, by being us. *Vis-à-vis* the alien, it risks robbing him of his identity. *Vis-à-vis* one's self, it may be a subtle manifestation of intolerance. *If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien.* This is, of course, infinitely, better than the physical annihilation. But it is still a form of dangerous internal and external intolerance. (The recent conceit by some post-modernists to remove boundaries by regarding us all as "others" is but the other, more arrogant, side of the same coin: Typically from the position of privilege and self-satisfaction robbing the real others even of their otherness.)

The alternative strategy – which is how I invite you to read the recent European past and to be the foundation for its future - is to acknowledge the validity of certain forms of bounded identities, (even if the identity is socially constructed and the boundaries are porous) but simultaneously to reach across boundaries. We acknowledge and respect difference (and what is special and unique about ourselves as individuals and groups too!) and yet we reach across differences in recognition of our essential humanity of being all born in the image of God, or the secular equivalent.

I do not tire of citing Hermann Cohen (1842-1918), the great neo-Kantian philosopher of religion, in an exquisite modern interpretation of the Mosaic law on this subject captures its deep meaning in a way which retains its vitality even in today's Ever Closer Union. It has been usefully summarised as follows: '[T]his law of shielding the alien from all wrong is of vital significance..... The alien was to be protected, not because he was a member of one's family, clan; religious community or people; but

because he was a human being. In the alien, therefore, man discovered the idea of humanity.' What is significant in this are the two elements I have mentioned: on the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, say, 'save him' by inviting him to be one of you. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and love him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by maintaining it and overcoming it. The very existence of a Europe of individuals with individual identities, a Europe of nations with the boundaries created by distinct national identities and a Europe of States with the differently distinct statal boundaries, which forces one both to acknowledge difference and to reach across in the deeply committed way which membership of the Community entails is what makes the European postwar experiment so special and, arguably, worth preserving even if it does not have quite the power and quite the constitutional clarity as, say, a European State would have, and even if it has been accompanied, since inception by a very healthy dose of brash self-interest by its partners.

Like all abiding projects of State craft — combination of State interest and idealism. We reserve our highest admiration for those whose feet rooted in the ground and can lucidly understand the deep interests of the societies they lead and yet situate the realization of those interests in a vision of society and humanity that are consistent with or even further our noble aspirations.

But as in the case of the economic and the political, this construct too is far from being consensus, and one can doubt its sustainability. Indeed, in listening to this construct, did it strike you that I was describing a reality — hardly, or was it more like the description of an *amore mancato* a Paradise Lost before it was even lived in. Note, too, that this is not only an issue for theorists of European identity. It is the back drop of much policy making. Europe talks the language of differentity, but is consistently deepening the boundaries between those in and those out, between being European and being non-European. Can one arrest a growing sentiment of European chauvinism, most noticeable in the discourse of the Euro? And what does one do if the only antidote to European chauvinism seems to be a regression to Member State nationalism? This

too is not a debate about the future. It is the current debate about the content we should give, and the vision we should proffer to the Maastricht invented European Citizenship.

\* \* \*

I turn now to the future or the futures of Europe, or rather, to certain risks inherent in such futures.

The greatest risk is, paradoxically, linked to the very success of the European construct measured not simply in the attainment of many of its specific market goals, in the continued success, despite many doomsdayers, of its classical governance structures and processes and, primarily, in its mainstreaming — in the fact that Europe has essentially moved beyond serious political contention in most of its Member States, among all the aspirants and applicants and is seen as an integral part of the polity — however that polity is described.

Success is risky because of a simple fact — it has a powerful legitimating effect. It has always been such in human affairs: Good outcomes legitimate, in the social empirical sense, questionable means.

What are the questionable means? There is no subject which is more likely to bring a yawn to the face of academics and a groan to the faces of politicians than the democracy deficit of the European Union. It is a matter which should be dealt with without shrill notes. But it will not go away. How to describe and explain the structure and process of European governance is contentious. I once described it as a multiple system covering international, supranational and infranational processes. Others have put forward other models. But whatever view you take you find democratic deficiencies at all levels of European governance. In essence it is the inability of the Community and Union to develop structures and processes which would adequately replicate at the Community level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility which are practiced with different modalities in the various Member States. Even the basic condition of Representative Democracy that at election time the citizens "...can throw the scoundrels out" — that is replace the Government does not operate in Europe. The form of European Governance is — and will remain for considerable time — such that there is no "Government" to

throw out. Dismissing the Commission by Parliament (or approving the appointment of the Commission President) is not the equivalent of throwing the Government out. There is no civic act of the European citizen where he or she can influence directly the outcome of any policy choice facing the Community and Union as citizens can when choosing between parties which offer sharply distinct programmes. Further, as more and more functions move to Brussels, the democratic balances within the Member States have been disrupted by a strengthening of the Ministerial and Executive branches of government. Certain groups are privileged and others underprivileged. The value of each individual in the political process has inevitably declined including the ability to play a meaningful civic role in European governance.

