οἰκουμένης πρόμαχοι

(oikoumenes promachoi)

Rede uitgesproken door

Prof. dr. G.E. Lock

bij de aanvaarding van zijn ambt van gewoon hoogleraar
in de Politieke filosofie in verband met de Europese rechtscultuur
aan de Universiteit Leiden
op dinsdag 25 november 2003

ISBN 90-808419-1-9

Mijnheer de Rector Magnificus,
Zeer gewaardeerde toehoorders:

Deze oratie zal ik, met uitzondering van de dankwoorden aan het slot, in het Engels uitspreken. De reden hiervoor is simpelweg dat mijn benoeming plaats heeft in een 'internationaal' kader, in het bijzonder van een samenwerkingsproject tussen de universiteiten van Leiden en Oxford. De inhoud wil ik daarom beschikbaar kunnen stellen voor Britse collega's en vrienden, die geen kennis hebben van de Europese taal die Nederlands heet. Daarom schakel ik over op een minder Europese taal, die echter wel ons Europees *koinè* is geworden.[1]

* * *

The title of the British novelist Graham Greene's 1934 novel, *It's a Battlefield*, is drawn from lines in A.W. Kinglake's history of the war in the Crimea.[2] Greene's biographer, Norman Sherry, comments: 'The idea of life as a battlefield in which individuals, ignorant of the extent of the whole war, fought their own separate battles, is the metaphor which embodies the theme of the novel.' Each of us fights his own battles, in – as Kinglake puts it – 'happy and advantageous ignorance of the general state of the action.'[3]

In Kinglake's own account the problem is the mist that lies over the battlefield: the soldiers can't, so to speak, see the wood for the trees. In Greene's novel the mist is metaphorical. His picture of the human condition resembles in one respect that of Spinoza. Recall Spinoza's claim that any human individual's comprehension of the world is necessarily inadequate just to the extent that it belongs to a particular, therefore limited human intellect.[4] We all walk around in a relative haze. From a rather different point of view, Hegel argues that, left to his own devices, a human individual can at best only comprehend – 'unconsciously', as he puts it – the 'universal task'. Most of us grasp little of what history is using us to bring about.[5]

That, I suppose, is roughly the position in which many of us find ourselves in respect to Europe and to the European Union. It's all pretty murky.

An American author, Melissa Rossi, has remarked that 'Europeans are absolutely confused about the European Union'.[6] A recent *Financial Times* editorial noted that not just individual citizens but nation-States too are confused.[7] Europeans – an ex-German Ambassador wrote – are 'confused about the roles and representativity of the many European institutions'.[8] A German Member of the European Parliament remarked that it is indeed 'easy to be confused about Europe's institutions'.[9] And at a media seminar in a would-be accession land, in an evaluation of coverage of European news, the difficulty was summed up in a few words: 'The European integration process [is] totally unintelligible to normal people.'[10] The Brussels haze spreads out over the whole continent and beyond.

I shall try today to review a number of themes, belonging to European history and philosophy, in such a way as to drive off some of the fog, at least in patches. I can tell you very little about the details of the functioning of the European Union which you don't already know. So I'll do something else, namely attempt to put various aspects of Europe and its intellectual history into a perhaps unexpected light. In this connexion I shall talk about a number of thinkers who, I believe, have a contribution to make to study in this area.

One of the commonest ideas about Europe to be found in the philosophical texts of the last centuries is that Europe stands for the principle of *universalism*. This idea is still widespread: the preface to a recent European Commission Forward Studies Unit publication on European Unity remarks that 'universalism is a European value and an obligation'.[11]

Unlike all other continents – but on the universalist view, of which there are of course many variants, European identity is in any case not essentially defined in geographical terms – Europe is 'nothing particular', just because it transcends all particularity. This is to be sure only one view, and it remains controversial. But it is a necessary reference in any examination of the idea of Europe, or rather of the ideas of the diverse Europes which have been or are still in competition.[12] Many Europeans have indeed considered themselves, as the Byzantines did – it is the title of this lecture - *oikoumenes promachoi*: champions or front-fighters for the whole world.[13]

Europe is, from this point of view, the model for the entire world, the future of the entire world. Or, to put it another way, the task of the *oikoumene* is to Europeanize itself. In this sense, Europe has no 'natural' frontiers. The non-European is just the not-yet-European. Europe is another name for cosmopolitanism.

If you don't like these identifications – for instance because they still resonate with their historical 'applications', colonialism and imperialism of the classic kind – then you might replace the term 'Europe' with that of 'the West'. The Western world is Europe-plus – 'plus America' etc. But the rest of the world, outside of the West, has also long been 'westernizing' – culturally, politically and legally. Between the West and the East the relation is not symmetrical: the West (leaving aside sporadic cultural enthusiasms for China and Japan and so on) has never been tempted by or in danger of 'Orientalization'.[14]

All these ideas obviously have a strong mythical component. But political and legal reality feeds on political and legal fictions.[15] The fictions then help feed our confusion.

Our 'confusion' about Europe is not just a matter of a defect in understanding – it is the reflection of an objective problem, or if you like, it is structural.

