

## CULTURE AND THE RATIONALITY OF LAW FROM WEIMAR TO MAASTRICHT

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### Introduction

At the dawn of the twenty first century, the late modern *ethos* of Weimar social and political organisation reproduces itself in the post-modern *ethos* of the European Union.<sup>1</sup> The Treaty of the European Union at Maastricht witnesses the return of the unresolved crisis of the modern constitution, which erupted even before the dust had settled over the struggles to find a political compromise at the close of 1919. The weakness and indecisiveness of the Weimar Constitution, its blind homogenisation of the disparate components of the German Empire, its transformation of a richly layered legal and institutional history into a bureaucratic black box, and its rote collectivisation of diverse sub-national traditions and ethnic particularity in the name of an empty concept of 'republicanism', is not singular, but symptomatic of a phase in the history of constitutionalism. Not in the history of constitutional law, but rather in the history of the *concept* of the constitution, its place is in a reference network that organises the relation of that concept to its subject, its content, its legitimacy and its own implicit ambiguity.<sup>2</sup> The recent debates concerning the constitutionality of the European Union, its state-oid appearance, and its democratic aspirations re-open an analogous if radically different constellation of questions and problems, categories and paradigms, which are required for a thorough understanding of the Weimar episode.

What is the function of the modern constitution? Does it have a *function*? Or does its *ontos*, its very existence, constitute its function? What is its *conceptual* status? Is it normative? That is, does it describe the order of rules and regulations, institutions and procedures that form the political basis for a programme

<sup>1</sup> Many thanks to Wilfried Spohn for his thoughtful commentary on an earlier version of this piece.

<sup>2</sup> The work of JHH Weiler has gone farther than any in the reconstruction of this conceptual history, and my debts to his work in the following will soon become clear. See in particular, JHH Weiler, 'The Transformation of Europe,' (1991) 100 *Yale Law Journal* 2403, which is integrated into JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999).



of change, progress and realisation? Or is it descriptive, that is merely an image, a record and legitimisation of the social, political, cultural order of what is? According to what norms and measures does it engage the question of validity and applicability, of who belongs to the constitutional state and who decides who belongs to the constitutional state? On what conceptual plane can the tension between disparate components of one unified entity be resolved? What is the meaning of the tension of interests which make up the inner fabric of constitutional compromise?

The task of this paper is to develop a hypothesis not about the *historical* continuity between Weimar and Maastricht, but rather about the *conceptual* continuity between them, to chart its sometimes-severe limitations, to analyse its excesses, and map its deficiencies. It is our hope that this process of moulding and melding will produce a set of conceptual *vases communicantes*, the basis for a certain continuity of juridical and political thinking capable of connecting two realities nearly a century apart. It will thus produce a certain number of conclusions about the nature of the legal categories that organise both the early twentieth century self-understanding of the Weimar Republic, and the early twenty first century self-understanding of the European Union.

The following discussion begins with the presentation of a contemporary conceptual issue: the legitimacy crisis of the European Union. It then explores the most notable legitimacy crisis of the twentieth century—the debate surrounding the Weimar constitution, and one of the central antagonists of that crisis, Carl Schmitt. It then returns to the present in the light of the findings from Weimar. It is a fundamental presupposition of this paper that the terms and categories of the critique, which the Weimar jurist Carl Schmitt brings to the debate around the Weimar Constitution of 1919, can cast light upon the debate about the European constitution. We will not try to suggest that the European ‘peoples’ of the late twentieth century are in a social, political or legal position identical to that of the German ‘peoples’ at the beginning of the twentieth century. However we will suppose that they are not so far away as to make uninteresting the project of bringing them into conceptual communication with one another. Carl Schmitt is not the analytic key to the conundrum of the European constitution. He is our conduit to an understanding of the European present. More than any other legal thinker of the twentieth century, his categories and concepts, queries, incoherencies and paranoia’s expose the irreducible problems of late modernity, both in the historiographical and juridical terms.

### “The King of Prussia” is not an Acceptable Partner at Versailles’

The immediate pre-conditions of the Weimar constitutions—its accessible form and acceptable categories—were determined through the formal impositions made in the ‘negotiations’ led by the allies in mid-October 1917. President Wilson and the Americans dominated the process. Indeed the conditions of peace imposed by the Allies were never formally recognised by France and Italy.<sup>3</sup> It was not until 5 November, one month after the de facto armistice, that the ‘official’ armistice was ‘enacted’. Indeed de facto peace was not peace at all. Peace in the eyes of Wilson was not a state attained after a cessation of hostilities. It was rather a principle or set of principles. Wilson’s famous ‘Fourteen Points’, which he subsequently presented in several political speeches, confirmed that peace was a *formal*, not *empirical* state. In other words, the very modalities and categories available to those negotiating the Treaty of Versailles—18 months later—were prepared in advance. The most dramatic consequence of this ‘pre-conditioning’ of the treaty negotiations, was that Imperial Germany, *strictu sensu* was excluded from negotiation. Wilson declared that neither the ‘military autocrats’ nor the ‘King of Prussia’ were acceptable partners at the table of peace negotiations.<sup>4</sup> Obviously it is not Wilhelm II who is at issue. It is rather the *identification* of the German people with one man, *according to the logic of monarchy*. The *formal* requirement of the Versailles negotiations is that the logic of embodiment, the entire nature of the relation between *people* and *person*, is being radically transformed, revolutionarised. Germany was not excluded in the sense that the vanquished part was not allowed to participate, to represent its own subjective position and to recognise—and thereby legitimise—the charges made against it. An integral part of the judgment was ‘which Germany?’. Which ‘figure’ could politically represent the German ‘people’ in a politically ‘acceptable’ form while at the same time embodying the German identity? Wilson ridiculed the monarchy, virtually decapitating the King of Prussia, and the German Empire was left to make massive identity changes in order to legitimate itself in the international symbolic dialogue. Imperial Germany had to *change* its symbolic identity in order to represent itself.

Obviously there were clear revolutionary moments in the pre-history of the Weimar Republic. The military revolts in Kiel on 4 November 1918, preceded by the famous submariner mutiny a few days before, as well as the public uprisings in Munich on 7 November 1918, combined with a newly opened public sphere, helped to lead the Empire to a collective mood of change. Furthermore, both the Independent Socialist Party (USPD) and the Spartakists played

<sup>3</sup> H Holborn, *Deutsche Geschichte in der Neuzeit. Band II: Das Zeitalter des Imperialismus (1871–1945)*, trans. A Holborn (Frankfurt am Main, Fischer, 1981) 287.

<sup>4</sup> *Ibid.* 292.



important roles in determining the tone of the first attempts at a new constitution. But an undeniable novelty in the 'revolutionary' events is the *formal* revolution, which shadows the material one. From the first actual cessation of hostilities until his 'retirement' from Berlin to Spa on 10 November 1918, Wilhelm II was pathetically drained of his legitimacy, to a large degree because of disagreement with his military advisors on the *legitimacy* concerning the cessation of hostilities, but also in part because of Wilson's simple refusal to acknowledge that a king, any king, could legitimately represent a people or a nation.

