

11 The evolution of European Union law and Carl Schmitt's theory of the *nomos* of Europe¹

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Territory, sovereignty and jurisprudence

In style and approach, Carl Schmitt's *The Nomos of the Earth* represents a departure from his earlier Weimar and inter-war works (2003). Written between 1942 and 1945, the book widens the scope of the juridical pessimism already established as one of the main themes of his career – sovereignty and legitimacy on the German national level – to questions surrounding the status of international law. In line with his claims about the historical withdrawal of jurisprudence in the national framework, *The Nomos of the Earth* develops an extended historical analysis of what Schmitt sees as the decline of the Eurocentric order of international law, beginning with Hellenism and reaching its nadir in the post-war institutions of international law. The book advances an idiosyncratic analysis of the universe of international jurisprudence surrounding the League of Nations, whose roots extend all the way back to the post-Napoleonic Monroe Doctrine (1823).

What is innovative about Schmitt's historical demonstration of the decline of European jurisprudence is its correlation with the decline of a certain European *spatial* order. According to Schmitt, the nature of the evolution in the relation between humans and the earth has been decisive for the nature of traditional legal order. In his view, the historical links to European international jurisprudence, *jus publicum Europaeum*, have decayed with the old world order that supported them. Territoriality, once the foundation of the nation-state, has evolved, causing a parallel change in the nation-state paradigm of sovereignty and the fabric of international law, which has its basis in that paradigm.²

The process of European integration has advanced further than any of the historical European utopians had dreamed. Despite the political setback posed by the failed referenda in France and the Netherlands in May and April 2005, the draft Constitutional Treaty for the European Union, together with the most recent enlargement begun on 1 May 2004 (to be completed with the accession of Romania and Bulgaria in 2007), remains a strong expression of a unified and coherent set of principles of institutional unity. Interpretations are sharply divided as to why the French and Dutch voted to reject the treaty (de Boisgrollier 2005; Moravcsik 2005), though most centre on domestic issues, such as

scepticism related to the rapid enlargement process (Hooghe and Marks 2006; Whitman 2005). Against this background, the question of the nature and aim of a European legal system becomes more pressing. What does it mean for any given institutional set-up to be European? Just how European is the European Union legal system (Niess 2001: 9–10; Burgess 2002: 469–470)? The question of the fundamental sense of Europe and what kind of institutional set-up it calls for is far from resolved (Pageden 2002; Passerini 2002). European unity remains something other than the unity of Europeans. Nor is it constituted by the unity of its political institutions, government, legislatures or courts. It is something more, though clearly something less as well.

If Schmitt was correct in his prognoses in the mid-1940s about the end of a global era and the rise of a new, yet uncharted, world order, then the evolving character of European jurisprudence would likewise be structured by the particular *sui generis* relation between European territoriality and traditional national and international categories of law. The architects of the nascent European Coal and Steel Community, the forerunner of today's European Union, would have faced the same historical conditions, carrying out their intellectual work with the same cultural, social and juridical raw materials, against the backdrop of the same concrete historical experience as Schmitt. The fundamental insight of the era, for observers as different as Schmitt and the signatories of the Treaty of Paris, was that the essential concepts, categories and values, as well as the legal concepts and assumptions, are trans-national and extra-territorial, and that they defy, for structural reasons or by historical contingency, the political and legal institutions of our time.³ The particularity of the European present lies in the unique way of organizing the relation between law and space.

Schmitt's stand-or-fall criterion for the validity of an international organization is precisely that it *not* be *international*, but rather *inter-national*. From a juridical perspective it must reattach the wayward fellows *jus inter gentes* and *jus gentium*, while at the same time recognizing the pragmatic, post-Hegelian impossibility of cultural, political and legal universality in any institution, be it local, national or supra-national.

As we will see, European Union law occupies a strange and complex position in this conceptual landscape, situated uniquely between an international law model and a federal model. It belongs to the project of European construction to develop a kind of jurisprudence which communicates with national legal traditions in the tradition of common law, based on culturally determined norms and customs, and which also appeals to universal principles and the formalism of international civil code. The recurring challenge for the European Court of Justice (ECJ), founded in 1952 through the treaty of the European Coal and Steel Community, and reinvigorated through successive treaties, has been to navigate this terrain between the general scope of international law, law established between member states, law established between member states and non-member states, and the growing corpus of law established *sui generis* between the EU and member states.

