

## THE SIR JEREMY LEVER LECTURE 2014

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### “EUROPE – THE BASELESS FABRIC OF A VISION ?”

#### DAVID EDWARD

60 years ago, Jeremy Lever and I sat opposite each other at the Scholar’s table at University College, Oxford (‘Univ’). He went on to become President of the JCR, President of the Union and Fellow of All Souls, and we followed his stellar career with awe and admiration.

Since then, he has made an immense contribution to the life of Univ and All Souls, to the life of the University, and to the life of the law in this country and more widely, especially in Europe.

Jeremy is one of my oldest and closest friends. So I feel especially privileged to have been asked to deliver this lecture named in his honour, and I do so with affection and respect.

When we came up in 1953, many of us had already done two year’s national service. Several had seen active service in Korea, and others, like Jeremy, had served in Kenya or Malaya – both still part of the British Empire.

I did my national service in the Navy between Classical Mods and Greats. As we sailed into the Grand Harbour of Malta we were lined up in bell bottoms on the upper deck. We sailed in with bands playing, saluting the flags of sundry Admirals flying on fortresses and men of war.

The sense of Empire was perhaps dimmed, but still alive. We had, after all, been born under the reign of the last King-Emperor to wear the Imperial Crown and receive the homage of Indian Princes. If we collected stamps, we did so in two albums – a red one for the British Empire and a green one for everywhere else.

Looking back to 1913, there were few who imagined then that, within five years, the map of Europe would be transformed, and the great Empires of Germany, Austria-Hungary and Russia would have disappeared.

And in 1953 I don’t think there were many of us who foresaw how soon the British Empire would follow.

The transience of human grandeur is a recurring theme in literature:

“My name is Ozymandias, king of kings:  
Look on my works, ye Mighty, and despair!”  
Nothing beside remains. ...

Far-called our navies melt away –  
On dune and headland sinks the fire –  
Lo, all our pomp of yesterday  
Is one with Nineveh and Tyre! ...

Above all, in Prospero’s speech in *The Tempest*, from which I borrowed the title for this lecture:

...like the baseless fabric of this vision,  
The cloud-capp’d towers, the gorgeous palaces,  
The solemn temples, the great globe itself,  
Yea, all which it inherit, shall dissolve,  
And, like this insubstantial pageant faded,  
Leave not a rack behind.

When we were undergraduates, our knowledge of the continent of Europe was clouded by memories of the War, and restricted by exchange control, which limited travel expenditure to £25 a year. The Iron Curtain prevented access beyond the line from Stettin (more accurately Kiel) in the Baltic to Trieste in the Adriatic, so our generation could not have repeated Paddy Leigh Fermor’s walk from Rotterdam to Istanbul, even if we’d had the leisure to try.

Speaking for myself at any rate, my knowledge of countries and peoples of the old Middle Europe (*Mitteleuropa*) was limited to the friendship of the Polish soldiers who had lived with us during the War and who disappeared behind the Iron Curtain after it.

Nearer home, most of us knew little or nothing about the Convention on Human Rights, the Schuman Declaration, the European Coal and Steel Community or, later in the decade, the Messina Conference and the Treaties of Rome.

Yet the institutions they created have already lasted as long as the British Empire of India, considerably longer than the German Empire, and almost as long as the Soviet Empire, from start to finish

The question I want to address tonight is whether the cloud-capped towers and gorgeous places of Brussels, and the solemn judicial temples of Luxembourg and Strasbourg, are as transient a phenomenon as the Empires of 1913 and 1953.

Are the European institutions, as some would have it, the baseless fabric of a vision – perhaps, even, a dangerous vision – at best, a vanity project for a self-selecting political élite ?

I do not believe so. But I also believe that those of us who have played some small part in the story should explain why we did so, why we thought it was worth doing, and what we learned on the way.

Our obligation is the greater since, as Christopher Andrew observed in his history of MI5:

Short-termism has been the distinguishing intellectual vice of the late twentieth and early twenty-first centuries. For the first time in recorded history, there has been a widespread assumption that the experience of all previous generations is irrelevant to present policy.