This de-coupling of the *people* from its formal logic of *collectivity* explains in part the weakness of the constitutional formulations of the Weimar Republic. Where the Bismarckian constitution of 1871 is based on a reciprocal relation between a *popular* representative body—the Reichstag—and the king, the presuppositions given to the architects and theorists of the Weimar constitution—Preuß, Weber, Jellinek, Meinecke, and others—were required to strike delicate balances along several registers, between Prussian hegemony, liberal and anti-liberal tendencies, revolutionary and anti-revolutionary movements, economic interests, etc.<sup>5</sup>

It is customary to insert the Weimar Constitution of 1919 either into a general European tradition of constitutional law or a particular Germanic legal tradition dating from the early nineteenth century—say from the Deutsche Bundesakte of 1815 or the Wiener Schlußakte of 1820. Such genealogies have distinct advantages, and in what follows we will build in part on historical reconstructions of a number of conceptual constellations. Still, the political and legal run-up to the Weimar Republic in 1919, and its extraordinarily turbulent fifteen year life make it a singular object of study. What sets Weimar Republic apart, and at the same time makes it an instructive case for our understanding of contemporary European questions, is the weave of tensions that traverse and organise it: monarchy and republic; novelty and tradition; revolution and democracy; bureaucracy and pre-bureaucracy.<sup>6</sup> These tensions are echoed by the conceptual construction of the Treaty of European Union.

To narrow the point of entry for this unorthodox comparison, we will focus on the constitutional theory of Carl Schmitt. More than any other theorist, Schmitt opened up theoretical reflection on the notions of constitutionalism, representation, identity, and legitimacy, and contributed a generalised set of categories for prying apart the antimonies of modern democracy. It is our intention both to explicate those categories, which seem pertinent to the question of European constitutionalism, and to measure the extent of their portability to the legal, political and ethical questions of the beginning of the twenty-first century.

<sup>5</sup> W Apelt, *Geschichte der Weimarer Verfassung* (München & Berlin, Beck'sche Verlagsbuchhandlung, 1964); H Schulz, *Weimar. Deutschland 1917–1933* (Berlin, Siedler, 1982) 90–91.

<sup>6</sup> P Gay, *Weimar Culture. The Outsider as Insider* (London, Penguin, 1968) 1–8.

# 'The German Empire is a Republic.'<sup>7</sup> / 'Citizenship of the Union is Hereby Established.'<sup>8</sup>

Conventional wisdom holds that the unification of the German Empire under Bismarck and the Imperial Constitution of 1871 was significantly weakened and indeed endangered by its successor, the Weimar Constitution.<sup>9</sup> The various forms of quasi-revolutionary turbulence, separatist movements, general social unrest and dissatisfaction put into question the entire consciousness of the Germanic peoples as a *Schicksalsgemeinschaft*, as it had been cultivated through the second half of the nineteenth century. The crisis of the immediate post-war period had two aspects—the material military catastrophe, and its immediate consequences for the material well being of the German Empire, on the one hand, and an *identity* crisis, on the other. This identity crisis can be mapped on several levels. It traverses social strata, cultural groups, and institutional matrixes. On the conceptual level, which is our primary interest, the crisis involves revisiting the question of the *unity* of the people(s) of the German empire.

For despite ideological dogma, and popular perception (both domestic and international), the German Empire at the end of the Bismarckian era was remarkably heterogeneous. Indeed the most noteworthy *political* achievement ascribed to Bismarck, and carried forth by Wilhelm II, was the *unification*, of the relatively diverse German peoples. The Frankfurt Constitution, born out of the Paris uprisings in 1848, although a grand opportunity for the German Empire Parliament to enter the ranks of liberal democracies in the early nineteenth century, ended in failure. When the Frankfurt Parliament collapsed in 1862, the baton was past from bourgeois liberalism to aristocratic militancy, within a discourse of culture, soul, and not the least body. The Empire was once again unified under the famous sign of blood and iron. As Bismarck remarked in 1862:

Germany does not look to Prussia's liberalism but to her power. The south German States—Bavaria, Württemberg, and Baden—would like to indulge in liberalism, and because of that no one will assign Prussia's role to them. [...] Not by speeches and majorities will the great questions of the day be decided—that was the mistake of 1848 and 1849—but by iron and blood.<sup>10</sup>

Both Article I of the Constitution of Weimar, ('The German Empire is a Republic') and Article 8 of the Treaty of European Union ('Citizenship of the Union is hereby established') are far rhetorical cries from more noteworthy

<sup>7</sup> H Hildebrandt (ed), *Die deutschen Verfassungen des 19. und 20. Jahrhunderts* (München/Wien/Zürich, Schöningh, 1992) 69.

<sup>8</sup> 'Treaty on European Union,' European Commission (1992) Article 8.

<sup>9</sup> Above n 5, Apelt, 369.

<sup>10</sup> M Viorst (ed), *The Great Documents of Western Civilization* (New York, Barnes and Noble Books, 1994), 265.



constitutional precedents, say the French Constitution with its poignantly deep and necessary enmeshing of state and right, or the American Constitution with its rhetoric of religiosity, freedom, and independence, or even the Frankfurt Constitution of 1849. Both Weimar and Maastricht conspicuously avoid poignancy, taking aim at the kind of instrumentality which assures their landmark rhetorical dryness. The Wilsonian democratic moral *ethos* and the utter failure of the politically embodied force of Wilhelm II or the other princes, made republican instrumental neutrality unavoidable.<sup>11</sup>

The naked, skeletal rhetoric of citizenship in the TEU European construction is also inseparable from a desire to avoid the politically ungainly questions of ethnicity and ethics in history. In this sense Germany's dominant position in the processes of European integration is inseparable from a certain political posturing towards a renewal of its political *ethos*. Both the Weimar Constitution and the Treaty of European Union grow out of political situations in which cultural politics grew burdensome, difficult, unprofitable, and even dangerous. At Weimar the result was schematic republicanism, at Maastricht econometric populism. The first inaugurates, the second reproduces, albeit in a different way, within a different context, a kind of transparent constitutionalism: the constitution as simple form, the modern antinomies of cultural unification resolved as juridical formalism.<sup>12</sup>

Not at all gratuitously, the self-transforming *ethos* of the transparent constitution, the conceptual history of the modern constitution has gone full cycle. We must underscore the modernity of the constitution since, as is well known, *polity* is also the central constitutional concept of Athenian democracy. Distinctively *modern* conceptual history reveals however that constitution enters the second half of the eighteenth century—the very dawn of synthesis of natural rights and individuality—as an experiential concept, which reproduces the political and judicial situation of a given state. Constitutional debates are *empirical*. Opponents of the modern consolidation of constitutionalism not satisfied with the pragmatic consequences of the constitution interrogate and attack its juridical backgrounds, thus opening a toward a tradition of political and social analysis, which parallels the more romantically inspired imperial traditions of the nineteenth century.<sup>13</sup>

<sup>11</sup> Indeed the strongest critique of the Weimar Constitution came from the southern German and Prussian 'federalists', who felt that the side of national unity was not strengthened to an acceptable level against the variety of regional particularity. Apelt at n 5 above, 371.

<sup>12</sup> Thus when Article A of the Common Provisions of Maastricht proclaims, 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen . . .', a Pandora's box of constitutional antinomies is opened: 'union', 'people(s)', 'citizen' must all be analysed in this same light.