Added to that is the ever increasing remoteness, opaqueness, and inaccessibility of European governance. An apocryphal statement usually attributed to Jacques Delors predicts that by the end of the decade eighty percent of social regulation will issue from Brussels. We are on target. The drama lies in the fact that no accountable public authority has a handle on these regulatory processes. Not the European Parliament, not the Commission, not even the Governments. The press and other media, a vital Estate in our democracies are equally hampered. Consider that it is even impossible to get from any of the Community Institutions an authoritative and mutually agreed statement of the mere number of committees which inhabit that world of Comitology. A complex network of middle level national administrators, Community administrators and an array of private bodies with unequal and unfair access to a process with huge social and economic consequences to everyday life — in matters of public safety, health, and all other dimensions of socio-economic regulation.

Typically, discussion of the democracy deficit leads to proposals for change, espousing any number of models ranging from the neo-liberal to the Republican, from the federal to the consociational and to the expressed fear that barring such amendment, the legitimacy of the European construct will be called increasingly into doubt threatening its survival.

My worry is quite the opposite. I take note of the fact that the European construct, democratic deficit notwithstanding, has been approved democratically again and again with the ratification of the SEA, of Maastricht, of Amsterdam and of each Enlargement. I do not expect this to change. These regular ratifications — despite their

“fast track” take-it-or-leave-it nature — are an authentic expression of the European electorate. They are a regular referendum on the success of the European construct.

But let me not mince words: They represent, too, the corrupting effect of the European success on the civic sensibilities of the European peoples. The invasion of a market mentality into the sphere of politics where the citizen is a consumer of political outcomes rather than an active participant in the political process. Where we come to cherish the closeted deliberations of civil servants because of the quality of their dialogue — deliberative in the most noble Habermasian sense, perhaps — and the merit of their outcomes, but in which citizens are at best partially informed consumers of such deliberative paradise. It is a moral “spill over effect”. The Neo-Functionalists of the 50s and 60s predicted that the material and functional success of the Community will lead to a transfer of loyalty from statal to transnational structures. That has not happened. On the contrary — contempt, fear. But what has happened is no less insidious: legitimation through results and not through process. As long as it works well...

This, then, is a vision of a successful future in which prosperity and security abound, in which we might even have a Third European way concerning social networks and redistributive policies, but in which one of the great hallmarks of the European revolution, the subjecthood of the individual, turns out to be progressively corrupted. It is a process which should be arrested. But who will be the agent for change?

There is another trend extending into the future which I regard with considerable concern and where the Union seems to be sliding into a trap that has plagued all federalisms. The issue concerns competences. At one level it is no more than a matter of perceptions. The perception has set in that the boundaries which were meant to circumscribe the areas in which the Community could operate have been irretrievably breached. Few perceptions have been more detrimental to the legitimacy of the Community in the eyes of its citizens. And not only its citizens. Governments and even Courts, for example the German Constitutional Court, have rebelled against the Community constitutional order because, in part, of a profound dissatisfaction on this very issue. One cannot afford to sweep this issue under the carpet. The crisis is already there. The main problem, then, is not one of moving the boundary lines but of

restoring faith in the inviolability of the boundaries between Community and Member State competences. There is a justified feeling that constitutional guarantees have crumbled in this area. An example is the recently passed Tobacco Advertising Directive. Tobacco kills, Advertising encourages the carnage. But is that a justification for Community legislation based on the most specious of constitutional grounds — *distortion to competition in the market place?*

There have been many proposals of how to deal with this issue. The official response is through the concept of Subsidiarity embraced by Union Institutions, governments and other political forces. *Refining and Operationalizing Subsidiarity* is how we plan to deal with the issue. I am profoundly skeptical. The pliability of Subsidiarity has been a boon to the powers that be. When you do not want to act, you have a ready alibi — Subsidiarity. When you want to act, it is always so easy to make the case that more efficient results could be achieved by joint action. Do you want a recent example? Consider the ease with which Mr. Schroeder made the very flawed case in these days for an harmonization of tax rates so as not to distort competition within the common market place. Then consider the ease with which Mr. Blair rejected the altogether more interesting proposal of the President of Parliament that the finance of the Community be achieved through a percentage of income tax receipts rather than vat receipts — a proposal which would be socially progressive and politically enhance radically the civic accountability and transparency of Community finances. Both used the logic of Subsidiarity. Both were probably wrong in the construction of the concept.

But my critique goes deeper than that — Subsidiarity is a worrisome concept because it is part of a world view which puts efficiency above all else. Successfully to argue that the Community should be barred from acting when the conditions of Subsidiarity are not fulfilled is to concede that it should act when those conditions are fulfilled.

There are two inimical results — One belongs to the vocabulary of democracy: The danger of ever increasing aggregation of power. But the other goes deeper still. Subsidiarity represents a world view, which subordinates so many values such as autonomy to a mechanistic view of efficiency.

