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Author(s): Jo Eric Khushal Murkens

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The Future of *Staatsrecht*: Dominance, Demise or Demystification?

Jo Eric Khushal Murkens*

The relationship between the national and the European legal orders is affected by the way it is theorised by the national constitutional traditions. This article will explore the opposing constitutional assumptions in Germany that underlie two interpretations of what in Anglo-Saxon countries is known as constitutional law: *Staatsrecht* and *Verfassungsrecht*. The two contending visions are generated from different conceptions of the European Union and, especially, the state. The origins of the German constitutional traditions will be historically reconstructed. Although *Staatsrecht* has historically offered the dominant interpretation of public law, *Verfassungsrecht* has 'de-mystified' the state. To continue to offer a coherent interpretation *Staatsrecht* need not abandon the state as its central concept, but will need to re-examine the content of the concept in light of modern forms of constitutionalism and European integration.

In a recent volume¹ three former German judges offer their 'contending legal visions' on the constitutionality of the European Union. On the one hand, a state-centred perspective is presented by Paul Kirchhof,² a judge on the Federal Constitutional Court from 1987–1999 and the reporting judge of the *Maastricht* decision.³ On the other hand, Ulrich Everling and Manfred Zuleeg, who were judges (from 1980–1988 and from 1988–1994 respectively) at the European Court of Justice, discuss European constitutional law from a Euro-centric perspective.⁴ Kirchhof's contribution is sandwiched between Everling and Zuleeg. This unfortunate positioning conceals the fact that his 'vision' of the legal structure of the European Union could not be more different from Everling and Zuleeg's. Moreover, little guidance is offered to the unsuspecting reader (ie a public/European lawyer not versed in German constitutional law) who is trying to make sense of the 'contending visions'. Anglo-Saxon public/European lawyers need to bear in mind that the literature on the European constitution and the issue of the *demos* has always had a different flavour in Germany. Stefan Oeter notes that

* Lecturer in Law, London School of Economics. I am grateful to Jochen von Bernstorff, Eric Heinze and Rainer Nickel for their constructive criticisms of earlier versions of this paper, as well as the two anonymous referees for their feedback. Thanks also to Sanmeet Kaur. All translations are my own.

- 1 A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart, 2006).
- 2 P. Kirchhof, 'The Legal Structure of the European Union as a Union of States' in von Bogdandy and Bast (eds), *ibid.*
- 3 *Manfred Brunner v The European Union Treaty*, BVerfGE 89, 155; English translation published at [1994] CMLR 57.
- 4 U. Everling, 'The European Union Between Community and National Policies and Legal Orders' and M. Zuleeg, 'The Advantages of the European Constitution – A German Perspective' in von Bogdandy and Bast (eds), n 1 above.

It is . . . not surprising that the Anglo-Saxon literature on European integration and on the set up of EU institutions can refer to the institutional settlement of the Community/Union as a 'constitutional system', whereas German constitutional theory (shaped by substantively loaded constitutional terminology) has great difficulty in doing so.⁵

If the language of constitutionalism causes problems for German public lawyers working in the European context, what is the subject of the 'contending visions'? What are the matters being disputed in the final pages of a book that is dedicated to the presentation of European constitutional law as binding law? The existence of 'substantively loaded constitutional terminology' suggests that the contention is a principal, rather than peripheral, feature of the European project. This article will show that the disagreement that separates Kirchhof from Everling/Zuleeg, but which is highlighted neither by the editors nor by the authors themselves, is buried within the constitutional traditions that split the German public law discourse. A summary of the arguments will illustrate the authors' disagreement in relation to the constitutionality of the European Union. At another level, the summary anticipates the fundamental constitutional schism: the authors' contributions raise questions relating to ultimate authority (legal sovereignty) and the proper interpretation of public law (ideology) which will be unearthed in the main part of this article.

Kirchhof claims that 'the existence of a constitution is fundamentally attributed only to the basic order of a state',⁶ and that since the European Union has not received direct legitimacy either from the *peoples* of Europe or a European *people*, 'the European Union cannot lay claim to the legitimation, the universal nature and the power of re-innovation of a constitutional state'.⁷ This point seems to be challenged (implicitly rather than expressly) by Everling, who suggests that 'the notion of 'constitution' can also be applied to an independent inter-state or supra-state entity, which is organisationally and legally fully equipped'.⁸ As a result, a European constitution would 'create clearer structures enabling the institutions to fulfil their functions more effective[ly] and present an understandable organisation to the citizens'.⁹ Similarly, Zuleeg argues that 'the EU's constitution is composed of Treaty law and judge-made law' which is more extensive than national constitutions. There are, therefore, 'good reasons' for referring to a 'constitution' for the European Union.¹⁰

The two contending visions are clearly generated from different conceptions of Europe: the European Union is either seen as a threat to the constitutional integrity of the nation-state (Kirchhof),¹¹ or as the institution that saved the nation-state by tying it into a supranational union in order to prevent permanently 'war, despotism and genocide' (Everling).¹² But the focus on Europe distracts from the ear-

5 S. Oeter, 'Vertrag oder Verfassung: Wie offen lässt sich die Souveränitätsfrage halten?' in T. Bruha, J. J. Hesse, and C. Nowak (eds), *Welche Verfassung für Europa?* (Baden-Baden: Nomos, 2001) 246.

6 See n 2 above 768.

7 *ibid.*

8 See n 4 above 703.

9 *ibid.* 706.

10 See n 4 above 819–820.

11 See n 2 above 768–769.

12 See n 4 above 679.

lier observation that the disagreement is actually fundamental in constitutional terms. It is argued in this article that the reasons for the contending visions lie secreted within the national constitutional cultures with which the judges are associated. What separates Kirchhof from Everling and Zuleeg is not merely a disagreement about the terms and conditions of membership of the European Union, or even a different reading of the German *Grundgesetz*, but a different understanding of ultimate authority (political sovereignty vs legal sovereignty) and the correct interpretation of the *Grundgesetz* (state-centred or 'closed' vs an international or 'open' conceptions).¹³

Arguably this disagreement is merely a local and practical manifestation of a much wider tension within constitutional theory regarding the legitimacy of law. In the United Kingdom there is a gulf between the political¹⁴ and the common law constitution,¹⁵ and in US constitutional discourse a similar dualism can be found between democracy and constitutionalism, or republicanism and liberalism. Ronald Dworkin, for instance, argues that modern legal orders are not only committed to certain principles as a matter of political morality, but that this pre-commitment (or 'rights foundationalism') must also be justiciable before the courts as part of positive law. The counter-argument ('rights scepticism') questions the assumption that a pluralist and diverse society could be founded on shared fundamental values. Jeremy Waldron,¹⁶ for example, asserts that the content and distribution of individual's rights are the subject of disagreement and that, therefore, they ought to be determined by the democratic political process, and not by the degree of their pre-democratic constitutional entrenchment.

However, German constitutionalism is not explicitly grounded in competing centres of original power. Instead, it is more subtly characterised by two interpretations of what in Anglo-Saxon countries is known as 'constitutional law': *Staatsrecht* (literally: state law) and *Verfassungsrecht* (literally: constitutional law),¹⁷ whose underlying assumptions the present article will seek to explore. The former has no counterpart in common law countries nor, indeed, in most other countries.¹⁸ Among contemporary German scholars the distinction between *Staatsrecht* and *Verfassungsrecht* is unclear. The dominant opinion suggests that they are identical but alternative terms to describe the constitutional law of the state. If Kirchhof is correct, and 'the existence of a constitution is fundamentally attributed only to the basic order of a state', then it would be impossible – indeed pointless – to draw analytical distinctions between *Staatsrecht* and *Verfassungsrecht*. However, if Everling is correct with his assertion that a non-state entity is capable of developing a

13 The significance of the opposing conceptions is underscored by an admittedly unscientific but nonetheless revealing search of the word 'state' in the three contributions. Kirchhof mentions 'state' 392 times, which is almost as often as Everling (276) and Zuleeg (136) combined. In contrast, the term 'Member State' is much more prevalent in Everling's piece (182 hits) than in Kirchhof's (144) – Zuleeg registers only 102 hits.

14 A. Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157.

15 T. R. S. Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C. Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney: Federation Press, 1996).

16 J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) chs 10–13.

17 The German translation of 'public law', which includes administrative law, is 'öffentliches Recht'.

18 C. Möllers, *Staat als Argument* (Munich: Beck, 2000) 1.

concept of 'constitution', then the two terms would be conceptually distinct. The present article treats them as distinct concepts for the following reason: where *Staatsrecht* offers a pre-constitutional and state-centred interpretation of constitutional law, *Verfassungsrecht* in both its formal and material facets embraces the totality of written and unwritten legal norms on the foundation, organisation and competences of the polity and the role of the citizen. In other words, the state-centred interpretation (*Staatsrecht*) subsumes the constitution, whilst the constitution-centred interpretation (*Verfassungsrecht*) gives it due prominence.

The legitimacy and dominance of *Staatsrecht* is thus fortified by an undercurrent of socio-politico-historical (as opposed to purely legal-constitutional) notions. Notwithstanding Germany's international openness expressed in Articles 24 GG¹⁹ and now 23 GG,²⁰ *Staatsrecht* continues to assume the 'sovereign, impermeable individual state'²¹ in relation to the European Union and in relation to the European Convention on Human Rights,²² to which Germany could return once it has 'discharged its bid for integration'.²³ By contrast, the legitimacy of *Verfassungsrecht* derives its presuppositions from law (positive law and the legal system). The distinction between the state as the political unity of the people and the European Union as a mere legal community is dissolved. From a legal perspective both are products of legal or constitutional communities. The concept of the political is replaced by the concept of law. According to *Verfassungsrecht*, the constitutional achievements and attributes of the European Union emerge as equal in kind to those of the *Grundgesetz*. Constitutional argument is expressly based on the *Grundgesetz* and the Treaties of Rome (as amended) whereas arguments derived from the political existence of the state are discredited. The state is the assignment, not the assumption.

Given the clear differences of style and substance between *Staatsrecht* and *Verfassungsrecht* the absence of a clear analytical divide between the two interpretations is surprising. The depth of doctrinal conflict between Kirchhof and Everling/Zuleeg with respect to their constitutional assumptions and European conclusions is too easily missed by placing their contributions alongside each other.²⁴ The same doctrinal difference exists with respect to the nature of constitutional law itself: the continuous use of orthodox concepts turns the historical ties to the nation state and to the relative homogeneity of the *Volk* either into a *conditio sine qua*

19 An original provision of the 1949 Grundgesetz, it reads: '(1) By a law, the Federation may by a law transfer sovereign powers to international organizations'.

20 Drafted specifically for the European Union in 1992, the relevant part for present purposes reads: '(1) For the realization of a united Europe, the Federal Republic of Germany participates in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat . . . '.