It is often claimed that any such confusion has to do, in part, with a lack of clarity about matters of *sovereignty*. The 1648 Treaty of Westphalia pretty unambiguously recognized the sovereign power of the individual nation-states. It is this settlement that is said now to be under pressure, not only as a function of what is called globalization,

but also as a consequence of European integration and unification. Some commentators talk in this latter connexion about a 'transfer' of sovereignty from the nation-states to Brussels. Others insist that the Union is a voluntary, treaty-based club and that the principle of *rebus sic stantibus* applies. This is a Civil Law doctrine (developed by ecclesiastical lawyers) according to which new and unexpected circumstances may be used to argue for withdrawal from treaty obligations. Like Civil Law, Common law has generally in modern times followed the *pacta sunt servanda* rule[16] – though it contains certain doctrines, for example that of frustration, which have allowed a contracting party an escape route. But at the level of international relations it is not entirely clear that, in the last resort, any doctrine needs to be invoked in order to justify treaty withdrawal, other than the doctrine of national sovereignty itself.

The problem about where sovereignty lies – and will come to lie – in Europe is illustrated by the recent discussion on the European Constitution.

This is, in the view of some legal experts, since it is a constitutional treaty, in fact not a constitution at all. The British House of Lords Select Committee, in its framework consideration of the Constitutional Treaty, expressed the view that even the article dealing with legal continuity – between the old European bodies, the European Community and the existing European Union on the one hand and the new European Union on the other – enters 'uncharted territory' and is a 'political minefield'.[17] If the minefield has a fog hanging over it too, there is a real problem.

I should like now to look briefly at a set of broader questions, concerning the legal-cultural background against which such matters of European integration and unification are played out.

My argument will be that the present and probable future shape of the European Union is arguably a function of a particular view of State and government and of their functions, a view now in vogue and sometimes known as 'contractual governance'.

As the name suggests, this view finds its basis in the application of a certain conception of contract. I try to problematize both the doctrine of contractual governance and the particular notion of contract which it appeals to. I suggest that this presently dominant notion of contract may be inadequate and also – a supplementary point relevant to the question of European legal culture – that this same notion is in origin perhaps not as entirely 'European' as we might think.

Let me situate the broader questions at issue by citing a European University Institute working paper by Christian Joerges on 'The Law in the Process of Constitutionalizing Europe'.[18]

His analysis of the relevance of the European Constitution places it in the context of the 'strategies of *juridification* of the integration project'. The reasons for this juridification have to do in part with the configuration of European institutions, in particular with the role of the European Court of Justice, in whose work – the author notes –

methodology and theory as to the legitimacy of Europe's constitutional charter are lacking. But, more generally, whenever the integration project has been renewed, it was, he adds, in any case in a direction that 'tended to confirm a supranational, non-state legal constitution'.

Community law has, he argues, been employed by the EU to achieve regulatory ends, especially in respect to the internal market programme. But 'because the EU itself ... lacks the administrative powers necessary to implement legally-binding rules in Member States, it has to try to compensate for these shortcomings'. And these attempts give yet more impetus to juridification.

In this way Europe has become something like what has been called a 'regulatory State'[19] or a regulatory super-State – if not, perhaps, a post-regulatory super-State[20] – in all of which cases the distinction between public and private spheres is blurred and the function of government tends ever more often to be substituted by that of (European) governance.

The juridification of Europe is only to be understood, I want to suggest, in the framework of an analysis of the general phenomenon of the *contractualization of society*.

A useful study of this phenomenon has been made by the French academic lawyer Alain Supiot. Let me summarize his picture.[21] It focuses of course on the notion of contract itself – a typically European notion, it may seem. (Japanese society, for instance, was accustomed – before its importation of German and French codification models – to consider the 'western' principle of contract – the formal binding of the parties, more or less independently of their changing circumstances – as contrary to the rules of *giri*, i.e. rules of social obligation: a much less abstract and more flexible manner than the European way of dealing with questions of social, including economic obligation.)

However that may be, we are concerned here with the present fashion in political thinking for 'contractual governance'. This idea draws both on legal doctrine (on a 'generalization of the contractual vocabulary') and also (Supiot argues) on a quite different discipline, in which the concept of regulation plays a central role: namely, molecular biology. This latter provides the key idea of treating living beings as machines whose environmental adjustment mechanisms can be represented in a formalized manner. The regulation of human society is then conceived of as a special case of such adjustment, operating via the formalization of conventions. Human law is theorized as deriving from, or rooted in, such conventions – and on the voluntary concurrence (the free will) of those bound by any convention. This provides a basis for the generalization of the contractual vocabulary (based on a will theory of contract – a question to which I will return in a moment). The overarching point here in any case is that contemporary doctrines of social contractualization are embedded in an eclectic set of references or, if you prefer, exploit an eclectic combination of sources, drawn from a certain theory of law, but also from the biological, the natural and the social sciences. It is not obvious that the result is very satisfactory.

The underlying ground of contract is the above-mentioned *pacta sunt servanda* principle: an entirely general principle, of late-mediaeval origin in its elaborated form, unknown in this form to the original Roman law,[22] and rooted in a moral principle – in fact in religious faith, in faith in Divine Law. (In our times, I shall suggest, something else takes the structural place of the Divinity.)

Supiot describes the generalization of the contract idea in the following (rather intricate) terms: 'The horizontal dimension of exchange or of covenant becomes the homogeneous and abstract groundwork on which the market economy thrives [only] if it is accompanied by the vertical dimension of the [so-called] universal guarantor under whose aegis the formation of contracts [or juridical acts] takes place'.