When we discuss human rights we are willing to eschew such functional reasoning. We define certain boundaries of individual liberties, fundamental bounda-

ries, in which government interference, even if rational, beneficial and efficient is excluded. The logic of federal spill over is inexorable. EMU will lead to demands on fiscal policy and fiscal policy will lead to demands on affected social policy. And social policy will lead to pressures on the criminal law. And all will happen with the impeccable logic of Subsidiarity.

In thinking, then, about the future of Europe, though going against the experience of most if not all federalisms, we should embrace the notion of fundamental non functional boundaries. Much is at stake.

I turn to my last and final issue — Enlargement

The official line is clear and compelling: Europe has a moral and historical duty to integrate the new East European democracies into the Union. Failure to do so, it is said, may undermine the long term stability of these states and that of the Continent as a whole. If you were to follow official statements and the bombast of Heads of State and Foreign Ministers it seems as if the only questions concerning Enlargement are practical: The order of accession (who will enter first) and the time table.

But corner any politician or Union official beyond the reach of the media, and you will be privy to a very different Enlargement discourse characterized by uncertainty, prevarication, and sometimes even hostility. Why the whispering? It has become taboo to raise any question concerning the principle of Enlargement itself.

This discrepancy between the official rhetoric and undercurrent concern is bad for the civic life of the Union. Enlargement, especially of the magnitude envisioned now is of huge consequence - no less than, say, EMU or any other fundamental Union policy. And yet, if the past is to be our lesson, it will just “happen”, incrementally, bit by bit, with a *deus ex machina* inevitability. And yet, Enlargement must be legitimated in the European public forum if it is to be successful. It should, thus, be the subject of a vigorous public debate. The taboos are also bad for the Enlargement process itself. Repressed objections and repressed hesitations will work their way through protracted negotiations and delays, souring the atmosphere and creating chagrin and disappointment among the candidates. Mine is not an argument against enlargement. Mine is an argument against a passive polity in which changes of such fundamental nature are not the subject of civic discourse.

Here, then, polemically stated, are the principal taboo subjects:

### - Democracy and Size

The European Union enjoys powers unparalleled by any other transnational entity. It has, *inter alia*, the capacity to enact norms which create rights and obligations both for its Member States and their nationals, norms which are often directly effective and which are constitutionally supreme. It has authority to take decisions with major impact on the social and economic orientation of public life within the Member States and within Europe as a whole. It has authority to engage the Community and, consequently the Member States by international agreements with Third countries and international organizations. It has authority to spend significant amounts of public funds.

Europe has exercised these capacities to a very considerable degree. Europe is not (and should not) be thought of as a State, but in many ways it behaves as one. And that is why the question of democratic legitimation is so pressing and so difficult. Enlargement is going to make that problem a lot more pressing and a lot more difficult. The issue is simple: Size. There is no precedent in history for a successful democracy operating with so many citizens. Already at 350 million the specific gravity of each individual in the Union is minuscule, the ability of the Institutions to listen to citizens is stretched and the remoteness of citizens from Union power centers is huge. Enlarging the Union even further by adding another 80 million or more citizens might defy the ability of any institutional set-up. A difficult situation may become impossible. This basic structural dilemma is something which is rarely if ever openly and honestly debated even though it is crucial to consider the issue.

### - Political Culture

It is quite normal in the discourse of enlargement to postulate that new Member States may only enter once their political economy has adapted to the free market economy model practiced in the Union. It is also accepted, and rightly so, that for this to happen it is not enough to change the rules. There has to be a shift in economic and commercial habits of both governmental bodies and private operators. Surely the same question can be posed about the political culture of a state? A true commitment to democracy, human rights, the rule of law. Is it enough that formal changes have been made or should there be time for internalization and acculturation? Union membership requires, too, a certain serenity about nationalism and national

identity which, arguably, is quite at odds with the current public mood in most East European States whose newly found freedom has also been the freedom to indulge their pent up nationalism. This may be positive, but is it conducive to constructive membership in a Union? There will be those who will argue that it is precisely membership in the Union which will consolidate such a shift in the political culture. This may well be so. But should this issue not be a subject of serious and sober public discussion?

- Institutional Set up

A Union of twenty five or more Member States will require new Institutional arrangements. The composition of Parliament, Council, Commission and even the Judicial branch will all have to be revisited, radically. This will inevitably affect the delicate checks and balances which have evolved and adapted over the years. Should these changes be deliberated and a matter of choice, or will they become an inevitable consequence of Enlargement? Even this debate which at one stage was supposed to be the focal point of the current IGC has become muted. Is it not time to face the issues squarely - in the public square?

There is no dramatic ending or soaring conclusion to these reflections. I have little doubt in my mind that by the conventional yardsticks of success — the Community, EMU, the Union — even the ever fledgling common foreign and security policy — will defy the skeptics. The thread which connects my reflections of the past and those on the future is the conviction that Europe is more than a functional arrangement better to serve the classical functions of the State. That it represents, too, a set of original, even revolutionary ways and means to in the way humans interact across boundaries. The future in that respect is far less clear.