21 J. Isensee, 'Staat und Verfassung' in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland (Vol II)* (Heidelberg: Müller, 3rd ed, 2004) at para 143.

22 For criticism see J. A. Frowein, 'Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht' (1998) 51 *Die Öffentliche Verwaltung* 806.

23 Isensee n 21 above: '[Der souveräne, impermeable Einzelstaat] bildet die Basis, von der die Integration ausgeht und zu der die Rückkehr nach erledigter Integrationsbemühung offensteht'.

24 Michelle Everson makes the same point in relation to *Principles of European Constitutional Law* as a whole: 'Is it just me, or is there an Elephant in the Room?' (2007) 13 *European Law Journal* 136, 137.

non for the factual existence of a constitution (*Staatsrecht*), or into an atavistic and antiquated understanding of the normative purpose of a constitution (*Verfassungsrecht*). Neither interpretation seems even remotely interested in getting to grips with a constitution for a post-national constellation²⁵ or in abandoning old hierarchies (state-centricity versus Euro-centricity) in favour of a heterarchical and pluralist conception of constitutional law.²⁶

The purpose of this article is to remedy the two deficits identified so far. First, the origins of *Staatsrecht* and *Verfassungsrecht* will be reconstructed historically by examining in some detail how 'state' and 'constitution' are conceived by the traditions. The rift has already been personified by reference to Kirchhof, Everling, and Zuleeg, but it entails more than disagreement over Europe and it involves more personages than a few former judges. Secondly, the conclusion will question the future ability of *Staatsrecht* to dominate the discourse, and query what measures it can take to prevent its demise. The usefulness of *Staatsrecht* as a contemporary constitutional interpretation is not only challenged by *Verfassungsrecht*, but more importantly by more recent constitutional theories whose concepts are dynamic and disconnected from the trappings of the nation state. The constitution either needs to become the hub of deliberative procedures, or it needs to transcend the well-worn struggle between popular sovereignty and constitutionalism, and adapt to the moral questions that emerge in a post-capitalist society.

HISTORICAL CONTEXT

Notwithstanding the success of the *Grundgesetz* since 1949, it has been the concept of the state (rather than the constitution or the legal sovereignty or the people) that has been the central concept in German constitutional discourse for the past 150 years. The state-centeredness is reflected by the term *Allgemeine Staatslehre* ('general theory of the state') which is the classic public law discipline that goes beyond law and looks at the timeless foundations of the state. The discipline cannot be defined by translation since any such attempt would fail

to capture a field devoted to a quest to understand the proper role in public life of the state bound by the rule of law, a field which rejects any strict academic division between legal studies, political, social, and economic theory, and philosophy.²⁷

25 See, for instance, J. Habermas, *The Postnational Constellation* (Cambridge, Mass: MIT Press, 2001); and J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003).

26 N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.

27 D. Dyzenhaus, 'Introduction: Why Carl Schmitt?' in D. Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998) 1. There is a confusing array of terms to cover this particular area of public law. Originally *Staatslehre* or *Staatswissenschaft* were concerned with the historical origin of the state, its political and social history, its demise, specific forms of statehood and the relationship between state and law. It was a descriptive science whose objective it is to capture the attributes of the state. It is not to be confused with *Staatsrechtslehre*, which is much narrower and focuses only on the legal nature of the state, its constitution, institutions, functions, structure and relationship with other states (G. Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd ed, 1921) 8–9; P. Badura, *Methoden der neueren Allgemeinen Staatslehre* (Goldbach: Keip, 2nd ed, 1998) 207, nn 19 and 20). The confusion is enhanced by the contemporary

The terminology of the legal discipline evolved from the mid-nineteenth to the early twentieth century. The term *Allgemeine Staatslehre* was coined in 1855 by Robert von Mohl.²⁸ Subsequently the legal discipline experienced a phase of stagnation which lasted until the turn of the century. Commentators spoke of a 'complete drought' or lamented the fact that 'virtually nothing had happened for decades on the general theory of the state in Germany'.²⁹ In the early twentieth century *Allgemeine Staatslehre* was the common title for a number of classic works, for instance by Georg Jellinek and Hans Kelsen,³⁰ and was the standard-bearer for scholars attempting to distinguish or distance themselves from that tradition. Carl Schmitt's major work was entitled *Verfassungslehre*³¹ which purported to analyse an 'empirical type' (rather than a normative system) of the modern constitutional state.³² However, the focus on 'constitution' is misleading since Schmitt's underlying purpose was clearly to reconstitute and rejuvenate a unified theory of the 'state'. Hermann Heller's *Staatslehre* (first published in 1934)³³ also does away with the ambition to be 'general': the state is an historical construction of political reality.³⁴ Probably the most appropriate way of tackling such a complicated subject-matter as the 'state' is to view it not as a specific phenomenon fixed in time and space but as an abstraction or an argument.³⁵ State is a concept, and agreement about the existence of the concept as such should not be confused with agreement as to its content. There is no universal concept of the state which is valid for all disciplines,³⁶ and the *Staatsrecht* and *Verfassungsrecht* disciplines have each moulded and imbued the state with different meaning.

The state produced a social theory (*Staatslehre*) as well as law (*Staatsrecht* was the name given to the discipline of *ius publicum universale*), and both were the object of 'positivist' analysis in the nineteenth century. However, 'positivism' took at least three different forms.³⁷ The first variant, sociological positivism, identified law with social practice and treated it as fact. The new discipline of 'sociology' analysed the reality of state and society in terms of their empirical reality, and law as a particular articulated form of authority, of interest only as a product of society. The theory of the state was the theory of social organisation. According to

distinction (that will be addressed below) between *Staatsrecht*, which derives legal argument from the existence of a pre-constitutional state (thus stepping into the shoes of *Staatslehre*), and *Verfassungsrecht* which derives legal argument from the positive constitutional text (and succeeds *Staatsrechtslehre*).

28 R. von Mohl, *Politische Schriften: eine Auswahl* (Opladen: Westdeutscher Verlag, 1966).

29 Citations in M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland (Zweiter Band): Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (Munich: Beck, 1992) 439.

30 Jellinek, n 27 above; H. Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925).

31 C. Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1928).

32 R. Mehring, 'Carl Schmitt's Lehre von der Auflösung des Liberalismus: das Sinngemüße der 'Verfassungslehre' als historisches Urteil' (1991) 38 *Zeitschrift für Politik* 200, 204.

33 Republished in H. Heller, *Gesammelte Schriften. Dritter Band* (Leiden: Sijthoff, 1971).

34 Hermann Heller's work is not considered in great detail here, principally because his influence on post-war German state/constitutional law and constitutional theory is significantly less than that of Kelsen, Schmitt and Rudolf Smend.

35 Möllers n 18 above.

36 Badura n 27 above 99.

37 P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997) 3.

Marck³⁸ and Jöckel,³⁹ the state existed as a social-empirical reality: the state's condition, its essential nature, its manifold manifestations, and its developments were the objects of inquiry. In other words, a general theory of the state (*Allgemeine Staatslehre*) was the proper subject-matter of sociology and not the juristic method. A concept of the state which induced its formal structure only from the written constitution, written laws and court judgements was an impoverished theory which did not describe the reality of the state.

The second variant, statist positivism, identified the theory of law with the norms correctly enacted (and thus posited) by a legal authority. *Staatsrecht* was particularly affected by the growth of legal positivism and the juridical method in the middle of the nineteenth century.⁴⁰ A law was a law not if the norm could be effectively enforced, but if it was recognised as valid within the legal system. Whereas sociology of law stood 'outside' the object (law/state) that it observed, legal positivism took an internal perspective on what the legal actor determined to be a valid and binding norm. Positivism's main ambition was to depoliticise the legal system by making it scientific, ie systematic, logical and conceptually concise.

The final variant, statutory positivism, was prominent during the years of the German Empire. It conceived statutes as the highest expression of the state's will. Carl Friedrich von Gerber (1823–1891) and Paul Laband (1838–1918) are the key representatives of this school. In their opinion, the legal system consisted of the 1871 Imperial Constitution and properly enacted statutes. In positivist terms, '*Staatsrecht* is the theory of state power'.⁴¹ Their concept of *Begriffsjurisprudenz* banned historical, political, philosophical considerations from the analysis of state law. Legal analysis had to be juristic and logical. The Gerber/Laband version of positivism differed from sociological positivism (which took account of social norms) and legal positivism which recognised a hierarchy of laws that Laband did not. The state produced the articles of the constitution and statutory law but the former were logically no 'higher' or better protected than the latter.⁴² 'The constitution is not a mythical power which hovers above the state but, as an act of state, equal to all other laws and changeable according to the will of the state'.⁴³ Legal positivism ensured that in the future law, history and philosophy would take on independent and separate forms.

38 S. Marck, *Substanz- und Funktionsbegriff in der Rechtsphilosophie* (Tübingen: Mohr, 1925) 151–2.

39 W. Jöckel, *Hans Kelsens rechtstheoretische Methode: Darstellung und Kritik ihrer Grundlagen und hauptsächlichsten Ergebnisse* (Tübingen: Mohr, 1930) 200–1.

40 Stolleis n 29 above 423.

41 C. F. W. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz, 2nd ed, 1869) at 3: 'Das Staatsrecht ist die Lehre von der Staatsgewalt'.

42 This is also true as a general description of nineteenth-century German constitutional law. The constitution was not conceived of as *lex fundamentalis*. This explains why Germany did not produce its own theoretical basis for the constitutional review of statutes (the Federal Constitutional Court was modelled on the US Supreme Court: see H. Wilms, 'Die Vorbildfunktion des United States Supreme Court für das BVerfG' [1999] 52 *Neue Juristische Wöchenschrift* 1527), and why basic rights – until 1949 – did not impose legal limits on the law-maker (see R. Wahl, 'Der Vorrang der Verfassung' [1981] 20 *Der Staat* 485, 491).