This account of the contractual relation introduces a category – that of the universal guarantor – which can be illuminated via the work of the Paris professor of Administrative law, Pierre Legendre.

In a series of works,[23] Legendre has examined the question of the structural conditions of the operation of law. These concern in particular the need for what he calls a 'foundational reference'. This reference plays the role, just mentioned, of universal guarantor. The context of the need for such a reference is that law must 'translate structure into a system of norms': it must normalize society. To do so, it must recruit individual human beings into that system; it must normalize them. This is a 'psychological' condition of its successful operation.[24] But law itself is not a social science; it is a dogmatics; that is to say, an institutionalizing discipline.[25]

Dogmatics, in the standard sense (analyzed in detail by Michael Herberger in his 1988 work *Dogmatik*),[26] is concerned with the articulation of the already mentioned foundational reference – whether in law or indeed in theology or medicine. Dogma is the principle and content of institutional rationality. In respect to the human individual, it provides a 'logic of attachment'.

On Legendre's account, the task of the science of law so understood lies in its role in knitting together three realms:

- that of the *human individual, in his biological existence*; that is to say, of the human body, with all its needs, and the varying social – including formal – conditions and consequences of their satisfaction;

- *human desire*, which is not the same thing as human need, but revolves around the affective identification of human individuals with one another via some founding reference – a God, a leader, an idea, an institution or whatever – and its laws;

- and *human society*, into which the individual is knitted, inheriting its norms, that is to say, inserting himself into its culture, which in important part is its legal order.[27]

Our founding reference in the Europe of the 21st century is, again on Legendre's account, no longer a God of the old type, nor even an Emperor or King ruling the nation by divine right, but 'the notion of a scientific, rational and welfare-oriented government'. Our society, he adds, is governed by a set of 'ultra-modern ideals', such

that 'normativity itself is imprisoned in scientific discourse' – presenting itself for example as just such a thing as contractual governance, an arrangement guided by the ideals of science and of democracy, as well as by the ultra-modern notion of management, which he calls the 'scientific-technocratic version of the theme of natural government' – an idea serving 'to reassure us that government rests on more than mere custom'.[28]

But more importantly, this ultra-modern reference is characterized by an essential oddity, namely that it denies its own dogmaticity. In this connexion I will quote my own words, from a recent publication:

'In reality it is not that we have moved into an era of consistent anti-dogmatism' – into a world, in other words, emancipated from ideology – 'but rather that we have substituted new dogmas for old.… The organizing core of these new dogmas' is indeed their 'anti-dogmatic pretension'. The content of this contemporary package of ideas is in principle simple, combining an appeal to (scientific) rationality with a guarantee of fundamental, 'self-evident' rights for all. Such a package 'recognizes no dogma or orthodoxy. This is its strength – but also its weakness. For in principle such an attachment can function as an obstacle to self-understanding', I wrote.[29]

A measure of understanding is what, in the murky landscape, we are aiming at. Let us therefore return to the question posed, that of the contractualization of the social bond. As God once was the universal guarantor of contractual obligation, so in (later) 'modernity' the State has come to assume this role. The State becomes the guarantor, as Third Party warrantee, of the effectivity – via the legitimacy – of the contractual relation.

The Third Party is here not so much a legal as a meta-legal category: it secures the causal conditions for the functioning of the legal relation. It is not normative, but metanormative. It is responsible for the magical operation – the conjuring trick – through which power is transformed into legitimacy, with all the consequences at the level of subjective affectivity, that is to say, of the passions.

Since this is an important point, we should look a little more closely at the general question of the need for the Third Party reference. This need derives from the human condition, from how the social and political animals called human beings are and operate.[30] It is recognized, in dogmatic form, in theology and in canon law.[31] Just as God is (for example) Third Party to any marriage, so he is Third Party to any contract, agreement or promise. This is not just a Christian doctrine: something approaching it is found for instance in the writings, nearly two thousand years ago, of the Talmudic sage Rabbi Akiva:

'Akiva explains: A creditor and a debtor or people making business negotiations don't make or accept loans or make transactions except with legal documents and witnesses, and thus if somebody lies or denies [the transaction], he lies or denies the [validity of] the documents and the witnesses. But someone who gives something to his

neighbour as a pledge [or deposit], doesn't want anybody to know about it except for the Third One between them. [In this case], when one denies the transaction, one denies the Third Party [i.e., God].'[32]

The legal theorist Hans Kelsen, in his 1922 article on 'The Concept of the State and Social Psychology',[33] talks about the modern State as the founding reference, that is to say, as the power of an idea which allows individuals to identify with one another. Thus he remarks that 'social unity – as Durkheim already recognized – has an *a priori* religious character, the social bond operating somehow via the intermediary role of the Divinity…. The concept of the State as a concept of a substance like 'force' or 'spirit', as a personalizing fiction, enters in parallel with the concept of God.'[34] Kelsen even writes that 'the State *presents itself* as a concept of God'. But this is hardly true of present-day Western States, at least not at the explicit level. On the contrary: the new dogma is that the State stands, in its neutrality, above matters of religion and indeed of morality.