<sup>13</sup> D Grimm, *Verfassung II* in R Kosellek et al. (eds), *Geschichtliche Grundbegriffe* (Stuttgart, Klettverlag, 1990).

## The Constitutionality of the European Constitution

In the opening reflections of his landmark work, *The Constitution of Europe*, JHH Weiler attempts to articulate an abiding general definition of a 'constitution', or even of *the* constitution of Europe as it is promised in the determinate form of his title. Indeed, glancing at the comprehensive index of the volume we find that the entry 'constitution' promises only a meagre handful of direct references. Instead of focusing on a fixed definition of a constitution, or even *the* constitution of Europe, Weiler begins by evoking the memorable "constitutional moments" associated in the collective mind with important changes in the constitutional order'.<sup>14</sup> He thus shies away from a substantial definition of the constitution, moving instead toward the notion of constitutionalism as a kind of *phenomenology* of the constitution. In other words, he focuses, in most of *The Constitution of Europe* not on what the European constitution is, was or should be, but rather on the what *happens* when constitutionalism happens, what are the backgrounds, structures, and newly articulated models that become visible when the constitution of Europe 'constitutions'. He regards such 'constitutional moments' of European construction and integration as the key situations in which the logical, legal, cultural coherence of Europe is put to the test and brought to the fore. Some 'obvious candidates', he suggests are the Schuman Declaration, the entry into force of the Treaty of Rome, the declaration of the European Court on the supremacy of Community law, the 1985 White Paper, etc. For all his theoretical sophistication, Weiler never explicitly theorises this approach, and that is perhaps one of its great advantages. Weiler's theory of European constitutionalism is a synthetic one, articulating and consolidating itself through the examination and analysis of the existing legal situation or reality.

This synthetic approach is instructive for a theoretical understanding of the nature and function of legal scholarship. The immense advantage of a legal-theoretical approach to European construction, compared, say, to a political scientific one, is that juridical science is accustomed to understanding the legal 'meaning' of juridical documents to be the object of a process of their own interpretation and testing. No legal scholar would claim that the legal sense of Maastricht is fixed at the moment of its signing. Its meaning is phenomenological, it emerges and evolves in and through a kind of logic of speech act, of 'doing things with words' to borrow Austin's illustrious phrase. Legal thought does not produce legal sense until it 'does' law, until it deploys the material and institutional mechanisms at its disposal, themselves produced within the limits of the legal system.

Through this institutional phenomenology a number of the tensions inherent in any constitution—and in the notion of constitutionalism—come forth.

<sup>14</sup> JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999), 3.



The most tenacious of these is closely related to the paradigm of legal-theoretical thinking as we just evoked it. Legality, and legitimacy, become active, indeed thinkable and analysable, only after the legal system whose legality and legitimacy is in question, closes the door on precisely these questions. The legitimacy of a legal system is created at the very moment when the origin or basis of that legitimacy withdraws into self-evidence. Thus the primordiality of the constitution obeys a very strange logic indeed. Any constitution or fundamental document of a legal order is composed and authorised by actors who not only do not belong to the legal order they are creating, but are not destined to belong to it. The legitimate, authorised creators of a constitution or constitutional order function necessarily *outside* and *prior* to the existence of the constitution. All constitutions are un-authorised, or in other words, authorised before authorisation was legitimately possible. The constitution is understood as the organisation structure and norms ('tenets') of the 'political and civic culture' of the polity, while at the same time dependent upon that polity for its constitutionality.

### Conceptual Logic of the Constitution According to Carl Schmitt

As we have already suggested, the genesis of the Weimar Constitution draws together the extremes of the political spectrum. No true revolution was necessary: the Empire collapsed by implosion under the strain of the revolutionary atmosphere of the times and the real shock of general strike on German soil. The precedence of constitutional republicanism widely occupied the consciousness of the continent. The German Empire stood prominently in the line of the similar quasi-revolution conjunctures.

In the eyes of Carl Schmitt, the military, political and social security of the Bismarckian Empire bred a constitution replete with juridical weakness and loopholes. This political arrogance was corroborated by the dominant paradigm of legal positivism, which tended to repress or simply displace theoretical questions of constitutionality, constitutional legitimacy and juridical coherence.<sup>15</sup> *Verfassungslehre* (1927) is in this context intended as a first of its kind study. Neither a commentary, nor an analytic study of individual articles, it is intended much more as a deeper conceptual reflection on the essence of the notion of the constitution in general. It refers actively but not exclusively to the living Weimar Constitution, seeking instead to present a general framework of the concept of constitution. It is thus a general theory of the constitution, in both historical and analytical perspective, an analysis of the networks and models in intellectual history that serve as origins and models for the *possibility* of thinking about the constitution today.

<sup>15</sup> C Schmitt, *Verfassungslehre* (Berlin, Duncker & Humblot, 1993), 3.

In the perspective of a treatment of the question of Europe, the situation of Schmitt's text opens many doors, but must at the same time be treated somewhat delicately. On the one hand, the generality of Schmitt's treatment of the concept of constitution provides a considerable body of indexes for revisiting the question of European construction in general and of a European constitution in particular. On the other hand, the political unity of Europe, not unheard of in 1927, is far from being submitted to an informed analysis, and farther still from the insights gained through the pragmatic attempts at construction of a European house. We will in what follows attempt to play on both registers, as it were. We will on the one hand deepen and exploit Schmitt's theory of constitutionality as it might possibly relate to some un-thought-of political entity with the possibility of being politically organised in a constitutional manner. On the other hand, we will attempt to bring the more speculative contemporary theory of European statehood and federalism into orbit with Schmitt's more narrow considerations of a constitutional state (*Rechststaat*).

### Unity and Constitution

Schmitt's first insight in the *Verfassungslehre* carries the argument of the entire work: the term 'constitution' is polyvalent. It denotes not only a number of different contents or notions, but also connotes a certain ontological *status*. A constitution in the latter sense (in English as in German) is the fundamental essence of a thing. In the most general sense, any thing that has being has a *constitution*. The constitutionality of any given thing is its position against the background of the *hic et nunc* of the cultural, social, historical order. It is its opposition to the general fabric of existence. It is a kind of assertion of existence against the forces which would cause the thing to wither or disappear. It is the irreducible kernel of the thing, that which cannot be dissolved either by conceptualisation, rationalisation, institutionalisation, or politicisation. We will retain this open, ontological sense of the word constitution as *statu*, for it will serve as a key to the mysterious and politically and ideologically charged concept of 'people'.

Schmitt, however, sees the need to concretise the object of his constitutional theory within the domain of traditional political forms in order to render it, as he puts it 'understandable'. He thus begins by narrowing his focus to the constitution of the State, defined as 'the political unity of a people'.<sup>16</sup> In this context a 'state' refers to 'the political unity or as a particular, concrete manner and form of state existence, and in this sense it can be understood as synonymous with 'the general state of political *unity* and *order*'. At the same time, he has to add, 'constitution' can refer to a 'system of norms' and must thus be

<sup>16</sup> *Ibid.* 3.



considered not a concrete, political unity, but rather an 'ideal unity'. Common to both conceptions of a constitution is the notion of a unified *whole*. In other words, both the political unity of a people and the unity of norms are based on an implicit coherence, a closed system of norms values and references. Both aspects of the conception of constitution belong to what Schmitt calls the 'absolute concept of constitution' as contrasted with the 'relative concept of constitution'. The former is best understood in opposition to the latter.