This chapter explores the correlation between Schmitt's historical analysis of

the *jus publicum Europaeum* and the grand geopolitical and civilizational project of European construction from 1950 to 2006 as it is expressed in the evolution of European Union law, exploring the applicability of the concept of *nomos* for the nature of EU evolution and interpreting general elements of the European legal system in terms of this concept. It suggests that European law, as it has evolved through the process of European construction, cannot, therefore, replace the *jus publicum Europaeum* as a new global *nomos*. However, our survey of European legal construction since the 1950s confirms Schmitt's diagnosis but not his pessimism, suggesting that the evolving European legal system might well offer one answer to the problem posed by Schmitt: a new *nomos* is emerging to respond to the challenges he perceived. Yet this *nomos* is characterized by a dialectical mix of 'limited' universality and local particularity, espousing a multi-cultural flux of values, which have a systematically blurry connection to territory, which function in the global economy and which are, moreover, protected by a security agenda that reaches beyond the 'traditional' inter-national space of Europe.

Schmitt's notion of the *nomos* of the earth

Carl Schmitt's concern in *The Nomos of the Earth* and a number of other post-war writings is to underscore and draw the consequences of the historical specificity of international law, to map its historical determinations and the parameters of its validity in the course of world history. It is an attempt to historically link fundamental changes in the nature of international jurisprudence with changes in the cultural, social, political and *spatial* order of the world.

The provocative and innovative historical analysis of the *Nomos* book would be impossible without the equally ground-breaking conceptual tools it deploys. In particular, Schmitt's analysis of the evolution of international law and the European legal order grows out of his singular interpretation and application of the concept of *nomos*. In ancient Greek, *nomos* can be defined as 'that which is in habitual practice, use or possession'. It is thus variously translated as 'law' in general as well as 'ordinance', 'custom', derived from customary behaviour, from the law of God, from the authority of established deities, or simple public ordinance (Liddel and Schott 1940). *Nomos* is also 'law' understood in the sense of rationality, the 'reigning' order of things, or what we would today call 'discourse'. Finally, it derives from the verb *neimô*, which means 'to deal out', 'to distribute' or 'to dispense'. It is thus also the distribution of rationality, both physical and metaphysical, the logical organization of things in space and time. It is the spatialization of rational order. *Nomos* implicitly includes an aspect of power, which can, as Schmitt himself underscores, lead to confusion about the dimension of power. It can designate the subject of power, the holder and exerciser of power, but should not be limited to this sense (Schmitt 2003: 338).

Nomos refers to both territory and the rationality or discursivity of the order that organizes it. It designates the order established through an appropriation of land, a land seizure (*Nahme*), which orders the earth and the relationship

between subjectivity and power, ownership and action on and around it. It also designates the act of establishing order, of logic or rational discourse through the original partitioning of land (ibid.: 341). Yet more importantly, *nomos* is not fixed, but, rather, it constitutes the reality of territorial order. The partitioning or dividing or spatial organization of land is never simply a moment of crystallization of territory and the administrative laws that organize it, but rather it is a productive shaping of the dynamics in and above and all around the territory. Indeed, Schmitt's development of the concept of *nomos* is meant as a polemical alternative to the positivistic understanding of legal order that he sees as bureaucratically encroaching on European jurisprudence in his own time. 'The *situation établie* of those constituted dominates all customs, as well as all thought and speech', reiterates Schmitt in the *Nomos* book. 'Normativism and positivism then become the most plausible and self-evident matters in the world, especially where there is no longer any horizon other than the *status quo*' (ibid.). *Nomos* must therefore not be understood as an instrumental prescription of law, which precedes its application and somehow exists prior to the territory over which it has jurisdiction. On the contrary, the fundamental meaning of territory, of inhabited or uninhabited space, that is, the *territoriality* of the territory, arises with its *nomos*. This is what Schmitt understands when he calls *nomos* constitutive: it constitutes the very territoriality of territory through its organization of it. It is indeed an ordering of reality, but one which orders reality by constructing it. The geographical reality constituted by land acquisition in turn plays a role in determining the shape and form of international law.

