systems. On the contrary, it is just another manifestation of each government's efforts to maximize its self interests, for sometimes clashing head on with competitors produces more costs than gains.

This is a ground-breaking book. Meessen shows the way in which economic law studies need to progress to achieve an even higher level of theorization. Meessen himself, since the publication of the book under review, has developed his approach a little further in a German-language booklet: 'Wirtschaftsrecht im Wettbewerb der Systeme' (Tübingen: Mohr Siebeck 2005 48 pp).

MATTEO ORTINO

The European Union: A Polity of States and Peoples By WALTER VAN GERVEN [Hart Publishing Oxford 2005 xvii + 397pp ISBN 1-84113-529-1]

Professor van Gerven's book starts with an anecdote that explains his deep involvement with and sympathy for the project of European integration and that is at the same time a reminder of the original raison d'être of integration. He recounts how, in May 1940, he saw the first German soldier walking into his home town of Sint-Niklaas, about 25 kilometres to the east of Antwerp, in Belgium, and how he saw the last one leave in September 1944. 'These events', he writes, 'deeply affected the men and women of my generation, and motivated them to change history.'[1] The tone is set for a deeply sympathetic, but highly sophisticated, account of European integration, in which the author uses EU law as a basis of his analysis, but manages to incorporate an impressive amount of comparative law, political science, and political theory.

The book is divided into seven chapters, respectively on 'The European Union's Institutions, Identity and Values', 'Accountable Government', 'The Rule of Law', 'Good Governance', 'Open Government', 'Making a Constitution for Europe', and a concluding chapter entitled 'Which Form of Government for Europe?' As can be gathered from glancing at the chapter-headings, the focus of the book is clearly on the broader constitutional debate, rather than on a detailed explanation of the substantive law of the European Union. It is also immediately clear from the chapter-headings that van Gerven sees analysis of constitutional law and theory as intimately linked with concerns about democracy and accountability. The author's persistent elaboration of this view throughout the book enhances both the book's readability and its relevance for present debates on the future of the Union.

It is impossible in this brief review to engage fully with the many lines of argument put forward by van Gerven, and the wide variety of subjects covered by the book. What follows will therefore only touch upon some of the issues discussed in it.

The author describes the aim of the book as twofold. On the one hand, van Gerven wishes to explain the Union as it currently stands and as it would stand were the Treaty establishing a Constitution for Europe ever to come into force. On the other hand, however, the book aims to show 'how the distinctive features of a democratic polity that characterize the Member States can be gradually transplanted to the European Union''[2] Does this imply that the author believes that the way to democratize the Union would be to remake it in the image of the Member States?

> The proposition underlying the book is that the most appropriate way to turn the Union into a full-fledged 'body politic'— a polity of states and peoples—is to replicate, at Union level, the parliamentary form of government, which is familiar to all of the Member States in one way or another, rather than to invent a new doctrine of democratic legitimacy.[3]

Van Gerven is, however, at pains to stress that his position does not imply that the Union should become a large nation-state.[4] The author therefore positions the book as firmly rooted in a recent strand of scholarship seeking to supersede the often purely statal framework of analysis which is used to critique the Union's constitutional structure. At the same time, van Gerven does not fall

[1] xiii. [2] 1. [3] 2. [4] ibid.

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in the trap of offering a purely negative account of why the Union should not be a carbon copy of a traditional statal structure. Van Gerven's book thus works as a three-faceted prism through which the European Union is viewed: descriptive, deconstructive, *and* reconstructive. It is especially when taking a critical deconstructive or a reconstructive stand that van Gerven cogently proves that, while the Union should not blindly imitate statal structures, many interesting insights for reform can be gained from comparative law and politics.