The 'relative' concept of constitution is, according to Schmitt, based on a conception of the relationship between individual laws of political entity and the total and general constitution of the same. The relative concept sees the constitution as *summum partes*. The constitution is neither more nor less than the totality of the rules, regulations, and norms that organise the polity that it encompasses. The constitution in this sense has no metaphysical dimension, no meaning, be it political, social, cultural or spiritual, which might transcend the empirical laws in effect. 'Constitution' in the 'absolute' sense seeks to comprise the notion of political *unity* in the broadest sense. It refers to the 'mode of existence (*Daseinsweise*)' of any given political unity. This mode of existence can be conceptualised on three levels: (1) as the concrete 'general status of political unity and social order of a particular state', (2) as a particular manner (*Art*) of political and social order, and (3) as the 'principle of *dynamic becoming* of political unity'. The conceptual frameworks of all three levels surpass in important ways the *summum partes* of the positivistic legal-constitutional model.

In the *first* sense the constitution is the State. It is the real, existing State in its present form, in all its possible dimensions. Constitution—which can only be named in the indefinite form—is not something the State possesses, it is rather the very State-ness of the State, its essence or irreducible substance. Constitution is prior to any notion of sovereign or sovereignty, any idea of monarchical or popular will, any constitution in the narrow sense of 'fundamental law'. Constitution, says Schmitt, is a *status* of 'unity and order': 'The State would cease to exist if this constitution, that is this unity and order ceased'.<sup>17</sup> The constitution of a State is not the mere fact that there is unity and order in a material sense. By 'order', Schmitt refers in part to the Aristotelian sense of a naturally given cohabitation of people in a city or a region. Far from the modern police-technical notion of 'law and order', Schmitt seeks to underscore the cultural or cosmic order. In the same vein, 'unity' is an organic belonging, an irreducible common ground, which resists the instrumentalisation of modern forms of systematic conceptualisation—and at the limit, democratic forms of instrumentalisation. This organic or cultural connotation of unity and order represented by constitution possess a spiritual dimension. 'The constitution is [the State's] *soul*, its concrete life, and its individual existence'.<sup>18</sup> The

<sup>17</sup> Above n 15, 4.

<sup>18</sup> Above n 15, 4.

State is a gathering point or nexus of a number of groups and individuals, common in certain respects, different in others. The fabric of commonality, the substance of the common belonging is its constitution, the spiritual common ground, the motivation for the laws and institutions which otherwise serve to organise in a concrete or pragmatic fashion the spiritual constitution of the collectivity.

In the *second* sense, Schmitt understands a partial concretisation of the political and social order. 'Constitution', in this regard, is still indeterminate, still inseparable from the existence or being of the State, still far from being one contingent property among others, but Schmitt attaches it to a determinate form of governance. The constitution of the State makes its imprint on the social and historical reality by determining the forms of governance available to and in part utilised by the State. Constitution in this sense corresponds to what is more commonly called the *form* of the State, be it monarchy, democracy or otherwise. In as far as constitution in this meaning represents a particular state form it is still an existential form, profoundly related to the very *being* of the state. The constitution is the *forma formarum*. This *being*, this *status* can be and is the object of evolution, of change. In a kind of historical State-paradigm shift, revolution can bring about a change in a State in the sense of a change in form of existence of the State. Indeed with the November Revolution of 1919 fresh in mind, Schmitt is obliged to explain historical change in terms of both continuity and rupture. Revolutionary change obeys both logics. This change, according to Schmitt is not merely a continuous change, a shift from one institutional or legal structure to another. It is rather a shift in the form of *being*, in the form of existence in which a new kind of 'soul' becomes the foundation for the new State.

Finally, in the *third* sense, Schmitt sees this *status* as a situation in constant development, or to use the more existential terminology, as constant in becoming. The analysis of the static, existential nature of constitution is thus opened to include this same cosmology in terms of genesis (*Entstehung*) and 'dynamic becoming' (*dynamisches Werden*). Here too Schmitt calls upon the dynamic reason in Aristotle's *Politics* in order to reconcile the notion of the organic unity of a political collectivity with its implicit, necessary, and equally organic self-transformation.

The conflation and concentration of these three aspects in the modern notion of 'constitution', such as it appears in the Constitution of Weimar of 1919 is far from simple. Yet a number of particularities of the Schmittian conception may be underscored, in view of a dialogue with the contemporary discourse of European constitutionalism. The guiding question that indeed receives some prospective answers concerns the nature of the unity, which can serve as the basis for the 'institution' of a State or a State-like entity. In his existential reflections on the nature of constitution, Schmitt suggests that the fundament of constitutional belonging is to be in a situation prior to the constitution as a positive document prescribing rights and obligations to



those technically belonging to the state. The ontological prioritisation of the 'classical' model conceives of the relationship between State, belonging, and constitution, in an entirely different manner. For the 'classical' model, the 'belonging' is more or less primordial, the State is conceived as an appropriate form of organisation for those who 'belong', and the constitution is then the final administrative tool for organising those who belong within the State-form. By reading both 'constitution' and 'State' in their strong, existential forms, Schmitt opens the dimension of the primordially of the constitution, of 'the' constitution as 'constitution', of 'constitution' and 'state' *qua status*, as the ground existential forms of collective self-organisation.

### Legal Implications of the Existential Constitution

Schmitt points out that 'constitution' in this 'absolute' conceptual sense likewise signifies a 'unified, closed system of greatest and last norms'.<sup>19</sup> The constitution in its existential sense is thus also the most general, most comprehensive normative dimension of a collectivity's self-organisation. The organic unity of constitution provides the organic pre-State—and thus pre-legal—basis for law. The ontological *status* is that of the 'shall (*Sollen*)'.

Schmitt emphasises that this system is *closed*. Yet as we have remarked before, this closure is not a summation of the parts. It is in effect the sum of the components of a legal order, plus the bonds between the components, plus the sense of the cohesion, plus the origin of the cohesion. 'Unity and order' are not purely technocratic or bureaucratic as, for example Weber would argue. On the contrary, order is a metaphysical term, far closer to the notion of *cosmos* than perhaps Schmitt is at liberty to suggest in his legal treatise.

This implicit normative essence has clear consequences for the notion of State as *status*, and Schmitt hastens to underscore them. For norms are by essence dynamic. Norms refer to a *status*, to a state of affairs, which does not yet exist, but which *should* exist. They thus implicitly point elsewhere, to a kind of potential development, the attainment of which requires that the *status* at hand be abandoned.

To further this reflection, Schmitt once again makes use of the foundational formula 'the constitution is the state', which we discussed above. In this context however the implication is that the State is always *already* normative. Such a position is in clear opposition to Weber and other modern theorists of the State, who understand it as a transparent, bureaucratic scaffolding in which the individual is more or less accessory.<sup>20</sup> Schmitt's view of the normative character of the State considers normativity as inseparable in some primordial way from the

essence of the State. The State is considered, *in its very being* as something implicitly normative ('*als etwas normgemäß Sein-Sollendes*'). Consequently a system of constitutional rights is already implicit in the State, quite simply because it *constitutes* the State (once again in the broad sense of the term.)