The *jus publicum Europaeum* and the new European *nomos*

In the essay 'The Plight of European Jurisprudence' from 1943 (Schmitt 1957), written at approximately the same time as *The Nomos of the Earth*, Schmitt evaluates what he sees as the state of the art of European jurisprudence and, in doing so, comments on the nature of European community in terms of an actual and possible legal framework.

For Schmitt, it is the burgeoning legal positivism that has shaped and determined the evolution of the informal European legal community. According to this model, which Schmitt sees as spreading and developing throughout Europe, the formal validity of law lies exclusively in its propositions, combined with a state that is willing to enforce them. According to the positivist position, laws are, by and large, instrumental: their validity is identical to the force of their implementation. For Europe, politically torn and tattered after two world wars, no substantive foundation for law seems available. Here Schmitt is referring to individual European nation-states and the aspects of a shared legal order they manifest. The prospect of a common European legal system in the sense we see it today in the institutionalization of EU law is distant since, as he explains, there is precisely no common political will to enforce a European law if there were one. This is of course true for the state of European solidarity in 1943.

Schmitt then unites his critique of the state of jurisprudence in Europe with a

parallel attack (in the *Nomos* book and elsewhere) on the destitute tradition of *jus publicum Europaeum*, the European law of nations (Schmitt 1957: 386). From the perspective of legal positivism, state law and international law have fallen completely apart from one another. They have, according to Schmitt, two quite distinct sources of law and procedural principles. The internal and the external are thus alienated from each other and a kind of political realism has become the abiding theory of politics (cf. Koskeniemi 2000: 22–24). The domestic and international belong to two utterly different spheres and have no conceptual or even practical communication with each other. Contracts and agreements made between European states have, for the positivist, formally speaking, nothing at all distinct in comparison with contracts and agreements made with non-European states. The fact that two European states might enjoy an international agreement, as opposed to having one with a non-European state, is strictly a matter of coincidence (Schmitt 1957: 388; cf. Slaughter 1995, 1997).

Since the 17th to 19th centuries the European spirit has developed a specific international law, now at the turn of the 19th and 20th centuries, international law has dissolved into countless indistinguishable inter-state relations of 50 to 60 states around the whole world, in other words into a frameless universality.

(Schmitt 1957: 388)

The assumption upon which Schmitt bases his lament over the absence of a coherent (non-positivist) legal order is precisely the same assumption he criticizes elsewhere in his assessment of the international legal order (League of Nations and United Nations), namely, that it is an amalgam instead of an interconnected, organic legal system. The strange reality, however, as Schmitt himself underscores, is that European states share legal systems similar enough to form the basis of a common legal community. In theory, Europe has reached the situation Schmitt is searching for, the basis for a common jurisprudence based on a particular historical and, not least, geopolitical path. Yet shouldn't the common ethical, political and cultural foundations of the national legal systems in Europe satisfy Schmitt's criteria, thus rendering a further *jus publicum Europaeum* unnecessary or uninteresting? And if not, if the European legal system falls short of a Schmittian *jus publicum Europaeum*, what indeed distinguishes one from the other?

The new European *nomos* will not be a legal order in which all European nation-states adopt one and the same parallel legal system, thus sharing a single tradition that is unaffected by national particularity. Nor will it resemble a re-transmission of Roman law as a 'spiritual and intellectual Common Law of Europe' (ibid.: 392–393). Such a re-transmission would be the opposite of the 'atomization' of the nation-states which Schmitt so vehemently attacks in his evaluation of the League of Nations and the UN. A true *jus publicum Europaeum* will need to be both more and less than a shared tradition, passively adopted. It will need to repose upon *both* shared traditions *and* national,

individual and case-based particularity. As it happens, something like a trans-sectoral legal order has indeed begun to emerge, and continues to develop, in Europe.