There is however a further point. The position of the State is, as we know, now under pressure from rival, non-State institutions, especially those operating on a global scale – a striking example being the World Trade Organization, previously GATT, whose rules are now said to be of application to more than 90% of international trade relations. Such institutions are even claimed to be in process of assuming the role of (global) government. As in the case of the European Union, but against a different historical and political background, it is said to be a matter of transfers of power and (as I mentioned) of where sovereignty is coming to lie. I prefer to say that there is a crisis of sovereignty, external and also internal.

In respect of internal sovereignty, an essential question (hardly posed in the standard legal and political science literature) is whether the European nation-states are any longer, in the light of the above-mentioned institutional and ideological developments, able to fulfil one essential element of their structural task. 'The motley world of conventions', Supiot writes, 'no longer has the State as its unique guarantor'. The consequent incapacitation of the State can, he adds, 'only be accompanied by a dismembering of the figure of the Third Party as guardian of compacts'.[35] And this in an epoch of contractual governance!

From this point of view there is, in spite of a common opinion, no new 'planetary legal order' given coherence by its attachment to human rights on the one hand and the free market on the other, but rather a multiplication of diverse references: arguably a kind of 're-feudalization' of social and of legal relations.[36]

There is, it appears, a 'new type' (or new idea) of contract, which plays a (more or less) novel political and legal role, offering the basis for an alternative to the older, hierarchical principle of internal State sovereignty – though in varied and hybrid forms.[37] Indeed, Supiot's conclusion is that 'far from designating the triumph of contract over [State] law, the "contractualization of society" is rather the symptom of the hybridization of law and of contract' itself and, again, of 'the reactivation of feudal-type social bonds'.[38]

What I want to suggest is that the present and planned configurations of the European Union reflect these developments. To repeat the point: Europe has been established – though not without resistance from various quarters – as a kind of regulatory super-State. The result is sometimes referred to as a new 'governance' structure, as for instance in the European Commission's *White Paper on European Governance* of October 2000. The White Paper is concerned, among other things, with working out ways to make application of 'contracts of agreed objectives between the Union, represented by the Commission, and the authorities with a regulatory or management capability' (note the terminology).

Christian Joerges argues, more generally, that it is not surprising that the real-life practices of European government can best be grasped with the concept of 'governance'; he even quotes Joseph Weiler's words about the 'underworld' of the European governance system.[39] Another commentator, Lawrence Lessig, speaks in the same connexion of various alternative modes of regulation: combining law with markets; combining law with norms, as in so-called self-regulation; and the 'hybrid of norms and law' called contractual government.[40] Indeed, the policy vocabulary is nowadays rich with new conceptual combinations.

But what does all this mean? In order to begin to answer this question, let us for a moment take a step back in history, to Hegel. Hegel (writing in 1821) insists that the State cannot be a contractually-based institution. 'It is … far from the truth', he notes, 'to ground the nature of the State on the contractual relation.' Indeed, 'the intrusion of this contractual relation … into the relation between the individual and the State has been productive of the greatest confusion in both constitutional law and public life.'[41]

In this regard I was interested to read a few years ago a piece by the French political scientist Gérard Duprat, in which he argues that, precisely from a Hegelian point of view, the European Community is not a State-like construction, even if it plays, in part, a government role. Its 'powers' ought not even, he suggests, to be called 'political'. It functions for the most part outside of any system of representation – and to that extent its so-called 'democratic deficit' is not a fault but lies in the logic of its principles of operation.[42] It does however provide a system of justice and it polices that system; it is oriented to the satisfaction of needs. In short: it is a *civil society*, in Hegel's sense. More accurately, it is a management system for civil society. In short, it is contractual governance. So it is not cut out to play a coherent role as universal, Third Party guarantor.[43]

The reluctance of the European Union to endow itself with orthodox State-like powers is indeed, it seems to me, an expression not just of political discretion in the face of the sensitivities or resistance of the member States but also of the influence of the presently influential revisionary view of what State-like powers ought to look like. Some of the EU's leading figures may indeed even believe that its own assumption of a governance role will render the old-fashioned nation-State function redundant.

But we no longer, Legendre claims, 'understand the role played by States in the civilized

society of the Western tradition, their structural vocation… A long crisis has shaken the scaffolding of the Third Party guarantor', which risks casting us into 'institutional nihilism'.[44] I think that there is something in this argument, which deserves serious consideration. If, I wrote in another context, 'the function of dogma is to knit together the biological individual and the social institution, within the framework of some system of … sacrosanct truth' then 'it would follow that when the knitting starts to unravel, as contemporary contractualism causes it to do' – think of the founding reference of our Western society, which embraces a paradoxical authorization to break all taboos, that is, to defy all such references – 'the barriers are removed to a reintroduction of "social fantasms of absolute power". For where lies the limit … when nothing is sacrosanct?'[45]

This contemporary contractualism – the contractualism of contractual governance – exploits a modern[46] notion of contract. What defines this notion? James Gordley has demonstrated, in his monograph on *The Philosophical Origins of Modern Contract Doctrine*, that the evolution of the modern idea of contract was accompanied by a 'doctrinal crisis'. For jurists had abandoned the Aristotelian and mediaeval philosophical foundations of contract theory without rebuilding 'the edifice they had razed'. Central to the modern account is the evolution of the 'will theory' of contract.[47] But the attraction of the will theory was not, on Gordley's account, in essence philosophical. Rather, will theories had politically attractive consequences. They were especially useful to economic liberalism, Gordley writes, which held that government 'should leave economic decisions to the market-place'. There was a 'common commitment' among lawyers and political thinkers 'to building a theory around the idea of [individual] human choice'. In any case, the abandonment of the Aristotelian and mediaeval doctrine of contract, with its direct politico-moral content, its theory of virtue and so on, left both lawyers and philosophers in a position in which they 'had left no other way to explain' either law or morality. If there is no objective moral ground for the rationality of legal and political institutions, 'then, it seemed, the source must be the will'.[48] And so the will became the central explanatory but also legitimating element in the new doctrine.[49]