What prevents Schmitt from taking recourse to the most primitive moral essentialism? A Heideggerian existentialist response to this question would be: the being of normativity would precede any given normative code. A simple determination of norms in the direction of interests moral or otherwise would be derivative or secondary. Schmitt's response is less rigorous and perhaps more in tune with the modern history of political ideas. In order to re-associate the normative essence of the constitution-*qua*-State with a modern political subject more or less unified with the 'will of the people', Schmitt makes recourse to more classical principles of natural law and distances himself from the legal positivism of his time. A constitution is valid because it has its origin in some constitutive power (*verfassungsgebenden Gewalt*).<sup>21</sup> This power is either identical to or a derivative of *will*. This will is associated with the people or peoples represented by the constitution.

A constitution reposes not on a norm whose correctness would be the basis of its validity. It reposes upon a political decision arising from political being about the kind and norm of its own being.<sup>22</sup>

Norms, whose correctness is based on the internal coherence of a *closed* system, must after all be *posited*. This positing is performed by the political will, nominally defined in a similar existential manner as the existing (*seinsmäßig*) dimension as the origin of normativity (*Sollen*).<sup>23</sup>

This brings Schmitt's argument full circle, and at the same time leads back to the European present. There is no such thing as a closed constitutional system of a purely normative kind. Once again the 'unity and order' of a political system lies not in its legal system, nor in rules and laws or normative dictates, but in the political *being* of the State. The *will* of s/he who was the origin of the constitution (in the narrow sense) is equally primordial as the state. The 'will' refers to, and in contrast to any 'independence from a normative or abstract correctness'—the 'essential existential aspect of the basis of validity'.<sup>24</sup> To extrapolate on Schmitt, the will of law makers is the State. The unity and order of a constitution does not refer to the internal coherence of its rules and norms. The question for the notion of European self-governance at the beginning of the twenty first century is what the 'closed system' in which both existential norms and existential will orbit and mutual refer to each other as a basis for the 'rule of law' of the system. The constitutionality of the constitution, be it the

<sup>19</sup> Above n 15, 9.

<sup>20</sup> Above n 15, 76.

<sup>21</sup> Above n 15, 9.

<sup>22</sup> Above n 15, 76.

<sup>19</sup> Above n 15, 7.

<sup>20</sup> Cf M Weber, *Wirtschaft und Gesellschaft* (Tübingen, JCB Mohr, 1972), 125–26.



'European constitution' or any other, lies in its primordial Europeanness, a substance—for those who cry 'essentialism'—which is disinterested, which precedes interests. The constitutionality of the European constitution must and shall transcend all the systematic internal contradictions, discontinuities and obscurity of the bureaucratic processes.

### Legitimacy of a Constitutional Collectivity

The problem of legitimacy of a European legal order may be pursued by following further the thread already exposed: that of the closed constitutional system and of the nature of such closure. This concept of closure is essential both to Schmitt's critique of the Weimar legal order and to our extrapolation of some of Schmitt's principles to the European present.<sup>25</sup> It is also this distinction which structures Schmitt's distinction between 'legality' and 'legitimacy'. In the long essay 'Legality and Legitimacy' (1932) he introduces the central distinction between the constitutional state in its legislative capacity (*Gesetzgebungsstaat*) and the constitutional state in its juridical, governmental, and administrative capacity. The former is characterised by a 'closed system of legality' which stands in contrast to the system of legitimisation of the latter. Never has the difference been so marked, says Schmitt, as today: '... today the normativistic fiction of a closed system of legality enters into a striking and undeniable opposition to the legitimacy of a truly present, legal (*rechtmäßigen*) will'.<sup>26</sup>

In more or less Weberian spirit, Schmitt criticises the tendency towards understanding the State as a purely administrative entity, concerned more or less with matters of economic management and administration all of whose motivation and 'legality' resides in the immense technical regulations that organise them. For Schmitt it is not a question of whether such bureaucratic activities are legitimate or not. The correctness of their activities are simply never reduced to questions of legitimacy. In this sense the legislative State is a mere vehicle, containing no inner substance, no existential significance, no place for the ethical forces that bind and separate the individuals assembled in the name of the State.

<sup>25</sup> 'End' is to be understood within the logical opposition between finitude and infinity. The end of something is the completion of a finite series of elements, finite from the inception. The process or task is understood in terms of and with reference to its completion and thus to its finitude. 'Finitude' is simply the contrary of infinitude. Closure, on the other hand, belongs to a dialectical logic. Closure is both the 'end', in the sense of 'finitude', and the exhaustion or completion of the notion of infinity. End is the stopping point against the backdrop of infinite possible continuation. Closure is the 'end', beyond which there is nothing more. Closure transcends the opposition finite-infinite. The opposition between closure and end is a recurring theme in Derrida's philosophical anthropology.

<sup>26</sup> C. Schmitt, *Legalität und Legitimität* (Berlin, Duncker & Humblot, 1998) 10.

Schmitt evokes the jurist Rudolf Smend, who in his own writing had complained of a missing *pathos* in the claim to the constitutional validity of values (*Wertgeltungsanspruch*). Schmitt agrees of course. Still with the help of some Weberian tactics his critique goes even further. Schmitt sees progressive disjunction from the feudal states of the Middle Ages, to the absolutism that preceded the French Revolution, to the constitutional systems of the Restoration, to the July Revolution 1830, to the German Revolution of 1848, and finally to the November Revolution of 1918, when the conditions were set for the emergence of the most modern edition of the Weimar constitution.<sup>27</sup> All these phases of European history are marked not only by renegotiations of constitutional documents, re-negotiations of relations of power between the sovereign and the ruled. They also constitute transformations in the very notion of the legitimacy necessary to constitute a sovereign and a state, of the minimum sufficient conditions to establish governance in the ideal (or absolute) sense, but also in terms of the pragmatic, policing functions of the State. Schmitt's analysis parallels Weber's in its agreement on the bureaucratisation of State authority and the transformation of legitimacy into floating legality.

The history of constitutional thinking has lead to a point where the ideal of a closed, self-reflexive system of legality is the standard by which to measure the degree of legitimacy.<sup>28</sup> Legality has taken over the roll played by legitimacy. Legitimacy is henceforth an expression or a derivative of legality. 'Legitimacy and legality are reduced to one common concept of legitimacy, when in effect legality actually means the opposite of legality'.<sup>29</sup> It is far from Schmitt's claim that nothing has legitimacy any more. Rather he means that legitimacy as a concept has been refilled with a new concept, that is, as legality.

The conflict that Schmitt and others see is that this displacement of legality to legitimacy, though it may be in pact with a certain political *Zeitgeist*, is nonetheless not in pact with the people intended as the sovereign subjects of the constitutional system. The state will not be successful as pure administration as long as there is popular aspiration for the ideals of a constitutional *ethos*.

