

**The Opening of the Human Mind**

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THIS IS NOT the first period in human history when the spirit of the time is characterised by an equilibrium of evils, when mankind veers between savagery and lethargy, superstition and immoralism.<sup>1</sup> This is not the first period in human history when the governing classes parade themselves as shameless corrupters and corruptees, collusive manipulators of the masses who manipulate them.<sup>2</sup> But this is surely the first period in human history when humanity feels powerless in the face of the products of human power. And among the most intractable of those products are the products of the power of the human mind.

At the heart of the drama of human history is *law* - author and director and chorus and actor and cold-eyed spectator. Law is the mysterious drama of the human will magnified and

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<sup>1</sup> “Man portrays himself in his actions. And what a figure he cuts in the drama of the present time! On the one hand, a return of the savage state; on the other, a complete lethargy: in other words, to the two extremes of depravity, and both united in a single epoch....Thus do we see the spirit of the age [*Geist der Zeit*] wavering between perversity and brutality, between unnaturalness and mere nature, between superstition and moral unbelief; and it is only through an equilibrium of evils [*Gleichgewicht des Schlimmens*] that it is still sometimes kept within bounds.” **F. SCHILLER**, *On the Aesthetic Education of Man, in a Series of Letters* (1794), Fifth Letter, **E.M. WILKINSON & L.A. WILLOUGHBY**, eds. & trs.; Oxford, Clarendon Press; 1967 at p. 25, 29.

<sup>2</sup> “In every political state the whole body of public functionaries constituting the supreme operative require to be considered in the character of corruptors and corruptees: at the best, they are at all times exposed to the temptation of being so, and in a greater or less degree are sure to be made to yield to that temptation.” **J. BENTHAM**, *The Constitutional Code*, ch. 10 in **J. BOWRING**, ed., Edinburgh, William Tait; 1843 vol. ix, 69. Bentham’s extensive writing on political corruption, inspired by the systematic corruption of British public life in the 18th century, is permanently topical. James Frazer suggested that the reciprocal and collusive nature of government is to be found in its very origins. “The idea that early kingdoms are despotisms in which the people exist only for the sovereign, is wholly inapplicable to the monarchies we are considering. On the contrary, the sovereign in them exists only for his subjects; his life is only valuable so long as he discharges the duties of his position by ordering the course of nature for his people’s benefit.” **J.G. FRAZER**, *The Golden Bough: A Study in Magic and Religion* (1890) London, Macmillan and Co.; 2nd ed., 1900, vol. I, 237-8. There can even be detected an ambiguous collusive reciprocity in the origins of the idea of ‘representative government’. In the early English parliaments, the consent of the representatives of the people is sought and given but they thereby legally bind the community they are deemed to represent. See **J.G. EDWARDS**, “The *Plena Potestas* of English Parliamentary Representatives”, in **E.B. FRYDE & E. MILLER**, eds., *Historical Studies of the English Parliament Vol. I*, Cambridge, Cambridge University Press 1970 at p.136. Writing in the 1560’s, Sir Thomas Smith, formerly Regius Professor of Civil Law at Cambridge, later Secretary of State under King Edward VI and Queen Elizabeth, was able to say: “And the consent of the parliament is taken to be every man’s consent.” **T. SMITH**, *De Republica Anglorum* (first published 1583), bk. II, ch. 1, **M. DEWAR**, ed.; Cambridge, CUP; 1982), 79 (spelling modernised). For an ominous implication of Smith’s statement, see *infra*, fn. 30.

collectivised. Each of us is master and slave of our will. Each of us is master and slave of the law.<sup>3</sup> Law is artificial<sup>4</sup> necessity,<sup>5</sup> the salutary yoke.<sup>6</sup>

An *anthropology of law* is at least as useful as any other possible form of intellectual inquiry which seeks to make sense of the overwhelming complexity and obscurity and mutability of human society. A given society's *idea of law* at any given time is a valuable diagnostic clue as to that society's state of mental health at that time. An anthropology of law at the outer limit of human self-socialising, at the so-called 'international' level<sup>7</sup> -the universal legal system- should provide us with particularly precious clues as to the present state of the mental health of all-humanity.

The present state of the idea of international law is a sad reflection of human social history, a symptom of the sad state of humanity's mental health. The European mind bears an

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<sup>3</sup> "How can it be that all should obey, yet nobody take upon him to command, and that all should serve, and yet have no masters, but be the more free, as, in apparent subjection, each loses no part of his liberty but what might be hurtful to another. These wonders are the work of law." **J.-J. ROUSSEAU**, *A Discourse on Political Economy* (1755), in **J.-J. ROUSSEAU**, *The Social Contract and Discourses*, **G.D.H. COLE**, tr.; London, J.M. Dent & Sons; 1913 / 1973, 115-153, at 124. Rousseau may or may not have known that Cicero, in his forensic role, had said: *legum denique idcirco omnes servi sumus, ut liberi esse possimus* ("and so we are all slaves of the law in order that we can be free"). **CICERO**, *Pro Cluentio*, liii.

<sup>4</sup> The philosophically sceptical David Hume's ingenious explanation of the idea of 'justice' is that it is both natural and artificial. It is the way in which the human mind chooses to present to itself the most necessary condition of human social co-existence. "The word, *natural*, is commonly taken in so many senses, and is of so loose a signification, that it seems vain to dispute, whether justice be natural or not. ... Men's inclination, their necessities lead them to combine; their understanding and experience tell them, that this combination is impossible, where each governs himself by no rule, and pays no regard to the possessions of others: And from these passions and reflections conjoined, as soon as we observe like passions and reflections in others, the sentiment of justice, throughout all ages, has infallibly and certainly had place, to some degree or other, in every individual of the human species. In so sagacious an animal, what necessarily arises from the exertion of his intellectual faculties, may justly be esteemed natural." **D. HUME**, *An Enquiry concerning the Principles of Morals* (1751), Appendix 3, **T.L. BEAUCHAMP**, ed.; Oxford, Oxford University Press; 1998, at p. 173.