You may recall that Sir Henry Maine, author of *Ancient Law*, wrote in 1861 about a 'movement of the progressive societies … from Status to Contract'.[50] But his thought is more complex than this slogan suggests. What is often forgotten is that, though Maine was an admirer of Roman law, he insisted (in his chapter on 'The Early History of Contract') that the views of the Roman lawyers were 'inconsistent with the true history of moral and legal progress'. But worse: much later, in modern times, the language of the Roman lawyers became 'the language of an age which had lost the key to their [the Romans'] mode of thought' – in other words, law, in the technical sense, had become disjoined from the underlying general legal and intellectual culture. Worse still, in Maine's view, was the example offered by the modern Social Contract theorists: 'It was', he writes, 'for the purpose … of gratifying their speculative tastes by attributing all jurisprudence to a uniform source … that they devised the theory that all Law had

its origin in contract' – this theory being in fact a mere 'legal superstition'. Interesting and relevant is also Maine's description in the same chapter of early feudal society, which was, he suggests, bound together precisely by the tie of contract – in contrast, we might say, to the modern, State-based polity. Thus Maine indirectly anticipates the recent critique of the contractualization of society, namely that this latter involves (I already mentioned the point) a kind of re-feudalization of social relations.

The idea of the European Union as a contractual governance structure is sometimes underpinned by a claim to the effect that, after all, it is (therefore) built on a typically European idea system, namely that of European law and more particularly on the putative root of that system, Roman law.[51] Indeed, it is often suggested that the reference to Roman law can function as a basis for the intellectual unification of Europe. In this connexion it is worth saying a few words about the recently published study by the Turin professor of law Pier Giuseppe Monateri entitled *Black Gaius: A Quest for the Multicultural Origins of the* '*Western Legal Tradition*'.[52]

Monateri's argument is that the European legal tradition has in fact non-European roots, which have too long been ignored. According to the theory of the 'renewal of the old' – to use David Johnston's phrase[53] – Roman law has always possessed a special capacity for self-renewal. Monateri suggests that this theory is in fact 'intertwined with the restatement of the project to use Roman law as the common glue with which to build up a newer law for European countries' – with which, that is to say, to promote European legal unity; 'a project with quite practical implications in the unfolding of Europe as a cultural alternative to the United States'. What interests Monateri are the rival theories, including the 'African-Semitic' account, which claims that the Middle East possessed highly developed legal cultures from which 'the Romans borrowed more advanced theories than they themselves possessed'.

Particularly relevant from the point of view of our theme are two more specific arguments:

First, there is the claim that the Romans never developed a general theory of contract, but rather various, pragmatically oriented contract laws, less advanced in fact than the corresponding Egyptian law: 'Whereas in ancient Egypt a written document could easily testify to transfer of possession, a Roman citizen, in case of a transfer of land, for example, had to walk on the land to take possession!' Very impractical! So, Monateri concludes, the so-called survival of Roman law and its continuous 'renewal' can in truth only be accounted for on an ideological basis, that is to say as a 'false consciousness of society at the service of governance projects'.[54]

Second, there is a claim concerning the theory of the State and of public law; more especially, concerning the absence of any such theory in Roman law[55] until the emergence of the post-classical Sacred Empire model at the time of the Emperor Diocletian (in the 3rd century AD). Yet this model was not Roman, that is to say European, but Oriental in origin! The Emperor now became a sacred figure, owner and God (*Dominus et Deus*) of his realms. The essence of this conception of imperial dignity was

maintained after the Christianization of the Empire: the Emperors, no longer Gods, nevertheless enjoyed the status of sacral figures, as spiritual leaders of Christendom. The theory, or rather the dogma, of this position is to found in the writings of the 3rd-4th century Eusebius Pamphili, Bishop of Cæsarea and his followers.[56] Important in this respect – if we want to situate these developments in the story of the emergence of Europe and of its conceptual identity – is that (as Harold Berman argues) this Empire 'was not a geographical entity, but a military and spiritual idea'.[57]

So much – though there is of course very much more to be said – on Roman law. Let me now summarize the line of thought which I have presented.

Firstly, the presently fashionable doctrine of contractual governance is based on a philosophically dubious notion of contract and results in an equally dubious theory of the State;

Secondly, conceivably more interesting schemes for improving our understanding of on the one hand contract, on the other hand the State and its principles of operation, as well as the functioning of government and law, are to be found in the historical texts, for example the above-mentioned late-Roman imperial, orientally-inspired political and constitutional theories. Indeed, we should here add that the Byzantine accounts are of particular interest in this connexion. Just because they focus on the extreme case – for instance that of the Emperor as God's viceroy and the like – they throw light on the everyday case: ours.

These are all immensely rich elements in the European tradition of political and legal thought – but they are underexplored in the academic research and debate of our time.

