



CARL SCHMITT ON FEDERATION

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One of the most thorough and interesting discussions of the relationship between federalism, constitutionalism and democracy is presented by Carl Schmitt in *Constitutional Theory*. A federation of states, or just a federation, is according to Schmitt a curious and structurally contradictory interstate relation, which has to be distinguished from, on the one hand, a confederation (an alliance of sovereign states) and, on the other hand, a federal state (one sovereign state).

A federation is a permanent association of two or more states which rests on a free agreement of all member-states with the common goal of self-preservation; an agreement that however changes the political or constitutional status of the member-states. It is immediately clear that the federation lies in between—or is a curious synthesis of—the confederation and the federal state.

On the one hand, in contrast to the federal state, which rests on a public law constitution, but similar to the confederation, the federation rests on an international contract. On the other hand, in contrast to the confederation but similar to the federal state, the establishment of a federation leads to a political change of the member-states' constitutions.

The constitutional change of the member-states does not necessarily entail a change of constitutional law in the member-states; the constitutional change regards something far more important, namely, "the concrete content of the fundamental political decisions on the entire manner of the existence of the state."

It is here important to note that Schmitt operates with a fundamental distinction between a constitution and constitutional laws. The constitution is not the sum of the constitutional laws. The constitution consists in the fundamental political decision on the political form of the state. In this way, the fundamental decision on democracy is encapsulated in the preamble to the Weimar Constitution: "the German people provided itself with a constitution"

and "State authority derives from the people" and "The German Reich is a republic."

The constitutional change of the member-states of a federation consists in the establishment of a permanent order that includes the member-states in their total existence as a political unity into a common political existence. This common political existence does however not eliminate the existence of the individual member-states; the federation and the states exist politically alongside one another.

The federal constitution is an interstate contract the content of which simultaneously is a component of each of the member-states constitutions. The federal contract is the only genuine form of contractual constitutionalism, because it presupposes two or more politically existing states, each of which containing within them one subject of the constituent power.

Within a state, a constitution will according to Schmitt always be a one-sided decision by the sovereign people as the sole carrier of the constituent power. The federal constitution is in this way a contract between two or more national subjects of the constituent power.

The aim of the federation is self-preservation. This entails that all federations unconditionally guarantee the political existence of each of the members of the federation, even if this is not stated explicitly. Internally, self-preservation signifies a necessary pacification. Internal peace is essential within the federation; a war between two member-states would signal the end of the federation.

Furthermore, in the name of the common interest in self-preservation and security, the federation has the right of supervision and, if necessary, intervention with regard to maintenance, preservation and security.

Externally, the federation protects all the member-states against foreign

invasion: "Every federation can wage war as such and has a *jus belli*. There is *no federation without the possibility of a federation war*." However, this does not mean that the individual members of the federation are totally deprived of their *jus belli*; "it follows from the nature of the political existence of the individual members that a right to self-help and to war is only being given up insofar as it is conditioned by membership in the federation."

The federation as a political form is, according to Schmitt, characterized by three legal and political antinomies. Firstly, there is a contradictory relationship between, on the one hand, the federation's aim of self-preservation hereunder the maintenance of the independence of all member-states, and on the other hand, the lessening of this independence of every member-state with regard to their *jus belli*.

In this way the federation leads to a contradictory status with regard to the self-preservation of the member-states. Secondly, there is an antinomy between, on the one hand, the fact that the federation members seek to preserve their self-determination and their political independence through the federation, and on the other hand, that the federation in the name of common security and self-preservation has the right to intervene since it cannot ignore the domestic affairs of the federation members. Thirdly, and most fundamentally, there is an antinomy between the political existence of the federation and the political existence of the member-states which have to coexist under a federal constitution.

The federation is conditioned on this coexistence: neither the member-states nor the federation are to be subordinated to the other part: "the federation exists only in this existential connection and in this balance." The essence of the federation resides in this "dualism of political existence." If the existential balance of this dualism is not kept intact the federation will dissolve either into individual sovereign states or into one federal sovereign state.

The problem of this dual existence is practically best illustrated by the problem of secession. On the one hand, the federation is founded as a permanent order which entails a continual renunciation of the right to secession. On the other hand, the federation is a contract of independent politically existing states which must have the continual right to decide upon the status of this contract themselves, also with respect to the annullability of this contract, i.e., the right to secession. In this way, the federation is existentially conditioned both on the member-states' continual right to secession and renunciation of this right.

In this way, the fundamental problem of the federation can be stated as follows: if an existential conflict arises between the federation and the member-states, who decides? The problem is, that the federation is predicated on the existential balance between the two parties' equal right, and if a decision is made, the federation will dissolve because *either* national or federal sovereignty is declared supreme.