<sup>5</sup> 'Necessity' is here used in the traditional philosophical sense, as the negation of that 'freedom' which the human mind seems to find within itself, a freedom that includes a free choice among possible courses of action ('freedom of the will') subject to the 'necessity' imposed, above all, by the 'causation' characteristic of the natural world. The problem of the relationship between *necessity* and *freedom* is a central focus of the philosophical tradition stemming from ancient Greece.

<sup>6</sup> "I should have wished to live and die free: that is, so far subject to the laws that neither I, nor nobody else, should be able to cast off their honourable yoke: the easy and salutary yoke which the haughtiest necks bear with the greatest docility, as they are made to bear no other." **J.-J. ROUSSEAU**, *A Discourse on the Origin of Inequality* (1754), in *The Social Contract and Discourses* (*supra*, fn. 3), 27-114, at 29.

<sup>7</sup> Bentham's introduction of the term 'international law', subsequently taken up in other languages, was "calculated to express, in a more significant way, the branch of law which goes under the name of the *law of nations*: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence". **J. BENTHAM**, *An Introduction to the Principles of Morals and Legislation* (1789/1823), XVIII, §25, fn. **J.H. BURNS & H.L.A. HART**, eds.; Oxford, Clarendon Press; 1996 at p.296. (The term was introduced, and the footnote added, in the 1823 edition.) The word 'international' must now be re-programmed semantically to replace the idea of a mere pluralism of nations or states with the idea of the dynamic co-existence of human societies in general, including nations and states.

exceptional responsibility for the present state of humanity's mental health. For twenty-seven centuries, for better and for worse, socially constitutive ideas have flowed from the European mind. Only humanity can cure humanity's sickness. But the European mind bears an exceptional clinical responsibility. The re-opening of the European mind is a necessary condition of the opening of the human mind.

THE LIFE-STORY OF LAW has certainly been dramatic. Law has been a Mother Courage with a wagon full of motley goods inherited from a murky past, assailed by every kind of lawlessness, always ready to exploit new opportunities, following an unsteady course through overwhelming events, including wars and revolutions and fundamental social transformations of every kind.<sup>8</sup> The courage of the law, like the courage of Brecht's heroine, has been ambiguous. It has certainly included a socialised form of what the French have called *civil courage* and the Germans have called *Zivilcourage* – giving a socially effective form to values that the individual human being, or at least the individual citizen, would regard as values that should be enforced socially. Such collectivised high values have included abstracted values grouped under suspiciously grandiose titles - the Rule of Law (*État de droit*, *Rechtsstaat*), human rights and fundamental freedoms, constitutionalism, republicanism, democracy.

The more poetic the title of a given social phenomenon the more likely is it to contain a large part of fiction. We would tend to be less suspicious of a public building called 'the law courts' than of a building called 'the palace of justice'. The courage of the law has also included a substantial proportion of what can only be called *abusive courage*, the form of political wisdom (*virtù*) which is characterised by the clever manipulation of that other ambiguous heroine, Machiavelli's disorderly *fortuna*.<sup>9</sup> The law is the best means that

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<sup>8</sup> Of his own ambiguous heroine, Bertolt Brecht comments: "Courage's unflagging readiness to work is important. She is hardly ever seen not working. It is her energy and competence that make her lack of success so shattering." **B. BRECHT**, *Mother Courage and Her Children* (1940) (**J. WILLETT**, tr.; London, Eyre Methuen; 1980), 116. This edition reproduces, in translation, comments (*Anmerkungen*) which Brecht appended to an edition of the play published in 1956 (East Berlin, Henschel-Verlag).

<sup>9</sup> "It is not unknown to me how many men have had, and still have, the opinion that the affairs of the world are in such wise governed by fortune and by God that men with their wisdom cannot direct them and that no one can even help them; and because of this they would have us believe that it is not necessary to labour much in affairs, but to let chance govern them. This opinion has been more credited in our times because of the great changes in affairs which have been seen, and may still be seen, every day, beyond all human conjecture. Sometimes pondering over this, I am in some degree inclined to their opinion. Nevertheless, not to extinguish our free will, I hold it to be true that Fortune is the arbiter of one-half of our actions, but that she still leaves us to direct the other half, or perhaps a little less." **N. MACHIAVELLI**, *The Prince* (1513/32) ch. XXV; **W.K. MARRIOTT** tr. & ed.; London, J.M. Dent & Sons, Everyman's Library; 1908 at p.197.

humanity has found for taming social entropy in ways that suit the desires and interests of those who make the law, and the law's best source of strength has been found in the human imagination. The law enacts what the imagination invents; promise, property, tort, crime, government, nations and state, all of these, and countless others, are works of the human imagination trans-substantiated into everyday social reality, fiction made fact.<sup>10</sup> Change the story you tell the people and you change the reality which you and they inhabit.

A SOCIETY needs a shared mythology.<sup>11</sup> A shared mythology does not necessarily make a society. We have inherited a shared international mythology which is not the shared mythology of a society.