As long as the belief in the rationality and ideality of its normativity is alive and well, in times and in peoples who still have the capacity to assert a (typical Cartesian) belief in the *idées générales*, it appears as something higher and more ideal.<sup>30</sup>

The measure of the conceptual and political need for the cultivation of a legitimising *ethos* is the popular ability to imagine it. The *ethos* that Schmitt suggests German citizens still know how to invoke is not proper to Weimar. It is a *European ethos*. It is the 'thousand years old' difference between *nomos* and

<sup>27</sup> Above n 15, 44–57.

<sup>28</sup> G Teubner & Z Bankowski, *Law as an Autopoietic System* (Oxford, Blackwell, 1993).

<sup>29</sup> Above n 26, 13–14.

<sup>30</sup> *Ibid.* 15.



*phesmos*, between *ratio* and *voluntas*, intelligence instead of blind, indifferent will, rights against the instrumentality of simple commands.<sup>31</sup>

The same classical questions may be asked of the legal components of European construction. On what do the claims of validity of European law repose? What is the origin of the legitimacy of the European Union in general and of the system European law and the European Court of Justice in general? To re-pose these questions in a Schmittian (or Smendian) fashion would be to seek the site (and historical moment) or rupture between legality and legitimacy. At what juncture in the history of the rise and fall of the nation-state as universal basis of collective identity, does the legality of collective systems break free from the deeply rooted *ethos* of legitimacy? What is the extent of the *pathos* of European belonging? To what degree can this *pathos* provide the legitimating basis for a constitution? And does the presence of a European *pathos* override the alleged absence of a European *demos*?

### EU and the Political Constitution of Union

Schmitt concludes his *Verfassungslehre* with an overview of the different forms of interstate political organisation, with particular focus on the constitutional nature of *union (Bund)*. Already in 1919 Europe had seen the birth of the League of Nations, conceived as a vehicle to collective understanding, and the hindrance of further world war. But without any strenuous reciprocal obligations, it represented a weak model for the kind of visionary concept of 'union' that Schmitt felt to be a natural continuation of his *Verfassungslehre*. Indeed, in his taxonomy of interstate relations Schmitt situates the *union* at the terminus of a progression from the least binding to the most binding types of relations.

Firstly, and in general, *accessory relations* between states are commonplace, reposing on the notion of coexistence as a 'right of peoples'. States that share an appreciation of these rights share also a common sense of belonging together. The principle of the other State is the basis for a logic of belonging. Here there is no constitution of any kind, only the 'pluriversum' of shared principles. Secondly, *contractual relations* between individual States represent the next level in the hierarchy of formalisation of international cohesion. Such agreements are binding, but do not but into play the existence of the State. Thirdly, the *alliance (Bündnis)* is a contractual relation between individual States in which war is a potential reprisal against violation. The conclusion of an alliance thus invokes a far more complex system of values and an existential *ethos*. The alliance is not an internal political act, does not require modification of the political identity of the individual actor, but nonetheless appeals to notions of justice and fairness in its relations toward those with which the

accords are made. Lastly, the *union (Bund)* sets itself apart from the other types of association by the fact that it puts into play the existential *status* of the political organisation involved. Not only does its conclusion imply a potential modification of the political architecture of the very State, but also violation of the union pact can have existential consequences for the parts involved.<sup>32</sup>

In this regard the European Union concluded at Maastricht and partially realised through Phase III of financial and monetary union, is a union in Schmitt's way of thinking. This is most marked by the fact that the Treaty of European Union is *irreversible*. There are no provisions for failure. Should it fail, it will not simply entail the locking up the doors of countless institutions in Brussels and in the various European capitals. Failure would introduce not only political but also structural crisis into each of the European member-States, and revolutionise the very architecture of European politics.

As Schmitt conceives it, the most essential determination of a union is the political unity that organises it. The union is conceived as a long duration project and its contract aims at the preservation of all the constituent members. In the same way, a union, in Schmitt's view, implies the commitment to protect any and all members from external military aggression. To this end, there can be no union without the possibility of intervention in the internal affairs of individual members. Lastly, there is no union without at the same time the possibility, indeed the international right, to go to war *as a union*. Now the European Union is a completely original creation, and we share the point of view of those who claim that it will only find a final political form that is *sui generis*. Still, we once again approach common ground with the provisions of the TEU, which as it were may be said to meet the criteria such as Schmitt understands them. The only grey zone is clearly the final criterion concerning 'union war' Article J4, goes reasonably far in opening for the possibility of an orchestrated European defence policy and military action with the aim of upholding it.<sup>33</sup>

With these categories and determinations in place Schmitt examines the contours and limits of the legal structure of the union. He arrives at three 'antinomies', all of which have direct interest for the question of European construction.

- (1) The first antinomy concerns *the right to individual self-preservation*. On the one hand, by definition, each member of the union is interested in the preservation of sovereignty and independence of each of the other members of the union. On the other, the preservation of the independence of other members necessarily weakens one's own sovereignty and independence.
- (2) The second antinomy concerns *the right to individual self-determination*. On the one hand, each member seeks, through the union, to preserve its own independence. On the other, the union in general is interested in the

<sup>31</sup> Above n 26.

<sup>32</sup> Above n 15, 363–66.

<sup>33</sup> *Ibid.* 367–70.



well-being of each of its members, and thus there is a tendency to intervention, thereby cancelling out the right to self-determination of each member.

- (3) The most general—and most interesting for our purposes—antimony concerns *the question of the homogeneity of the union*.<sup>34</sup>

Schmitt's understanding of the union's homogeneity, or lack thereof, builds upon two previously explored themes from the *Verfassungslehre*, namely those of 'will' and 'existence'. Both are to be understood in their deep-organic ontological sense. The 'common will' and 'political existence' of the individual members of the union are kernels, guarantors of the individuality of the individual members, irreducible to the will and existence of the collective union. In this sense there is also an irreducible political cohabitation within the union: the general existence of the union, and the individual existence of each member. They constitute to diverse forms of political existence, which, though fundamentally incompatible, because fundamentally, necessarily heterogeneous—that being the very definition of a union. The *degree* of heterogeneity, or inversely, homogeneity is also the key to Schmitt's 'solution' of the antinomy. Any union must repose upon an essential precondition: the homogeneity of its members, that is, a substantial equanimity (*Gleichartigkeit*) which founds a concrete and essential agreement and thus hinders situations of extreme conflict. This homogeneity, says Schmitt, can be 'national', religious, 'civilisational', social or class-oriented, or otherwise.<sup>35</sup> The political union can exist only in a contradictory situation. Any union must exist within the limitations of its double subjectivity, one based on the nation-State constitution, the other based on the rights of peoples.

### The European *Nomos*: Cultural and Legal Geography

In his 1944 article 'The Situation of European Legal Science' and more systematically in his post-war book *The Nomos of the Earth* (1950), Schmitt prolongs his critique of legality masquerading as legitimacy, which we have already underscored in his pre-war writings.

Some comments on the term *nomos* are indispensable. From a certain point of view the entire book *The Nomos of the Earth* is little more than a prolonged historical reconstruction and interpretation of this term. Either explicitly or

<sup>34</sup> The matter of homogeneity is a crucial component in the argumentation of the German Constitutional Court in its famous finding against the constitutionality of the Maastricht Treaty of the European Union. The absence of a European *demos*, among other things, excludes its constitution from legitimate recognition. JHH Weiler, 'Der Staat über alles—Demos, Telos und die Maastricht Entscheidung des Bundesverfassungsgerichts,' *Harvard Jean Monnet WP* no 7 (1995) 3 and JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999) 268–70.