One must, of course, be cautious in seeking to draw lessons from history. A recent review of one of the numerous books about 1914 began:

The temptation for posterity is to impose pattern and meaning where none originally existed. Historical events happen, one thing after another – not necessarily one thing because of another.

This is particularly relevant to a study of the European institutions. There is a constant tendency, particularly amongst political scientists and some European politicians, to look for pattern and meaning. Having decided what the pattern is and what the meaning should be, all further developments must conform. Developments or proposals that do not conform are condemned as treason to the vision of the founders.

My argument in this lecture will be, first, that the European institutions can best be understood in their historical context. This will explain why they are as they are. Second, in looking to the future we should keep in view what Robert Schuman said at the beginning:

Europe will not be conjured up at a stroke, or by some master plan. It will be attained through concrete achievements that lead in practice to a community of interest.

To establish the historical context, one can easily go back to 1783 or even earlier. For present purposes, let us start in 1919, at the end of the First World War.

In 1919 John Maynard Keynes, disgusted by the outcome of the Paris Conference and the Treaty of Versailles, wrote a book entitled *The Economic Consequences of the Peace*.

Keynes' biographer, Robert Skidelsky, says that the book "has a claim to be regarded as Keynes' best book. ... The writing is angry, scornful and, rarely for Keynes, passionate: never again were his denunciations of bungling and lying, or his moral indignation, to ring so loud and clear. Giving shape to the whole is a brooding sense of menace."<sup>1</sup>

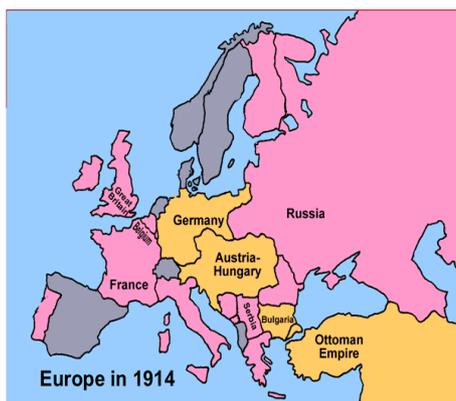
Keynes has lost credibility in recent years – in some quarters at least – and his proposals for revision of the peace settlement were severely criticised at the time. But I believe that his analysis of the defects of the settlement was valid, that it was directly relevant to the Europe of 1953, and that it remains relevant to the Europe of 2014.

During the Peace Conference, General Smuts reported to Keynes what had been said to him by Margaret Clark Gillett, a grand-daughter of John Bright. She reminded Smuts that economic reform had preceded franchise reform in the nineteenth century, and said:

"Now it seems as though in the same way the political and territorial questions won't be solved until the economic world is righted".<sup>2</sup>

Keynes said how true that was: he had never thought of it that way. As Skidelsky remarks "Perhaps here we have the origin of the main theme of *The Economic Consequences of the Peace*". That is, essentially, that economic stability is a condition of political stability.

Before 1914, Middle and Eastern Europe had been dominated by the three Empires of Germany, Austria-Hungary and Russia.



This had significant economic advantages which Keynes describes:

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<sup>1</sup> Skidelsky, *John Maynard Keynes, Hopes Betrayed 1883-1920*, page 384.

<sup>2</sup> *Ibid*, page 373.

The interference of frontiers and of tariffs was reduced to a minimum, and not far short of three hundred millions of people lived within the three Empires of Russia, Germany and Austria-Hungary. The various currencies, which were all maintained on a stable basis in relation to gold and to one another, facilitated the easy flow of capital and of trade to an extent the full value of which we only realise now, when we are deprived of its advantages.

Over this great area there was an almost absolute security of property and of person. Round Germany as a central support the rest of the European economic system grouped itself, and on the prosperity and enterprise of Germany the prosperity of the rest of the Continent mainly depended.

The final Chapter of the book, *Europe after the Peace*, begins:

This chapter must be one of pessimism. The Treaty includes no provisions for the economic rehabilitation of Europe – nothing to make the defeated Central Empires into good neighbours, nothing to stabilise the new States of Europe, nothing to reclaim Russia; nor does it promote in any way a compact of economic solidarity amongst the allies themselves.