In a section on the Union's 'body politic' and its identity, the book addresses the preliminary question of whether the Union is a state, or another form of political entity. Starting from the definition of statehood in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States,[5] the author compares the EU to the US and points out that, at first sight, the Union could very well be a state already. Within the powers conferred by the Member States on the Union, the latter exercises its authority within a defined geographical space, coinciding with the territories of the Member States. It has the capacity to enter into treaties and is not subject to the sovereignty of any entity external to the Union, and it is empowered to regulate movement across and within its borders, all within the sphere of its competences. Both the US and the EU have their powers limited by those left to the federated entities. Both grant citizenship and both have institutions able to carry out governmental functions. 'Despite all that', van Gerven concludes, 'the European Union is not a state because it lacks sovereign powers in matters such as foreign policy, security, and defence policy, and criminal matters.'[6] This all depends, it is submitted, on what is to be understood under 'sovereign powers in foreign policy matters'. Van Gerven does not specifically mention those areas in which 'sovereign powers' have been transferred, but if there are any such areas, surely the common commercial policy, which belongs to the exclusive competence of the Community (and of the Union under Article I-13(1)(e) of the Treaty establishing a Constitution for Europe), would qualify as much as, for example, monetary policy for the EURO-states. I submit that an external commercial policy is a fundamental aspect of any state's foreign policy, and that the latter concept cannot be limited to refer only to so-called 'high politics'. Moreover, it is hardly a novelty to question the feasibility of the assumption that economic aspects of foreign policy can be separated from more 'political' aspects. Indeed, the eminent international relations scholar Christopher Hill has argued that 'the once popular distinction between "high" and "low" politics is no longer of much help', because

> the *intrinsic content* of an issue is not a guide to its level of political salience or to the way it will be handled, except in the tautological sense that any issue which blows up into a high-level international conflict (and almost anything has the potential so to do) will lead to decision-makers at the highest level suddenly taking over responsibility […].[7]

Van Gerven does, however, not base his denial of statehood to the Union completely on the 'absence of sovereign power is foreign policy matters' argument. He concludes that

> [t]he most important reason why the Union is not a state…is that the Member States, and probably their peoples, *do not wish* the Union to be a full-fledged state, because they do not want to see their status, or that of their state, reduced at the international level to that of a component state.[8]

The author adds that making the Union into a state would 'also imply that the Member States would be somehow limited in their capacity to enter into international agreements.'[9] However, I

[5] 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.'

[6] 38.

[7] C Hill *The Changing Politics of Foreign Policy* (Palgrave London 2003) 4, emphasis in the original.

[8] 38, emphasis in the original.

[9] 39. This is immediately followed by a caveat to the effect that a limited ability for federated entities to enter into international agreements does not disqualify the federation of statehood, such

respectfully submit that such a limitation of the Member States' ability to enter into international agreements is already part of the Union's constitutional legal order. It has been part of the Community's legal order at least since *AETR*, when the Court pointed out, referring to the loyalty principle of Article 10 EC-Treaty, that it would be impossible for the Member States operating outside the institutional framework of the Community to assume responsibilities—inter alia by concluding treaties—which might affect or alter the scope of Community rules that have been promulgated for the attainment of Treaty objectives.[10] While a similar statement of the Court is absent with regard to external relations falling under the second pillar,[11] an obligation not to disrupt engagements taken at the EU level by concluding international agreements can be deduced from the loyalty principle in Article 11(2) EU-Treaty.

More generally, whether or not an entity is a State is considered not to be a mere question of fact, but of international law. As James Crawford put it:

> A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which a treaty may be said to be a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules.[12]

An inquiry into whether an entity is a state cannot be limited to an inquiry into one particular criterion, nor can it be a mere application of the Montevideo Convention definition, which is widely considered to be insufficient, if not defective.[13] The question of statehood is

> a matter of careful consideration in the light of the circumstances of the case, in particular the claims made by the entity in question, the facts on the ground, especially with regard to third-party control and the degree of administrative effectiveness manifested, and the reaction of other international persons.[14]

It is impossible to point to a single crucial factor which warrants the conclusion that the Union is not a state. Rather, the Union lacks statehood due to a combination of factors: it does not claim to be a state on the international plane, it is not recognized as a state by other states, and it could be said to lack a fully effective government, as evidenced, among other things, by the lack of any central taxation, lack of organized social security system at Union level, and a lack of unified army and defence capabilities.[15]