<sup>35</sup> Above n 15, 376.

implicitly, it is central to the majority of Schmitt's reflections on culture, law and economics in the European context. When Schmitt thinks internationally, his particular understanding of the concept of *nomos* makes itself felt. *Nomos* is the copula that makes possible the thought of the transnational. It is the common 'ground' of the concept of Europe, and in this sense it is essential for our speculations on the meaning and future of European construction. The abiding critique through virtually all of his writings on international law is against an impoverished determination of the concept of the 'European' through a too narrow understanding of the roll of space and thus geo-politics, on the one hand, and the mutations in the categories of the *Volk* and international law, on the other. For Schmitt's sometimes virulent attacks on legal and political scholarship is an attack on the *discourse* of Europe. By this I mean the notion of a certain legal rationality that pretends to capture adequately and exhaust the question of Europe. In this sense, Schmitt is already an anti-postmodernist. This does not mean that he is simply a modernist—here in the Lyotardian sense of implicitly adopting the 'master narratives' of progress, individuality, technology, etc. These too fail to grasp the metamorphoses of the European conceptual universe, made 'visible' in the metamorphosis of the European *space*. Schmitt refuses the abiding and canonical discursive-construction of Europe created in and through the discourse of international law.

It is thus not incorrect, but somewhat myopic to translate *nomos* with 'law'. *Nomos* does indeed translate to law, but only in its most technical-rational modern sense, precisely the sense that is the object of Schmitt's ire. Schmitt's work clearly indicates that *nomos*, has deep pre-discursive roots, or that in some sense 'law' is also the law of the earth, not simply the object of legislation, execution, or judgment, it is a transposition of ontological nature of Europe. Not merely the moving of borders from A to B on the surface of one self-same continent, but a change in the nature of the surface, in the nature of the border, in the relation of individuals—real, living bodies, with concomitant physical borders and limitations, and States, 'legally' constituted 'bodies' which in turn, as we have tried to show above, are not simply pronouncements ('legality', as Schmitt himself would say) but certain, specific kinds of *being*.

Here is Schmitt's definition in the early pages of *The Nomos of the Earth*:

*Nomos* [...] comes from *nemein*, a word which means both 'to divide' and 'to pasture'. *Nomos* is accordingly the immediate form in which the political and social order of a people makes itself spatially visible, the first measuring and division of the pasture, that is the partitioning of land and also the concrete order which lies in it and follows from it. [...] *Nomos* is the *measure* that divides and spatialises the ground and soil of the earth in a particular order, and thereby in the given form of the political, social and religious order.<sup>36</sup>

<sup>36</sup> 'Nomos dagegen kommt von *nemein*, einem Wort, das sowohl 'Teilen' wie auch 'Weiden' bedeutet. Der Nomos ist demnach die unmittelbare Gestalt, in der die politische und soziale Ordnung eines Volkes räumhaft sichtbar wird, [40] die erste Messung und Teilung der Weide, d.h. die



Schmitt's historical reconstruction begins in the sixteenth century when the notion of *jus gentium* could not refer to a plurality of peoples to whom an equally plural system of law would apply. The notions of *self* and *other*, as they are often used today were in some sense applicable, but the *topology* of otherness was not yet differentiated. The spatial order, which associates people and space, was not global in the sense that the term can be understood today, nor was it 'local' in the sense that place and varying place were real dimensions. Schmitt uses the term *terran*. This original 'terrane world' first underwent change in the fifteenth century age of discovery, when the first evidence of 'global consciousness' appears.<sup>37</sup> In this context, 'people' is not understood as a given group to whom a set of rights might be applied. It is the *singular* origin of the notion of right. The expression *jus gentium*, thus implies a powerful double genitive. Right comes *from* the people and is applicable *to* the people. There exists no people for whom it might be a *question* of the applicability of *jus gentium*. The meaningfulness of the legal system reposes on the singularity of the people.

The historical progression, which Schmitt carefully charts out in *The Nomos of the Earth* traces the effects of the de-coupling of the legal system from this singular origin, and its transformation into a plural system based on an application to 'peoples' in the plural. The final phase of this transformation corresponds to the definitive disappearance of European *Völkerrecht* and its modernised incarnation as 'international law'. This innovation simultaneously renders the differentiation between *Völkerrecht* and *Staatsrecht*. To this delineation, can be added a number of others, such as *Privatrecht*, *Wissenschaftsrecht*, *öffentliches Recht*.

Against this background, Schmitt paints the picture of the new *nomos* of the earth. The central element in the new European topological situation is the domination of the global economy, or to use the contemporary term, *globalisation*, which clearly has always only meant *economic* globalisation. The historical turning point is the period from 1890 to 1939, from the Monroe Doctrine to the 'Wilson Doctrine'.<sup>38</sup> Until the 1890s, says Schmitt, the dominant perception was that *Völkerrecht* was a particularly European *Völkerrecht*, based on the classical notions of humanity, civilisation and progress.<sup>39</sup>

Landnahme und die sowohl in ihr liegende wie aus ihr folgende konkrete Ordnung [...] Nomos ist das den Grund und Boden der Erden in einer bestimmten Ordnung einteilende und verortende Maß und die damit gegebene Gestalt der politischen, sozialen und religiösen Ordnung.' C Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, Duncker & Humblot, 1988) 39–40.

<sup>37</sup> *Ibid.* 19.

<sup>38</sup> 'Die 1823 verkündete amerikanische "Monroe Doctrine" ist in der neueren Geschichte des Völkerrechts das erste und das bisher erfolgreichste Beispiel eines völkerrechtlichen Großraumprinzips. Sie ist daher für uns ein einzigartiger, wichtiger "precedent". Von ihr, nicht von der Lehre der "natürlichen Grenzen" oder dem "Recht auf Land" oder gar den eben erwähnten Regionalpakten, ist auszugehen, wenn der Rechtsgedanke eines völkerrechtlichen Großraumprinzips zur Erörterung steht.' C Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (Berlin, Duncker & Humblot, 1991) 22.

<sup>39</sup> Above n 36, 201.

Simultaneously these principles began to find themselves detached from their previous topology, by and through the advances in globalisation. The distinction between *peoples*, between *jus inters gentes* and *jus gentium* disappeared from the discourse of international law, and consequently the problem of a spatial order disappeared with it.<sup>40</sup> This process is what Schmitt calls *Entortung*—both displacement and detachment from spatiality in general. The general *Entortung*, which Schmitt sees taking place in Europe in the 1950s has put it into a whole new constellation of powers and doctrines, for which legal positivism of the day has no influence at all. Schmitt's analysis of the European present shows that it has completely lost its relationship to any *Raumordnung*.