It is an extraordinary fact that the fundamental economic problem of a Europe starving and disintegrating before their eyes, was the one question in which it was impossible to arouse the interest of the Four [Woodrow Wilson, Clémenceau, Lloyd George and Orlando].

The peace settlement did not restore economic stability. Still less did it lead to political and territorial stability. Part of the problem was the unresolved problem of minorities in the newly created nation states of Middle Europe.

As Keynes noted, the three Empires had a population of some 300 million, displaying a bewildering variety of ethnicity and languages.

## LINGUISTIC EUROPE PRE-1914



By comparison with what we know today, the ethnic mix was extraordinary. For example, half the population of Salonika (now Thessaloniki) was Jewish and the remainder was a mixture of Greeks, Turks, Albanians and Armenians. Atatürk, the founder of modern Turkey, was born there.

Ethnic ambitions and rivalries were, in large part, the reason why War came in 1914. They only got worse during and after the War.

The Peace Treaties for Middle and Eastern Europe were (at least in theory) based on the principle of self-determination. But it was self-determination for the majority. Almost all the new nation states contained within their frontiers minorities distinguished by language or ethnicity, amounting in some cases to 25% of the population.

During the Peace Conference, Keynes wrote to Duncan Grant:

“I sit in my room hour after hour receiving deputations from the new nations, who all ask, not for food or raw materials, but primarily for instruments of murder against their neighbours.”<sup>3</sup>

In order to protect minorities against discrimination and oppression, the so-called Minority Treaties were imposed on the new States of Middle Europe. These gave the League of Nations power to exercise control over their national, religious and educational policies.

<sup>3</sup> *Ibid.* page 371.

No such obligations and restrictions were imposed on the established States of Western Europe or, indeed, on Germany. The States that were subject to them felt them to be a stigma of inferiority and objected that they limited their sovereignty as self-determined, and self-respecting, nation states.

Moreover, they had legitimate concerns about attempts by minorities (on the principle of self-determination) to set up a state within a state and to invoke the protection of foreign powers of the same race or language.

By 1937, Czechoslovakia was the sole working democracy of all the new states of Middle and Eastern Europe. The claims of the Sudeten Germans were made the pretext for the destruction of that democracy too - all due, in Neville Chamberlain's chilling words, to "a quarrel in a far-away country between people of whom we know nothing".

In 1945 there could be no question of a Peace Conference or Peace Treaties on the lines of 1919, because most of Europe - West, Middle and East - lay in physical and economic ruins.

Middle and Eastern Europe had already been carved up at Yalta and Teheran.

Germany, as a state, ceased to exist and its territory was divided into four zones of occupation by the United States, Britain, Russia and France.

Apart from the millions who had been killed during the War, more than 10 million people were expelled from their homes and from what, for them and their families, had been their homeland. They became, in the bureaucratic terminology of the time, "displaced persons" and in some cases stateless persons.

Such expulsions - now known as "ethnic cleansing" - reduced the minorities from more than 25% of the population to less than 10%.

That is, incidentally, the main reason why the political frontiers of most of Middle Europe today coincide, more or less, with the linguistic frontiers.



By the time the countries of Middle and Eastern Europe became Member States of the EU, the problem of minorities had been substantially diminished – not by greater tolerance, but by forcible expulsion, or ‘ethnic cleansing’ during or after the German and Soviet occupation.

All the same, minority problems have not gone away.



This is a supporter of the ice-hockey team of Miercurea Ciuc in the middle of Romania. But his T-shirt does not say Miercurea Ciuc; it says Székelyföld – a Magyar word, also written in the ancient Hungarian script below. The ice-hockey team are all ethnic Hungarians and claim to be discriminated against by the authorities of Romania.



CAUCASUS?  
LINGUISTIC?  
PLURALITY?



The outstanding problems of these areas – not least in the light of the renewed ambitions of Russia – are immense. They affect the lives and aspirations of millions of people. They are Europeans like us, and they deserve more than to be treated as people in a far-away country of which we know nothing.