For this reason, the existence of the federation is conditioned on a perpetual openness of the question of sovereignty, that is, the existence of the federation is predicated on an existential exclusion of internal conflict in the federation. It is important to note here that existential balance between two political entities, according to Schmitt, does not entail a "division of sovereignty": the question of who decides is merely left open.

The only possible resolution to these antinomies, according to Schmitt, lies in an existential and substantial homogeneity among all members of the federation, which will ensure (a) that the first antinomy regarding the member-states' self-preservation is resolved by ensuring internal pacification and external compatibility of enmity (in this way the *jus belli* of the member-states will coincide with the *jus belli* of the federation), (b) that the second antinomy regarding the self-determination of the member-states is resolved by ensuring that the interference of the federation in the internal affairs of the member-state will not appear as foreign in existential terms (in this way the interference by the federation will not be against the will of the

member-states) and (c) that the third antinomy regarding sovereignty is resolved by ensuring that internal conflict is existentially excluded (in this way, the closure of the question of sovereignty is precluded).

Two questions have to be raised in relation hereto: Firstly, how is the homogeneity established? Secondly, what are the consequences of this homogeneity for a federation of democratic member-states? Regarding the first question, Schmitt argues, substantial homogeneity can primarily be derived from national similarity of the member-states' populations. However, political form (democracy, aristocracy, or monarchy) and principles such as religion, culture, or class can add to the principle of national homogeneity. Homogeneity is in this way primarily something which is existentially given.

In order to answer the second question, a short discussion of Schmitt's conception of democracy is necessary. According to Schmitt, democracy is in general treated as an ideal concept not properly distinguished from liberalism and the *Rechtsstaat* (hereunder socialism, justice, peace and international understanding); an ideology and a political form which democracy, according to Schmitt, is not merely distinct from but directly opposed to.

In contrast to the general discourse of the *Rechtsstaat* presenting freedom and equality as the dual principles of democracy, Schmitt argues that not merely is freedom not a democratic principle, freedom and equality are often opposed to one another.

The democratic principle is according to Schmitt equality; not the general human equality of all persons discussed by liberalism which precludes political distinction and exclusion, but the concrete equality of a people within a nation-state: "Even the French Declaration of the Rights of Man," Schmitt writes "states that all *persons* are by nature free and equal. As soon as it involves political rights and those of the state, however, it no longer speaks of persons (*homme*), but instead of *state citizens* (*citoyen*)."

In a national democracy, like the French, the presupposition of democracy is

a substantial equality of a people, meaning a national homogeneity: "democratic equality is essentially *similarity*, in particular similarity among the people. The central concept of democracy is *people* and not humanity" (p. 261-3).

Democracy is by Schmitt defined—both as a state form, a governmental form and a legislative form—as the identity of ruler and ruled. Identity as the key term of democracy has at least three meanings for Schmitt: (a) the identity of a homogenous people (national identity), (b) the identity of politically unified people (political identity) (c) the self-identity of a physically present people as in contrast to representation (presence identity).

Democracy rests in this identity because if the identity is strong enough there will be no difference between the opinion of one and the opinion of another: there will be one sovereign will of the people. It is this will that has the power or authority to constitute a state as a democracy: the homogenous sovereign will of the national people is the subject of the constituent power.

Regarding the second question: since both democracy and federations rest on substantial homogeneity, it is necessary that the national homogeneity converges with the federal homogeneity.

For this reason, Schmitt argues "it is part of the natural development of democracy that the homogenous unity of the people extends beyond the political boundaries of member states and eliminates the transitional condition of the coexistence of the federation and the politically independent member states, and replaces it with a complete unity."

In this way, the principle of homogeneity that led to the resolution of the antinomies of the federation—the antinomies which again, if not resolved, would lead to the dissolution of the federation because of the closure of the question of sovereignty—has in the case of democratically constituted states a path dependency which stirs the federation directly toward its dissolution into a federal state.

On the other hand, if the homogeneity is not strong enough, the antinomies of the federation will lead to a collapse of the federation into sovereign states. For this reason, the legitimacy of a federation, in Weberian terms (the sociological criteria which will lead the population to accept the political system), will lead (a) to the dissolution of the federation into a federal state if they are fulfilled and (b) to the dissolution of the federation into nation-states if they are not fulfilled. The non-statist form of the federation is therefore, according to Schmitt's theory, merely a transition from one form of statehood to another form of statehood.

The *photo* shows, "Spring in the Trenches," By Paul Nash, painted in 1918.