The naïve animism of Vattel – personifying ‘nations or states’ as if they were the lumbering *Übermenschen* of a Norse saga or a Wagner music-drama (1758).<sup>12</sup> Herder's

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<sup>10</sup> “A fictitious entity is an entity to which, though by the grammatical form of the discourse employed in speaking of it, existence be ascribed, yet in truth and reality existence is not meant to be ascribed.” **J. BENTHAM**, *The Constitutional Code*, **J. BOWRING**, ed., *supra* fn. 2, vol. ix at p.77. “By fiction, in the sense in which it is used by lawyers, understand a false assertion which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true.” “Constitutional Code Rationale”, in **J. BENTHAM**, *First Principles Preparatory to Constitutional Code* (1822), **P. SCHOFIELD**, ed.; Oxford, Clarendon Press; 1989, at p.267. Bentham saw fictions as a central feature of the law, and a prime source of the abuse of social power – “instruments of delusion employed for reconciling the people to the dominion of the one and the few”. *The Constitutional Code* (above), 76. There is a convenient compilation of Bentham's scattered writings on fictions in **C.K. OGDEN**, *Bentham's Theory of Fictions*, London, Kegan Paul; 1932, Georges Sorel (1847-1922) said that in ‘poetic fictions’ we have “the ability to substitute an imaginary world for scientific truths which we populate with plastic creations and that we perceive with much greater clarity than the material world. It is these idols which penetrate our will and are the sisters of our soul.” Quoted in **J. STANLEY**, *The Sociology of Virtue: The Political and Social Theories of George Sorel*, Berkeley, University of California Press; 1981 at p.90. The quotation is from an article by Sorel: “La science et la morale” in *Questions de morale* (Paris, Félix Alcan; 1900, at 7.

<sup>11</sup> In *La mentalité primitive*, Paris, Librairie Félix Alcan; 1922, **LUCIEN LEVY-BRUHL**, one of the old masters of anthropology, recognised that thinking in terms of a hidden world of supernatural explanations of natural phenomena is not an inferior form of thinking as compared with European rational thinking, merely a different form dictated by different conditions of life. More modern anthropologists (Marcel Mauss, Claude Lévi-Strauss) see such thinking as reflecting a general human need felt by human societies to have a story of the origin and nature of their unique identity and character, a story which may be constantly re-interpreted but can never be abandoned. The same has been said of ‘religion’, in a more general sense: “...society has been built and cemented to a great extent on a foundation of religion, and it is impossible to loosen the cement and shake the foundation without endangering the superstructure.” **J. FRAZER**, *The Belief in Immortality and the Worship of the Dead*, London, Macmillan and Co; 1913, vols. I and 4.

<sup>12</sup> “Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and is thus become a moral person having understanding, and a will peculiar to itself, and susceptible at once of obligations and of rights.” **E. de VATTEL**, *The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns*; **C.G. FENWICK**, tr.; Washington DC, Carnegie Institution; 1916, at p.3. “But as its duties towards itself clearly prevail over its duties towards others, a Nation owes to itself, as a prior consideration, whatever it can do for its own happiness and advancement.” (*ibid.*, 7). Writing about animism, David Hume said: “There is an universal tendency amongst mankind to conceive all beings like themselves, and to transfer to every object those qualities, with which they are familiarly acquainted, and of

psychologising of the ‘nation’ – each with its own Fichtean *ego* full of the violence of repressed desire (1774).<sup>13</sup> Clausewitz and the rationalising of Napoleonic total war – nation against nation as gladiators in a permanent existential struggle, political, economic and military (1832).<sup>14</sup> The fertile fictions of ‘law’ could obviously be used and abused to serve the purposes of the masters of this new world of the imagination, this new symbolic universe.<sup>15</sup> They could not be expected to cause it to civilise itself, let alone to socialise itself.

Romantic nationalism was the most deadly form of collusion between government and people. Enthusing the people with a fraudulent image of their ideal identity enabled governments to take absolute power over the people, body and mind. The industrialising of national economies, integrating the labour of the masses into superhuman wealth-creating machines, transformed governments from the disreputable successors of medieval royal courts into general managers of apparently unlimited concentrations of public power. The making and enforcement of the law became the power over all social power. The expansion of socio-economic might, through international trade and colonisation, extended the gladiatorial arena of the nations to cover most of the human world. People discovered that total government and total war require total sacrifice and such was a legacy of the symbolic universe of Europe’s nineteenth century to the real world of the twentieth century.

Mysteriously, however, the agonistic co-existence of the new state-molochs within the nineteenth-century symbolic universe not only survived what should have been its twentieth-century *Götterdämmerung*. It managed to retain the trappings of a much more ancient symbolic universe – the world of *diplomacy*. Relations between states are conducted in forms that derive from medieval Europe, most characteristically from the bizarre process of mutual

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which they are intimately conscious.” **D. HUME**, *The Natural History of Religion*, **A.W. COLVER**, ed.; Oxford, Clarendon Press; 1976 at p.33.

<sup>13</sup> Herder speaks of *der gemeinschaftliche Geist* (the mind or spirit of a community), *der Gefühl einer Nation* (the feeling of a nation), and of the *Seele, Herz, Tiefe* (soul, heart, depth) of a people or nation. **J.G. HERDER**, *Auch eine Philosophie der Geschichte zur Bildung der Menschheit* (“Yet Another Philosophy for the Education of Mankind”, München/Wien, C. Hanser Verlag; 1984, at p.612. Herder insists that, in traditional societies, the shamans are powerful because they themselves believe the stories they tell the people. J.G. Fichte (1762-1814) had proposed an idealist philosophy centred on a self (*ego*) which creates a world-for-itself which the self regards as containing also the self-consciousness of other ‘selfs’.