Universality and particularity of the European *nomos*

The new geopolitical configuration that emerged from the Treaty of Westphalia (1648) was based on a concern for security. Even though the political landscape was considered a thing apart, European culture has been at pains to see itself in terms of geopolitical particularity, as one meeting point, among many possible, between territory, culture and history. Indeed, the European cultural self-understanding is anything but particular; it is the very invention of universal pretension. Typical of this pretension is the inevitable evolution of European jurisprudential thought. The newly humiliated European Constitution, like its treaty-based predecessors, sets out a conceptualization of the European, which, like the logic of value itself, defies the territorial confines of the European continent. As the Preamble to the draft Constitution states:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law; Believing that Europe, recruited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest, most deprived, that it wishes to remain a continent open to culture, learning and social progress, and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity through the world; Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny. . . .

(European Commission 2004: 12)

Europe's past is conceived of as the foundation for the values of its present and its future. There is, according to the Preamble, inspiration to be found in the past, inspiration which also contributed to developing the inviolable and inalienable 'universal values' of our present. Those values, though universal, must be posited again as the basis of the Europe of today, in order both to overcome the divisions of the past and to forge together the common 'destiny', which, even though it is the destiny of Europe, appears to be sufficiently threatened to require inspiration from the past in order to safeguard it. An insistent, though fundamentally unstable, notion of universality inhabits these opening aspirations. On the one hand, the cultural inheritance of Europe's past is the origin of the universal values of the present, the basic political principles that guide the European construction of our time. On the other hand, that past is one of division and clashes, division which must be overcome in order to deploy the

values, which nonetheless were valued before, towards the uniting of our present, which finds itself under the inspiration of the past. Thus, the strange logic of universal value: universalism of the past is fissured and must be transcended in order to achieve universalism.

This is the tension between a transcendental notion of universality, a notion whose origin and destiny are doomed to remain invisible like Schmitt's mystical origin of international law, and a kind of normative universalism, a universalism-to-be, a universalism understood as in some sense already here, but nonetheless necessary to effectuate and operationalize in, and through, European construction. A dialectical opposition between universality and particularity in jurisprudence would represent a situation in which the *particular* application of law would be everywhere and always the same, and in this sense *universal*. According to the principles of European law the particular authority and competency in national and local settings does not call for universal application in the same way. Yet European law is not simply opposed to universality; it, rather, deploys a kind of limited universality.

The geography of values

The universalism of European cultural history thus obeys a conceptual topology that we are at pains to map onto its physical geography. This is so for two reasons: first, because geography is never purely physical geography; it is always made conceivable, understandable, and communicable by a network of ideas about place, space, emptiness, etc., which do not collapse onto it. Second, conceptual topology of any kind contains an implicit reference to the materiality of things in space and in time. One does not precede the other; both render transcendence *strictu sensu* meaningless. In the eyes of the Constitutional convention, Europe is both a place and a transcendental, extra-spatial entity, a set of ideas and values, which by their very nature are trans-national and international.

Thus the themes of 'territoriality' and 'territorial cohesion' recur again and again in the Constitution's provisions. Though the European Union remains a geopolitical entity whose physical boundaries are beyond dispute, the cohesion of its territoriality is explicitly posited as an object to be reinforced. Among the EU's objectives, formulated in Title 1, is the promotion of 'economic, social and territorial cohesion' (European Commission 2004: 16). At the same time, the Union will seek to maintain and respect the 'territorial integrity' of the member states, 'maintaining law and order and safeguarding national security' (ibid.: 17). EU citizenship confers the right to work and reside freely within the territory of member states (ibid.: 19), to enjoy rights of EU citizens in the 'territory' of third states. It becomes evident that, on the one hand, the classical notions of nation-state self-constitution and relation to others are clearly valid and in vigour; on the other hand, the repeated reaffirmation of the notion of territoriality reads nearly like a throwback to an age when the notion had far less anchorage in time and tradition. The notion of territoriality is reiterated precisely

because the draft EU Constitution comes to the fore in a moment when territoriality has never been so precarious, never so distant from its own self-evidence.