So I would contend that we are faced today with problems that are, admittedly, less grave and pressing than those that faced Europe in 1945, but are, on a wider canvas, potentially the same. <sup>4</sup>

Keynes began his book on the Peace in this way:

The power to become habituated to his surroundings is a marked characteristic of mankind. Very few of us realize with conviction the intensely unusual, unstable, complicated, unreliable, temporary nature of the economic organization by which Western Europe has lived for the last half century. We assume some of the most peculiar and temporary of our late advantages as natural, permanent, and to be depended on, and we lay our plans accordingly. On this sandy and false foundation we scheme for social improvement and dress our political platforms, pursue our animosities and particular ambitions. ...

If we seek to analyse and understand why the settlement of 1919 fell apart so catastrophically, and why, in contrast, the institutions created after the Second World War have survived thus far, I think there are two fundamental differences.

<sup>4</sup> NOTE: This lecture was delivered on 14 February; President Yanukovich fled Kiev on 21 February; Pro-Russian protests began in Sevastopol on 23 February; Russian forces were deployed in Crimea on 26 February 2014.

The first is the recognition that economic stability is a precondition of political stability, rather than the other way round.

The second is the recognition that conventional international institutions, based on conventional doctrines of international law, are insufficient to provide economic and political stability and to guarantee the freedom of the individual.

In 1942, Edvard Beneš, the Czech President in Exile wrote a powerful article in *Foreign Affairs*, the journal of the American Council on Foreign Relations.

It is necessary that an end should be put to the international hypocrisy which, when it is so disposed, finds reasons everywhere for intervening in the interior affairs of other states. It is as bad as the hypocrisy which, when it does not want to intervene, takes its stand suddenly on the principle that non-intervention in the interior affairs of another state is a sacred and inviolable right of peoples.

The protection of minorities in the future should consist primarily in the defense of human democratic rights and not of national rights.

I believe that after the present war a charter of Human Rights must be constitutionally established throughout the world.

In the same year, Churchill sent a message to the World Jewish Congress, looking forward to the day “when this world struggle ends with the enthronement of human rights”.

Also in 1942, Hersch Lauterpacht, the Professor of International Law at Cambridge, started work on a book that was eventually published in 1945 under the title *An International Bill of the Rights of Man*.

For a long time, it had been an article of faith for international lawyers and diplomats that States must be sovereign within their territory. States, they said, and States alone, are the “subjects” of international law. Individuals are merely its “objects”.

Lauterpacht challenged this dogma:

The sovereign State, in an exclusive and unprecedented ascendancy of power, has become the unsurpassable barrier between man and the law of mankind.

An enforceable International Bill of Rights would not be a break with what is truly permanent in the legal tradition of western civilisation but it would be in accordance with the purpose of the

law of nations. That purpose cannot be permanently divorced from the fact that the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of law.

Lauterpacht's book became a corner stone of the work of Eleanor Roosevelt's Committee that drew up the Universal Declaration of Human Rights under the aegis of the newly-created United Nations. The Universal Declaration was followed by national Bills of Rights and some regional Charters of Rights.

The first regional charter was the European Convention on Human Rights.

The purpose was, as Lauterpacht and Beneš had said,

1. to limit the exclusive sovereignty of states;  
and therefore
2. to limit the power of democratically elected assemblies to enact laws inconsistent with the agreed minimum standard of human or basic rights;  
and
3. to provide for interpretation, application and enforcement by the courts of the Member States with, as a backstop, recourse to the Commission and Court of Human Rights in Strasbourg.

Hitler came to power in Germany through a purportedly democratic election. One of the problems for judges in Nazi Germany was that the legislation depriving Jews of civil rights had been passed by an elected legislature. Judges who could not bring themselves to apply it had no alternative but to resign and lose their salaries and pensions.

In the scheme of the Convention, the judge's dilemma was to be resolved by giving its principles constitutional validity, allowing the judge to give priority to those principles as against any conflicting rules of national law.

So it is important to be straight about this: the European Convention *was and is intended* to limit the powers of national parliaments, politicians and administrators and to provide internationally accepted principles for the judiciary to apply.

It is important, too, to recognise that recourse to the Commission and Court of Human Rights in Strasbourg is the last resort once all national remedies had been exhausted. The primary responsibility for complying with the Convention lies with the authorities of the Member States themselves. I will come back to the proper relationship between the national courts and the Court in Strasbourg.