<sup>14</sup> “War therefore is an act of violence intended to compel our opponent to fulfil our will...Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power.” **C. von CLAUSEWITZ**, *On War* (**J.J. GRAHAM**, tr.; **A. RAPOPORT**, ed.; London, Penguin Books; 1968), 101.

<sup>15</sup> For the idea of ‘symbolic universes’, see **P.L. BERGER & T. LUCKMANN**, *The Social Construction of Reality*, London, Allen Lane; 1967, 113 ff.

self-constituting of the two emerging nation-states of England and France. From the eleventh century, and for five centuries thereafter, it was impossible to say whether the essential nature of the querulous Anglo-French sibling rivalry was diplomacy punctuated by episodes of war, or war punctuated by episodes of diplomacy.<sup>16</sup>

War and diplomacy were natural pastimes of the nobility, especially the feudal barons whose social power was based on land-holding. The acquisition of land, and disputes over title to land, could be submitted to the arbitration of violence, if they could not be submitted to a court. War had the advantage over jousting that it could be conducted by proxy and would risk the lives of expendable retainers and the otherwise worthless rabble. The manipulation of relations with rival land-holders through negotiation and marriage could be a profitable art for those who mastered it. For the king, lord of all lords, war and diplomacy had the additional attraction of being conducted on a larger stage, with larger, more thrilling challenges and rewards.

That this medieval paradigm of the co-existence of rival feudal land-holders should have survived into the new symbolic universe made by Vattel, Herder, and Clausewitz is a tragic and terrible irony of history. The vast impersonal power-machines of the nation-states were apparently still supposed to have not only *interpersonal* relations, but even personal *feelings* about each other.<sup>17</sup> Even in the twentieth century, their formal relations were seen, by otherwise intelligent and knowledgeable observers, in the same glamorous and theatrical light as they had always been, as they had been in the days of Henry V or François I or Henry VIII, Wolsey or Richelieu or Mazarin.<sup>18</sup>

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<sup>16</sup> “We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own. We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means.” C. von CLAUSEWITZ, *On War* (*supra*, fn 14, at p.402.

<sup>17</sup> “Practically every nation in Europe was afraid of Germany, and the use which Germany might make of her armaments. Germany was not afraid, because she believed her army to be invincible, but she was afraid that a few years hence she might be afraid...In 1914 Europe had arrived at a point in which every country was afraid of the present, and Germany was afraid of the future.” Viscount Grey, who had been British Foreign Secretary before and during the First World War, speaking in the House of Lords in 1924. Quoted in G.M. TREVELYAN, *Grey of Fallodon*, London, Longmans, Green & Co.; 1937 at p.244.

<sup>18</sup> “The world on the verge of its catastrophe was very brilliant. Nations and Empires crowned with princes and potentates rose majestically on every side, lapped in the accumulated treasures of the long peace. All were fitted and fastened – it seemed securely – into an immense cantilever. The two mighty European systems faced each other glittering and clanking in their panoply, but with a tranquil gaze. A polite, discreet, pacific, and on the whole sincere diplomacy spread its web of connections over both.” W.S. CHURCHILL, *The World Crisis*

EUROPEAN INTEGRATION cannot escape its genetic inheritance. The European Union contains the whole of European history. A re-opening of the European mind begins with the effort to understand the true nature of European integration, an effort that is directly related to the challenge of understanding the true nature of a globalising world.

The masters of European integration want the people to believe that the EU is something essentially new, a new chapter in a new volume of European history. But the inarticulate historical sense of the people tells them that, on the contrary, the EU seems very much like yet another episode in the three-thousand-year history of the relationship between the governed and the governors, the many and the few. And the people certainly see that, in the vast legal structure of the 'new Europe', they are witnessing yet again the ambiguous wonder-working of *law*, the projection of the master-servant relationship onto a third thing (a *tertium quid*) which rules them both.

The masters of European integration want also to convince themselves, and the European people, that the EU is a form of mental re-engineering, a re-forming of the ego-psychologies of the European peoples. The problem is that the ego-psychology of the European peoples is not merely a psychology of their *identity*. In the course of European history, the peoples of Europe have developed substantially different *constitutional* psychologies, different stories about the nature of society and government.<sup>19</sup>

The remarkable clairvoyance of Alexis de Tocqueville was able to explain the new United States better than the Americans explain it to themselves.<sup>20</sup> But he was also able to propose a masterly, if controversial, interpretation of the true nature of the French Revolution, that most obscure of historical events. De Tocqueville saw a unifying logic in the event, a logic whose source was not to be found in distorted ideas about 'political freedom' gleaned

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1911-1918 (1923), London, Odhams Press Limited; no date of publication at p.151. At the outbreak of the war, Churchill had been First Lord of the Admiralty (the British Cabinet Minister responsible for the Royal Navy).

<sup>19</sup> For fuller discussion of the constitutional psychologies of three member states of the EU, see "The Crisis of European constitutionalism: reflections on a half-revolution", in P. ALLOTT, *The Health of Nations: Society and Law beyond the State*, Cambridge, CUP; 2002, ch. 7. Previously published in 34 *Common Market Law Review*, 439-490 (1997). It is there suggested that the central focus of the British constitution is the idea of 'society', of the French constitution the idea of 'nation', of the German constitution the idea of 'state'.