43 P. Laband, *Das Staatsrecht des Deutschen Reiches* Vol II (Tübingen: Mohr, 5th ed, 1911) 39–40.

Georg Jellinek (1851–1911)

Georg Jellinek's *Allgemeine Staatslehre*, first published in 1900, broke the deadlock that had persisted throughout the second half of the nineteenth century. He argued that sociological positivism and legal positivism were both erroneous approaches. The ontological existence of the state ('*Das An-sich des Staates*') could not be explained by legal positivism, and the legal nature of the state could not be explained by sociological positivism.⁴⁴ The state could thus neither be understood in purely normative-juristic terms nor in purely socio-politico-historical terms. Jellinek, therefore, produced a 'two-sided' theory of the state (*Zwei-Seiten Lehre*), which was a 'synthesis'⁴⁵ whereby the state could be the identical subject-matter of both analytical approaches.⁴⁶ Jellinek distinguished between a social, empirical theory of the state (*soziale Staatslehre*) and a juristic, normative theory of state law (*juristische Staatsrechtslehre*). This distinction had methodological repercussions for the academic disciplines: whereas the object of analysis of the social theory of the state is human relations (such as exist between the governors and the governed) and the factual-historical union of people, the juristic theory analyses the state as a legal subject that is based on law and justified by its guarantee of the legal order.⁴⁷ The state can thus be analysed from parallel perspectives that are, nonetheless, methodologically distinct:

An amalgamation of law with its pre-legal elements should not occur in a scientific description of the theory of the state.⁴⁸

It is important to note that Jellinek does not produce two different concepts of the state but one concept which reveals the dual nature of the state.⁴⁹ The state, like a coin, has two sides, and a comprehensive theory of the state (that embraces both sides) is the foundation of all theoretical study of the state.⁵⁰ The identification of the state at the intersection between fact and norm is a distinction that continues to reverberate in public law discourse today. The concept of the state contains factual-political and normative-legal elements; it pits a (political) theory of social organisation against a (juristic) theory of state power. The ideological recourse to extra-legal elements in the analysis of constitutional concepts, however, raises methodological issues and is open to criticism particularly from the positivist camp. On the one hand, Jellinek's concept of law is a unitary concept that is the same in all acknowledged areas of law.⁵¹ It is not contingent on material, rational or natural law elements but is grounded in the people as an organised unity and,

44 G. Jellinek, *System der subjektiven öffentlichen Rechte* (Tübingen: Mohr, 1905) 21.

45 See Stolleis n 29 above 450; cf Möllers, n 18 above 34–5.

46 G. Jellinek, *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (Vienna: Hölder, 1880) 50; *Die Lehre von den Staatenverbindungen* (Vienna: Hölder, 1882) 9; *System der subjektiven öffentlichen Rechte*, n 45 above 17 et seq; *Allgemeine Staatslehre*, n 27 above 10 et seq.

47 *Allgemeine Staatslehre*, n 27 above 11; 334 et seq.

48 *ibid* 11–12.

49 Badura, n 27 above 108.

50 *Allgemeine Staatslehre*, n 27 above 12: 'Eine umfassende Staatslehre ist die Grundlage aller theoretischen Erkenntnis vom Staate'.

51 Jellinek, *Die rechtliche Natur der Staatenverträge*, n 46 above 1.

hence, the state. The state is the legitimate law-making organ because it posits law according to the 'sovereign will of the totality'.⁵² Jellinek refers to Hegel who claims that laws are only valid if they can be traced back to the will of the state, in other words, if they are the result of an empirically verifiable law-making process.⁵³

But, on the other hand, Jellinek's separation does not go far enough. His juristic concept of the state is ultimately contingent on sociological pre-conditions.⁵⁴ In an important paragraph Jellinek concedes that

[However,] the theoretical basis for the juristic conception of the state is the indisputable natural, historical phenomenon of a people settled within the boundaries of their territories and governed by a ruling class, which characterises all communities of mankind that are termed states in learned discourse.⁵⁵

The state, according to Jellinek, is made up of more than law. It consists of territory, people and effective government (*Staatsgebiet, Staatsvolk, Staatsgewalt*),⁵⁶ and is prior to anything else an untamed sovereign socio-political unit. The natural existence of the people is transformed into a legal existence as *Staatsvolk*.⁵⁷ As a legal concept the state is an organic union equipped with political power to organise the community of people (*Völksgemeinschaft*).⁵⁸ The state is not identical with the law but with the people that it represents who in turn identify themselves with the state and from which the *Machtstaat* demands obedience.⁵⁹ Only later does it develop its normative potential through self-commitment (*Selbstverpflichtung*) to law.⁶⁰ Every law is a self-limitation of the will of the state.⁶¹ Jellinek resorts to pre-legal categories (power, people, and territory) on which he grounds his factual concept of state. Only later does the state evolve into a polity with legal personality that can enter into legal relations with other states.⁶²

The main difficulty with Jellinek's theory is thus methodological impurity which confuses the legal and social aspects of the state. Since the basis of the creation and validity of law is socio-psychological, the distinction between legal and social methodology is irrelevant: Jellinek ultimately tends towards the monistic assertion of the sociological method.⁶³ In the final analysis, the concept of law is based on a non-juristic, substantive concept of state.⁶⁴ Law is nothing but a 'factual

52 *ibid* 2.

53 *ibid* 3; see also G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge: CUP, 1991) §333.

54 Badura, n 27 above 208.

55 Jellinek, *System der subjektiven öffentlichen Rechte*, n 46 above 21.

56 This triad has also formed the core of the guidelines for the recognition of new states in public international law since they were included in the definition of Article 1 of the Montevideo Convention on Rights and Duties of States (26 December 1933, LNTS, vol CVXV, 25).

57 Jellinek, n 27 above 263.

58 The term was discredited only after the NS-Regime.

59 Jellinek, n 27 above 183.

60 Jellinek, *Die Lehre von den Staatenverbindungen*, 34; *System der subjektiven öffentlichen Rechte*, 195; both n 46 above; *Allgemeine Staatslehre*, n 27 above 367 et seq.

61 Jellinek, *Die rechtliche Natur der Staatenverträge*, n 46 above 27.

62 Jellinek, *System der subjektiven öffentlichen Rechte*, n 44 above 28.

63 Badura, n 27 above 208.

64 Möllers, n 18 above 23.

exercise'.⁶⁵ The continuous and repetitive nature of an exercise transforms a habit into a legal norm. Changes to the factual power relations among the highest organs are reflected in the lower organs without having to change the constitution. Jellinek refers to the struggle for sovereignty in Britain: the weakness of the House of Hanover and the factual power of Parliament brought about the contemporary relationship between Crown and Commons.⁶⁶ The integrity of the juristic method is thus undermined by 'the normative power of the factual' which transforms factual power into legal power.⁶⁷ The state is a meta-juristic concept that has to link up with the sociological concept of state.⁶⁸

Jellinek is the starting point for any contemporary inquiry into the nature of the state, or more precisely, into which method correctly captures the nature of the state. By identifying and isolating the two sides of the state, Jellinek accentuated the existing boundary lines and, more significantly, ensured that the entire public law debates of the future would be dominated by the tension between is and ought, facts and norms, power and law, realism and idealism, legitimacy and legality, and state and constitution. In a sense, the constitutional, state-theoretical discourse of the year 2000 is not very different from that of the year 1900. Georg Jellinek's observation that the state could be the identical subject-matter of two different points of view (legal and a social) can be repeated not only for contemporary constitutional interpretation but, by extension, also for the European Union. The relationship between national and European law can be analysed from two diametrically opposed standpoints: one rooted in the tradition of the state, and the other in the tradition of the constitution. The scientific analysis of that relationship by Kirchhof, Everling and Zuleeg discussed at the outset is determined by precisely those standpoints. The difference, however, is not merely methodological. It is epistemological and existential, ingrained and ideological – as Gumpłowicz' attack on legal positivism would testify: '[Jurists] want to treat and "construct" the state "juristically", which is about the same as eating a Beethoven sonata with spoons'.⁶⁹

WEIMAR JURISPRUDENCE

The tension between is and ought, facts and norms, legitimacy and legality, and state and constitution runs like a *leitmotif* through Weimar constitutional discourse. Whilst it would be wrong to suggest that all constitutional debate could be reduced to that tension, much of it, especially the contributions by Hans Kelsen and Carl Schmitt, took place at opposite ends of the spectrum which once more demonstrates the analytical and ideological difference between state-based (political) and constitution-based (legal) argument. Their theories have been

65 Jellinek, n 27 above 339.

66 *ibid* 342.

67 *ibid* 338 et seq.

68 *ibid* 182 et seq.

69 L. Gumpłowicz, *Allgemeines Staatsrecht* (Innsbruck: Wagner, 3rd ed, 1907) 450. '[Juristen] wollen den Staat "juristisch" behandeln und "konstruieren", was ungefähr dasselbe ist als wenn man eine Beethovensche Sonate mit Löffeln essen wollte'.

discussed extensively in recent Anglo-American literature⁷⁰ and will only be summarised briefly here.

Kelsen's *Allgemeine Staatslehre* is 'a theory of the positive state'.⁷¹ The state exists by virtue of its legal order which it personifies and with which it is implicitly identical. Kelsen's sovereignty of the law renders sociological, political or other factors, in other words the entire second side of Jellinek's theory, irrelevant for the juristic analysis of the state. This much is generally understood by readers of Kelsen's literature. What is less easily appreciated is the subtlety of Kelsen's gripe with the two-sided theory of the state, which is purely methodological. Kelsen does not deny the existence of a socio-political perspective of the state. In fact, Kelsen also developed a sociological concept of the state of his own.⁷² The point of his rejection is that the existence of sociology and politics can be of no interest to the lawyer. Kelsen does not claim a monopoly over the general concept of the state for the discipline of *Staatslehre*; he claims a monopoly over the juristic-legal concept of the state for *Staatslehre*. In juristic terms, the state is conceived solely as a normative and logical order. The state is not social reality but an object of legal science and the area in which the legal order is valid. The state thus cannot be analysed from two completely different perspectives. As Kelsen repeatedly emphasises, positive law is not 'a complex of "is"-facts' and the state is not 'the epitome of factual power relations' which precede the law.⁷³ Instead, from a legal scientific perspective, the state is identical with the law. It follows that since the state is a singular object it cannot be the subject of two different scientific methods.⁷⁴ Jellinek's error, he claims, was a basic methodological one, which consisted in drawing normative conclusions from sociological facts, and making sociological claims that did not correspond to real-life facts (such as the factual unity of the state which for Kelsen was pure fiction).⁷⁵ Kelsen thus solves the problem of having two such heterogeneous sides of the same coin by arguing that the central problems of state theory are juristic.

Ironically it was the second (sociological) side of Jellinek's dualist theory that found more widespread reception amongst lawyers and amongst some of the key figures in constitutional theory during the Weimar Republic. The theories it inspired are linked together by a common political conception of the state which is emphatically anti-positivist (in Kelsen's sense) in that it assumes the

70 See, eg. C. Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, J. Seitzer (trans and ed), 2004); E. Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham, NC: Duke University Press, 2004); Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003); A. J. Jacobson and B. Schlink, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000); D. Diner and M. Stolleis (eds), *Hans Kelsen and Carl Schmitt: A Juxtaposition* (Gerlingen: Bleicher, 1999).

71 Kelsen, n 30 above vii.

72 *ibid* chs 1 and 2; *Der Soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (Tübingen: Mohr, 2nd ed, 1928) chs 1 and 2.