Nevertheless, van Gerven does make a very convincing case that, even if the Union lacks statehood, it can still be a fully developed legal order with a functioning democracy. He thereby implicitly challenges the German *Bundesverfassungsgericht*'s conception of democracy rooted in a 'nation-state' as put forward in its '*Maastricht-Urteil*'.[16] Indeed, confining the possibility of democracy to a nation-state would imply that no democracies would be possible in multi-lingual and multicultural states. As van Gerven rightly observes, the concept of the nation-state has always been quite inadequate to describe countries such as Belgium, Switzerland, Canada, South-Africa, and India.[17]

as is the case with regard to Belgium: Art 167 of the Belgian Constitution. Cf, however, also the cases of the former Ukrainian SSR and Belorussian SSR, both members of the USSR, which not only concluded their own treaties, but were also members of the United Nations: I Brownlie *Principles of Public International Law* (OUP Oxford 2003) 74.

[10] Case 22/70 *Commission v Council* [1971] ECR 263 § 22.

[11] Due to the Court's lack of jurisdiction in the second pillar: Art 46 EU-Treaty.

[12] J Crawford *The Creation of States in International Law* (Clarendon Press Oxford 1979) 4.

[13] eg TD Grant *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger London 1999) 414.

[14] M Shaw *International Law* (5th edn CUP Cambridge 2003) 217.

[15] Also cited by van Gerven 38–9.

[16] 2 BvR 2134/92 *Manfred Brunner v European Union Treaty* [1994] CMLR 57; Cf further on this: A Verhoeven *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International The Hague/London/New York 2002) 90–3.

[17] 41.

Having decided that the Union is not a state and having described the Union's peculiar pillar-based constitutional structure, Van Gerven goes on to argue that the EU institutions and the Member States do not attach too much importance to the division of competences between the different pillars, and in practice make the EU function as 'possessing a multilayered institutional unity'.[18] The author also argues that the division of competences between legislative, executive and judiciary that can be distinguished within the first pillar does not apply to the second pillar,[19] where law- and policy-making remain largely in the hands of the Council and the European Council. The author rightly points out that the crucial question for the future of European Integration is whether the so-called 'Community method' will spill over into the second pillar, or whether the opposite will occur and the 'intergovernmental' method of the second pillar will become increasingly common in matters previously governed by the first pillar Community method. Van Gerven both predicts that it is not necessarily so—as many have feared—that the second possibility will become reality, and cites Alec Stone-Sweet's argument that 'intergovernmental bargaining' will remain part and parcel of EU law making.[20] While it is indeed not necessarily so that the intergovernmental method will start to dominate the system of decision-making in the entire Union, I would submit that it is equally unlikely that the Community method will in the near or even distant future apply to the entire spectrum of policy-making in the Union.

However frequently the book emphasizes the many linkages and overlaps between the different pillars of the Union, and the many ways in which they can be said to form one legal order, the chapter on accountable government makes it abundantly clear that many differences between the pillars remain. When discussing accountable government, van Gerven understandably focuses on the first pillar, in which the different forms of accountability developed are the most extensive in the Union's legal order. The author provides, however, a rather striking explanation for this focus on the first pillar:

> It is indeed under the first pillar that the integration process, driven by a strong executive, the EU Commission, has advanced farthest, and, accordingly, that accountability, submission to the rule of law, good governance, and open government *are most needed*.[21]

While the advanced state of development of the first pillar might be an explanation for the equally advanced state of accountable government in its sphere, it is submitted that this should not necessarily be an argument why accountable government is needed more in the first pillar than in other pillars. Surely the third pillar, which has produced legislation such as the EU Arrest Warrant, should be a prime example of an area where accountability is needed, even though this accountability may be to a large extent absent in the present structure of the Union. Though this is clearly more controversial, a similar argument could be made with regard to the second pillar.