Leiden University already has a number of institutions and persons doing important work on varied aspects of European history, politics and law. I should like finally to make a plea for an intensification of this work: Leiden is in an especially favourable position to make a highly significant contribution to this work of investigation and reflection, not just within the academic community but in collaboration with circles in European politics, administration and the private sector. Let us try in this spirit to make our contribution – as another kind of champion for the whole of Europe – to lifting some of the fog.

* * *

Mijnheer de Rector Magnificus, leden van het College van Bestuur van de Universiteit Leiden:
Ik dank u zeer voor het in mij gestelde vertrouwen dat u met het benoemingsbesluit hebt getoond;

Mijnheer de decaan, bestuursleden en leden van de Faculteit der Rechtsgeleerdheid:
Ik ben u veel dank verschuldigd voor uw bereidheid om deze benoeming te realiseren.

In het bijzonder wil ik dank zeggen aan de voormalige waarnemend decaan, Theo de Roos, aan Carel Stolker, en aan Andreas Kinneging, die zich persoonlijk hebben ingezet om de benoeming tot stand te laten komen;

Een speciaal woord van dank gaat uit naar Leiden University Worldwide Programs – LUWP – en zijn directeur, Maurits van Rooijen, die onmisbare steun heeft verleend;

Mijn Nijmeegse faculteit, de Nijmegen School of Management, en haar decaan, Hans Mastop, ben ik verschuldigd voor de bereidheid om de benoeming in Leiden mogelijk te maken;

Vele anderen zijn er ook die mij steun hebben verleend, sinds ik – te veel jaren geleden – naar Leiden ben gekomen als eenvoudige medewerker; om te beginnen met Herman van Gunsteren, die binnenkort in dit Groot Auditorium zijn afscheidsrede zal uitspreken;

Dames en heren studenten en toehoorders:
Hartelijk dank voor uw aanwezigheid. Dit blijk van belangstelling en vriendschap stel ik persoonlijk zeer op prijs;

Tenslotte, als laatste maar niet het minste, dank ik mijn familie – Maria, Cecily en Edwin – die mij steeds hebben bijgestaan. *Sine qua mihi nulla voluptas vivere.*

Ik heb gezegd.

Notes

1 This printed version is a slightly expanded version, with footnotes added, of the lecture as read.

2 *The Invasion of the Crimea*, 8 vols., Edinburgh: Blackwood, 1863-87.

3 *The Life of Grahame Greene*, Harmondsworth: Penguin, vol. 1, 1989, 481.

4 Spinoza, *Ethics*, Part 2, prop. 36.

5 *Phenomenology of Mind* (*Phänomenologie des Geistes*), London: George Allen & Unwin, 1971, 377.

6 Foreign Policy Association interview with Melissa L. Rossi, at http://www.fpa.org.

7 *Financial Times*, June 22, 2002.

8 Immo Stabreit, ex-German Ambassador to the USA and France, at http://www.coeur.ws/meetings/meeting1c.htm.

9 Klaus Hänsch, idem.

10 The seminar took place in Armenia: see http://www.humanrights.coe.int/media/atcm/2000/Armenia/synopsis1.doc.

11 Thomas Jansen (ed.), *Reflections on European Identity*, European Commission, Forward Studies Unit Working Paper, 1999, 5.

12 Cf. Etienne Balibar, 'Quelles frontières de l'Europe?', in *Penser l'Europe à ses frontières*, La Tour d'Aigues: Editions de l'Aube, 1993, 90ff. See also Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, Princeton: Princeton UP, 2004.

13 See Ernst Kantorowicz, 'Medieval World Unity', in *Selected Studies*, Locust Valley: J.J. Augustin, 1965, 81.

14 The term 'West' of course also has its resonances, but rather different if overlapping ones, consequent on its different history. Cf. Alexandre Zinoviev, *L'Occidentisme: essai sur le triomphe d'une idéologie*, Paris: Plon, 1995.

15 Heinrich Schneider writes in the above-mentioned EC Forward Studies publication that there is a certain idea of 'national identity' which 'serves efforts of make-believe in the service of a political will. It derives from religious doctrines and concepts which are given a new interpretation by transferring into socio-political thinking.' Schneider's example is 'the originally theological concept of the "corpus mysticum", that is the community of the faithful who find their identity in Christ's "pneuma", in which they eucharistically and spiritually participate, [which] is transferred on the nation, whose members are spiritually bound together by their participation in some metaphysical substance, which Herder called "Volksgeist". It is only later that such notions lose their "mystical" (or mythological, or pseudo-theological) character, so that the nation then (and we might say, "only") becomes a community by common culture and disposition through having shared a common fate.' (*Reflections on European Identity*, 15.)

One question in this connexion is whether modernity has rendered the 'corpus mysticum' obsolete and redundant. Mark Neocleous argues, in an article on 'The Fate of the Body Politic', that 'far from there being a disincorporation of sovereignty in the late eighteenth century, what took place was incorporation in a new form, a form appropriate to the bourgeois democratic politics that were to emerge from the democratic and intellectual revolutions set in motion in the late eighteenth century. This was the body of the people…' (*Radical Philosophy,* July-August 2001; also at http://www.radicalphilosophy.com.)