73 H. Kelsen, 'Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus', in H. Klecatsky, R. Marcic, and H. Schambeck (eds), *Die Wiener Rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl und Alfred Verdross* (Band I) (Vienna: Europa, 1968) 337; *Der Staat als Integration* (Vienna: Springer, 1930) 11: the state is 'not a creation of nature but of the mind'.

74 H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: Mohr, 2nd ed, 1923) 395–6; *Allgemeine Staatslehre*, above n 30, 7, 76; *Der Soziologische und der juristische Staatsbegriff*, above n 72, 115.

75 Kelsen, *Hauptprobleme der Staatsrechtslehre*, *ibid* 177.

factual existence of the state. Carl Schmitt does not begin his analysis with the state but digs deeper in search of a political level that pre-supposes the state. Unlike the nineteenth century positivists, Schmitt does not engage in *Begriffsjurisprudenz* but in *Begriffssoziologie*, ie ‘political theology’ which unearths the political content of legal terms.⁷⁶ Whereas Jellinek separates clearly the two sides of the state so that the juridical claim on the state is balanced out and controlled by the sociological side of the state, Schmitt’s premise of the state is its factual existence and its ability to assert its legitimate will (‘decisionism’) over legality in situations of emergency. Schmitt’s underdeveloped premise (that the state comes before the law) is the inverse of Kelsen’s postulate that the law is identical with the state. The law as ‘higher’ law pre-dates and exists independently of the state. The existence of the state is rooted in the concept of the political, and the constitution can be replaced without disrupting the continuity of the state. Schmitt’s constitutional theory is the sum of law⁷⁷ and politics⁷⁸ whereby the constitution presupposes and controls the state.⁷⁹

Intellectual continuities can be seen between the Weimar scholarship and contemporary constitutional interpretation. Kirchoff’s state-centred perspective on European law is clearly inspired by Schmitt. The correlation between constitution and state stems directly from Schmitt, for whom ‘the word “constitution” must be confined to the constitution of the state, ie the political unity of a people, if an understanding is to be possible’.⁸⁰ Schmitt and Kirchoff cannot accept Kelsen’s position of equating the constitution with the normative legal order of the state, and ignoring its factual, sociological side. As Kirchoff expounds, ‘the term “constitution” includes the claim to stipulate a comprehensive basic order of public [ie state-based] life, which renews itself from within, takes on new tasks independently and empowers the corporation that it constitutes for autonomous further development’.⁸¹ Similarly, for Schmitt the concept of the constitution is rooted in a sphere that lies beyond the positive, written constitutional text. The constitution is the state’s “soul”, its concrete life and its individual existence’.⁸² It is valid because the German people gave itself the constitution.⁸³

By contrast, Everling and Zuleeg view the European Union as a relatively autonomous legal order which produces its own rules and principles. As a result, ‘the concept of constitution is meaningful in order to recognise, sort and compare these basic rules and principles’.⁸⁴ This is not to argue that Everling and Zuleeg are closely following Kelsen’s footsteps. Kelsen does not represent the German mainstream.⁸⁵ His legal positivism came under fire from other Weimar scholars such as

76 C. Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot, 2nd ed, 1934).

77 Schmitt, *Verfassungslehre*, n 31 above 123 et seq.

78 *ibid* 221 et seq.

79 *ibid* 200.

80 *ibid* 3.

81 n 2 above 769.

82 *ibid*.

83 Schmitt, *Verfassungslehre*, n 31 above 10. See also Kirchoff, n 2 above 769: ‘... the term “constitution” intimates a basic order constituted and legitimated by a democratic *Staatsvolk* ...’.

84 Zuleeg, n 4 above 804.

85 Kelsen’s work experienced a renaissance that began with the publication of H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Baden Baden: Nomos, 2nd ed, 1990), which tries to integrate Kelsen’s theory with contemporary theories on law and state.

Rudolf Smend and Hermann Heller, who in turn inspired the Federal Constitutional Court's constitutional interpretation in post-war Germany. But Kelsen is significant for the more progressive constitutional interpretation for two reasons. First of all, his theoretical framework provides for the autonomy of legal systems. Kelsen does not tire of repeating that the pure theory of law is limited to the systematic understanding of positive law: law can only be understood on its own terms. Its evaluation, on the other hand, is a matter of political morality. In that sense, Everling is free to apply the concept of constitution to non-state entities, and Zuleeg is entitled to a neutral concept of constitution. Zuleeg denies that a homogeneous citizenry is a necessary *legal* condition for democracy. He shows elsewhere that homogeneity is not even a necessary *sociological* condition for democracy which, instead, depends on the free will of the people.⁸⁶ Since the European Union is built on the principles of democracy and protects rights and freedoms, it exists by virtue of its legal order with which it is implicitly identical and 'can be counted among the governing entities that have a constitution'.⁸⁷

Secondly, Kelsen's method forms the clearest legal paradigm from which to analyse and understand the discipline of *Staatsrecht* in his day and in ours. *Staatsrecht* is special because it is not defined by a 'pure' juristic understanding but by extra-legal notions of the state. Kelsen's structure can thus be used as a template for criticising the practice of *Staatsrecht* which doubles the state up with the constitution and the pre-legal *Machtstaat*. According to Kelsen's pure theory of law, the state is constituted only by the constitution. By reverting to the pre-legal concepts of state, constitution and sovereignty, *Staatsrecht* is (according to Kelsen) dabbling with ideology which is methodologically wrong. Judgement on the contemporary status of *Staatsrecht*, and on the question whether its political foundation ensures its dominance, sounds its death knell, or calls for its demystification, will need to be reserved until both constitutional interpretations have been analysed and assessed.

STAATSRECHT

The historical discussion above has paved the way for an analysis of the contemporary distinction between *Staatsrecht* and *Verfassungsrecht*. The purpose of this section is two-fold. First, it will locate Kirchhof's argument that the constitution is a fundamental attribute of the state in its national context by linking it up with related *Staatsrecht* thought. Second, this section will develop further the argument made at the outset that the difference between the two 'contending visions' is not merely based on a different reading of the *Grundgesetz*. The roots of disagreement are ultimately foundational and of a political or ideological character.

The ideological difference between the two interpretations is supported by the existence of two 'handbooks' of German public law whose titles alone illustrate the central schism. The highly acclaimed *Handbuch des Staatsrechts* (its first volume was first published in 1987), in which Josef Isensee and Paul Kirchhof edit

⁸⁶ M. Zuleeg, 'What Holds A Nation Together?' (1997) 45 *American Journal of Comparative Law* 505.

⁸⁷ Zuleeg, n 4 above 805.

the contributions of 132 authors (roughly a third of all constitutional scholars in Germany) in ten volumes with almost 12,000 pages, contains the biggest discussion by far of the state. The programmatic title and the size of this oeuvre seek to re-establish the 'state' as the central concept, its message being that reports of the state's death – like the report of Mark Twain's – are greatly exaggerated. In part at least, the *Handbuch des Staatsrechts* was a reaction to the *Handbuch des Verfassungsrechts* by Ernst Benda, Werner Maihofer, and Hans-Jochen Vogel (first published in 1983),⁸⁸ which placed the 'constitution' at the heart of the debate. The quality of the argument notwithstanding, it is a single volume handbook that was outnumbered by ten volumes on the other side. The Isensee/Kirchhof project is, as Preuss⁸⁹ and Hofmann⁹⁰ note critically, a deliberate attempt to revitalise the concept of the state, and goes against the current trend of neglecting a priori targets and goals of the state. Unsurprisingly, not a single chapter focuses on the *Grundgesetz*. Instead, the unifying themes of the relevant contributions are the antecedent state; pre-constitutional targets and goals of the state; the pre-constitutional idea of a commonwealth; the meta-constitutional right of the state over emergency laws.⁹¹

The dominant *Staatsrecht* interpretation emphasises the pre-constitutional tradition of the institutions and principles regulated by the *Grundgesetz*. Authors such as Klaus Stern, Isensee and Kirchhof constantly refer to the pre-constitutional tradition as the foundation of constitutional doctrine. Isensee's centrepiece,⁹² as well as the entire *Handbuch des Staatsrechts*, confirm the 'state' as the dominant term of political perception and of constitutional theory. The handbook was first published in a series from the late 1980s to the early 1990s, 'at the zenith of the Federal Republic of Germany, but also at a time when certain indubitable assumptions underlying this work were vanishing'.⁹³ The following paragraphs will explore those allegedly assured assumptions underlying the state and the constitution, and examine the relationship between these two concepts.

The state and the constitution

Josef Isensee's own contribution to the *Handbuch des Staatsrechts* begins with the sentence 'Even the constitutional state is state'.⁹⁴ Isensee's opening sentence is not an innocent statement but a statement of intent. He is not analysing the state in abstract, universal or theoretical terms,⁹⁵ nor is he only addressing the specific state of the *Grundgesetz*.⁹⁶ Isensee's concept of the state is phenomenological,

88 E. Benda, W. Maihofer, and H.-J. Vogel (eds), *Handbuch des Verfassungsrechts* (Berlin: de Gruyter, 2nd ed, 1994).

89 U. K. Preuss, 'Staats- und Verfassungsrechtliche Handbücher' in T. Ellwein, J. J. Hesse, R. Mayntz, and F. W. Scharpf (eds), *Jahrbuch zur Staats- und Verwaltungswissenschaft* (Band 3) (Baden-Baden: Nomos, 1989).

90 H. Hofmann, 'Von der Staatssoziologie zur Soziologie der Verfassung' (1999) *Juristenzeitung* 1065.

91 See Hofmann, *ibid* 1066.

92 Isensee, n 21 above.

93 U. Di Fabio, *Die Staatsrechtslehre und der Staat* (Munich: Schönningh, 2003) 62.

94 Isensee, 'Staat und Verfassung' n 21 above para 1.

95 *ibid* para 2; cf S. Breuer, *Der Staat. Entstehung, Typen, Organisationsstadien* (Reinbek: Rowohlt, 1998).

96 cf K. Stern, *Der Staat des Grundgesetzes* (Munich: Heymans, 1992).

pre-constitutional, polemical, and at odds with the rigours of positive law. The German state cannot be understood with sole reference to the *Grundgesetz*. It requires an ontological analysis: 'Germany is state' in the same way that, say, 'water is wet'. A dividing line is drawn between 'state' and 'constitution'. The state is defined variously as

- a unit of power, decision-making and peace that precedes the constitution;⁹⁷
- the subject-matter and pre-condition of the constitution;⁹⁸ without which the constitution is non-representational and thus meaningless.