<sup>20</sup> A.C. de TOCQUEVILLE, *De la démocratie en Amérique* (1835-40). In other writings, he was even able to explain the true nature of the British constitution as the constitution of a monarchical republic.

from Locke or Voltaire or Montesquieu or Rousseau or the abbé Sieyès.<sup>21</sup> He suggested the much more interesting idea that the true spiritual progenitors of the Revolution were the French ‘Economists’ or ‘Physiocrats’ (he used both terms) of the 18th century.<sup>22</sup> We may be inclined to believe that they are also the true spiritual progenitors of the European Union.

Chapter three of part three of de Tocqueville’s *The Old Regime and the French Revolution* should be read by anyone generally benevolent towards the idea of European integration but anxious about the particular form that it has taken. He presents ‘the Economists’ as the masters of rationalist political absolutism or absolutist political rationalism. Royal power would be adopted and adapted to become the instrument of revolutionary social transformation.<sup>23</sup> He describes how the French people had come to regard “the ideal social system as one whose aristocracy consisted exclusively of government officials and in which an all-powerful bureaucracy not only took charge of affairs of state but controlled men’s private lives”. But, to reconcile this with their ancient love of freedom, they decided to combine “a strong central administration with a paramount legislative assembly: [combining] the bureaucratic system with government by the electorate. The nation as a whole had sovereign rights, while the individual citizen was kept in the strictest tutelage; the former [the nation] was expected to display the sagacity and virtues of a free race, the latter [the citizen] to behave like an obedient servant”.<sup>24</sup>

Whoever the true spiritual progenitors of European integration may be thought to be, its birth was attended by two ghosts from Europe’s past – war and diplomacy. The governing

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<sup>21</sup> Another clear-eyed and prophetic observer of the French Revolution had seen the Revolution differently, as a sort of religious revolution invoking such distorted ideas, and threatening a sinister campaign to extend its ‘dogmas’, by force if necessary, across the whole of Europe. **E. BURKE**, *Reflections on the Revolution in France* (1790) and *Thoughts on French Affairs* (1791).

<sup>22</sup> The French Physiocrats laid the foundations of the modern discipline of economics. But they did so at a time when the ‘economic’ aspect of society was discussed as an integral part of a discussion of social organisation in general. Their discipline was therefore correctly called ‘political economy’. It was in the 19<sup>th</sup> century that the study of more narrowly ‘economic’ phenomena became a separate discipline under the name of ‘economics’.

<sup>23</sup> “Thus there could be no question of destroying this absolute power; far better, turn it to account. ‘The State should govern in accordance with the rules basic to the maintenance of a well-organized society,’ was the opinion of Mercier de la Rivière, ‘and, this being so, it should be all-powerful.’” **A.C. de TOCQUEVILLE**, *The Old Régime and the French Revolution* (1856) **S. GILBERT**, tr.; Garden City, Doubleday & Company, Anchor Books; 1955, at p.162. “It is a curious fact that when they envisaged all the social and administrative reforms subsequently carried out by our revolutionaries, the idea of free institutions never crossed their minds. True, they were all in favour of *laissez faire* and *laissez passer* in commerce and industry, but political liberty in the full sense of the term was something that passed their imagination or was promptly dismissed from their thoughts if by any chance it occurred to them.” *Ibid.*, 159. “It is commonly thought that the subversive theories of what today is known as socialism are of recent origin. This is not so; views of this kind were sponsored by the earliest Economists.” *Ibid.*, 164.



class claim to have cured themselves from their addiction to war by using diplomacy to create a new kind of social system, in which rational absolutism and representative legitimation are combined to create a legal order superior to, but integrated with, the ancient national legal orders. By governmental fiat, all-Europe would become, for the first time, a single constitutional order, folding the national constitutional orders into the integrated constitutional order.<sup>25</sup> However, this ingenious and ambiguous process is beset by a deep-structural and life-threatening problem. The masters of European integration failed to achieve the mental re-engineering of the people. They failed to find a mythology of European integration, a society-forming story to tell the people.<sup>26</sup> But, worse than that, they failed to re-engineer their own mentality. The masters of European integration live in two different symbolic universes – the new universe of the rational-absolutist European legal constitution and the old universe of diplomacy. They have extrapolated the ethos of diplomacy –the functional reconciling of rational and irrational national claims and interests– to embrace the practice of government and, in particular, the practice of law-making. It seems unlikely that they will re-form their self-imagining or their practice in the foreseeable future. It seems unlikely that the people will embrace such an equivocal half-revolution in the foreseeable future. It is an ominous precedent for the imagining and the practice of a globalising world.

IN 1945, exhausted and ashamed, the European mind closed. European integration took place in a philosophical void. The colonial empires disintegrated and evaporated in a philosophical void. Profound social transformation at the national level took place under the aegis of nineteenth-century ideas of bureaucratic rationalism and socialist meliorism, with imperious economic forces as the driving force and legislation as the engine of social change, as in the nineteenth century. Philosophy had made its own philosophical void. Philosophy had convinced itself philosophically of its own impossibility.

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<sup>24</sup> *Ibid.*, 167.

<sup>25</sup> For the idea that the EU is a union of constitutional orders rather than a union of states, see **P. ALLOTT**, “Integration von Verfassungen, nicht von Staaten”, *Frankfurter Allgemeine Zeitung*, 9 May 2001, 13.