The Convention was signed at Rome on 4 November 1950. Meanwhile, on 9 May 1950, Robert Schuman, the Foreign Minister of France, made a short speech – known as the Schuman Declaration – which offered the beginnings of a solution to the problem of economic and political instability.

During the 1919 Peace Conference, the French Minister for Industry and Commerce, Étienne Clémentel, proposed to Clémenceau a scheme for sharing of resources and the removal of tariff barriers. One of his close advisers was – who else? – Jean Monnet. The scheme came to nothing, but the idea was taken up by Keynes.

In his book, Keynes proposed three changes to the provisions of the Peace Treaties

- A more realistic scheme of Reparations;
- Strengthening of the Coal Commission to give fair and equal access to the Europe's resources of coal and iron – including for Germany;
- Removal of barriers through the establishment of a Free Trade union under the auspices of the League of Nations.

The Schuman Declaration started with Keynes' second proposal – sharing the resources of coal and steel. Bear in mind that, at this time, the Federal Republic of Germany was only one year old. The former Russian zone had become the German Democratic Republic in the same year, which also saw the end of the almost year-long Berlin Blockade.

The security of the FDR was not absolutely assured and the new Republic was by no means fully integrated in western Europe. The Schuman Declaration was 'visionary', but it was severely practical at the same time:

Europe will not be conjured up at a stroke, or by some master plan. It will be attained through concrete achievements that lead in practice to a community of interest. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. ... The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.

This led to the creation of the European Coal and Steel Community – the first, and so far the only, experiment in truly supra-national governance.

In the brief period of euphoria that followed, proposals were made for a European Defence Community and a European Political Community along the same lines. The Defence Community failed to pass the French National Assembly, and the project for a Political Community fell by the wayside.

That vision faded and there followed a period of marked Euroscepticism. The European Economic Community was created, not as the fulfilment of a vision, but out of economic necessity. Indeed, it is significant that Jean Monnet felt that the Economic Community was less important than the European Atomic Energy Treaty (Euratom) which was negotiated at the same time since he was concerned with sharing of primary resources..

The programme for the EEC Treaty was the Spaak Report of 21 April 1956 – a hard-nosed analysis of Europe’s economic position and the remedies for it. It began by noting that the United States alone accounted for almost 50% of world production and that the ‘collectivist’ régimes, with a third of world population, were increasing output at the rate of 10-15%.

Relatively speaking, Europe had lost influence and position and was held back by its internal divisions. The solution proposed was the creation of a common, or internal market without internal barriers.

The first step was the creation of a customs union with no internal tariff barriers and a common external tariff. The GATT, inaugurated in 1947, already laid down strict conditions for such an arrangement.

Within the frontiers of the customs union, it was possible to create an internal market based on free movement of goods, persons, services and capital. These ‘four freedoms’ were stated in the Treaty to be “The Foundations of the Community”. Those words were removed by the Maastricht Treaty but I don’t think that should be taken to imply that the four freedoms are no longer fundamental.

This system was, and is, based on mutually agreed and legally enforceable texts, with institutions capable of implementing and, within limits, enforcing them. As Jean Monnet said:

Nothing is possible without people; nothing is lasting without institutions.

So, by the time of the next great upheaval – the Fall of the Wall and the collapse of the Soviet system at the end of the 80s and beginning of the 90s -

Western Europe had achieved a state of *relative*, though not complete, stability, economic and political.

What differentiated the situation after 1989 from the situation in the 1920s and 1930s were two things (or two aspects of the same thing):

- The existence of an institutional structure offered the newly liberated countries of Middle and Eastern Europe a prospect of stability to which they could aspire; and
- It provided the framework within which the countries of Western Europe could co-ordinate their approach to the aspirant countries and their problems.

One can, of course, speculate on what might have happened if the institutions of the ECHR and the EU had not been there. But it is legitimate to ask:

- Would East Germany have been absorbed into the Federal Republic with so little commotion, bearing in mind that President Mitterand and, initially at least, Mrs Thatcher, were vehemently opposed?
- Would Germany have accepted with so little argument the Oder-Neisse Line as the permanent frontier between Germany and Poland? And would the German people have been prepared to abandon all claims on former German property beyond that frontier?
- Would the Baltic States have been able to achieve their freedom from the Soviet Union? Remember that the Helsinki Accords on 1975 had been deliberately vague about incorporation of the Baltic States in the Soviet Union. As late as 1991 Soviet troops were killing civilians on the streets of Vilnius.