All this is to say that the *Grundgesetz* did not create the German state in 1949 but re-constituted the existing state which was originally constituted as the North German Federation (*Norddeutscher Bund*) in 1866/67 and has ever since been recognised as a state by public international law. The Federal Constitutional Court has spoken of a partial identity of the Federal Republic with the German Empire which is a legal consequence of statehood.⁹⁹

Carl Schmitt's concept of the political helps to understand the premise of *Staatsrecht*. The state is not a subsystem of society but ranks above it. The state is not a legal unit but an animated body that comes to life and organises political power. It is an organisation of power, rule, and authority (*Herrschaftsorganisation*).¹⁰⁰ As a result, the order that it regulates is an antecedent and binding normative order.¹⁰¹ Since the state exists in substance outside the constitutional order, the constitution and the political form of the state can change whilst the state continues.¹⁰²

97 E. W. Böckenförde, *Staat, Nation, Europa. Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie* (Frankfurt am Main: Suhrkamp, 1999) 136.

98 'Gegenstand' und 'Voraussetzung': see Isensee n 21 above para 1; D. Murswiek, 'Maastricht und der Pouvoir Constituant: Zur Bedeutung der verfassungsgebenden Gewalt im Prozeß der europäischen Integration' (1993) 32 *Der Staat* 161, 162.

99 BVerfGE 36, 1 (Grundvertrag) 16. For the continuity view see, eg. P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland' in J. Isensee (ed), *Europa als politische Idee und als rechtliche Form* (Berlin: Duncker & Humblot, 1993) 74. For the 'clean slate' view see, eg. H. Kelsen, 'The International Legal Status of Germany to be Established Immediately upon Termination of the War' (1944) 38 *American Journal of International Law* 689, 693 ('... Germany would legally be a new state. The new constitution of sovereign Germany would ... be ... the beginning of a new constitutional life'). W. -D. Grussmann, 'Grundnorm und Supranationalität: Rechtsstrukturelle Sichtweisen der europäischen Integration' in T. Von Danwitz, M. Heintzen, M. Jestaedt, S. Koriath and M. Reinhardt (eds), *Auf dem Wege zu einer Europäischen Staatlichkeit* (Stuttgart: Boorberg, 1993) 51, notes that the original validity of the *Grundgesetz* created a new Grundnorm which led to the 'revolutionary creation of the Federal Republic'. R. Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Frankfurt am Main: Suhrkamp, 2003) 415 writes of '[t]he consciously posited and experienced new beginning of German statehood in the Federal Republic ...' and (*ibid* 422) of 'the birth of the legal order of the Federal Republic from the spirit of the *Grundgesetz*'. The partial identity of the Federal Republic with the Empire is only true as a matter of international law. In two early decisions (BVerfGE 3, 58; *Beamtenverhältnisse* and BVerfGE 6, 132 *Gestapo*), the Federal Constitutional Court ruled that the Empire's relationship with civil servants ended on 8 May 1945. There is no state continuity in this respect, as the *Grundgesetz* created a new order.

100 P. Kirchhof, 'Der deutsche Staat im Prozeß der europäischen Integration' in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Vol VII) (Heidelberg: Müller, 1992) para 31.

101 E. W. Böckenförde, *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt am Main: Suhrkamp, 1991) 20.

102 Böckenförde, n 97 above 138–139.

As a result, Germany is a state regardless of the *Grundgesetz*. 'The constitution shapes and strengthens an antecedent power and structure into a constituted state, thus contributing to the continuity of the community'.¹⁰³ All the *Grundgesetz* does is translate statehood into positive terms for the constitution and define it.

The constitutional law-giver does not determine the existence or the demise of a state, but its organisation, its modes of action and its future development. The laws of the constitution assume the state and re-arrange it.¹⁰⁴

According to Ernst-Wolfgang Böckenförde, a former judge of the Federal Constitutional Court and a liberal interpreter of Carl Schmitt's work, *Staatsrecht* is necessarily broader than *Verfassungsrecht*. The subject-matter of *Staatsrecht* are 'the legal forms, the legal rules and the legal institutions that relate to the state as an organised and effective unit of action, and the exercise of its sovereign decision-making powers'.¹⁰⁵ *Staatsrecht* thus regulates, co-ordinates and limits the exercise of sovereign decision-making powers for an unlimited duration. However, what characterises *Staatsrecht* as a constitutional interpretation is its inclusion of sovereignty by reference to political dogma, ie the main ethical-legal and political-legal principles and decisions which underpin the concept of the state. It is important to note, and Böckenförde emphasises this, that these principles and decisions precede the scientific analysis of the state, and are not produced by it.¹⁰⁶ The parallels with the Weimar discourse are readily apparent. Carl Schmitt rejected the positivist equation of the formal and the material constitution by drawing a distinction between the absolute and the positive constitution.¹⁰⁷ Likewise, Böckenförde does not equate the formal and material elements of the constitution. Not all elements of the material constitution are codified. And not all norms of the constitutional text are covered by the material constitution (eg nationality laws, electoral laws, norms regulating the civil service). *Staatsrecht* thus relates to the pre-existing material constitution, whereas constitutional law is the law of the formal constitution, ie the constitutional document.¹⁰⁸

Böckenförde has produced 'arguably the most quoted sentence in post-war German political thought':¹⁰⁹ 'the liberal, secular state lives off the preconditions which it cannot itself guarantee'.¹¹⁰ Grimm concurs that the constitution structures the political process, guides the public and provides social and political stability 'not by itself, but by drawing on social prerequisites that it can itself

103 Kirchhof, 'Die Identität der Verfassung' in Isensee and Kirchhof (eds), n 21 above para 25.

104 Kirchhof, *ibid*.

105 Böckenförde, n 101 above 11; see also Isensee, n 21 above para 185.

106 *ibid* 21.

107 The argument that Schmitt's influence on contemporary legal scholarship is limited (see M. Aziz 'Sovereignty Über Alles: (Re)Configuring the German Legal Order' in N. Walker (ed), *Sovereignty in Transition* [Oxford: Hart, 2003] 296; W. von Simson, 'Carl Schmitt und der Staat unserer Tage' (1989) 114 *Archiv des öffentlichen Rechts* 185, 189) cannot be supported. Where Schmitt is relied on as authority (his concept of the political is often implicit in constitutional argument) it is an indication not of a 'current vogue' whose impact on European integration is negligible (Aziz, *ibid*) but of the dominant state-centred tradition.

108 Böckenförde, n 101 above 12; Isensee, n 21 above para 188.

109 Müller, n 70 above 4.

110 Böckenförde, n 101 above 112.

no longer guarantee'.¹¹¹ The constitution does not derive its legitimacy from a content-independent *Grundnorm* but from social assumptions and political culture. However, as Böckenförde also argues, it is not just the content that distinguishes *Staatsrecht* from other areas of law but also its 'structural particularities'. Underpinning Böckenförde's analysis are four assumptions of *Staatsrecht* as:

- *fundamental law*: it self-regulates the requirements, forms and procedures of law-creation, sets up principles and limits on law-creation by the state, and controls the manner and form of the application and enforcement of law through state organs.
- *political law*: it is the legal discipline that is closest to and directly intertwined with politics. By determining how political power is exercised, and limiting it, *Staatsrecht* is an integral part of the unity of the state which it both structures and regulates. 'It is not by coincidence, but by design, that the foundational state and constitutional concepts, such as democracy, *Rechtsstaat*, federal state, the free and democratic basic order, are politically and ideologically laden concepts'.¹¹²
- *fragmentary and incomplete*, at least in large parts: constitutional law generally speaking only picks out and regulates those aspects of the state that it deems particularly important, whilst other (self-evident) aspects are left unregulated. 'What ought to be valid is here tacitly assumed'.¹¹³
- a *legal framework*: state practice is given room to manoeuvre in the knowledge that not all aspects of political life can be regulated in detail.¹¹⁴

Staatsrecht emerges as an untamed and 'impure' body of law whose object of analysis (the state) is a veritable Leviathan whose constitution is nothing more than a collar and a leash on a useful but dangerous animal.¹¹⁵ *Staatsrecht* emphatically distances itself from a logical-formal analysis of law that would not do justice to the underlying dogmatic assumptions. Its association with politics, with the concept of the political and with sovereignty makes it impossible to interpret and apply *Staatsrecht* and its 'public field of reference' (*öffentliches Beziehungsfeld*) in positive legal, politically-neutral (pure), and universal terms.

The interpreters of *Staatsrecht* and its dogma must bear in mind that its rules and decisions are a normative answer to particular political and politico-social problems, which are fixed and employed as a stabilising and structuring element for political life and the political process; they are, moreover, an expression of central political ideas and conceptions of order, a fallout of political confrontation and, sometimes, political compromises.¹¹⁶

111 D. Grimm, 'Does Europe Need a Constitution?' in P. Gowan and P. Anderson (eds), *The Question of Europe* (London: Verso, 1997) 245.

112 Böckenförde, n 101 above 15–16.

113 *ibid* 16–17.

114 For more detail see Böckenförde, n 101 above 14–18; Isensee, n 21 above para 190.

115 H. Schulze-Fielitz, 'Der Leviathan auf dem Wege zum nützlichen Haustier' in R. Voigt (ed), *Abschied vom Staat – Rückkehr zum Staat?* (Baden Baden: Nomos, 1993) 95–96.

116 Böckenförde, n 101 above 25.

The *Staatsrecht* discussion is reminiscent of Schmitt for whom it was 'political law',¹¹⁷ but it would be myopic to equate the discussion. Contemporary *Staatsrecht* moderates Schmitt's nationalism with Böckenförde's etatism.¹¹⁸ To be sure, the 'ontological existence' (*seinsmäßige Gegebenheit*) of the people is seen as having 'preponderance' over the legal provisions of the constitution, and the legal part of the constitution and its guarantees are said to be dependant on the existing political unit and form.¹¹⁹ And Schmitt's political analysis of the state is accepted as an essentially appropriate, if insufficient, theory of the modern democratic state. Böckenförde accepts the legitimacy of the German state as the guarantor of peace, and the final authority of the absolute constitution. Every constitution, he says, presupposes a state. It is impossible to avoid or bracket out the question about the highest authority or power in the state.¹²⁰ What prevents *Staatsrecht* from disintegrating into a political football, however, is its attachment to a 'secure juristic method' which is based on objective (ie rational and verifiable) criteria and standards.¹²¹ This can be rephrased as the correct form of constitutional interpretation on which, alas, there is currently no agreement.¹²²

At one level, the tension within *Staatsrecht* is about the correct interpretation of the *Grundgesetz*, which is either viewed as a threat to the state or as a civilising force for good. The former distinguishes between material and formal constitutional law which requires agreement on a body of unashamedly 'political' law which trumps the written constitutional text. The idea of a positive constitution is derided as a legal ideal, as a 'cosmic egg from which all else derives, from the Criminal Code to the law regulating the production of medical thermometers'.¹²³ According to Isensee, the constitution has transformed from a 'legal framework order to a universal programme of integration', the 'unlimited, virtually omniscient *Totalverfassung* for state and society'.¹²⁴ The constitution is interpreted as a 'declaration of faith' (*Glaubensbekenntnis*), a 'basis of hope' (*Hoffnungsbasis*), and denounced with so many -isms that the terms require no translation: *Verfassungsmoralismus*, *Verfassungspietismus*, *Verfassungsmessianismus*, *Verfassungszelotismus*.¹²⁵ Isensee's point is that a discourse which is grounded in the concept of constitution rather than state and power turns the constitution into a 'political bible' which 'inspires anarchic idealism and the utopia of an authority-free discourse'.¹²⁶ Isensee also criticises the Federal Constitutional Court for its tendency to ignore the

117 Isensee, 'Verfassungsrecht als 'politisches Recht'' in Isensee and Kirchhof (eds), n 100 above.

118 Mehring, n 32 above 203–204; 'Carl Schmitt und die Verfassungslehre unserer Tage' (1995) 120 *Archiv des öffentlichen Rechts* 177, 197.