Van Gerven dedicates a separate chapter to the question whether the Union as a whole is subject to the rule of law. Inevitably, the position of the second and third pillar comes up again and the author rightly identifies this as a fundamental problem for the position of the Union as a *Rechtsstaat*. Van Gerven notes that there is no easy answer to the question whether the Union as a whole is subject to the rule of law. While there is no substantive judicial review under the second pillar, the author argues, this cannot be a decisive argument in itself, given the similar position of foreign policy matters within the constitutional systems of many states. Van Gerven concludes that 'if the whole Union (as opposed to the first pillar alone) is not yet a political entity governed by the rule of law, it is nevertheless in the process of becoming one.'[22] While the author is undoubtedly right that substantive judicial review in foreign policy matters within any constitutional system is very uncommon indeed, if not virtually non-existent, I submit that this should not divert us from fundamental questions about the implications of this constitutional position of foreign policy for *any* entity – state, international organization, or otherwise – that presents itself as being subject to the rule of law. It is true that the EU probably does not differ very much from

[18] Van Gerven (2005) 57–8.
[19] Nor to the third pillar.
[20] Van Gerven (2005) 58.
[21] 62, emphasis added.
[22] 121.

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other constitutional systems with regard to the absence of substantive judicial review of foreign policy decisions, but I submit that this does not answer the question of the implications of this absence for the characterization of the EU as a *Rechtsstaat*, in the same way that it does not make this question disappear with regard to any other constitutional system.

As mentioned above, the book's underlying proposition is that the most appropriate way to turn the Union into a polity of states and peoples is to replicate, at Union level, the Member States' parliamentary form of government, rather than to invent a new doctrine of democratic legitimacy.[23] In accordance with this, the book's last chapter sketches what the most appropriate form of government for the European Union should be, starting from a comparison with the constitutional systems of the UK, Germany, the USA, and France. Van Gerven here clearly shows that he does not support any naïve transplantations of governmental structures from the national to the European level. He concludes that the Union in its current state is more a parliamentary than a presidential system, the latter of which he also rejects as a possibility for reform of the Union's constitutional system. Both the presidential system of the USA and the semi-presidential system of France are unsuitable for the European Union and would substantially disrupt the existing institutional balance, based on a delicate system of power sharing between the institutions and between the Union and the Member States, and not at all on a—at least as compared with the EU—neat separation of powers such as in the US constitutional system.

The Union, van Gerven argues, is therefore best served by a 'consensus' system of government, ie 'a non-majoritarian, multiparty parliamentarian system…with an electoral system of proportional representation.'[24] He suggests that a European democratic government should encompass a number of elements: (1) the existing European Parliament, with steadily increasing legislative powers exercised on a par with the Council; (2) a multiparty 'consensus' government—viz the Commission—with the Commission President as a strong head of government and with a right of legislative initiative to preserve the Union's interests; (3) a Commission that is fully accountable to Parliament, in that the latter would control the Commission's appointment and operational activities, and would be able to make it resign with a constructive vote of no-confidence;[25] (4) a Council of Ministers with greater democratic accountability through increased transparency of its legislative action and possibly making it accountable to an empowered COSAC;[26] (5) a European Council as the driving force behind European integration, with a president elected by the Council, and not by the people.[27]

While it is possible to disagree with van Gerven's proposals—one could, for example, wonder whether it follows from his argument that he proposes to extend the Commission's sole right of initiative to the CFSP, and if not, how he envisages that the 'Union's interests' will be sufficiently safeguarded within the second pillar—it is clear that his conclusions and proposals are based on a deep knowledge of EU law and a judicious use of many insights from comparative law and political science.

It should be evident from the above that this short review does not do justice to the complexity and the richness of the argument presented by van Gerven in this book. As announced above, it has only been possible to engage with a small number of aspects. If I could, however, make one structural remark, it would be that I have my doubts about whether this book would be entirely suitable to explain European integration to 'a general audience' as the back-flap announces. It is not necessary to be an EU constitutional lawyer to be able to read it, but I should think that a certain background in law or political science would be required to benefit fully from what the book has to offer.