<sup>26</sup> The rebellious Americans of 1776 had two great advantages in inventing their national myth. (1) They could, and did, claim to be the true and better heirs of a thousand-year constitutional tradition, a tradition itself seasoned with myth, fantasy and poetry. Thomas Jefferson himself agreed with the ‘Anglo-Saxonist’ view, that the essence of the British constitution stemmed from the period before the Norman invasion of 1066. See “The Theory of the British Constitution”, in **P. ALLOTT**, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory*, London, Cameron May; 2005, ch. 1. Previously published in *Jurisprudence: Cambridge Essays*, **H. GROSS & R. HARRISON**, eds.; Oxford, Clarendon Press; 1992, 173 - 205. (2) They had a double creation-myth, itself as much fiction as fact, to the effect that the original settlers in 1620 were escaping from the clutches of oppression and that they themselves were throwing off the yoke of tyranny. They then created a federal constitution (1787), an elegant distillation of an idealised British constitution, which they made into a sacred totem.

All this in a century when the blood of uncounted millions had been shed and the lives of countless more millions had been ruined, all over the world, in the name of ideas which had originated in Europe. Over the course of the three thousand years of its recorded history, Europe had accumulated a vast cultural mass made from all the arts and sciences, from all that the human mind and the human hand can make. Now Europe has found that its remarkable essence had been distilled into the form of a hypertrophic state, in the internal sense of the word 'state' and equally a pusillanimous state, in the external sense of the word 'state'. Adrift in a bleak and primitive world in which the European presence seemed condemned to be a secondary presence, a world in which all the perennial social problems were grossly magnified, a world dominated by a parody of the old balance of power – a balance of ultimate evil, in which the Soviet Union and the United States were the Fafner and Fasolt of a crazy psycho-drama,<sup>27</sup> a *folie à deux* which nevertheless determined and threatened the existence of all-humanity for almost fifty years and which, since 1989, has left the human world in a state of perilous confusion. Was it the old world order under new management, or a new kind of world order emancipated from its European roots? The answer is: neither. It is the old world order hopelessly out-of-step with the new reality of the human world.

The anthropology of law, at the global level, reveals a human world that is anything but lawless. The universal legal system is in three layers – national legal systems, transnational law (national legal systems applied to persons and events outside national jurisdiction), and international law (law applicable to the human world as a whole, to persons and events everywhere). At the global level, the fossil of international law remains as a *lusus naturae*, a sport of human nature, a mental taxon surviving from the mythological period of modern history, from the mind-world of Vattel, Herder and Clausewitz, tragically inappropriate for the post-1945 world, hopelessly inappropriate for the the globalising world of the twenty-first century.

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<sup>27</sup> In *Das Rheingold*, the first part of Richard Wagner's four-part music-drama *Der Ring des Niebelungen*, Fasolt and Fafner are two giants who are responsible for building Valhalla, the home of the gods, and who destroy each other in fighting over the stolen gold which is to be their payment. In *Götterdämmerung* (Twilight of the Gods), the last part of the drama, Valhalla and the old gods are destroyed and, with them, the reign of greed, hatred, vengeance and perverted love, leaving the memory of Brünnhilde, improbably capable of pure love, and of Siegfried representing the improbable possibility of a new human being and a new Germany.

The state of law at the two subordinate levels is radically diverse in effectiveness and sophistication from legal system to legal system. But everywhere it contains a troubling characteristic, even in the most sophisticated of national societies. It is a characteristic that has posed a crucial challenge for the redeeming of the EU and that now presents a crucial challenge for the making of a new kind of international society.

Bentham's analysis of public corruption<sup>28</sup> centred on what he called the 'sinister sacrifice' – when the holder of public power substitutes personal interest for the public interest. Within a characteristic British intellectual tradition (Hobbes, Milton, Locke, Hume, Paine, Godwin, Mill), Bentham regarded government as nothing better than a necessary evil.<sup>29</sup> Governmental corruption is as natural to government as evil is to the fallen human being. Bentham saw only two possible means for redeeming government from its original sin – public opinion and the law. To make government safe as an instrument for the well-being of the people rather than merely a source of privilege and profit for 'the ruling few', Bentham proposed a vast and detailed constitutional system in which public opinion and law could be made to act as what he called 'counterforces', to resist the permanent and ineradicable threat of public corruption. A Tribunal of Public Opinion, resting on the two pillars of 'transparency' in the business of government and a 'free press', would permanently observe and judge the words and deeds of the holders of public power. The law, master and servant of the constitutional order, would permanently correct and punish the abuse of public power, not in the name of so-called 'natural' rights but as a matter of everyday prudential practice.<sup>30</sup>

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<sup>28</sup> *Supra*, fn. 2. Bentham has a further discussion of corruption in "Constitutional Code Rationale" in *First Principles*, *supra*, fn. 10, ch. 3.

<sup>29</sup> "All government is in the very essence of it an evil...To exercise the powers of government is accordingly to do evil." **J. BENTHAM**, "Economy as applied to office", in *First Principles* (*supra*, fn. 10), 4. "Society is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices." **T. PAINE**, *Common Sense* (1776), in *Common Sense and Other Political Writings*, **N.F. ADKINS**, ed.; New York, Bobbs Merrill Co, American Heritage Series; 1953 at p.4. William Godwin (1756-1836), mistakenly supposed to be an apostle of anarchism, suggested that as human beings and human societies perfected themselves, government would wither away and human beings would become self-governing.