119 E.-W. Böckenförde, 'Der Begriff des Politischen als Schlüssel zum Staatsrechtlichen Werk Carl Schmitts' in H. Quaritsch (ed), *Complexio Oppositorum. Über Carl Schmitt* (Berlin: Duncker and Humblot, 1988) 290; 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' in *Law as Politics*, n 28 above 43–44.

120 Böckenförde, n 97 above 133 et seq.

121 Böckenförde, n 101 above 26–27.

122 *ibid* 53–89.

123 E. Forsthoff, *Der Staat der Industriegesellschaft*, (Munich: Beck, 1971) 144.

124 J. Isensee, 'Die Verfassung als Vaterland: Zur Staatsverdrängung der Deutschen' in A. Mohler (ed), *Wirklichkeit als Tabu: Anmerkungen zur Lage* (Munich: Beck, 1986) 19–24.

125 *ibid*.

126 Isensee, n 21 above para 17.

existence of *Staatsrecht* when it searches for ‘immanent limits to the constitution’ (*verfassungsimmanente Schranken*) within the constitutional text only.¹²⁷

Yet other *Staatsrecht* commentators (of whom Böckenförde is the clearest example) have noted that the *Grundgesetz*, far from being the legal steamroller Forsthoff and Isensee make it out to be, is sparing with its regulations. Its fragmentary nature is designed for practical, political needs. It is a framework constitution, a set of general rules which provides a space for the legislator to enact specific laws. On the one hand, this leaves room for political development and for the sovereign who emerges in situations of crisis, but on the other hand it also requires an active constitutional jurisprudence. In practice this shifts the onus of decision-making onto the Federal Constitutional Court which, although it is endowed with indirect legitimacy,¹²⁸ undermines the democratic political process¹²⁹ and creates a legitimacy deficit.¹³⁰ Germany ends up looking not like a ‘parliamentary legislative state’ but like a ‘constitutional adjudicative state’ based on the will of the constitutional court.¹³¹ The true ‘guardian of the constitution’ is no longer any sovereign body or person, like a directly elected president,¹³² but rather the Federal Constitutional Court.

At a deeper level, however, the tension relates to the use of constitutional concepts such as state and constitution. *Staatsrecht* is a constitutional theory which analyses the validity of law through the eyes of the institution that has the power to make and suspend it. Law is subject to the dormant threat of suspension and ultimately dependent on a political decision over its validity. *Staatsrecht* prefers to locate sovereignty in meta-constitutional, pre-legal (state) power, in the one who decides on the exception, who can take charge of the executive in times of crisis and who can enforce laws with military might if need be (which is why Kirchhof views the European Union as a threat to the state). The authority of law is qualified by the question of power which cannot be bracketed out from legal discourse (which is why Kirchhof continues to refer to the Member States as the ‘masters of the treaty’).¹³³ *Staatsrecht* stands in stark contrast to a constitution-centred analysis according to which the constitution is the highest norm and ultimate authority lies with the *Grundgesetz* and the Federal Constitutional Court. But for *Staatsrecht*, the normal hierarchy of authority would not suffice to explain the true locus of sovereignty. Would the Federal Constitutional Court have the wherewithal to enforce conformity to the *Grundgesetz* in a state of emergency? Of course not. It is an organ of state that is ultimately dependent upon recognition by other organs of state, therefore it cannot itself be sovereign. *Staatsrecht* claims that *Verfassungsrecht* is living in denial by ignoring or circumventing the question of power. ‘Power’ is

127 For references see Isensee, n 21 above para 190, n 399.

128 Federal Constitutional Court justices are elected, with a two-thirds majority, jointly by the *Bundestag* and the *Bundesrat*.

129 Böckenförde, n 101 above 197.

130 H. Abromeit, ‘Volkssouveränität, Parlamentsouveränität, Verfassungssouveränität: Drei Realmodelle der Legitimation staatlichen Handelns’ (1995) 36 *Politische Vierteljahrsschrift* 49, 61.

131 Böckenförde, n 101 above 190.

132 C. Schmitt, *Der Hüter der Verfassung* (1931, Berlin: Duncker & Humblot, 4th ed, 1996).

133 n 3 above 769.

the Achilles heel of *Verfassungsrecht*,¹³⁴ and the strength and weaknesses of the alternative constitutional interpretation will be addressed in the following section.

VERFASSUNGSRECHT

Everling and Zuleeg's claim that the European Union not only can be the object of reference for a constitution, but to all intents and purposes already has one, will be analysed within the broader context of *Verfassungsrecht*. In order to make this claim the umbilical chord which *Staatsrecht* scholars situate between 'state' and 'constitution' needs to be severed. *Verfassungsrecht* is not a modern day interpretation of Kelsen's pure theory of law, although it does follow Kelsen in making the politicised issue of sovereignty theoretically redundant. Kelsen's main objection to the concept of sovereignty is that, unless it is defined juristically for scientific purposes, it is a malleable and polemical term that can be abused for political purposes.¹³⁵ The concept of sovereignty – juristically understood – is an indispensable element of constitutional theory, and a necessary concept to describe formal properties of the (unitary and hierarchically structured) legal order rather than substantive properties of the state. *Verfassungsrecht* thus replaces the centrality of 'sovereignty' with the paramountcy of the constitution within the legal system.

In terms of legal and political theory sovereignty is commonly defined with reference to Bodin as *puissance absolue et perpétuelle*, a definition that includes both supreme power (*summa potestas*) and the final legal responsibility of the state. However, according to Bodin and later Hobbes, the sovereign prince is also limited by 'the laws of God and nature',¹³⁶ and bound by his own contracts and civil covenants.¹³⁷ The inconsistency is weighted in favour of absolute power as the limits are not policed. Nor do these limits provide for effective enforcement mechanisms or for civil disobedience.¹³⁸ The Bodin-Hobbes definition of sovereignty thus invokes the spectre of the authoritarian and absolutist *Machtstaat* that uses law in the interest of power, and is often viewed as conflicting with the *Rechtsstaat* principle. As Franz Neumann notes, 'both [sovereignty and the rule of law] . . . are irreconcilable with each other, for highest might and highest right cannot be at one and the same time realised in a common sphere'.¹³⁹ By way of contrast, the constitution's concern with law rather than power can be traced back to John Locke who argues that laws exist not to empower a despot monarch but

134 Böckenförde, n 97 above 133–4.

135 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr (Siebeck), 2nd ed, 1928) 1; 'Der Wandel des Souveränitätsbegriffs' in H. Kurz (ed), *Völkessouveränität und Staats-souveränität* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1979) 164–165.

136 J. Bodin, *Six Bookes of a Commonweale* (Cambridge, Mass: Harvard University Press, 1962) Book 1, ch 8, at 92. According to Hobbes, the sovereign is not subject to positive law, but he is subject to natural law which is morally binding (T. Hobbes, 'Leviathan or the matter, forme and power of Commonwealth ecclesiastical and civil' in T. Hobbes, *Leviathan/Thomas Hobbes* (Cambridge: CUP, R. Tuck (ed), 1991) II, ch 26, para 4.

137 Bodin, *Six Bookes of a Commonweale*, *ibid* 106–107.

138 *ibid* 105.

139 F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986) 4.

to protect 'natural rights' (to life, property and personal security) and to regulate political or civil society.¹⁴⁰ Locke's image of sovereignty is not absolute. His 'Supream Power' (as opposed to arbitrary – sovereign – power) is limited by the public good, the rule of law, and the concept of property.¹⁴¹ Crucially, Locke argues that if a sovereign power exists it must ultimately belong to the people who also decide when a breach of trust has occurred.

Verfassungsrecht can be understood as a synthesis of both constitutional traditions. Although the German concept of *Konstitution* or *Verfassung* has traditionally referred to the pre-constitutional, ie political condition of the state,¹⁴² it also draws on the modern concept of constitution that has existed since the eighteenth century in the USA and France.¹⁴³ The constitutional state is the result of an evolution of sovereignty that began with the sovereign person (the prince or the monarch), before transforming into a model of pure democracy where sovereignty lay with the people, to, finally, constitutional sovereignty.¹⁴⁴ In other words, not even the people are absolutely sovereign in the *Verfassungsstaat*. They are *pouvoir constituant* (the people exercise their sovereign powers in the unique act of creating the constitution) but once the constitution is properly enacted the sovereign disappears, the constitution itself takes on sovereign character, and the people become *pouvoir constitués*; they do not (*pace* Renan and Smend) exercise a *plebiscite de tous les jours*. The constitution is self-supportive. It alone is the foundation and pre-requisite of the state.

Everling and Zuleeg (supported by other *Verfassungsrecht* scholars) would probably rise to the challenge by arguing that, in the modern world, the definition of sovereignty as unconditional and supreme authority of power is unrealistic, given the nuanced nature of interdependence and global economic ties, and undesirable, given the need for European integration and international openness. The term 'sovereignty' is associated with the pre-modern, unconstituted state with undomesticated powers. It is antithetical and extrinsic to the constitutional state (*Verfassungsstaat*) and thus anathema to constitutional law.¹⁴⁵ A modern conception of constitutional law either does away with the concept of sovereignty altogether or modifies its definition as 'a monopoly of decision-making within a consistent system of competences' that makes do without an omniscient body.¹⁴⁶

140 J. Locke, *Two Treatises of Government* (1690, Cambridge: CUP, 1988) II, para 89.

141 *ibid* paras 135–141. Kant makes a similar argument when he ties popular sovereignty to fundamental rights. This does not amount to a constraint on sovereign power, he argues, since no citizen could ever agree to a law that infringing her natural right to private autonomy. Natural rights are those which 'one cannot give up even if one wanted to' (cited in J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT Press, 1996) 100); they are an inalienable property of every human being.

142 D. Grimm, *Die Zukunft der Verfassung* (Frankfurt am Main: Suhrkamp, 1991) 111.

143 G. Maddox, 'A Note on the Meaning of "Constitution"' (1982) 76 *American Political Science Review* 805; Grimm *ibid* 31–66.