In this sense, it is also remarkable that a new figure of spatiality emerges from the draft Constitution, equally marking the new *nomos* of the EU. The value abstractions announced and confirmed in the draft Constitution are repeatedly associated with an *area*. Thus, 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers' (ibid.: 15, 48). In terms of its neighbouring states the European Union shall 'also promote an amorphous space of influence', 'an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation' (ibid.: 58). It shall also 'constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States' (ibid.: 187). The values of the European Union are not positively and indistinguishably attached to singular individuals or institutions, not even to particular determinations of space such as borders and walls. The European values to be institutionalized in the Constitution of the EU comprise semi-amorphous areas, zones of value, non-linear and non-discrete. Though the Constitution by nature unites Europe under the aegis of one set of principles, these principles can only be understood and observed in terms of local, regional and, not least, institutional variation. To the degree that the concept of *nomos* assumes a homogeneous value-landscape it is at tension with the European reality.

The Charter of Fundamental Rights, contained within the Constitution, lays out an unsurprising set of traditional European values, based on the Universal Declaration of Human Rights (UDHR) tradition of humanist principles, supplemented by global capitalist notions of free movement of goods and market liberalism. *Values*, moreover, provide a central theme throughout the text. Most significant for our purposes is that the distinct European tradition, geographically discrete and territorially sovereign, nonetheless constitutes an amorphous 'zone' of values and rights (ibid.: 15–17). The values which form Europe exceed it as well. By the very logic of value, the European topology of value is not identical to the European geography. This 'area of freedom, security and justice, without internal frontiers, and an internal market where competition is free and undistorted' does not map onto the political geography of Europe, rather it draws its own value-topology in a Heideggerian fashion (Heidegger 1986). Simultaneously the draft Constitution insists on one of the primary inter-national values, namely the maintenance of 'territorial cohesion and solidarity' among member states.

This is only one form of the great paradox of our time, reduced to the term 'glocalization': globalization opens the horizon to a shared global experience of ideas, in particular unprecedented knowledge of the local. By virtue of being global we have never been so local. This is the truly Hegelian moment of global society: the universality of universal precepts is overturned by the universally valid experience of their specific application and applicability in particular settings. Market liberalism, to take the most prominent example and a central tenet in European construction, is only universal to the extent that it can be applied in

the individual global settings that were completely unforeseen by those who first formulated the principle. In terms of the Preamble, the European values will be spread to all Europeans, all who fall under the same umbrella of European-ness will be respected for their difference, precisely because they are different, weak, deprived.

By the same token, national individuality is not opposed to European identity. The national schisms that caused the European wars of the past are not in some sense exceptions of history. Nor are they inferior moments in the construction of a higher order of civilization. The dialectical experience of conflict-in-unity is the very essence of European thought, both on the political level and in the domain of jurisprudence. Without the geographically based cultural heterogeneity of this otherwise homogeneous peninsula, the notion of a European unity would be unthinkable.

This set of ideas stands in contrast to what Schmitt rejects in the League of Nations model of international organization: namely, that it homogenizes the member states, reducing their political subjectivity and legal personality to mere straw men; that they become mere political and juridical atoms, with no internal politics or interpretative jurisprudence. The far more dialectical self-understanding of the draft EU Constitution conceives of the political subject and legal personality of member states, and the EU as a whole, as *permeable*.

Spatiality of the new European *nomos*

The same can be said of the European legal order. Indeed the space of international law – its organizing *nomos* – has always been severed and incised, cut and engraved. The fundamental mutation that Carl Schmitt sees after the Second World War can also be characterized as a lateral cut along the geographical East–West line. This cut does not, however, hinder further cuts and divisions on different levels, traversing different planes, zones and spheres. These cleavages exist in both space and time. International law, during the Cold War, is simultaneously universal, bipolar and heterogeneous. In Europe, in particular, there is a clear ‘north–south’ distinction separating Greece, Portugal, Spain, southern Italy and Ireland from the rest of Europe. The European system of norms is also torn in two across the trans-Atlantic axis. After 1990 the abiding bifurcation dissolves, the fall of the Berlin wall brings with it the end of communism, the unification of Germany, the collapse of East–West European multilateralism, and fresh Eastern European aspirations to join the economic development of the rest of Europe (Gautron 1999: 6–7).