<sup>30</sup> Bentham, for once in agreement with Edmund Burke, classed the fiction of 'natural rights' as a fraudulent and nonsensical delusion. "The tyrant Henry the Eighth of England...did not know what an effectual instrument of despotism was to be found in that grand magazine of offensive weapons, the rights of men...Had fate reserved him to our times, four technical terms would have done his business...- 'Philosophy, Light, Liberty, the Rights of Men'." **E. BURKE**, *Reflections on the Revolution in France* (1790), London, J.M. Dent & Sons, Everyman's Library; 1910, 112-3. We may also recall de Tocqueville's opinion of the Tudor monarchs (1485-1603), not the least of whom was King Henry VIII: *Nulle part en Europe, le despotisme ne s'y montra plus terrible, parce que nulle part il ne fut plus légal*. **A.C. de TOCQUEVILLE**, *Voyages en Angleterre et en Irlande* (**J.P. MAYER**, ed.; Paris, Gallimard; 1982, 56. "Nowhere in Europe was despotism more terrible, because nowhere else was it more 'legal'." **A. C. de TOCQUEVILLE**, *Journeys to England and Ireland*, **J.P. MAYER**, ed.; **G. LAWRENCE & K.P. MAYER**, trs.; London, Faber & Faber; 1958, at p.38.

Bentham might have foreseen the way in which the economic dimension of society would join law and government in a collusive hegemony with politics to form a ruling triumvirate of ultimate social power. The economy – the struggle to make the wealth of the nation and to distribute it unequally in the form of the legal fiction of property.<sup>31</sup> Politics –the struggle to take power over law and government in the name of ideas. Law and government– master and servant of the economy and of politics. He might not have foreseen how law and government would come to see the facilitating of the economy as their primary task, with another ancient legal fiction –the corporation– as the leading actor in the drama of political economy, an imaginary entity demanding from law and government an unceasing flow of new legal fictions to make possible the wonder-working mysteries of the imaginary social arena known as ‘the market’.

Bentham might also not have foreseen that, in the most highly developed societies, endemic collusive corruption would take on a much more complex and productive form – a public-private conspiracy which would leave the private minds and private lives of the citizens as barely residual human phenomena in a form of society in which private ambition and public policy would coalesce. Our social existence was redefined. Society exists for the benefit of us the citizens because we the citizens exist for the benefit of society. It is the task of law and government to mediate this new existential human relationship with ruthless precision.<sup>32</sup>

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<sup>31</sup> “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 soon be 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 the laws...tell them they must either continue poor or acquire wealth in the same manner as they have done.” **A. SMITH**, *Lectures on Jurisprudence* (lecture of 22 February 1763), **R.L. MEEK et al., eds.**; Oxford, Clarendon Press; 1978, 208-9. “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.” **A. SMITH**, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), **R. CAMPBELL & A. SKINNER, eds.**; Oxford, Clarendon Press; 1976, vol. II at p.715.

<sup>32</sup> Suspicion of such over-government is a leading theme of much of John Stuart Mill’s writing. He says that experience proves “that the depositaries of power who are mere delegates of the people, that is of a majority, are quite as ready (when they think they can count on popular support) as any organs of oligarchy, to assume arbitrary power, and encroach unduly on the liberty of private life. The public collectively is abundantly ready to impose, not only its generally narrow views of its interests, but its abstract opinions, and even its tastes, as laws binding upon individuals. And the present civilization tends so strongly to make the power of persons acting in masses the only substantial power in society, that there never was more necessity for surrounding individual independence of thought, speech, and conduct, with the most powerful defences, in order to maintain that originality of mind and individuality of character, which are the only source of any real progress, and of most of the qualities which make the human race much superior to any herd of animals.” **J.S. MILL**, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), bk. V, ch. XI, **J.M. ROBSON, ed.**; London, University of Toronto Press; Routledge & Kegan Paul; 1965, 939-40.

Now, in the first years of the twenty-first century, we are able to observe a remarkable phenomenon. Globalisation is the globalising of social phenomena, including the best and worst aspects of society. The very old and the very new challenges of human society are manifesting themselves now at the global level, the level of the society of all-humanity. The great question of the relation of law and government, the great problem of governmental corruption, the troubling phenomenon of the reciprocal manipulation of the governors and the governed, and the perennial absolutist tendency of law and government, exacerbated now by the new form of public-private collusion – all these great challenges are now present at the level of international society. Globalisation is the globalising of both social good and social evil.

WHAT WILL BE the presence and the role of law and government at the level of the new international society, the society of all societies, the society of all-humanity? One safe prediction is that the triumvirate of law and government, the economy, and politics will also be the driving forces of the new international society. Together they fashioned the old symbolic universe which suited the desires and needs of the masters of the old international system. Together they will dominate the making of the symbolic universe of the new international society.

The old idea of international law was made on the basis of an ingenious manipulation of two powerful ideas taken from general social philosophy – custom and consent. Those ideas have served again and again as the constitutive elements of powerful social philosophies. Customary law and its deep structure of consent is a social form as old as human societies.<sup>33</sup> In the making of international law, they were used cynically to prevent the emergence of law as a third thing, a *tertium quid* capable of ruling the rulers, capable of mastering the makers of the law themselves.<sup>34</sup>

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<sup>33</sup> International law is seen as customary law made by the ‘consent’ of ‘states’. “Nothing is more reprehensible than to derive the laws prescribing what *ought to be done* from what is *done*, or to impose upon them the limits by which the latter is circumscribed.” I. KANT, *Critique of Pure Reason* (1781) N. KEMP SMITH, tr.; London, The Macmillan Press; 1929 at p.313. Kant was surely not condemning customary law which, at its best (as in the English common law), transforms into legal obligation that which has had an obligatory social effect in the past. For discussion of the idea that customary law depends on an idea of the subjects of the law acting as virtual Kantian universal legislators, see P. ALLOTT, *The Health of Nations*, *supra*, fn. 19, §§10.26 ff.