144 H. Vorländer, 'Die Suprematie der Verfassung. Über das Spannungsverhältnis von Demokratie und Konstitutionalismus' in W. Leithold (ed), *Politik und Politeia: Formen und Probleme Politischer Ordnung* (Würzburg: Königshausen & Neumann, 2000) 378.

145 Abromeit, n 131 above 49.

146 P. G. Kielmannsegg, *Völkssouveränität* (Stuttgart: Klett, 1977) 240.

The state and the constitution

Within German constitutional discourse, the relationship between state and constitution was challenged in the 1960s by Horst Ehmke¹⁴⁷ and Konrad Hesse, formerly a judge of the Federal Constitutional Court, whose *Grundzüge des Verfassungsrechts* ('Essential Features of Constitutional Law') was first published in 1967 and is now in its twentieth edition. The centrality of the state concept, and in particular the claim that constitutional law requires an antecedent state or the unitary will of a sovereign people, is disputed. Since constitutions can and have been used in non-state contexts, to describe legal systems (Kelsen) and other exercises of political power,¹⁴⁸ there is no reason to confine constitutional law to the state and to subsume it by *Staatsrecht*.

The starting point is the claim that the constitution constitutes the state. The constitution replaces the state as an *a priori* value. The state is a *Verfassungsstaat*, ie a 'constitutional state', a state under the constitution. It is limited by formal as well as material constitutional principles, such as fundamental rights, the social welfare state, separation of powers and judicial independence.¹⁴⁹ The constitution is not a framework order whose validity rests on a pre-constitutional power or authority but the foundational legal order of the polity (*rechtliche Grundordnung des Gemeinwesens*), ie the norm which not only establishes all forms of state authority¹⁵⁰ but also affects all aspects of the legal order of the polity.¹⁵¹ Constitutional law is thus broader than state law as it affects marriage and family, private property, education, the arts and science. Yet it is also narrower than state law which embraces norms of the material constitution that are not codified.¹⁵²

The *Verfassungsrecht* image of the constitution is characterised by its dynamism. It does not work with pre-fabricated concepts (of state and people), but seeks to achieve what *Staatsrecht* assumes. The central task of the constitution is to construct the political unity and the legal order of the state.¹⁵³ The political unity of the people, like the state and state power, cannot be assumed as pre-existing – as it was in Jellinek's day and as it is in the dominant *Staatsrecht* tradition described above. If there is a pre-constitutional substance it should not be termed 'state' but rather 'nation'. The German nation is older than the German state. The state is recognised by public international law and constituted by domestic law – it is

147 H. Ehmke, '“Staat” und “Verfassung” als verfassungstheoretisches Problem' in K. Hesse (ed), *Staatsverfassung und Kirchenordnung: Festgabe für Rudolf Smend zum 80. Geburtstag* (Tübingen: Mohr, 1962) 23 et seq.

148 R. Bieber, 'Verfassungsentwicklung der Europäischen Union: Autonomie oder Konsequenz staatlicher Verfassungsentwicklung?' in P.-C. Müller-Graf and E. Riedel (eds), *Gemeinsames Verfassungsrecht in der Europäischen Union* (Baden-Baden: Nomos, 1998) 210.

149 P. Häberle, 'Der kooperative Verfassungsstaat' in F. Kaulbach and W. Krawietz (eds), *Recht und Gesellschaft. Festschrift für Helmut Schelsky zum 65. Geburtstag* (Berlin: Duncker & Humblot, 1978) 144 and generally K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: Müller, 20th ed, 1995).

150 W. Kägi, *Die Verfassung als rechtliche Grundordnung des Staates: Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht* (Zürich: Polygraph, 1945).

151 K. Hesse, 'Verfassung und Verfassungsrecht' in E. Benda, W. Maihofer and H.-J. Vogel (eds), *Handbuch des Verfassungsrechts* (Berlin: Walter de Gruyter, 2nd ed, 1994) para 10.

152 Hesse, n 149 above 10–11.

153 *ibid* 5.

not pre-legal. The state is, moreover, the product of political processes in modern pluralistic society that consist of different groups, opinions, interests, aspiration, and the resolution and regulation of conflict.¹⁵⁴ This endeavour is an ongoing and indefinite process.¹⁵⁵ According to this understanding, integration is the necessary task of the constitution.

This burden must not be shifted from the levels of political will-formation to pre-political, pre-supposed substrates because the constitutional state guarantees that it will foster necessary social integration in the legally abstract form of political participation and that it will actually secure the states of citizenship in democratic ways.¹⁵⁶

The constitution determines the guiding principles around which political unity should take shape and the state should act, as well as the procedures according to which conflicts within the community can be resolved.¹⁵⁷ It is expressly not a closed (neither logically nor hierarchically) systematic unit. The ambition of the constitution is not to codify, but to regulate – often in general and vague terms – what it considers to be important.

For these reasons, the constitution does allow for different political conceptions, and the pursuit of political objectives. It can take account of changed technical, economic, or social circumstances, and can adapt to historical transformations, thereby securing a basic requirement of its own existence and effectiveness.¹⁵⁸

Verfassungsrecht makes an important distinction between the constitution and the legal order. The constitution is the foundational act of the legal order as well as a product of its time. The social reality depicted by the constitution is subject to historical change. The constitution itself treads a fine line between providing continuity and adapting to historical changes.¹⁵⁹ In contrast, areas of law that are not regulated by the constitution are handed down to the legal order. The legal order, in Hesse's view, is a more general task of the state.¹⁶⁰ The community needs it to facilitate social life. The legal order, like the state, is not a given normative order but the product of history and human influence. 'Only if historical law – consciously or unconsciously – becomes part of human behaviour does it come to life and into existence'.¹⁶¹ The state guarantees and supports this process. The legal order is thus not an abstract order, but an order filled with 'rightful' content which makes the order legitimate. Hesse notes that the criteria for the 'rightful' order are not just established tradition but also historical experience that has shown what is not 'right' and should not be considered as law.¹⁶²

154 Hesse, n 151 above para 5.

155 R. Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze* (1955, Berlin: Duncker & Humblot, 3rd ed, 1994) 136 et seq.

156 J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' in P. Gowan and P. Anderson (eds), *The Question of Europe* (London: Verso, 1997) 262–263.

157 Hesse, n 149 above 10.

158 Hesse, n 151 above 16.

159 Hesse, *ibid* 22.

160 Hesse, n 149 above 9.

161 *ibid* 9–10.

162 *ibid* 10.

In a reductive sense the concept of *Verfassungsstaat* – like the rule of law – is a formal concept. Any state with a valid constitution – regardless of its content – is a constitutional state. This concept would also include the ‘semantic’ constitutions of authoritarian or one-party state systems,¹⁶³ and clearly does not represent the concept as it is used in German constitutional discourse.¹⁶⁴ However, in a specific and substantive sense, as the basic order rather than a framework order of the state, the *Verfassungsstaat* creates the requirements for the exercise of state power. The constitution thus saturates the entire legal order by setting up the organs and entrusting them with different, defined and delimited areas of competence as well as delegated powers required for the correct exercise of those functions.¹⁶⁵

In contrast with the constitution which presupposes the state (*Staatsrecht*), the state under the constitution has no conception of sovereignty.¹⁶⁶ The absence of an extra-constitutional holder of sovereign powers de-politicises constitutional law without legalising politics. From a *Verfassungsrecht* perspective, the task of politics is to provide social and political stability in changing circumstances. The role of constitutional law is to create the legal structure for decision-making procedures by the state. However, the removal of an extra-constitutional sovereign appears to create a void. If the constitution legitimates all state power, constitutes and binds all state organs (see Articles 1 III; 20 III GG), and prohibits any organ of the state from claiming sovereignty for itself in a state of emergency, the original question of *quis iudicabit* remains unanswered. Logically, there are two possibilities: either the constitution itself provides for a final decision-making instance in the case of a state of emergency, or it does not. In the first case, the owner of the constitutional power in the case of conflict is not just the servant, but becomes the master of the constitution. In the second case, where the constitution neither makes allowance for an antecedent people whose unity it is the task of the state to maintain, nor for an extra-constitutional dimension on which an organ of the state could base a claim of sovereignty or derive exceptional powers, some political power (even one not anticipated by the constitution) will take over and claim final decision-making authority over content, application and enforcement of the constitution.¹⁶⁷ Heller’s definition of sovereignty consists of both the legal and the political ability to resolve conflicts,¹⁶⁸ but the legal ability does not exist in the modern state:

Either it is a legal ability, in which case it is included in the positive law; the decision is not taken contrary to positive law but on the basis of a positive-legal enablement according to which certain norms of positive law are temporarily suspended – a legal procedure. Or the decision really is taken against positive law, in which case

163 Böckenförde, n 98 above 128–129.

164 Häberle makes the same point about *Allgemeine Staatslehre*, which can also describe an authoritarian state. Since 1989, however, all states, especially the former communist states, have wanted to become *Verfassungsstaaten* (with its structural elements of fundamental rights, democracy and social market economy). The only legal discourse that is both necessary and feasible is, therefore, *Verfassungslehre*: P. Häberle, ‘Die überstaatliche Bedingtheit des Staates’ in P. Häberle, J. Schwarze, and W. Graf Vizthum (eds), *Europarecht Beiheft 1* (Baden Baden: Nomos, 1993) 16.

165 Hesse, n 149 above 7.

166 M. Kriele, *Einführung in die Staatslehre* (Reinbeck: Rowohlt, 2nd ed, 1981) 111–116.

167 Böckenförde, n 97 above 134.

168 H. Heller, *Gesammelte Schriften: Zweiter Band* (Leiden: Sijthoff, 1971) 97 et seq.

it is not a 'legal' ability but the factual power to transcend and replace the law, thus a crime, *coup d'état*, revolution, or the use of the democratic *pouvoir constituant*. In short, the constitutional state has no sovereign: instead, in historical and conceptual terms, it refers to the structure of state sovereignty as the totality of state organs and *Staatsrecht*.¹⁶⁹

Böckenförde's criticism of *Verfassungssouveränität* is that the beauty of its internal logic is maintained only for as long as no serious conflicts within the state arise, and only for as long as the content and validity of the constitution do not become problematic in themselves.¹⁷⁰ In the final analysis, the power over the last word on the content, applicability and enforcement of the constitution is unspoken for. Citing Carl Schmitt's notion that the sovereign is defined by his capacity to decide over the situation of emergency, Böckenförde argues that sovereignty has not disappeared, and has not been replaced by the constitution, but

is potentially preserved and finds its concrete holder, whom it always needs, in that particular body that is effectively able, in the case of conflict and as the final authority, to decide on the content and application of the constitution.¹⁷¹

Isensee concurs that the question of sovereignty can only be held 'in abeyance' as a matter of politics but not of law.¹⁷² A legal case of abeyance would have to be grounded in a legal norm which would be binding on both the national and the European legal orders: however no such norm exists.¹⁷³ Internal sovereignty (the pre-requisite for the constitution) is thus not a juristic concept and it is not part of law. It is existentially a political category of power.¹⁷⁴

CONCLUSION

The different interpretations of constitutional law are so deeply rooted that the 'contending visions' on the constitutionality of Europe merely skim the surface. In fact, the two sides of the state (practice and theory, fact and norm, social science and legal science, politics and law, state and constitution, power and authority, *Staatsrecht* and *Verfassungsrecht*) continue to divide constitutional theory and, by extension, the reception of European law. By re-asserting *Staatsrecht* as the dominant interpretation Kirchhof throws a constitutional spanner in the works of European integration and the international openness of the *Grundgesetz*. By drawing on *Verfassungsrecht* and sidestepping the centrality of the state, Everling and Zuleeg give an incomplete picture of German constitutional dogma. Aside

169 Kriele, n 166 above 116.

170 Böckenförde, n 97 above 133–134.

171 *ibid* 134.