Moreover, the 1990s introduced a new landscape of both states and inter- and non-governmental organizations. The former Soviet Union had broken into a number of states, while ex-Yugoslavia and Czechoslovakia also brought new states onto the scene, all of which make transitions to both market rules and legal norms at differing speeds. The juridical questions related to borders, monetary zones, trade and taxes, armaments, security, and rights of individuals and citizens become geometrically more complex.

Simultaneously, a new juridical cosmos of inter- and non-governmental organizations has become more and more dominant, supplanting, in some settings, the legal and economic society at large. To this can be added the expansion of the Council of Europe and the Organization for Security and Cooperation in Europe, a still unfinished revamping of both NATO and the Western European Union, the Organization for Economic Cooperation and Development, and lastly, of course, the various enlargements of the European Union. Each of these institutional changes has its own set of political, economic and juridical consequences in each of the European states. These political and institutional changes in European 'architecture' signal a shift in the *nomos* of European jurisprudence: they reorient the way in which the European institutions, which assume or are given the task of operationalizing the (universal) principles of European construction, actually map onto or relate to a heterogeneous European reality.

Anthropology of the new European *nomos*

Though debate among political scientists surrounding the question of what kind of political entity the European Union actually is has not abated, there is consensus among legal experts that it constitutes a *sui generis* phenomenon of jurisprudence. EU jurisprudence distinguishes itself from both classical international law and all types of federal jurisprudence. As the Court of Justice of the European Communities stated in the oft-cited 1963 judgments by ECJ Van Gend and Loos:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

(European Court of Justice 1963)

Even before the Treaty of European Union (TEU), in which the notion of Europe as a community of shared values first arises, the Court of Justice was struggling to draw the consequences of a system of legal ties without precedent. Also in the well-travelled *Costa vs. ENEL* case, the judgment makes visible the way in which social and political systems of legitimacy struggle to find their anchoring point in the legal system:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an

integral part of the legal systems of the member states and which their courts are bound to apply.

(European Court of Justice 1964)

Yet instead of one axis of comparison in the political sphere – an assembly of nation-state-like structures – the question of the status of the EU system is inevitably one which moves between the norms of national law and the categories of international law.

The multiple genealogies of European law

European law flows from a number of different sources, on different layers, international, European and national. It is an amalgamation of 'sources', but also a synthesis of *kinds* of sources of varying hierarchization (Hunnings 1996; Winter 1996; Cairns 1997; Chalmers and Szyszczak 1998; Evans 1998).

Writ large, the 'sources' of EU law consist of three levels of authority and legitimacy and are ordered in a hierarchical manner. The two primary sources of European Union law are: (1) primary law, the treaties creating the EU; and (2) the treaties entered into by the European Community with third states. The Treaty of the European Community, Article 249, then identifies the formally recognized 'secondary sources' or 'secondary legislation' of community law: (1) regulations; (2) directives; and (3) decisions. Finally, a set of tertiary sources of European law are associated with the practices of jurisprudence of the European Court. Such sources are decision-based and fill out the areas not directly covered by the secondary and primary sources. These are: (1) Acts adopted by representatives of member state governments; (2) the case law of the European Court of Justice (ECJ); (3) member state national law; (4) general legal principles; and (5) principles of public international law (MacLean 2000: 91–92).

These three layers of source material for EU law, differentiated into two, three and five sublevels, form the substantial sources. The treaties represent the most general or universal level of legal sources. They dialogue with the grand principles and philosophical traditions, questions of design and destiny of the European project. Here, the scope of legal interpretation is broadest and its politicization the most salient. The secondary sources integrate the technical and technocratic elements to be covered in any regulatory construction. The third level sources provide space for politics on all levels, though predominantly they open the way for inter- and intra-national politics. Member state national governments express political identity by asserting the legal validity of governmental acts. The case law of the European Court of Justice particularizes the palette of legal sources by bringing non-state groups, corporations, classes and individuals to the corpus of law. To these are added conventional principles of national law and international public law, as well as the general philosophical principles of legislation. The 'mystical' sources of law, proclaimed by Schmitt at the outset of *The Nomos of the Earth*, might very well be the general precondition of law itself (Derrida 1994; Schmitt 2003).