16 See Article 26 of the Vienna Convention on the Law of Treaties, 1969, entitled 'Pacta sunt servanda': 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' But cf. the statement of Pope John Paul II to the Rector of the Pontifical Lateran University, March 21, 2002: 'Assistiamo a volte, con rammarico, a comportamenti nella comunità delle Nazioni che disattendono il fondamentale principio del *pacta sunt servanda*, preferendo un continuo ricorso alla prassi del *consensus*…'

17 House of Lords, Select Committee on European Union, Eighteenth Report, 2003.

18 ARENA Conference on Democracy and European Governance: *Theory and Practice in the Debate on the Future of Europe*, Oslo, March 4-5 2002; Badia Fiesolana: European University Institute, 2002.

19 For example by Giandomenico Majone; see Majone (ed.), *Regulating Europe*, London: Routledge, 1996.

20 On the post-regulatory State, see Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State', National Europe Centre Paper No. 100, Australian National University, 2003.

21 See Supiot, 'La contractualisation de la société', *Le Courrier de l'environnement*, no. 43, mai 2001.

22 It is sometimes said to be derived from a rule found in the *Codex Justinianus* (C 2.3.29): 'Si enim ipso edicto praetoris pacta conventa, quae neque contra leges nec dolo malo inita sunt, omnimodo observanda sunt…' But it was given properly theoretical content only much later, by the 13th century Church lawyers. Cf. – on the (lack of a) general Roman theory of contract – James Gordley, *The Philosophical Origins of Modern Contract Theory*, Oxford: Clarendon Press, 1991; for example: 'In his general observations about contract, Gaius did not mention … a virtue of fidelity' (32). The Romans, Gordley notes, had not been interested in building meta-juridical, philosophically explanatory theories. Nor did Justinian add much in this respect. The mediaeval scholars performed this task, and with far-reaching legal consequences. (Cicero's discussion in *De officiis* about whether agreements and promises should always be kept – for instance at III.XXIV: 'Pacta et promissa semperne servanda sint, quae nec vi nec dolo malo, ut praetores solent, facta sint' – provides not legal but moral arguments: he advises us when we should keep our legal obligations and when we should not.)

23 Beginning with his *L'Amour du censeur: Essai sur l'ordre dogmatique*, Paris: Editions du Seuil, 1974, and followed by several other titles, including the series of *Leçons*, I-VIII, Paris: Fayard, 1983-98.

24 Cf. Legendre, *Law and the Unconscious*, London: Macmillan, 1997, 197: 'The central question of Europe's cultural heritage [is] *How are we to think the institutional treatment of symbolic value in novel terms?*'

25 A clear example is provided by the rationale for the production of Justinian's Code, namely the prevention of general discussion and debate on the law and its meaning: see Ian Maclean, *Interpretation and Meaning in the Renaissance*, Cambridge, CUP, 1992, 51. For this reason, the law is not a domain for interpretation by learned thinkers, but by Authority alone – by the Emperor: '... cui soli concessum est leges et condere et interpretari' (from *De confirmatione Digestorum*, quoted by Maclean, ibid.).

26 Herberger, *Dogmatik: Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz*, Ius commune Sonderheft Nr. 12, Frankfurt am Main: Vittorio Klostermann, 1981.

27 Legendre, *Law and the Unconscious*, 115.

28 *Op. cit.*, 100-101; Legendre, *Sur la question dogmatique en Occident*, Paris: Fayard, 1999, 14. Cf. Legendre, *Le Désir politique de Dieu*, Paris: Fayard, 1988, 63ff:

'I should [specify] the reasons why we need to place *management* in the perspective of the great religious schemes of mankind, schemes without which the modern version of dogmatic practices, especially those centering around the dual name of *State and Law*, is not really thinkable, by which I mean comprehensible from the anthropological point of view.
Management, as the sharp end of industrial governance, is the technological version of what, since Aristotle (though somewhat simplifying his message), we call *politics*....
But the sciences of management cannot accept that they themselves are the basis of a dogmatic construction, that is to say, that they are themselves a form of normative discourse in an evolving structure. In other words, the modern industrial system is as blind to its own nature as are, from the ethnographer's point of view, the Bambara or Islamic systems…'

29 Grahame Lock, 'Dogma, heresy and voluntary servitude; from the second millennium to the third', *Episteme*, Lisbon: Universidade Técnica de Lisboa, No. 7-8-9, 2001, 9-10, 12. The point is that we, the citizens, are attached to this package by a 'religious' bond, even if that is not the way we understand the matter, nor recognized by the dogmatic system in which we 'believe'.

30 The 'guarantee' in question is therefore not a legal guarantee – it is psycho-social (see above); it provides the 'glue' holding any society and its members together in a framework of dogmatic reference. Cf. Lock, 'Dogma, heresy and voluntary servitude', 16-17, referring to Bernard Edelman, *L'Homme des foules*, Paris: Payot, 1981, 69, 76: 'Edelman makes a similar point in a different way. Human individuals in mass society, he suggests, are characterized by their attachment to "two affective centres". On the one hand they stand in a relation of subordination to some authority. On the other hand it is this very relation of subordination that makes it possible for them to "identify" with their fellow men. That is to say, sociability is a function of submission. The masses, he adds, are the slaves of their master's liber-

ty, and indeed of his own narcissism. This description might arguably also call to mind the story of the Grand Inquisitor in Dostoevsky's *Brothers Karamazov…'*

31 'The trinitarian structure of the Christian faith represents an essential feature of Western sociality. Power is … always triangulated…. In theology, the power of God … must always pass through a mediating figure – that of the Pope, the emperor or the priest – before it becomes an object of subjective attachment….' (Peter Goodrich, Glossary, in Legendre, *Law and the Unconscious*, 262).