172 See also C. Schmitt, *Verfassungslehre*, n 31 above 371 et seq: 'The question of sovereignty is a question of deciding an existential conflict. There are several methods of peaceful conflict resolution, but if the facts of the case require a decision – and only this case is relevant here – then the political conflict cannot be resolved by a judicial process . . . As soon as the case is governed by immediately upon Termination of the War a valid, recognised norm it does not lead to a real conflict'.

173 J. Isensee, 'Vorrang des Europarechts und deutsche Verfassungsvorbehalte – offener Dissens' in J. Burmeister (ed), *Verfassungsstaatlichkeit: Festschrift für Klaus Stern zum 65. Geburtstag* (Munich: Beck, 1997) 1265.

174 Isensee, n 117 above para 75.

from this binary choice, is there space for a third option whereby *Staatsrecht* retains its constituent concepts (state, constitution, *Volk*, sovereignty) but dematerialises or demystifies their pre-constitutional (political) content?

The constitutive power (*pouvoir constituant*) has since the French Revolution¹⁷⁵ been defined as a pre-constitutional power of the people to set up, sustain, and suspend the constitution. According to *Staatsrecht* the constitutive power of the people must reveal the link to the people as an ideational or normative unit and, at the same time, the existing political unit.¹⁷⁶ Inspired by Rousseau and Siéyès, Schmitt conceived the *demos* in romantic and organic terms as the pre-requisite of the nation state.¹⁷⁷ The democratic self-determination of the people is the classic expression of popular sovereignty, power relations and hierarchical structures that exist *prior to* the legal constitution. The *Staatsrecht* argument is that subtracting the political preconditions from positive constitutional law creates a sovereignty problem. As a result, the failure of *Verfassungsrecht* to theorise political sovereignty (ie power) can only result in a flawed and unworkable theory of the state.

The *Verfassungsrecht* riposte is that 'constitutional law is conceivable without a state, a nation, or an instrument that fulfils all the traditional requirements of a constitution'.¹⁷⁸ Making the validity of law dependent on the prior existence of an absolute political sovereignty outside or above the law is not a theoretical premise of the German *Rechtsstaat*: after all, 'constitutional law has to underwrite itself'.¹⁷⁹ The constitutive power of the people is not a pre-constitutional fact but merely a normative reference point: under Article 20 II (1) GG the 'people' have those competences which are defined in the constitution and no residual rights.¹⁸⁰ The antecedent political substrate of the *demos* is not ignored but redefined, for instance by Jürgen Habermas as 'a new level of social integration' whereby strangers create solidarity which is abstract and legally mediated through democratic citizenship. Habermas prefers an 'ethical-political self-understanding of citizens' to a collective identity that exists prior to, and independently of, the democratic process.

What unites a nation of citizens as opposed to a *Volksnation* is not some primordial substrate but rather an intersubjectively shared context of possible understanding.¹⁸¹

Thus cleansed of their politico-historical connotations, Habermas is able to fuse two otherwise 'contradictory principles', namely democracy (the unrestricted expression of popular sovereignty) and constitutionalism (the rule of law limits the people's sovereign self-determination),¹⁸² and offer an even more dynamic image of the constitution. Habermas argues that the principles are not contradic-

175 See the Decree of the National Assembly of 21 September 1792: 'La Convention nationale déclare qu'il ne peut y avoir de constitution que celle qui est accepté par le peuple'.

176 Badura, 'Die parlamentarische Demokratie' in Inensee and Kirchhof (eds), n 22 above para 28; Böckenförde, 'Demokratie als Verfassungsprinzip' *ibid* para 7.

177 Schmitt, n 32 above 79, 238.

178 See von Bogdandy in the preface to *Principles of European Constitutional Law*, n 1 above.

179 Hesse n 151 above 19.

180 H. Dreier, 'Souveränität' *Staatslexikon: Recht, Wirtschaft, Gesellschaft* (Freiburg: Herder, 1995) 1207.

181 Habermas, n 156 above 262.

182 J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766.

tiory, but complementary and 'co-original'. In other words, they are interdependent (the existence of one necessitates the existence of the other) as well as independent (they do not impose limits on each other). Democracy and constitutionalism are reciprocally conditioned by human rights which link institutionally structured political decision-making with spontaneous and unorganised circuits of communication in the public sphere.¹⁸³ Eschewing the *Staatsrecht* preoccupation with the people as the pre-existing political unit, and the *Verfassungsrecht* conception of the people as a purely normative reference point for original power, Habermas 'desubstantialises' the idea of popular sovereignty still further by removing the concept from the body of the people and dispersing it in deliberative procedures, or more precisely 'subjectless forms of communication that regulate the flow of discursive opinion- and will-formation'.¹⁸⁴ The institutionalisation of procedures of rational collective will-formation (in other words 'proceduralised popular sovereignty') allows for universalist constitutional principles – that remain contested and controversial – to be routinely realised in ordinary legislation. As a result, the constitution is no longer static but becomes dynamic: even though 'the wording of norms has not changed, their interpretations are in flux'.¹⁸⁵

Ulrich K. Preuss' constitutional exposition also has a unifying element. The apparent contradiction between democracy (Rousseau's popular will) and constitutionalism (the Federalists) can easily be redefined as two mutually supporting pillars. The key is not to conceive the demos as a gathering of atomistic individuals, since the old paradigm is no longer suitable as a problem-solving mechanism. Instead, constitutions need to be conceived in denaturalised terms and applied to a corporate entity that is capable of making fair decisions: 'constitutions are instruments of collective self-organisation'.¹⁸⁶ However, according to Preuss human rights offer only a partial outlook on the constitution that exists alongside other pragmatic, scientific, and moral perspectives. The big questions of today (namely the moral dimension of scientific progress) cannot be resolved by liberal democratic constitutionalism. Instead, a constitution must replace universal principles, which do not facilitate social consensus on scientific and technological progress, with 'moral reflection' and with a framework for a politics which is non-traditional and non-transcendental.¹⁸⁷

What repercussions do these developments have for *Staatsrecht*? Two options are available for its future trajectory. It can insist on the historical inseparability of state and constitution. *Staatsrecht* (as understood by the dominant interpretation from Schmitt to Böckenförde) is thus political law: the state is the political unity of people, and the constitution is the political decision over the manner and form of unity. The traditional interpretation operates with the paradigm of an introspective

183 Habermas, n 141 above 485. For a recent discussion of Habermas in this context see R. Nickel, 'Private and Public Autonomy Revisited: Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State' in M. Loughlin and N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007).

184 *ibid* 486.

185 *ibid* 489.

186 U. K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Atlantic Highlands, NJ: Humanities Press, 1995) 18.

187 *ibid* 123.

state as the unit of power, rule and authority, and as the sole reference point of a constitution. This carefully constructed argument, which is deliberately built around the unity of the state as opposed to its openness to other legal systems, reflects not only legal reasoning but also political rhetoric and ideology.

Alternatively, the doctrine of the impermeable pre-legal state which used to be an 'indubitable assumption' can be made the subject of constitutional analysis and debate by divorcing the state from the constitution. The reasons for the paradigmatic change from state to constitution have been well rehearsed in political theory: the concept of the state has suffered from historical misuse; the notion of independent states is out of touch with the reality of interdependent states; the modern state has witnessed internal pluralisation and external integration, and is committed to universal human rights. Whilst the new constitutional model also opens itself up to the charge of political ideology, the contemporary state clearly has to embrace issues of a social, economic, environmental, scientific and technological nature. Its new role, according to Preuss, is to heighten awareness of the moral implications that come with, say, scientific argument and justification. It has to provide for a 'morally reflexive constitutionalism' in order to resolve moral questions for which liberal democratic constitutionalism is simply an inadequate paradigm.¹⁸⁸

Thus understood the state (and *Staatsrecht* emanating from it) is 'not dead but de-mystified'.¹⁸⁹ It competes with a more liberal and open paradigm of the constitution as the linchpin of the legal order.¹⁹⁰ Whether *Staatsrecht* will be able to make the transition by adjusting to new circumstances depends not on the centrality of the state but on the content of the state concept. At one end of the spectrum, if the state is defined (with Schmitt) as the embodiment of the political existence of the people, then *Staatsrecht's* attempts to theorise its domain will look helpless and hapless: 'the science of state theory must not lose its grip on the state'.¹⁹¹ At the other end, the argument that the world needs states in order to ensure the decentralised and unitary function of their political system, and in order to guarantee peace and security in a global order¹⁹² is an age-old argument that will be underwritten by most scholars on both sides of the constitutional divide. The orthodox understanding of *Staatsrecht* is thus vacuous at best and counter-productive at worst, since the use of substantive and pre-legal notions creates a divide between the theory of the state and its social reality. As Christian Tomuschat points out:

[a]s a consequence of the growing interdependence among all nations and peoples, the sovereign state that can exercise authority in splendid isolation is increasingly becoming an anachronism.¹⁹³

Instead of reifying itself as the object of deep disagreement and disassociation, the demystification of *Staatsrecht* might garner broader consensus by viewing the state inclusively as the central link in an interdependent and international community.

188 *ibid* 122–123.

189 Hofmann, n 90 above 1069.

190 As rejected by Isensee, n 21 above para 6.

191 Di Fabio, n 93 above 77.

192 U. Di Fabio, *Das Recht offener Staaten* (Tübingen: Mohr (Siebeck), 1998); *Der Verfassungsstaat in der Weltgesellschaft* (Tübingen: Mohr (Siebeck), 2001) and n 93 above.

193 C. Tomuschat, 'Die internationale Gemeinschaft' (1995) 33 *Archiv des Völkerrechts* 1, 20.