It would be absurd to pretend that the institutional structure is perfect. Still more absurd would it be to pretend that every decision taken by the European institutions is wise, sensible or right. But it has always seemed to me to be odd that we are prepared, day by day, to criticise our own institutions and our own government, but any shortcomings in the European institutions, or the decisions they take, are taken to be conclusive proof that they are incompetent and corrupt.

In spite of all the criticism and hostile rhetoric, the achievements of the last sixty years are immense and the community of interest is real. We should talk less about what is wrong and remember that, for someone of my age, born nearly 80 years ago, what is surprising is not how badly our system works but the fact that it works at all.

The fact that the system works is, I believe, due to the fact that, like the Convention on Human Rights, it marked a departure from the conventional view that treaties are about relations between states. It recognises that, in Lauterpacht's words, "the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of law".

The Four Freedoms guaranteed by the Treaties are not just secondary 'economic' rights. They are rights in every sense as fundamental and important for the average citizen as those enshrined in the Convention. They reflect a conception of a Europe where individuals are free to choose their own destiny – to go where they want; to live where they like; and to trade and work where they can.

That perception of what the Treaties are about lies at the heart of the case-law of the Court of Justice. The decision in *Van Gend en Loos* in 1963 is perceived, particularly by political scientists, as the product of a desire by the Court to enhance its powers at the expense of the Member States – a kind of judicial conspiracy.

I can only say that I saw no evidence of such a conspiracy when I was there.

It is no longer a secret that the decision in *Van Gend en Loos* was in fact taken by a narrow majority of four to three, and that one of the decisive voices was that of a professor of civil law at the University of Padua – Alberto Trabucchi. (When I met him, he was engaged, aged 87, in preparing the 36<sup>th</sup> edition of his treatise on *The Institutions of Civil Law*.)

Trabucchi belonged to a school of thought in Italy that rejected the view that the function of judges is the neutral application of logical analysis, reasoning from established general principles to the facts of the cases before them. For Trabucchi, the law was also about values, as you can see from his Opinion in *Mr and Mrs F v Belgian State* (a case about a handicapped child in 1975), where he said that "The migrant worker is not regarded by Community law – nor is he by the internal legal systems – as a mere source of labour but is viewed as a human being"<sup>5</sup>

My predecessor as Professor of European Institutions at Edinburgh – the late, great John Mitchell – said in his Inaugural Lecture:

There is a demand for the individual to be able to make his voice effectively heard. ... I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organised it is

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<sup>5</sup> Case C-7/75 *Epoux F v Belgian State* 1975 ECR 679 at 696

through them that the individual can play a larger and more significant part in government while gaining a greater sense of security.

Speaking for myself, I take pride in the fact that the Court of which I was a member, dealing with cases brought by ordinary citizens, brought reality into the concept of European citizenship, although we were warned against it. We were solemnly told by the representative of one Member State that citizenship was included in the Maastricht Treaty to make people more comfortable with the idea of European Union - "but it was never intended that it should have any legal effect".

It is through the persistence of individuals like Mrs Marshall in her battle with the Southampton Area Health Authority that theories of equal treatment, non-discrimination and freedom of movement have become a practical reality for our fellow citizens.

And it is, above all, in the courts that those in authority have had to learn what has sometimes been a hard lesson for them: that fundamental freedoms are to be restricted only for reasons of overriding public interest and in ways that are objectively justified, necessary and proportionate.

That, for me, is the ultimate fabric of the European vision.

Let me close with the words of Robert Marjolin, one of the negotiators of the EEC Treaty, who was both more sceptical, and I think more clear-sighted, than Monnet:

A treaty is just a piece of paper. One or more signatories can tear it up, admittedly, but that is equally true of any organisational formula: any legal construct is perishable. The only answer is the existence of a will to live together, the realisation by nation-states that, whatever the disadvantages of the Community, they are better off in it than out of it.