32 Quoted from Kolel, the Adult Centre for Liberal Jewish Learning, at http://www.kolel.org/pages/5760/vayikra.html.

33 Kelsen, 'Der Begriff des Staates und die Sozialpsychologie', *Imago*, VIII, Vienna: Internationaler Psychoanalytischer Verlag, 1922. I have used the translation: 'Le Concept d'état et la psychologie sociale', *Cahiers Confrontation*, XI, Paris: Aubier, 1984.

34 Kelsen, 'Le Concept d'état', 35, 43-45.

35 Which does not mean that the State is not continually assigning itself new repressive powers, sometimes unprecedented in their scope. This development in fact runs parallel to the State's normative retreat.

36 The idea of a re-feudalization of society was proposed by Jürgen Habermas in his *The Structural Transformation of the Public Sphere*, Cambridge, MA, 1989 (*Strukturwandel der Öffentlichkeit*, 1962), where he talks about a process, beginning in the nineteenth century, of a tendential re-merging of State and society. The suggestion made in the present paper is more specific: it concerns a particular kind of fragmentation of authorities (levels of sovereignty) in the present-day world, a fragmentation which is itself facilitated by the application of social contractualist models.

37 This is not really a new idea, but a new type of exploitation – via its banalization – of an existing notion.

38 Supiot, *op. cit.*

39 Weiler, interview in *Die Zeit*, no. 44, 22 October 1998; quoted by Joerges.

40 Lessig, *Code and Other Laws of Cyberspace*, New York: Basic Books, 1999; quoted in Scott, *op. cit.*, 18.

41 Hegel, *Philosophy of Right* (*Grundlinien der Philosophie des Rechts*), § 75. It is by the way worth comparing Spinoza with Hegel on this point. Spinoza, who originally worked with a notion of social contract, came to renounce it. See Etienne Balibar, *Masses, Classes, Ideas*, New York and London: Routledge, 1994, 16; more generally, Pierre Macherey, *Hegel ou Spinoza*, Paris: Maspero, 1979.

42 Duprat, 'Europe et démocratie', *Philosophie Politique*, Paris: Presses Universitaires de France, no. 1, 144.

43 Except perhaps marginally when it mimics a little of the symbolic function of the nation State, for example in assigning itself an anthem, a European Day and the like.

44 Legendre, *Sur la question dogmatique en Occident*, 15.

45 Lock, 'Dogma, heresy and voluntary servitude', 16.

46 In the common sense of the term, not of course in Harold Berman's sense, according to which modernity begins in the 11th century. See Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA: Harvard UP, 1983, 4: 'Modern times … have their origin in the period 1050-1150.'

47 In fact there are several, more or less technical versions of this theory; I refer here to the general, non-technical conception and the correlative idea found in political philosophy. Cf. Morris Cohen: 'Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract, but also on the political doctrine that all restraint is evil and that the government is best which governs least.' ('The Basis of Contract', 46 *Harvard Law Review*, 1933.)

48 Gordley, *op. cit.*, 228.

49 Present-day professional jurists, on account of difficulties with the will theory, nowadays make use of a more pragmatic notion of contract with miscellaneous theoretical content, as compared with the more or less purely will-based conception still invoked by many social and political theorists.

50 Henry Sumner Maine, *Ancient Law, Its Connection With the Early History of Society, and Its Relation to Modern Ideas*, London: John Murray, 1861.

51 For a subtle account of the relation between Europe and Roman law, see Paul Koschaker, *Europa und das Römische Recht*, Munich and Berlin: C.H. Beck, 1966 (1947).

52 Available at the Turin Law School website, http://www.jus.unitn.it/cardozo/users/pigi/blackgaius/bge.pdf.

53 'The Renewal of the Old' is the title of Johnston's 1996 Cambridge inaugural lecture.

54 Monateri, op. cit., 50.

55 But cf. the claim by the above-mentioned David Johnston in his article on 'The General Influence of Roman Institutions of State and Public Law', in D.L. Carey Miller and R. Zimmerman (eds.), *The Civilian Tradition and Scots Law*, Berlin: Duncker & Humblot, 1997, that Roman public law is more significant and has had more impact than generally supposed.

56 See especially his *Tricennial Orations* (*Triakontaeterikos*); cf. D.M. Nichol, 'Byzantine Political Thought', in J.H. Burns (ed.), *The Cambridge History of Mediaeval Political Thought, c. 350-c. 1450*, Cambridge: Cambridge UP, 1988; H.A. Drake, *In Praise of Constantine: A Historical and New Translation of Eusebius' Tricennial Orations*, Berkeley: University of California Press, 1975.

57 Berman, *op. cit.*, 89.

58 That is to say, they may even be of help in throwing light on how present-day Western societies function, since the latter tend themselves to conceal what Kelsen calls the religious character of the social bond they (help) establish and reproduce. For instance: does modern democracy provide us with a new mystical body, the body of the people, with its own sacral status? - cf. Neocleous, op. cit.