[23] 2 *passim*.
[24] 372.
[25] After the German example of the *Konstruktives Mistrauensvotum*, as described in Art 67 of the German Basic Law.
[26] Conference of European Affairs Committees: a committee composed of national MP's in charge of EU affairs in their respective national parliaments: cf point 4 of the Protocol on the Role of National Parliaments in the European Union, attached to the Amsterdam Treaty.
[27] 373–4.

Having said that, this book is a uniquely knowledgeable interdisciplinary account of European integration by someone whose brilliance as a European and Comparative lawyer is too well known to need any rehearsal. Whether one agrees with the theses put forward or not, the book certainly provides much material to engage with on many levels and the argumentation is always clear and succinct. It is therefore highly recommended for anyone interested in the European Union as an evolving constitutional structure.

GEERT DE BAERE

Indigenous Peoples in International Law By S JAMES ANAYA [2nd edn OUP Oxford 2004 pp xi+396 N/p ISBN 0-19-517349-X; 019–517350 (p/bk)]

Professor Anaya has produced a second edition of his highly regarded monograph on the position of indigenous peoples in international law. The second edition continues the themes of the first (1996), but updates the text to include recent developments within international law's human rights programmes. This new edition re-confirms his reputation in this field. This is an important textbook by a major legal scholar, written, as always, with considerable fluency and clarity as well as persuasiveness. For those unfamiliar with his work, the new edition will be an opportunity to consider Professor Anaya's approach towards a topic of growing profile in international law.

Part I of the book is entitled 'Developments Over Time'. In these two chapters the author describes international law's 'strong doctrinal historical tendency' to view tribal nations as unqualified for statehood. Instead of seeing indigenous peoples as subjects inside its realm, he reports international law as favouring the consolidation of power over them by the European States and their colonial offspring (p 6). He then tracks the emergence of this state-centred and absolutist approach, beginning with the early naturalist frame of (most notably) Las Casas and Vitoria. That framework changes with the post-Westphalian rise of the modern state when the concept of natural law went from 'a universal moral code for humankind into a bifurcated regime comprised of the natural rights of individuals and the natural rights of states' (p 20). He rightly sees Vattel as a key figure in that transition. He articulated 'the foundation for the doctrine of state sovereignty, which, with its corollaries of exclusive jurisdiction, territorial integrity, and non-intervention in domestic affairs, developed into a central precept of international law.' That trend ripened into the positivized notion of state sovereignty that Anaya describes as dominating international law at the beginning of the twentieth century. He notes that as this happened many colonizing powers adopted trusteeship notions with the objective of weaning native peoples from their 'backward' ways and to 'civilize' them (p 31).

This historical account is background to the author's subsequent concentration on the international institutional settings through which norms are presently being articulated with regard to indigenous peoples. The historical sources relied upon by the author tend to be the fin de siècle publicists with some reference to international tribunals late in the chapter. There is no doubt that international law did positivize during the nineteenth century, however the conclusion that this eliminated indigenous peoples entirely from its scope is made rather unqualifiedly. More recent scholarship—such as the work of Antony Anghie (who has published extensively in this area in the time between the first and second editions of this book)—would suggest that international law was not as rigid and as absolutist as some of the treatise writers would have it. State practice (a norm-forming area of international law which the author tends slightly but now and then significantly to underplay) still showed European nations entering into treaty relations with tribal nations. Rather it may be that the question was not really the apparently absolute one of personality (as stipulated by a small group of treatise writers) so much as capacity (as revealed by actual state practice): In the century before the Second World War international law recognized 'uncivilized' polities as holding a measure of capacity for jural relations whilst not being full members of the European States system. This approach would mean that the post-War developments were less of the new direction Professor Anaya regards them as being. There may be more historical continuity than the typology of discontinuity Anaya emphasizes in order to give more cogency to his picture of post-War international law.

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