The topography of the new European *nomos* I: competence, meta-competence, para-competence

These dilemmas and conundrums between general principles and the complexity of their application gave birth eventually to the theory of competences, itself particular to the EU and designed to navigate the treacherous waters between the bare Schmittian universalism of international law, and the federal law of the hitherto close approximations of legal community. Competence is not an extra-legal attribute, but rather the fundamental attribution of law. Competence designates the foundation of jurisdiction, the basis of authority and legitimacy for any given field of legal issues. Yet, like legitimacy and authority, competence is necessarily the object of attribution. Competence can only be attributed through competent authority. Thus, a meta-competence becomes the precondition of competence itself. The EU does not idly wait for competence to evolve naturally through national court procedures. Rather, it possesses the right of attribution of competence (also known as 'transfer of sovereign rights').

Like other aspects of the inter-national EU project, the theory of competences finds unavoidable the division of legal thought into internal and external. Yet, across the EU external border and through its internal borders, there runs a complex of extra-territorial flows of cultural meaning, legitimacy and competence. However, instead of aligning itself with the model of federal law, whereby competence is attributed according to substance, the attribution of Community or Union competence follows the lines of the aim of the treaties, doing so with 'variable intensity'. The EU thus possesses a mechanism for the distribution of legal power which has a *géométrie variable*. As a function of this intensity one can distinguish situations in which the Community has at its disposition competences which are substituted for those of states, and situations in which the Community has at its disposition a coordinating competence, itself susceptible to varying degrees of coordination (Gautron 1999: 113).

The topography of the new European *nomos* II: supremacy, direct effect, subsidiarity

Three other recurring principles have marked the singularity of the European legal order: direct effect, supremacy and subsidiarity. *Direct effect* can be defined in broad terms as the mechanism whereby a European citizen can rely upon a provision of EU law before his or her national courts. The national courts are required to acknowledge, protect and enforce the rights conferred by the provision (Cairns 1997: 84). The notion of direct effect thus sets EU law aside from other international institutions in the sense that it relates directly to the individual. Whereas international law and international organizations confer rights and obligations on nation-states, EU law has the ability to exercise jurisprudence in an individual capacity. Individuals have a set of transnational European rights, which at the same time are protected by the jurisdiction of the national courts. *Supremacy* assures the precedence of EU law in cases where it comes into conflict with national law.

These structural principles are not formally assured in EU treaties. On the contrary, they have grown informally through the corpus of case material that has developed throughout the construction of the European legal system. The principles of supremacy and direct effect have a clear impetus: they move the centre of gravity of European jurisprudence away from the nation-state level, and towards the EU level. From this emerged the concept of *subsidiarity*, both in legal cases and in the political discourse surrounding the Delors presidency in the European Commission. The principle was first codified in EU law through Single European Act (1986) and later codified in the TEU (Art. 5, European Commission 1992) in terms of *competence*, specifying that

in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The triple mechanisms of direct effect, supremacy and subsidiarity thus put into place a regulation of the porosity of nation-state sovereignty. They support an international legal order in which the currents of universality are both supplemented and supplanted by those of particular rights and obligations. They realign the notion of authority in terms of the level of institutional competence instead of formal jurisdiction. The validity of any legal principle varies according to the national setting in which it is to be applied. On one level this legal-conceptual framework thus suppresses the very notion of abstract legal universality, replacing it with a system of 'local' legitimacy and authority; on another level the uniformity of application of the criteria constitutes an enriched universality, unifying European law as a standardized set of rules of application. These principles thus transcend the classical 'monist'-'dualist' dilemma which Schmitt bemoans in the 'Plight' essay of 1943 (1957). That controversy pits those who, like Kelsen, see national legal orders as 'creatures' of international law (monists) against those who, like Triepel and Anzilotti (see de Witte 1999: 178) argue that national legal orders were separate legal orders which resisted the penetration of international norms. The European legal system, if only by default, resists both poles of the debate.