<sup>34</sup> Old international law was particularly well suited to a government which was capable of acting in the role of a ‘sensible knave’. “And though it is allowed, that, without a regard to property, no society could subsist; yet, according to the imperfect way in which human affairs are conducted, a sensible knave, in particular incidents,

We may already be able to detect the first signs of a new human springtime. We may see a new kind of international law and government emerging from the roots of the old international system, like green shoots after a drought or a flood. The new organic international law and government will be as complex and dynamic and specific as the social situations it is designed to regulate. Eventually, the new ascending organic international law and government will meet the decaying remnants of the autumn of the old order, the order of diplomacy and war.<sup>35</sup> It will not be a natural self-socialising of properly constituted state-systems, which was a more modest aspect of the great Kantian dream.<sup>36</sup> It will be a form of law and government in the making of which other social phenomena –commercial and industrial corporations, non-governmental interests, global political and economic forces of all kinds, old and new threats to world public order– will play an increasing role. It will be a form of law that may at last be able to act as a powerful counterforce to resist the unlimited opportunities for the abuse of public power and public-private power present in a globalising world.

To re-imagine Europe requires yet another re-opening of the European mind, a re-awakening from its restless and dreamless sleep.<sup>37</sup> The European Union is an intermediate social formation between nationalism and globalism. It is a daring sublation of many dialectical oppositions in Europe's past -France-Germany, Britain-Germany, France-Britain, Germany-Poland, Britain-Spain, Britain-the United States of America, Roman Catholicism-Protestantism, faith-reason, Christianity-Islam, and many others. Europe has been made by a long series of productive frictional contiguities. A better future for the EU requires a sublation of two profound dialectical oppositions in its present situation – (1) the unresolved tension between the Union and its member states with their ancient institutions and their peculiar

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may think, that an act of iniquity or infidelity will make a considerable addition to his fortune, without causing any considerable breach in the social union and confederacy." **D. HUME**, *An Enquiry concerning the Principles of Morals*, *supra* fn. 4, IX.2 at p.155.

<sup>35</sup> For discussion of 'descending' theories of government (sovereignty flowing from the king downwards) and 'ascending' theories (sovereignty flowing from the people upwards), see W. Ullmann, *Medieval Political Thought*, Harmondsworth, Penguin Books; 1975, 12.

<sup>36</sup> **I. KANT**, "Idea for a Universal History with a Cosmopolitan Purpose" and "Perpetual Peace: A Philosophical Sketch", in *Kant's Political Writings*, **H. REISS**, ed., & **H.B NISBET**, tr.; Cambridge, CUP; 1970, 41-53, 93-130.

<sup>37</sup> For the idea that the European mind has experienced a succession of enlightenments at three-century intervals since the end of the Roman Empire in the West, and hence is now due for another enlightenment, see **P. ALLOTT**, *The Health of Nations*, *supra*, fn. 19, §3.18, fn.15.

social psychologies, and (2) Europe's relationship to a new frictional contiguity - the radically new external reality in which Europe now finds itself.

The European mind already contains within itself a rich store of creative ideas which will inspire its contribution to the opening of the human mind, to the re-imagining of international society and international law – ideas about a possible universal social ideal<sup>38</sup> or about a possible universal social model.<sup>39</sup> We should enjoy the task of finding a new *bella menzogna*<sup>40</sup> – a new story for human beings to tell themselves about the social life of the whole human species. We must never cease to take responsibility for constantly correcting the equilibrium of evils which is the natural default condition of human social order, the continuous reconciling of man the god and man the beast.<sup>41</sup> Above all, we must never cease to believe in our power over the products of the power of the human mind. We must believe in the permanent possibility of human self-perfecting.<sup>42</sup>

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<sup>38</sup> “Hence it is evident that the same life is best for each individual, and for states, and for mankind collectively.” Aristotle, *Politics*, VII.3.10, B. JOWETT, tr.; Oxford, Clarendon Press; 1905, 265.

<sup>39</sup> The *humana universitas* (Dante), the ‘universal society’ (Suárez), the ‘great and natural community’ of mankind (Locke), the *civitas maxima* (Wolff), the ‘great city of the human race’ (Vico), the ‘general society of the human race’ (Rousseau), a ‘perfect civil union of mankind’ (Kant), an ‘international society of all human beings, the society of all societies’ (Allott).

<sup>40</sup> *Una veritate ascosa sotto bella menzogna* (“a truth hidden beneath a beautiful lie”). Dante’s definition of allegory (*Convivio*, II.1.3) may be used as an elegant variation of Plato’s idea of the necessary social poetry as the ‘noble lie’ or ‘opportune falsehood’: Plato, *Republic*, 414b.

<sup>41</sup> “But he who is unable to live in society, or who has no need because he is sufficient for himself, must either be a beast or a god.” Aristotle, *Politics*, I.2.14 (*supra*, fn. 38), 29. Kant said that the problem of attaining a civil society which can administer justice universally is “both the most difficult and the last to be solved by the human race”. I. KANT, “Idea for a Universal History”, in *Kant’s Political Writings* (*supra*, fn. 36), 41-53, at 45-6.

<sup>42</sup> “The scales of understanding are not quite impartial, and one arm of them, which bears the inscription: Hope of the future, has a mechanical advantage...This is the sole error which I cannot set aside, and which in fact I never want to.” I. KANT, *Dreams of a Spirit-Seer*, pt. I, ch. 4, F. SEWALL, ed. & E. GOERWITZ, tr.; London, Swan Sonnenschein; 1900, 365.