The most pregnant illustration of this tendency in its institutionalised form are the attempts at European unification. Schmitt attributes, for example, the geopolitical failures of the League of Nations precisely to its absence of a concrete *Raumordnung*. And the seeming lack of *nomological* vision in Briand's notion of the Union Européenne, suffers from the same weaknesses. These problems are exacerbated by the entire problem of war reparations, by the intervention of a freshly constituted global community in the 'internal' affairs of the European continent.<sup>41</sup> In the same way, Schmitt sees the Treaty of Versailles as a further illustration of the domination of an 'empty legal and contractual positivism, which was nothing more than the juridical instrument of the legality and legitimacy of the status quo, and indeed principally the status of Versailles'.<sup>42</sup> Within the logic of *nomos* the central question for Schmitt is which new *Raumordnung* will become dominant in the period to come.<sup>43</sup>

### Conclusion: Contentious Europe or the Dialectic of Resistance

As is well known and already exhaustively debated, in its decision of 14 October 1994 the German Constitutional Court found that the European Union could not be considered a federal entity into which the German Federal Republic could *legally* be integrated according to the terms of the Maastricht Treaty. Its reasoning was based on a certain notion of democracy, which the Court found to be absent from the European empirical picture. 'Democracy', according to the Court, is based on the existence of a democratic polity, itself by nature based on an observable *demos* emitted by and empirically observable people (*Volk*). The amalgamation of the European 'peoples' cannot, according to the Court, be considered a people. Since the principle of democracy would be unacceptably emptied of content if it were to exercise state power without

<sup>40</sup> *Ibid.* 203.

<sup>41</sup> C Schmitt, 'Der Begriff des Politischen' (Berlin, Duncker & Humblot GmbH, 1996) 56.

<sup>42</sup> Above n 38, 15.

<sup>43</sup> *Ibid.* 214–17.



reference to a 'relatively homogenous' civil population (*Staatsvolk*). Thus the entry into full of the GFR is judged unconstitutional.<sup>44</sup>

We have already dealt with the central complaint of the GCC—the notion of homogeneity as a condition for the legitimisation of a Union—in our discussion of Carl Schmitt. In an oft-cited paper, Weiler opens a parallel set of questions about the conditions of possibility for the establishment of a *demos* and its relationship, in the history of constitutionalism to the notion of constitution, and what he calls the GCC's 'No Demos Thesis'.<sup>45</sup> Weiler's criticism of the German Court's decision correctly takes its point of departure in a *conceptual* problematisation of the terms used by the Court. A certain 'organic' idea of *Volk*, affirms Weiler, is the basis for the modern-nation state, in the sense that it forms the polity, which is the basis for the constitution. Ethnicity, he admits, has a roll to play in the notion of national belonging. Still, argues Weiler, by formulating the conceptual constellation as the Court does, (*demos* = *Volk* = polity), it both definitively denies the prospect of European democracy and proclaims a kind of de facto European internal alienation. Weiler answers by challenging and then re-formulating both the notion of *demos*, such as it is used by the Court, and the notion of polity. What is most compelling about Weiler's argument is the nuance with which he reconstructs the concept of *Volk*, refusing, in the end to de-mystify it, to debunk it as a residue of nineteenth century political romanticism.

Weiler's critique is two-pronged. On the one hand, it argues that from an empirical point of view, the charge of 'no *demos*' is simply not accurate. A look at the 'European anthropological map' reveals significant pockets of 'social cohesion', 'shared identity' and 'collective self'. On the other hand, Weiler points to the juridical antinomy that informs not only the Court's decision, but the constitutions of national democracies in general, namely that the *demos*-nation link is circular. The *demos*, this un-definable amorphous ethnic-organic-cultural entity, is practically speaking defined by members of the nation. The nation constitutes its *demos*, which in turn gives substance to the nation, which constitutes the *demos*, etc. Weiler's critique is convincing, but by way of conclusion, we would add a voice to the chorus of critique of the GCC finding, in the form of two remarks.

The first remark is to some extent parasitic upon Weiler's reflection on the actual, empirical existence of a European *demos*, an observation, which flies in the face of the GCC ruling. There is indeed a clear and empirically observable European *ethnos*. For better or worse, the empirical measure of this *ethnos* is, on the one hand, the rainbow of political conflicts on the national level sur-

<sup>44</sup> EuGRZ (1993) 439.

<sup>45</sup> JHH Weiler sets the tone for the most engaging debate on the legal philosophy of the European Union. His oft cited 1995 working paper on the German decision: <http://www.law.harvard.edu/programs/JeanMonnet/papers/95/9506ind.html> and its reworking in *The Constitution of Europe* are the basis for these comments.

rounding immigration policy, national language, cultural heritage, social support, minority rights, religious freedom, culturally and religiously marked content of school curriculum, etc. On the other hand, the presence of a European *ethnos* is present in the transnational or European debates on coordinating immigration policies. The Schengen Agreement has served to Europeanise to some extent these national traits by Europeanising the legal guidelines for immigration. There is a clear empirically observable European ethnicity. But more importantly this ethnicity is in particular observable in the political *conflicts* which arise within the framework of each nation-state around the question of immigration and migration. Ethnicity as a perceivable substance arises in moments of conflict, insecurity, and political strife. The *concept* of ethnicity erupts in border disputes. And yet the conceptual twist on the traditional logic of border disputes is that the borders are no longer simply identical with the frontiers of nation-state territories. They traverse territory, institutions, groups and collectivities. They demarcate the cultural consciousness of any given collectivity, divided, regroup and reform the self understanding of all social and cultural formations—most of all that of the modern nation-state. Ethnicity is thus structurally identical to the constitution such as it is thematised by Weiler in *The Constitution of Europe*. It is *phenomenal*. Its essence is its appearance. And this appearance is inseparable from conflict and contention. Schmitt's critique of European conceptual territoriality meets the phenomenality of ethnicity.

The second remark concerns the evolutionary nature of the *concept* of constitution. Just as the ethnic fabric of Europe is in a state of change, and just as the concept of ethnicity is in constant evolution, so the very notion of constitution is in a state of change. To understand the present situation of European constitutionalism requires that one understand the relation between *ethnos* and constitution in a dialectic. In other words, both the present state and the evolution of the one is implicitly dependent on the other. As the European ethnic topology changes, the European 'constitution', which pretends to have institutionalised it also changes. But what is more, the concept, the self-understanding of constitution evolves as well. This is Schmitt's second fundamental contribution to this discussion. The cultural-spiritual topology implies an evolution in the very notion of what a constitution is.

Belonging cannot be utterly and timelessly institutionalised in the form of a constitution. The European collectivity is not a sack of identical marbles, which can be seamlessly conceptualised and thus constitutionalised. It is rather a set of heterogeneous individuals and groups which by nature *resist* collectivisation, or which 'accept' constitutional collectivisation dialectically as part of the logic of recognition, adopting the rule of collectivisation in order to achieve the right to dispute it. The *resistance* to homogenisation, among the populous, among the political elite, and among the constitutional theorists, in the German or other national courts is the basis of dialectical substance of the European polity. The European mode of constitutional existence is the production,



contention, and renewal of a European polity. This understanding calls upon both the deepest European tradition of the public sphere, and an understanding of that tradition as one of debate and dissent. This is the most profound democratic impulse and doubtless the greatest hope for Europe. The task for those who would construct a European institutional scaffold is to relocate polity in resistance to polity, to recognise polity in the form of the *question* of polity.