Conclusion

In light of Schmitt's account of the *jus publicum Europaeum* and his concept of *nomos*, this chapter examined the general elements of the European legal system and the project of European construction from 1950 to 2006 more generally, expressed in the evolution of European Union law. To the extent that the evolving European legal system is not at present, and does not aspire to be, a global legal system, a new global *nomos*, in the sense of a world order based on the appropriation, dis-appropriation and distribution of the earth, it cannot fill the

void left by the collapse of the *jus publicum Europaeum* bemoaned by Schmitt. This impossibility lies in the far more modest aspirations of European construction, in the nature of the concept of *nomos*, in the finitude of the history of global expansion and in our experience of the finitude of our planet. This assessment, on the basis of our analysis above, leads to four partial conclusions.

First, the blurring processes that Schmitt observed early in the twentieth century have continued. The basic oppositions that Schmitt diagnoses in a number of his writings (inside/outside, war/peace, enemy/criminal) hold true, more so in our day than ever before. Second, there will never again be a global legal order.⁴ This is the consequence of the concept of universality itself. Both experience and the logic of universality teach us that a universal system is only universal in opposition to another. As Schmitt admonishes in *The Nomos of the Earth*, until outer space becomes a true space for conquest and appropriation on a grand scale, the global state will remain a fiction. Third, on formal legal grounds, the European legal system, with its dialectical mix of 'limited' universality and local particularity, the variety of its sources from different levels of European life, is in some sense one answer to the problem posed by Schmitt. The European legal sciences have already survived their own fissuring into legitimacy and legality. Moreover, the breakdown of international law into international politics is not a menace to European civilization, as Schmitt might see it, but rather inherent in the system of European law. Finally, the extension of Schmitt's analysis beyond the 1950s into the era of European construction confirms Schmitt's diagnosis, while at the same time suggesting that he was too pessimistic in his characterization of the European legal order. A kind of new *nomos* is emerging to respond to the challenges he perceived. Yet this is a *nomos* that is characterized by a multi-cultural flux of values, which have a systematically blurry connection to territory, which function in the global economy and which are, moreover, protected by a security agenda that reaches beyond the 'traditional' inter-national space of Europe. This is the new European *nomos*: a new spatial order, based not on space ordaining law, but building upon a new ordering of peoples, culture and value in space.

Notes

- 1 Many thanks to Sonja Kittelsen for assistance in the preparation of this chapter.
- 2 Schmitt's understanding of the European conceptual makeup evolved throughout his career. Following John P. McCormick (2003), we can roughly situate it in four categories: the fundamentally Christian project of the 1920s exemplified by *Political Romanticism* (Schmitt 1925), the Central European emphasis of the late 1920s most directly expressed in the essay 'The Problem of the Domestic Neutrality of the State' (Schmitt 1930a), the National Socialist *Grossraum* theory (Schmitt 1939), and the post-war analysis of the *Nomos* book.
- 3 Remarkably, the Treaty of Paris, which founded the European Coal and Steel Community, was signed by the founding members of the European Union – France, Germany, Luxembourg, Italy, Belgium, Netherlands – only a year after the publication of Schmitt's *Nomos* book. The Treaty, with its core philosophy of peace, sought to ensure the reciprocal integration of the European coal and steel industries which was

seen as the first and most obvious step towards a fusion of national interests. European peace would thus be assured not by diplomacy between nation-states, but by dismantling the political-economic sovereignty of nation-states, albeit gradually and only in selected areas. The Treaty was envisaged as the first step in a long and continuing process of building down sovereign national borders, based on the notion that the values of the European nation-states no longer map onto those nation-states, but rather exceed and precede them. Jean Monnet said:

The Schuman proposals are revolutionary or they are nothing. The indispensable first principle of these proposals is the abnegation of sovereignty in a limited but decisive field. A plan which is not based on this principle can make no useful contribution to the solution of the major problems which undermine our existence. Cooperation between nations, while essential, cannot alone meet our problem. What must be sought is a fusion of the interests of the European peoples and not merely another effort to maintain the equilibrium of those interests.

(Cited in Fontaine 2004: 17)

4 Of the Kantian variety most notably envisaged by Höffe (1999).

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